CLEARY GOTTLIEB

ALERT MEMORANDUM

The EU Listing Act: Important Changes to MAR

October 9, 2024

On October 8, 2024, the Council of the European Union formally adopted the Listing Act, which marks the final step in the decision-making process.[1] The Listing Act is part of the package of measures that has been released to further develop the EU's Capital Markets Union (CMU).[2] The Listing Act includes important changes to the Market Abuse Regulation (MAR).[3] Those changes will have a significant impact – mostly positive – on the MAR compliance practices of EU listed issuers.

MAR establishes a robust framework to preserve market integrity and investor confidence with numerous rules aiming to prevent insider dealing, unlawful disclosure of inside information and market manipulation. It subjects issuers to extensive obligations, including as to disclosure and record-keeping, that have a direct impact on the daily operations of listed companies.

The Listing Act's changes to MAR are aimed at alleviating some of the high compliance burdens which MAR puts on issuers, with the objective to enhance legal clarity, address disproportionate requirements for issuers and, importantly, to increase the overall attractiveness of EU capital markets, while also ensuring an appropriate level of investor protection and market integrity.

In this updated alert memorandum,[4] we summarize the most significant changes to MAR introduced by the Listing Act and consider some of their practical implications for issuers.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

BRUSSELS

Laurent Legein
+32 2 287 2122
llegein@cgsh.com

Laurent Ruzette
+32 2 287 2149
lruzette@cgsh.com

Marijke Spooren
+32 2 287 2075
mspooren@cgsh.com

Jean-Sébastien Rombouts
+32 2 287 2027
jrombouts@cgsh.com

Ruben Foriers
+32 2 287 2082
rforiers@cgsh.com

Michiel De Wolf
+32 2 287 2086
mdewolf@cgsh.com

Tom Vanderhaegen
+32 2 287 2215
tvanderhaegen@cgsh.com

[1] See Council Press Release, "Listings on European stock exchanges: Council adopts the listing act", October 8, 2024.

[2] The Listing Act package includes (1) a Regulation amending the Prospectus Regulation, the Market Abuse Regulation and MiFIR (PE-CONS 38/24) (Listing Act Regulation), (2) a Directive amending the MiFID II Directive and repealing the Listing Directive (PE-CONS 39/24) and (3) a Directive on multiple-vote share structures in companies that seek the admission to trading of their shares on a multilateral trading facility (PE-CONS 23/24).

[3] Regulation (EU) No 596/2014 of the European Parliament and of the Council of April 16, 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

[4] A previous version of our alert memorandum, in which we discuss the European Commission's proposal of December 7, 2022 (COM/2022/762 final) is available on our website. In the final Listing Act, notably the proposed changes with respect to permanent insider lists have been dropped.

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Key Changes to MAR

1. Immediate disclosure of inside information will no longer be required for **intermediate steps in a "protracted process" (*e.g.*, an M&A situation)** where those steps are connected with bringing about or resulting in particular circumstances or a particular event.

2. The general condition for **delayed disclosure** that "*the delay of disclosure is not likely to mislead the public*" is replaced with a new condition that "*the inside information is not in contrast with the latest public announcement or other type of communication by the issuer […] on the same matter to which the inside information refers*".

3. It is clarified that the **market sounding regime** is an **optional safe harbor** and not a mandatory procedure.

4. The **threshold** to notify the issuer and national authorities of **transactions conducted by PDMRs and CAPs** is raised from EUR 5,000 to EUR 20,000 (although competent authorities may increase or lower such threshold). The **scope of exempted transactions** during closed periods is also broadened.

5. **Administrative sanctions** for infringements of disclosure requirements will be made more proportional to the size of the issuer.

I. Disclosure Requirement for Intermediate Steps in a "Protracted Process"

Current framework. As a general principle, inside information must be disclosed as soon as possible.[5] This is a sensitive issue in so-called "protracted processes", where inside information may crystalize at different stages.[6] Indeed, in these kinds of processes, immediate disclosure of inside information may sometimes prejudice the issuer (*e.g.*, in case of extended confidential negotiations) who may wish to keep certain information confidential.

The issuer may however decide to delay such disclosure subject to compliance with the requirements of Article 17(4) MAR (see also point II below). Such decision is required for each new piece of information deemed to be sufficiently precise and of a price sensitive nature to constitute inside information within the meaning of Article 7(1) MAR.

In this context, the Belgian Financial Services and Markets Authority (FSMA) has repeatedly taken a fairly strict stance on the assessment of inside information and the immediate disclosure requirement, which has further exacerbated the delicate balancing act between informing the markets as soon as possible and protecting the issuer's legitimate interest.[7]

Amendment. The Listing Act exempts intermediate steps in a protracted process: immediate disclosure will no longer be required for intermediate steps in a protracted process where those steps are connected with bringing about or resulting in particular circumstances or in a particular event. Such steps cover announcements of mere intentions, ongoing negotiations or stages of progress of negotiations.[8] Only "*the final circumstances or final event*" will need to be disclosed as soon as possible after they have occurred.

[5] Article 17(1) MAR.
[6] Articles 7 (2) and (3) MAR.
[7] See, *e.g.*, the "Sapec" decision of FSMA's Sanctions Committee of December 27, 2021 and the settlement with Biocartis Group approved by the FSMA's Management Committee on July 18, 2023.
[8] See Recital (67) of the Listing Act Regulation.

The FSMA's Biocartis Decision

On July 18, 2023, the FSMA's management committee approved a settlement with Biocartis Group with respect to the latter's failure to comply with its obligation to disclose inside information as soon as possible (or to elect deferring disclosure thereof).

The FSMA considered that two separate instances occurring in the period leading up to the termination of a strategic collaboration agreement qualified as inside information, namely the receipt of a letter of intent to terminate the collaboration and the receipt of a draft termination agreement, sent by Biocartis' counterparty.

Albeit intermediate steps ultimately leading to the termination, the FSMA found that these two instances should have been disclosed, or disclosure should have been duly delayed. Biocartis had however only issued press releases once its counterparty disclosed the termination discussions in a press release and the termination of the partnership had been (nearly) formalized.

The amendment can be supported as information relating to intermediate steps is indeed not sufficiently mature and may therefore not enable investors to take well-informed decisions, and may even mislead them instead. Thus, where the intermediate steps would be deemed "precise information" and would therefore qualify as inside information, the issuer would not be required to disclose this information before the "end result" (*i.e.*, the event that the protracted process intends to bring about) materializes. Consequentially, issuers will also no longer be required to take a decision to delay the disclosure of inside information for these steps to avoid immediate disclosure. The recitals to the Listing Act clarify that, in general, for contractual agreements, the "final event" should be deemed to have occurred when the core conditions of that agreement have been agreed upon. For mergers, disclosure should be made as soon as possible after management has taken the decision to sign off on the transaction agreement, once the core elements of the transaction have been agreed upon.[9]

Requirements and restrictions. Even in the absence of a disclosure requirement, issuers should still ensure the confidentiality of this information. As is the case for inside information of which the disclosure has been delayed,[10] if the confidentiality is no longer ensured (*e.g.*, in case of rumors that are sufficiently accurate), the issuer will be required to nevertheless disclose the inside information to the public as soon as possible.

In addition, the prohibitions of insider dealing and unlawful disclosure of inside information will continue to apply in full, as well as the obligation to draw up an insider list. Indeed, this change does not imply that steps in a protracted process cannot constitute inside information (they can, and trading in knowledge thereof continues to be unlawful insider trading), but rather that issuers are no longer required to disclose them or make an election to defer disclosure.

Timing of disclosure. Once the "final event" of a protracted process has occurred, the disclosure obligation revives.

In practice, tricky questions may arise as to what exactly can be considered to be the "final event" of a process. To facilitate the assessment of the appropriate moment of disclosure, the Listing Act empowers the European Commission to adopt a delegated act providing a non-exhaustive list of "final events in protracted processes" and, for each event, the moment when such event is deemed to have occurred.

Practical considerations. Issuers will no longer have to choose between immediate disclosure or delayed

[9] See Recital (67) of the Listing Act Regulation.
[10] Article 17(7) MAR.

disclosure in the initial stages of a particular project. This will be especially relevant for multi-stage processes such as M&A transactions. During an M&A process, questions on the qualification of inside information may arise early on and (re-)emerge at various stages of the process, often creating tension between the issuer's disclosure obligations and the preferred communication strategy.

Nevertheless, even though a formal Article 17(4) MAR deferral decision will no longer be required, it may still be prudent for an issuer to formally record the moment as from which it considers that it has inside information and open a so-called "prohibited period", since it will also be required to draw up an insider list. This will be particularly relevant to ensure compliance with the trading prohibition and prevent any allegations of insider dealing *post factum*.

When the "final event" crystallizes, the issuer may still decide to delay disclosure in compliance with the requirements of Article 17(4) MAR. In practice, those requirements – and in particular the requirement that "*disclosure would be likely to prejudice the legitimate interests of the issuer*" – may be more difficult to satisfy then. But this will need to be assessed on a case-by-case basis, as there may well be circumstances where immediate disclosure of the final event could prejudice the issuer (*e.g.*, with respect to contractual agreements, because even though the core conditions of an agreement would have been agreed upon, the agreement itself would not yet have been signed).

II. Decision to Delay Disclosure

A. Conditions for delayed disclosure

Amendment. The Listing Act amends one of the three conditions for delayed disclosure,[11] essentially preventing issuers from delaying disclosure of inside information if such information is in contrast with previous disclosures by the issuer.

The current general condition that "*the delay of disclosure is not likely to mislead the public*" will be replaced by the requirement that the inside information the issuer intends to delay "*is not in contrast with the latest public announcement or other type of communication by the issuer […] on the same matter to which the inside information refers*". The European Commission is empowered to adopt a delegated act to set out a non-exhaustive list of such situations.

The purpose of this change is to increase legal certainty and allow for a consistent interpretation of the conditions to a deferral decision.[12] The new condition could be perceived as being somewhat easier to satisfy than the former one, thus giving more latitude to issuers assessing whether the conditions for delaying disclosure of inside information have been met. Indeed, under the pre-Listing Act regime, the condition "likely to mislead the public" was clarified in ESMA guidelines to include at least three circumstances,[13] *i.e.* that inside information (i) is not *materially different* from the previous public announcement of the issuer on the matter to which the inside information refers, (ii) does not regard the fact that the issuer's financial *objectives are not likely to be met*, where such objectives were previously publicly announced, and (iii) is *not in contrast with the market's expectations*, where such expectations are based on signals that the issuer has previously sent to the market, including interviews, roadshows or any other type of communication organized by the issuer or with its approval.

Practical considerations. Without the broader catch-all of the former "*not likely to mislead the public*" condition, the new, more objective condition may allow to conclude more clearly that deferral is an option, especially if the issuer has not communicated on the matter to which the inside information relates. Nevertheless, the new condition leaves some room for interpretation. As for the prior condition, the

[11] Article 17(4) MAR.
[12] See Recital (70) of the Listing Act Regulation.
[13] Guideline 2 in ESMA – MAR Guidelines: Delay in the disclosure of inside information and interactions with prudential supervision, April 13, 2022, ESMA70-159-4966. Note that guideline 2 will lapse.

guidance the European Commission may provide in this respect in its delegated act will thus be key.

B. *Notification to competent authority of decision to delay disclosure*

Under the proposal of the European Commission released on December 7, 2022, issuers would have become required to already inform the competent authority of its intention to delay the disclosure of inside information immediately after the decision to delay disclosure is taken, instead of immediately after the information is disclosed to the public as is currently the case. These proposed changes did not make it into the final Listing Act. Accordingly, the regime remains unchanged in this respect.

Like before, issuers are expected to include an explanation as to how they deemed the conditions for delayed disclosure to have been met. Member States are still given the option to require that such explanation be provided upon the request of the competent authority only, which option has not been exercised by Belgium to date.

C. *Broader scope for Article 17(5) MAR*

Amendment. An issuer that is a credit institution or a financial institution can delay the public disclosure of inside information in order to preserve the stability of the financial system provided that certain conditions are met. The Listing Act broadens the scope of Article 17(5) MAR, which will now also apply to issuers that are a parent undertaking of a listed or non-listed credit institution or financial institution.

III. Market Sounding Regime

Cleary has long defended the position that the market sounding regime is an optional safe harbor.[14] This means that it is not a mandatory set of rules and procedures that must be observed in any situation that qualifies as a market sounding. The Listing Act now confirms this position and specifies that the market sounding regime is optional for the disclosing market participants (DMPs) and entails the protection from the allegation of unlawful disclosure of inside information.[15]

DMPs may thus decide whether or not to comply with the information and record-keeping requirements of the market sounding regime when gauging market interest. If they do so, they will benefit from the statutory safe harbor. However, if they do not, they will still be able to demonstrate that the market sounding was carried out in the course of the normal exercise of a person's employment, profession or duties,[16] and will thus not be presumed to have committed an unlawful disclosure of inside information. Important to keep in mind is that certain record-keeping and information obligations regarding the assessment of whether the information shared in the course of a market sounding qualifies as inside information, apply to the DMPs regardless of whether they intend to rely on the optional safe harbor.

Focus – Market Soundings

Market soundings are communications of information to one or more potential investors prior to the announcement of a transaction, in order to gauge the interest of such potential investors in the possible transaction and its conditions, such as its potential size or pricing. These communications can be done by an issuer, a secondary offeror, or a third party acting on behalf of any of such persons. It is an established practice that contributes to efficient capital markets and is typically handled by the compliance teams of investment banks. The Listing Act extends market soundings to situations not followed by a specific transaction announcement.

IV. Insider Lists

In the European Commission's initial proposal of December 7, 2022, a radical change to the framework

[14] Cleary Gottlieb Steen & Hamilton LLP, Reply form for the Consultation Paper on MAR review report (available on ESMA's website).
[15] Replaced Article 11(4) MAR ("*where that market participant opts to comply …*) and Recital (65) of the Listing Act Regulation.
[16] This is the general exception of Article 10(1) MAR.

of insider lists was contemplated: a "permanent insiders" format for all issuers' insider lists was contemplated to be introduced. As described in our earlier alert memorandum,[17] such a system would suffer from a number of weaknesses and we therefore welcome the deletion of this proposed change.

While there are no substantive changes to the legal framework governing insider lists,[18] the Listing Act charges ESMA with revising the implementing technical standards on the alleviated format of the insider lists for issuers admitted to trading on SME growth markets, which requires less information, to extend the use of such format to all insider lists. ESMA is to submit draft standards to the European Commission nine months after the entry into force of the Listing Act.[19] As of now, this means that the insider list regime remains unchanged.

V. Managers' Transactions

The Listing Act also introduces a number of important changes to the regime applicable to persons discharging managerial responsibilities (PDMRs) and the persons closely associated with them (CAPs).

A. *Threshold for notification*

The threshold to notify the issuer and national competent authorities of transactions made by PDMRs and CAPs is increased from the current EUR 5,000 threshold to EUR 20,000.[20] The current limit was deemed too low and led to disclosures of transactions that were not considered meaningful. National authorities will have the ability to increase that threshold even further to EUR 50,000 but, alternatively, also to decrease it to EUR 10,000.[21]

B. *Exempted transactions during the closed period*

Expansion to other financial instruments. MAR prohibits trading by PDMRs during a period of 30 calendar days before their company's announcement of its annual and (mandatory) interim financial reporting (so-called "closed periods"), unless certain stringent conditions are met and the issuer allows such trade.[22] In an effort to promote consistency of rules that apply across asset classes, the exemption relating to exceptional circumstances and employees' schemes will now be expanded to include financial instruments other than shares. In light of the limited reliance on this exemption by Belgian issuers, it will likely not have a material impact in practice.

Additional exemption. Furthermore, a new exemption is included based on the rationale that the PDMR trading prohibition should only cover transactions or activities that depend on the willful active investment decision or activity of the PDMR. This is currently already alluded to by the "active" phrasing of Article 19(11) MAR ("*shall not conduct*" vs. "*conducted on their own account*" in Article 19(1)(a) MAR). Where the transaction or activity depends exclusively on external factors or actions of third parties, or does not involve such active investment decision, the prohibition should not apply. This covers irrevocable arrangements made outside of a closed period or an investment activity resulting from a discretionary asset management mandate executed by an independent third party. Such exempted transactions may also be the consequence of duly authorized corporate actions not implying advantageous treatment for the PDMR. They may also be the result of the acceptance of inheritances, gifts and donations, or the exercise of options, futures

[17] See our alert memorandum of March 27, 2023, pages 5-6.
[18] Article 18 MAR.
[19] Replaced Article 18 (9) MAR.
[20] Amended Article 19(8) MAR.
[21] Under the current regime, the authorities in Denmark, France, Italy and Spain made use of their power to increase the threshold from EUR 5,000 to EUR 20,000, while the Belgian authority (FSMA) has not previously made use of this power. *See* ESMA, List of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons, January 4, 2021, ESMA70-145-1020.
[22] Article 19(11) and (12) MAR.

or other derivatives agreed outside the closed period. In sum, all such activities do not, in principle, entail an active investment decision by a PDMR. The prohibition of such transactions throughout the closed period would unduly restrict the freedom of PDMRs, since there is no risk that they will benefit from an informational advantage. This is a welcome clarification and will give the necessary comfort for PDMRs who are frequently confronted with these "passive" trades in practice.

VI. Administrative Sanctions

More proportionate sanctions. The Listing Act makes administrative sanctions for infringements of disclosure requirements more proportionate to the size of the issuer.[23] As a general rule, pecuniary sanctions for this type of infringements are to be calculated as a percentage of the total annual turnover of the issuer.

However, if the calculation of pecuniary sanctions is done based on the total annual turnover of the issuer and competent authorities deem that the amount based on the total annual turnover would be disproportionately low, considering all relevant circumstances (including those set out in Article 31(1) MAR), competent authorities may alternatively impose sanctions based on absolute amounts.

Focus – Calculation of Pecuniary Sanctions

The maximum percentages of the annual turnover for administrative sanctions are:

→ 15% for insider dealing, unlawful disclosure of inside information and market manipulation;

→ 2% for insufficient arrangements, systems and procedures aimed at preventing and detecting (attempts at) insider dealing and market manipulation;

→ 2% for failure to timely disclose inside information, or failure to comply with the delay of disclosure regime; and

→ 0.8% for violations of requirements relating to insider lists, manager's transactions and investment recommendations and statistics.

Adapted sanctions for SMEs. For cases where the pecuniary sanctions are calculated based on absolute amounts, the Listing Act introduces lower absolute maximum amounts for SMEs (including micro-sized enterprises), *i.e.*, EUR 1,000,000 for breaches of Article 17 MAR and EUR 400,000 for breaches of Article 18 or 19 MAR.

Relevant circumstances. The Listing Act adds an additional element to the non-limitative list of relevant circumstances the national authorities should, where appropriate, take into account when deciding on sanctions to apply, *i.e.*, the disadvantage resulting from the duplication of criminal and administrative proceedings and penalties for the same conduct.

VII. Other Amendments

Safe harbor for buy-back programs. Article 5 MAR creates a safe harbor for buy-back programs that comply with the requirement set out in such article. To alleviate the current excessive disclosure burden for issuers with respect to buy-back programs, issuers should report the information only to the national competent authority of the most relevant market in terms of liquidity for their shares and no longer to each competent authority of the market where their shares are listed. In addition, they should only disclose aggregated information to the public, rather than every trade.

Front-running. The definition of inside information with respect to "front running" conduct[24] is amended to ensure that it captures not only persons charged

[23] Amended Article 30 MAR.
[24] Replaced Article 7(1)(d) MAR.

with the execution of orders concerning financial instruments but also other categories of persons that may be aware of a future relevant order. The change also aims to ensure that the definition covers the information on orders conveyed by persons other than clients, such as orders known by virtue of the management of a proprietary account or a fund.

Accepted Market Practices – T&Cs of liquidity contracts. The Listing Act removes the requirement for an operator of an SME growth market to approve the terms and conditions of liquidity contracts and replaces it with an obligation to only acknowledge in writing to the issuer that it has received such contract. As the operator of an SME growth market is not a party to the liquidity contract, the requirement to have such contract approved by the operator was deemed to lead to excessive complexity.[25]

Mechanism to exchange order data. The Listing Act requires competent authorities supervising trading venues with a significant cross-border dimension to set up a cross market order data surveillance mechanism (CMODS) to permit ongoing and timely exchange of order data.[26] ESMA is tasked with drafting technical standards for this purpose.

Focus – MiFIR

In connection with the CMODS mechanism, the Listing Act amends MiFIR to specify that a competent authority can request order book data on an ongoing basis to a trading venue under its supervision and to empower ESMA to harmonize the format of the template used to store such data.

Only competent authorities that supervise markets with high cross-border activity should be obliged to participate, although authorities of other Member States may participate voluntarily. The European Commission will determine this cross-border dimension in a delegated act. The mechanism will, at first, only concern order data on shares, before being extended to bonds and futures.

Collaboration platforms. The Listing Act also caters for the creation by ESMA upon the request of one or more national competent authorities, of collaboration platforms with national competent authorities as well as with public bodies that monitor spot markets, to reinforce the exchange of information in the case of serious concerns related to market integrity or the orderly functioning of markets.

VIII. Entry Into Force

Following the Council's adoption, the different measures of the Listing Act – including the Listing Act Regulation – will be published in the Official Journal of the European Union and enter into force twenty days later. As a regulation, the Listing Act Regulation is directly applicable in all Member States.

The new regime on public disclosure of inside information with respect to intermediate steps in a protracted process will only apply from 18 months after the entry into force of the Listing Act Regulation.

Additionally, Member States are required to take necessary measures to comply with the revised sanctions regime within 18 months after the Listing Act Regulation's date of entry into force.

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[25] Amended Article 13(12) MAR.
[26] New Article 25a MAR.