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EUROPEAN ISSUERS POSITION ON THE REVIEW OF THE MARKET ABUSE REGULATION

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Market Abuse Regulation (MAR) has resulted in a complex regulation with heavy bureaucratic and burdensome procedures, as EuropeanIssuers had already the opportunity to illustrate in many different position papers.

However, it is not an easy task to suggest concrete amendments to certain MAR provisions as it is our observation that the process of implementation has not come to an end and some legal uncertainties remain.

The occasion of the MAR review by 3 July 2019 should be mainly exploited to get clarity on what the key remaining problems are.

EuropeanIssuers illustrates below some critical issues of the Regulation that have been reported to us so far, trying to propose some solutions. Please note, however, that our views are preliminary in nature.

- Scope of application

One of the major critical issues of MAR relates to the scope of application which has been extended to trading platforms (MTFs) beyond regulated markets. This extension has substantially increased the level of regulation for smaller companies listed on these MTFs, as these companies now must compile insider lists, notify managers' transactions and comply with the duty to publish inside information[1].

Many smaller companies entered those junior markets because they considered themselves not ready to cope with a more stringent regulatory environment yet and wanted to benefit from lighter and more proportionate rules. Extension of MAR to MTFs endangers the business model of some of these markets developed to attract small growing companies to capital markets.

Some simplifications have been proposed in the context of the SME Listing Package but available only for SMEs on SME Growth Markets. Though this is helpful, the key issue of the extended scope remains. **We therefore advocate for excluding non-regulated markets from the scope of certain MAR provisions** (especially on disclosure and insider lists)[2].

[1] Although many MTFs before MAR had already in place some rules on disclosure of price sensitive information. See Veil and C. Di Noia, *SME Growth Markets*, D. Busch a G. Ferrarini, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, p. 354 e ss

[2] See also EI Response to CMU Mid-Term Review, 17th March 2017, p. 5.

Moreover, it would be useful to verify which kind of activity **of enforcement has been put in place on MTFs by the Competent Authorities, further to the extension of the rules to MTFs. Therefore, we would suggest ESMA conducting a survey among Member States** in this regard.

- Notion of Inside information and delay

First, it is worth noting that the transposition of the MAR into supervisory practices has not yet come to an end. Consequently, listed companies are still confronted with a high level of legal uncertainty as e.g. the interpretation of important legal definitions and provisions remains unclear to some extent

Already the Market Abuse Directive (MAD) has created a legal setting where the **possibility of delaying the publication of inside information must be regarded as a natural counterweight to a rather broad definition of inside information** (which is the same both for the market abuse prohibitions and for the duty of disclosure). This has not changed with the MAR, however, from our perspective two things are changed and need to be reviewed:

i) A main issue with the delay is the fact that issuers **must react to rumors**. ESMA's interpretation of this provision is that the leak of the rumor has not to come from the sphere of the issuer in order to trigger the duty to disclose the inside information (ESMA 2015/1455, No. 243). This wide interpretation creates a massive problem for issuers. They always face the risk that a legitimately delayed information must be disclosed prematurely because of abusive rumor spreading. **The review could address this problem by clarifying that the leak must stem from sphere of the issuer and, if it does not, a no comment policy will still be possible;**

ii) **ESMA considers the delay as exceptional**[3]. However, this is neither clear from the level 1 text nor it is reasonable from a broader perspective. As the legislator has already decided in the MAD for a rather broad definition of inside information**, the delay should be regarded as a natural counterweight to protect the legitimate interests of the issuer**[4]. This should be clarified in level 1, so that ESMA can no longer argue that a delay is only exceptional**.** M&A transactions may serve as a perfect example: they cannot take place without the option of delaying the disclosure of inside information; and this is, by the way, also in the interest of investors.

Moreover, the use of the delay as a natural counterweight may be hampered by **the condition that the delay "*is not likely to mislead the public*"**. As stressed in the ESME Report and by other authors[5], this condition - taken literally - it is almost impossible to comply with, because "*the definition of "inside information" per se implies that a reasonable investor would use it as a basis for her decisions: thus, any delay in the dissemination is almost by definition misleading and it is very difficult to think of a circumstance in which delay would be permissible under this test*"[6].

[3] "However, it should be borne in mind that the possibility to delay the disclosure of inside information as per Article 17(4) of MAR represents the exception to the general rule of disclosure to be made as soon as possible according to Article 17(1) of MAR, and therefore should be narrowly interpreted" (see ESMA Final Report–Guidelines on the Market Abuse Regulation, 13 July 2016 | ESMA/2016/1130, par. 52).

[4] A premature disclosure is harmful both for investors, as torrent of potentially unreliable information could be disclosed; and for issuers, as it could harm their ability to conduct business and protect sensitive information, increases the costs of disclosure and enhances litigation risks. See J. Payne, Disclosure of inside information, Law Working Paper n. 422/2018, October 2018, ECGI, fn. 2

[5] The Law of Capital Markets in the EU, Sergakis, 2018, p. 109

[6] See Esme Report, *Market Abuse EU legal framework and its implementation by Member States: a first evaluation*

This condition, therefore, *"should be modified in order to allow companies to trust on a **safer legal basis** when they decide to disclose negotiations when they can be confident, with a sufficient degree of certainty, that a positive outcome is reached*"[7].

Furthermore, the removal of *"**impending developments** that could be jeopardized by premature disclosure"* from the list of illustrative examples in the ESMA's guidelines is unhelpful to issuers. As a result, issuers may assume that impending developments are incapable of constituting a legitimate interest justifying delayed disclosure. Therefore, we think that **some additional examples to clarify when the delay in publication is not misleading the public could be helpful.**

To sum up, in our view, a viable solution in order to allow issuers to use the delay as a remedy against a premature disclosure**,**[8] on a safer legal basis, could be:

i) **deleting or modifying the condition** that a listed company does not mislead the public when delaying disclosure of inside information;

ii) providing a **wider set of examples of "legitimate interests" and re-introducing,** among the examples in the ESMA's guidelines, also the case of "**impending developments that could be jeopardized by premature disclosure".**

In some Member States, after the entry into force of MAR, issuers have increasingly used the delay compared to the situation under the MAD[9]. In our view this is the evidence of the fact that issuers are concerned about premature disclosure of information and to avoid it, they use the delay.

It could be useful if ESMA could conduct a survey among Member States in order to verify which are the solutions put in place by Member States in order to manage the problem of premature disclosure of inside information and **how the delay has been used**[10].

Moreover, we see a conflict between the objective of the **Transparency Directive** to inform investors at predictable points of time and MAR as to the disclosure of financial information and the notion of inside information with regard to the moment in time when inside information in a protracted process must be disclosed to the market. The problem is especially relevant about periodic financial information (annual and half-yearly financial statements), for which, the problem arises of identifying the moment in which the information becomes "inside" and then should be disclosed[11]. Apart from the cases of profit warnings for

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[7] See C. Di Noia and M. Gargantini, *Issuers at midstream: disclosure of multistage in the current and in the proposed EU Market Abuse Regime,*" European Company and Financial Review", p. 520, see fn. 2.

[8] See SMSG, *Advice to ESMA, Response to ESMA' s Consultation Paper on draft guidelines on market abuse regulation*, 31 March 2016, fn. 2; the Advice states: "Moreover, a general consensus has emerged that the right to delay disclosure of inside information is no longer to be interpreted in a narrow way (which is acknowledged by the NCAs, courts and also in literature)".

[9] While according to some CAs the delay is physiological under MAR. See Consob, *Proposta di adozione di due comunicazioni recanti l'adozione delle Guide operative Gestione delle informazioni privilegiate e raccomandazioni di investimento, documento di consultazione*, 6 aprile 2017, p. 5. According to the Consob Annual Report in 2018 the use of delay has increased (260 delays in 2018 under MAR while under the previous regime there were 5/6 delays every year see p.129) .http://www.consob.it/documents/46180/46181/Rel2017.pdf/60ed0b08-e6ef-4030-99e5-21c5cee14921

[10] See also European Issuers, *Response to EC Consultation on fitness check,* 24 July 2018, p. 18.

[11] J. Lau Hansen, *Say when: when must an issuer disclose inside information?* "Nordic & European Company Law", n. 16-03, June 2016 cit., nt. 6 *"In this context, it should be noted that 'delay' only occurs where Art 17(4) is relied on. Some inside information may be timed in such a way that its disclosure need not be deemed 'delayed' even if the information qualified as inside information before it was disclosed. This is notably the case in respect of financial reporting, which is often disclosed subject to a 'finance calendar' that is made public at the beginning of the issuer's financial year. Such a calendar undertakes to specify the dates when financial reports from the issuer can be expected by the market and enables market participants to be ready for the report. The content of financial reporting may comprise inside information and so the persons preparing this reporting within the issuer may be subject to the insider dealing bans even before the financial report is finished. It may be argued that as long as a financial report is not approved by the*

which an immediate disclosure obligation is justified and necessary to inform investors, the MAR should not interfere with the normal process of financial disclosure in pushing into the direction of premature disclosure close to a regular publication date[12].

The uncertainty relates also to the **management of the insider list**, as it is not clear when the latter must be activated. If issuers have to public inside information as soon as possible, according to art. 17.1, the insider list should be opened only in case of delay. However, in some Member States Competent Authorities take a different approach and ask for the insider list to be opened before, in the space of time necessary for the issuer to public the price sensitive information[13].

- Insider list

The management of the insider list is very burdensome also due to all the information that must be gathered by the issuer and inserted in the list. Thus, it should generally be **reconsidered the level of disclosure of personal data of insiders,** including private addresses, phone numbers etc. which do not seem necessary and, hence, disproportionate as the individuals can be identified via their employer.

Even if there are some simplifications (the possibility to have lists of permanent insiders on one side and the obligation on third parties acting on behalf of the issuer, typically consultants and advisors, to set up their own insider lists -as clarified by ESMA - on the other side), an additional **clarification that should be provided is about the possibility for issuers to indicate in their insider list the contact details of only one person of reference (working for the third party) able to identify the persons within that company/law firm etc. (i.e. the third party) having access to inside information[14].** This is already a common practice in some member States[15] but it should be expressly clarified at the level 1.

company body competent to do so (such as a board of directors), it is not final and thereby not sufficiently 'precise'; but if the content of the reporting is likely to be adopted, and it often is, especially very close to its predetermined disclosure date, it would be relevant to qualify the financial report as inside information even before its final adoption. Hence, any person trading on its content would violate the insider dealing ban. Yet it would still be wrong to describe the later disclosure of the financial report as a 'delay'. On the contrary, where the financial report is disclosed according to the previously disclosed finance calendar it is 'timely' as required by Art 17(1) and the issuer does not have to notify the NCA of any delay."

[12] In some Member States a further critical issue that has been raised regards the legality of the relations and discussions between the issuer and its shareholders (with particular reference to the controlling shareholders). MAR only states in recital 19 that "This Regulation is not intended to prohibit discussions of a general nature regarding the business and market developments between shareholders and management concerning an issuer". However, in practice, there is uncertainty on how to manage those discussions without violating the MAR prescriptions.

[13] See Consob, Linee Guida - gestione delle informazioni privilegiate, ottobre 2017, par. 5.2 This is also the practice in the Polish Market. One possible solution could be redrafting article 2, subsection 1 of Commission Implementing Regulation (EU) 2016/347 as follows: "*New sections shall be added to the insider list upon the identification of new inside information, as defined in Article 7 of Regulation (EU) No 596/2014, provided that the disclosure of the inside information has been delayed according to article 17, paragraphs 4 or 5, of Regulation (EU) no. 596/2014".*

[14] See also EI Interpretation of the Market Abuse Regulation – Issues and solutions, 23 May 2017, p. 6.

[15] Germany (Bafin FAQ on insider list, 31.5.2017, II.3) and France (AMF, Guide de l'information permanente et de la gestion de l'information privilegiée, p. 45). According to Consob, instead, the issuer should insert in its insider list the data of the physical persons working, as it seems, for the third party (see See Consob, Linee Guida - gestione delle informazioni privilegiate, ottobre 2017, par. 5.2.6).

- Manager transactions

The Management's transactions regime under MAR should be improved in several aspects in order to reduce administrative burden, ease compliance in practice and avoid misleading information for the market.

Firstly, **we propose to raise the threshold for managers'** transactions to EUR 100,000. Once the threshold of EUR 100,000 has been reached, the calculation of the threshold should restart from zero until EUR 100,000 have been reached again. This would reduce the administrative burdens on issuers. A different formulation of the calculation does not give any significant market signal and it would overburden issuers.

Secondly, we suggest simplifying the system of notification. **We suggest that the Competent Authorities should be responsible for disclosing managers' transactions to the public** (this is already an option left to Member States).

On the timing for the notifications, we welcome the modification recently adopted in the SME listing package and extended to all issuers.

Thirdly, many transactions that were excluded under MAD must now be notified (e.g. donations, inheritances), among them many that do not have any signaling value for the market. Also, a **clear guidance should be provided on what types of Managers' Transactions** do and do not need to be disclosed, as well as on the scope of the relevant provisions in the context of different types of transaction.

Generally, the catalogue of transactions triggering a disclosure requirement should be reviewed with a view to restricting it to those transactions that could reasonably have a "signaling" effect into the market, i.e. eliminating those where any nexus to an active investment decision by a PDMR can be excluded (for example: in heritage, gifts).]

Thus, it should for example be clarified that no notification duty is required for **shares granted for free;** the moment in which shares are granted for free to PDMRs should not be notified (there is no discretion by the PDMR and there is no signaling value for the market), while when the shares are sold there should be a notification. A different interpretation would imply a duplication of notifications, more work to be done by the personnel of the issuer and the increase of indirect costs for the personnel. **For phantom stocks**, the notification duty should be excluded as the PDMR has only receives cash based on predetermined payout structure so that there are no transactions in securities and no signaling value for the market.[16]

Fourthly, **we support the aggregation of transactions** as a means of making the disclosure exercise as simple as possible. This should be continued and be on a same day basis with no netting, with only the highest and lowest prices (not the weighted average) disclosed. The timeframe of the executions would not be disclosed.

One more issue that should be tackled regards the derogations to the application of closed periods to the manager transactions under art. 19.12; the problem arises in the context of employee share or saving schemes as article 19.12 states that:

"*Without prejudice to Articles 14 and 15, an issuer may allow a person discharging managerial responsibilities within it to trade on its own account or for the account of a third party during a closed period as referred to in paragraph 11 either:*

[16] See also EI EI Response EC Consultation SME Listing, 26 February 2018, p. 22.

(a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or

(b) due to the characteristics of the trading involved for transactions made under, or related to, an ***employee share or saving scheme,*** *qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change".*

Article 9 of the delegated regulation 2016/522 mentions the transactions which can be authorised by the issuer during closed periods.

However, this article lacks clarity and issuers question if the transactions such as a subscription to a capital increase reserved for employees or the allocation of the participation and / or the incentive to employee savings plans are included in the scope of Article 9 of the Delegated Regulation.

In our view, even if they hold inside information, employees should nevertheless be able to subscribe since:

- the operation is collective and open, under the labour law rules, to all employees of the group;
- the operations are planned well in advance and the employee has no control over the choice of the subscription period;
- the shares subscribed are blocked for several years (generally 5 years except in the event of release), which neutralises the effects of the holding of privileged information;
- in certain cases, the shares may be released by regular payments or regular deductions from wages, which precludes their sale during this period;
- there is a gap between when the shares are subscribed and when they are allocated in the saving plan, so that their allocation may occur at a time when the information has been made public.

We think that this could be clarified by ESMA.

- <u>Exempt companies from drawing up and keeping lists of persons closely associated to PDMRs (Art. 19 of MAR)</u>

Art. 19 of MAR requires companies to gather information from PDMRs relating to their personal life and keep this information up-to-date which is also burdensome and unnecessary from the investors' point of view.

In order to give a sense of the amount of data that needs to be collected, according to the data gathered by Polish NCA there are approx. 25,200 closely related persons in Poland alone. In the EU there are around 13,000 publicly listed companies (both on RM and MTFs). It's just a rough estimate, but each listed company might have on average 10 PDMRs and each of them might have on average 3 family members. That means that there are approx. 520,000 natural persons falls into the scope. This number further increases with approx. 100,000 legal persons that PDMRs may be associated to. Gathering data from all these persons is disproportionate having in mind that only very few of those persons (probably less than 1%) enter into transactions related to the issuer's securities. Also, any infringement in the procedure is subject to a fine of up to EUR 0,5 million for any person in the chain (e.g. manager and his/her family members). Considering the size of companies and remuneration of managers (especially in some Member States), such sanctions are highly punitive. We attach infographics developed by SEG (Polish Issuers' Association) which describe how burdensome the administrative procedures that companies must apply to comply with MAR rules regarding Managers' Transactions.

To remedy this situation, **we suggest reverting to the pre-MAR situation, meaning that issuers would not be obliged to keep the lists of PMDRs' closely related persons**[17].

- Exempt non - financial companies from the application of the rules on prevention and detection of market abuse (art. 16.2 MAR).

Another issue that should be tackled regards the application of the rules on prevention and detection of market abuse according to art. 16 MAR.

Due to a broad interpretation in a Q&A of ESMA (Q6.1) and differently from the previous regime, the above-mentioned rules are applicable also to non-financial counterparties (NFC) professionally arranging or executing transactions in financial instruments.

Although ESMA makes some qualifications the Q&A bring into scope non-financial firms whose main activities do not consist in arranging or executing financial transactions on a professional basis. NFC's engage in financial transactions on an ancillary basis only, with the main objective to hedge risks resulting directly related to their commercial or treasury financing activities (mainly with derivatives on exchange rate or taxes). Hence, decisions to use financial instruments are taken based on operative requirements, within the framework of internal guidelines, and not with the aim to chase opportunities in financial markets. Moreover, NFC's mostly act as clients of the financial sector in the respective transactions, not as providers or market makers.

Therefore, NFCs should not have to comply with the obligation of Art. 16 MAR.

From our perspective the review of the MAR should clarify the scope of Art. 16 MAR by excluding non-financial firms. It has never been the political intention to bring the "real economy" into the scope of that regime. Rather, it appears to be a mixture of an ambiguous wording (such as the reference to a trading desk for which there is no definition) and a far-reaching interpretation of ESMA that resulted in the current situation

- Adjusting the amount of sanctions

Sanctions are too high and disproportionate. We hear that in some markets, sanctions are even higher than the market capitalisation of many companies (see e.g. response of SEG – Polish Issuers Association – for data). It is important to keep in mind that one size does not fit all and that capital markets are still quite fragmented in Europe.

Therefore, we propose to provide for **substantially lower sanctions. The problem is twofold: while for smaller companies and private persons the absolute maximum level is disproportionate to the size of companies, the inappropriateness for bigger issuer results from linking the sanction to the yearly turnover**. In addition, linking the amount of fines to turnover appears disproportionate as it turnover is not necessarily a measure of the capacity to bear fines economically (especially if despite the high turnover the available funds are small in the case of low-margin industries with a low profitability).

In any case sanctions should thus be applied in accordance with the principle of proportionality. The burden of applying the disproportionate sanctions framework (see Art. 31) in a proportionate manner should not be on the CAs, which is why we suggest amending the sanctions regime in order to make it proportionate. This

[17] See also EI EI Response EC Consultation SME Listing, 26 February 2018, p. 21.

is particularly important considering the current MAR environment which does not provide a sufficient level of legal certainty as regards the interpretation of some material aspects of the MAR[18].

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[18] See also EI EI Response EC Consultation SME Listing, 26 February 2018, p. 16.