Disclosure and delayed disclosure of inside information in the light of the EU Market Abuse Regulation

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Tiivistelmä/Referat – Abstract

The EU securities market regulation is under a reform. The new Market Abuse Regulation (the MAR) was passed in summer 2014 and it will come into force and replace the current Market Abuse Directive (the MAD) in July 2016. The MAR has been enacted as a regulation and it thus has a direct effect, i.e. it will be directly applicable in all Member States. The MAR will tighten the ongoing disclosure regulation, which means in practice that issuers are required to disclose more information than ever before. Most importantly, the MAR extends the obligation to disclose also to uncertain information relating to future events. Consequently, such a far-reaching disclosure obligation requires correction not to jeopardise issuer interests. Correction is provided by the delayed disclosure provision, the interpretation of which will be the hot question of the EU disclosure regulation in the near future.

The delayed disclosure mechanism will serve as a safe harbour to issuers. However, entry to the safe harbour is strictly regulated by three criteria (i.e. legitimate interests of the issuer, misleading the public and confidentiality of the information) which need to be met in order to grant the access to the harbour. The interpretation of the criteria is a dilemma and a solution to it needs to be found to strike an optimal balance between disclosure and delayed disclosure. In other words, there is a conflict of transparency, favoured by investors, and confidentiality, favoured by issuers, and a balance between these conflicting interests is needed. Finding the optimal balance is not only in the interest of issuers and investors but also of the market in general, as disclosure is a key to efficient and well-functioning securities markets. The answer to the dilemma lies in how broadly or narrowly the criteria for delayed disclosure are interpreted, and this thesis thus focuses on searching for the optimal balance by means of interpretation.

The thesis concentrates on the following research problems: 1) what is the current status of the disclosure regulation across Europe, 2) on what grounds may an issuer delay the disclosure of inside information, and 3) how should the disclosure and delayed disclosure be balanced i.e. what should the balance be between transparency and confidentiality? Discussing the first question lays the foundation for the thesis. The implementation of MAD in chosen Member States, i.e. Germany, France, the UK, Italy, Finland, Sweden and Denmark, will be discussed in order to map the current status of the disclosure regulation and the challenges that will be faced in the era of the MAR. Discussing the second question includes a thorough analysis of the criteria for delayed disclosure, the interpretation of which is the key to finding the optimal balance for transparency and confidentiality. Again, the practices adopted across Member States will be analysed in order to get an overall picture of the functioning of the delayed disclosure mechanism. Finally, the third question leads to the core of the thesis and to the proposed solution on how the conflict of transparency and confidentiality should be solved and how the disclosure and delayed disclosure should be balanced.

The thesis contributes mainly to the EU securities market law, but interfaces to other fields of law, company and criminal law in particular, have also been taken into account. A pluralistic method has been adopted in the thesis and it contains elements from legal dogmatics, law and economics as well as from comparative law. Legal dogmatics is the core, whereas law and economics and comparative law bring perspective to the thesis and diversify the analysis. Further, a market-based interpretation method has been applied, which combines the teleological interpretation method typical for EU law and economic argumentation needed in securities market law. Using the market-based method in interpreting the disclosure regulation is crucial in order to take into consideration the market environment and the purpose of the regulation and to find an optimal balance for disclosure and delayed disclosure.

Avainsanat – Nyckelord – Keywords

Ongoing disclosure obligation, disclosure regulation, mandatory disclosure, delayed disclosure, deferred disclosure, inside information, market abuse regulation, market abuse directive, information asymmetries, securities market law

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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1 INTRODUCTION

1.1 Topic, research problems and delimitations

The EU securities market regulation is under a reform. The new Market Abuse Regulation (the MAR)[1] was passed last summer and it will come into force and replace the current Market Abuse Directive (the MAD)[2] in July 2016. The MAR has been enacted as a regulation and it thus has a direct effect, i.e. it will be directly applicable in all Member States[3]. The MAR will tighten the ongoing disclosure[4] regulation, which means in practice that issuers are required to disclose more information than ever before[5]. Most importantly, the MAR extends the obligation to disclose also to uncertain information relating to future events. Consequently, such a far-reaching disclosure obligation requires correction[6] not to jeopardise issuer interests. Correction is provided by the delayed disclosure provision, the interpretation of which will be the hot question of the EU disclosure regulation in the near future.

The delayed disclosure mechanism will serve as a safe harbour[7] to issuers. However, entry to the safe harbour is strictly regulated by three criteria, discussed later in this thesis, which need to be met in order to grant the access to the harbour. The interpretation of the criteria is a dilemma and a solution to it needs to be found to strike an optimal balance between disclosure and delayed disclosure. In other words, there is a conflict of transparency, favoured by investors, and confidentiality, favoured by issuers, and a balance between these conflicting interests is needed. Finding the optimal balance is not only in the interest of issuers and investors but also of the market in general, as disclosure is a key to efficient and well-functioning securities markets. The answer to the dilemma lies in how broadly or

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[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 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.

[2] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

[3] Ojanen 2010, 41–42.

[4] From now on, by disclosure I refer to ongoing disclosure. Periodic disclosure falls beyond the scope of this thesis. However, chapter 2 which concerns the economic analysis of disclosure in general applies to both ongoing and periodic disclosure.

[5] Schön 2006, 28.

[6] Koch 2013, 288.

[7] The metaphor of a safe harbour has also been used in this context by Gilotta 2012, 73.

narrowly the criteria for delayed disclosure are interpreted, and this thesis thus focuses on searching for the optimal balance by means of interpretation.

This thesis concentrates on the following research problems:

1. What is the current status of the disclosure regulation across Europe?
2. On what grounds may an issuer delay the disclosure of inside information?
3. How should the disclosure and delayed disclosure be balanced i.e. what should the balance be between transparency and confidentiality?

Discussing the first question lays the foundation for the thesis. The implementation of MAD in chosen Member States, i.e. Germany, France, the UK, Italy, Finland, Sweden and Denmark[8], will be discussed in order to map the current status of the disclosure regulation and the challenges that will be faced in the era of the MAR. Discussing the second question includes a thorough analysis of the criteria for delayed disclosure, the interpretation of which is the key to finding the optimal balance for transparency and confidentiality. Again, the practices adopted across Member States will be analysed in order to get an overall picture of the functioning of the delayed disclosure mechanism. Finally, the third question leads to the core of the thesis and to the proposed solution on how the conflict of transparency and confidentiality should be solved and how the disclosure and delayed disclosure should be balanced. The economic argumentation is used in arguing for the proposed solution.

The described topic and the delayed disclosure mechanism in particular is an important research subject for at least two reasons. Firstly, the extending scope of disclosure will shift the main focus of the disclosure regime to the possibilities of delaying disclosure in the near future[9] and the topic is thus extremely timely. Secondly, the previous research on the subject is scarce[10], which must be due to the fact that the interest has only recently, specifically after enacting the MAR, shifted towards the delayed disclosure mechanism. Thus, the topic is definitely a burning issue at the moment and requires attention.

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[8] Illustrative examples are also given of the US regulation when considered necessary. In addition, occasional references are made to other Member States, the regulation of which has, however, not been analysed systematically.

[9] Koch 2013, 309.

[10] As the chapter 4 will indicate, some discussion regarding the interpretation of the delayed disclosure mechanism can be found especially from the national legal practice, legal literature and authority statements of Member States. However, an EU level discussion is limited to only a few sources. See e.g. Koch 2013; ESME 2007; CESR/06-562b; EU Commission 2009.

The disclosure regulation in general has mainly been discussed from either a national point of view or at the EU level. However, a comparative research that would take into consideration the national differences of the regulation and its interpretation is almost non-existent[11]. This is surprising, since the true harmonization of the disclosure regulation across Member States requires understanding of the national approaches and practices of disclosure. As the currently effective MAD has been enacted as a directive having no full direct effect[12] in the Member States, the securities market regulation in Europe has maintained its national characteristics. In order to enable truly harmonised practices and interpretation of e.g. the criteria for delayed disclosure in the era of the MAR, an understanding of the current status of the disclosure regulation across Members States is needed. This thesis aims at contributing to a development of such an understanding and creating a "common ground" that is required to enable a pan-European interpretation of the criteria for delayed disclosure and that would be acceptable across Member States. In this thesis, my goal is to distance myself from the Finnish perspective as far as possible[13] and try to look at the regulation of different Member States as objectively as possible. Since a complete harmonization of the securities market regulation is targeted with the MAR, an EU law perspective adopted in this thesis is obviously justified.

As the said indicates, the thesis is concentrated on the securities market law and the EU disclosure regulation in particular. In addition to disclosure regulation, the links to other fields of market abuse, i.e. insider trading and market manipulation, have been taken into consideration. The concept of inside information is crucial for this thesis but, nevertheless, the interpretation of its criteria has not been discussed in this thesis as they have already been covered by very extensive legal literature[14]. Besides securities market law, interfaces to other fields of law, company and criminal law in particular, have also been taken into account.

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[11] See however ESME 2007; Di Noia & Gargantini 2012; Di Noia & Gargantini 2009; Koch 2013.

[12] Directives require transposition into national laws and may only have a direct effect in limited circumstances. Ojanen 2010, 42–44.

[13] However, it is impossible to reject the Finnish perspective totally when it comes to e.g. criminal aspects of the disclosure regulation.

[14] As a summary, see e.g. Knuts 2011, 25−114; Annola 2005, 208−305; Kotiranta 2014, 269−296.

1.2 Structure

This thesis proceeds as follows. At the end of this chapter the methodology of the thesis, i.e. a combination of legal dogmatics, law and economics and comparative law, is described. As this thesis is rooted in the EU law, its doctrine of sources of law and its interpretation methods will be discussed shortly. The market-based interpretation method used in this thesis to solve the conflict of transparency and confidentiality will also be introduced.

The second chapter will concentrate on the economic analysis of disclosure. The big picture will first be outlined by discussing the information asymmetries in the markets to which disclosure offers a solution. Disclosure, however, also causes problems, and thus the limitations for disclosure will be covered as well. Thus, both the pros and cons of disclosure will be dealt with from an economic perspective. The second chapter is by nature descriptive and summarising, and presented key arguments will be referred to regularly in the chapters to come.

The third chapter will analyse the current and future status of the EU disclosure regulation. First, the disclosure regulation of the MAD and its implementation across chosen Member States will be discussed. The analysis indicates that the MAD disclosure regulation has been implemented in various ways in Member States and that the implementation approaches can be roughly divided into two categories, one-step and two-step model. A typology of the disclosure regulation of the studied Member States will be drafted, too. It is crucial to discuss the current status of the disclosure regulation across Member States in order to indicate the future challenges of the new disclosure regulation of the MAR, the content of which will be presented at the end of the chapter.

In the fourth chapter a detailed discussion will be carried out on the delayed disclosure mechanism, the crucial component of the disclosure regulation under the MAR. The criteria for delay will be discussed in depth and the procedure and the sanctions for the delay will be covered shortly. Again, the understanding of the current disclosure practices of the studied Member States is crucial in order to provide a rational interpretation proposition on how the interpretation of the criteria for delayed disclosure should evolve in the EU, which will be discussed in the fifth chapter.

The fifth chapter starts by summarizing the major regulatory challenges of the MAR from an economic point of view. In other words it will be discussed how the MAR matches with the economic theory of disclosure presented in the second chapter. Then, an available solution is proposed on how to interpret the criteria for delayed disclosure and balance disclosure and delayed disclosure in a way that takes into consideration the economic aspects of disclosure. At the end of chapter five, practical implications of the disclosure regulation of the MAR and the proposed interpretation solution will be discussed shortly. The sixth chapter concludes the thesis.

1.3 Methodology and perspective

1.3.1 Pluralistic approach

A pluralistic method has been adopted in this thesis and it contains elements from legal dogmatics, law and economics as well as from comparative law. Legal dogmatics is the core, whereas law and economics and comparative law bring perspective to the thesis and diversify the analysis.

Firstly, as said, the core of the thesis is in legal dogmatics which aims at *interpreting* and *systemizing* legal rules (here the EU disclosure regulation), the first one being the core activity of practical legal dogmatics and the latter of theoretical legal dogmatics[15]. My goal in this thesis is to contribute to both branches of legal dogmatics by outlining the legal framework of disclosure regulation, discussing the relevant concepts and norms and organizing them coherently in relation to each other, describing the contents of the regulation, explaining the meaning of the described legal rules by interpreting them and finally suggesting solutions to the "hard cases" of the EU disclosure regulation. Legal rules do not always provide clear answers to such hard cases and the solution has to be searched from legal principles and, when they intersect, from weighting them against each other.[16] Legal argumentation is crucial in the practical legal dogmatics[17], and therefore my goal is to justify my interpretations, that are based on the correct sources of law, in a way that could be accepted by the legal community.

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[15] Aarnio 1997a, 75.

[16] For the legal dogmatics doctrine, see e.g. Aarnio 1997a; Aarnio 1997b, 237; Timonen 1998, 12−14; Hirvonen 2011, 24.

[17] Aarnio 1997b, 51 & Aarnio 1989, 285.

Secondly, this thesis draws from the law and economics[18] which is the prevailing doctrine in the interpretation of the EU single market regulation[19] and which has an especially significant role in certain branches of law, e.g. company and competition law, and securities market law makes no exception. Ignoring economic arguments in such branches could even be considered a grave (procedural) error.[20] Taking into consideration the economic environment of securities market regulation, it is quite clear that examining disclosure regulation in the securities market would not be meaningful without discussing also the rationales behind the regulation. As the disclosure regulation has a tight link with the functioning of the securities market, the link needs to be discussed in order to interpret the regulation in a meaningful manner.

To be more precise, the approach of this thesis could be described as legal dogmatics with a law and economics twist[21]. By following such an approach the economic outcomes of the regulation are at the core of this thesis and my goal is to connect the economic argumentation to the interpretation, systematization and weighting propositions of the relevant legal rules and argument on how the regulation reaches its economic objectives (i.e. how efficient the regulation is) and how the interpretation of the regulation should develop in order to reach its targets even better.[22] The described method may, however, conflict with the traditional, static doctrine of sources of law[23]. Therefore a more dynamic understanding of the sources of law has been suggested in the legal literature and also

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[18] The US literature on law and economics is at the core of this thesis. For law and economics doctrine in general, see e.g. Posner 2007; Mackaay 1982; Cooter & Ulen 2014.

[19] Siltala 2003, 527. For a more detailed discussion on the interpretation methods of the EU law, see chapter 1.3.3.

[20] Mähönen 2004, 58.

[21] For such an approach (in Finnish "*oikeustaloustieteellinen laintulkintaoppi*"), see Siltala (2003, 552–556), who considers the approach to derive from the Scandinavian social engineering doctrine (in Swedish "*reella övervägande*"), which connects law and its interpretation to the society instead of the legal system which is the core of the conceptual legal dogmatics.

[22] The thesis includes also some regulatory critics, but such critics are not at the core of the thesis since the EU securities regulation has been reformed only recently and now the focus should be on how to interpret the regulation in a meaningful manner, not on how to reform the regulation again. For regulatory critics and *de lege ferenda* argumentation as another important approach on law and economics, see Siltala 2003, 554.

[23] For the static doctrine of the sources of law adopted especially in the Nordic countries, see e.g. Aarnio 1989, 220−221; Tolonen 2003, 22−27; Siltala 2003, 200. According to this normative doctrine of sources of law the sources are divided into a hierarchy of strongly binding, weakly binding and permitted sources of law. The doctrine has been criticised for being strictly rule-base and for not accepting legal principles and case-specific arguments or taking into consideration the EU law. For the critics, see e.g. Siltala 2003, 201–202 and Mähönen 2004, 51.

adopted in this thesis[24]. According to it strongly biding sources, i.e. legislation and customary law, still have the highest position in the hierarchy[25] but the weight of the other sources of law should be considered based on the case-specific circumstances, and also legal principles and other non-rule based arguments should be taken into consideration. Thus, economic arguments should, at the very least, be taken into consideration as real arguments or even as the most crucial basis for interpretation[26].

Thirdly, this thesis also has characteristics of comparative law. By following the comparative method, the aim of this thesis is to compare the relevant disclosure regulations of the chosen Member States, find similarities and differences and explain the potential reasons behind them. The goal is also to create a typology, which highlights the characteristics of each legal system.[27] The purpose of such comparisons is to pinpoint the significant differences in the disclosure regulation, which the MAR aims at eliminating. As the legal cultures, systems and thus also the optimal level of disclosure differ[28] in Member States it is all but easy to force an adoption of a uniform disclosure regulation. To enable, however, the adoption of a uniform regulation and its interpretation, the interpretation of the relevant provisions should be compatible with the legal cultures and systems of each Member State. The knowledge interest of the comparison is, therefore, *integrative* or even *unificative*[29], i.e. the motive for the comparisons of this thesis is to find a "common ground" that could enable a pan-European interpretation of the relevant disclosure rules suitable to all Member States. In addition, the knowledge interest is also *practical*, as the goal is to find a practical solution to an interpretation problem regarding the delayed disclosure provision.

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[24] See e.g. Timonen 1998, 122; Karhu 2003; Mähönen 2004. For a more detailed discussion on the sources of the EU law and this thesis, see chapter 1.3.2.

[25] Legislation could, however, be surpassed with other arguments but only in the utmost exceptional situations. Otherwise the foreseeability of the law would be at danger.

[26] Regarding the weight of economic arguments see Timonen (1998, 127) according to whom economic arguments should have a considerable relevance in evaluating interpretation alternatives or consequences of the regulation and in criticizing regulation. In actual court decision-making, however, economic arguments should have less relevance. Mähönen (2004, 63) on the other hand, has argued that the relevance of economic arguments should be extended to court decision-making as well.

[27] For the comparative law method, see Husa 2013 (especially 25 and 36).

[28] See chapter 3.1.4.

[29] Husa (2013, 60) divides the knowledge interest of comparative law into integrative, uniform, contradictive, practical, theoretical and pedagogic.

1.3.2 Sources of law

The EU law has changed the national order of sources of law[30] in a way that it places the EU legal system and its sources over the national legal order[31]. The sources of the EU law may be divided into primary, secondary and supplementary law. Primary law has the highest position in the hierarchy and it includes the founding Treaties and the general principles of the EU law in this order. Secondary law is the next level in hierarchy and it includes legal acts, e.g. regulations, directives and decisions, based on the Treaties. The hierarchy within the secondary sources may be further divided into legislative acts, delegated acts and implementing acts in this order. Supplementary law includes the case law of the European Court of Justice (ECJ) and soft law.[32] The main sources of this thesis are those of secondary and supplementary law.

The EU securities market regulation is under change at the moment. The MAR has been passed and it will come into effect in July 2016. The MAR has been enacted as a regulation (it falls within the legislative acts category) and it will therefore be directly applicable and binding in all Member States[33]. As the MAR comes into force, it becomes part of the national legal systems without any actions of the Member States, it will have a legal effect independently of any national law and the Member States may not pass regulation that conflicts with it[34]. Therefore, this thesis primarily has the focus on the EU law. To be more precise, this thesis concentrates on the interpretation of certain disclosure provisions of the MAR, i.e. Article 7 on inside information[35] and especially Article 17 on public disclosure of inside information and their recitals. The relevant preliminary works are also discussed when they provide further details on the purpose of the regulation. The MAD provisions and its implementation directive are also discussed when they appear to be still relevant in

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[30] *Supra* note 23.

[31] Timonen 1997, 115.

[32] For the sources of the EU law and their hierarchy see e.g. Craig and Búrca 2011, 103−120; Weatherill 2010, 27−78; Ojanen 2010, 37−48; European Parliament 2014.

[33] European Parliament 2014, 2. However, other securities regulation to be enacted in the future based on the MAR may also be given as directives which still require national implementation.

[34] Craig and Búrca 2011, 105. However, Member States may need to modify their respective regulations in order to comply with the MAR.

[35] Although, as said before, the criteria for inside information will not be discussed.

interpreting the MAR provisions. The ECJ case law, especially the Daimler case[36], is also a relevant source for this thesis.

In the future, the national legislations of the Member States will have only a limited role in the securities market regulation. Accordingly, the national legislation and related sources of national law, i.e. the legislation of Germany, France, the UK, Italy, Finland, Sweden and Denmark, are discussed in this thesis when it is necessary for justifying a coherent and appropriate interpretation proposition for the MAR from the Member States' point of view. None of the discussed national legislations is in a dominant position in this thesis but the legislation and implementation measures of the MAD in the chosen Member States are of equal importance and an extensive analysis of the regulation and relevant examples of the studied Member States are provided to justify the interpretation propositions of the thesis.

When it comes to the EU securities market regulation, the Lamfalussy process also needs to be taken into consideration. The four-level Lamfalussy process was launched to increase the harmonisation of the EU securities market regulation and reach the Single Market targeted in the Financial Services Action Plan (FSAP) of the EU, and it specifies the regulatory process and hierarchy of the securities market regulation[37]. Level 1 of the Lamfalussy process includes the legal acts by the European Parliament and the Council, e.g. the MAD and the MAR, which set out the framework for the legislation. Level 2 includes legislation, i.e. delegated or implementing acts, by the Commission regarding the details and technical implementing measures necessary for operationalising level 1 legislation[38]. Level 3 includes guidance given by ESMA (former CESR) on technical details and interpretation of the regulation[39]. Finally, level 4 includes acts of the Commission and Member States to strengthen the enforcement of the EU law.

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[36] Case C-19/11, Markus Geltl v. Daimler AG.

[37] For FSAP and Lamfalussy process, see e.g. ESME 2007, 2−3; Burn 2014, 4−8; Möllers 2010; Di Noia & Gargantini 2012, 487−489; Di Noia & Gargantini 2009, 1−6; Häyrynen & Kajala 2013, 23−26; Moloney 2008, 16−24.

[38] Four level 2 acts were enacted based on the MAD. One of them is relevant in this thesis: Commission directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation. No level 2 acts have yet been enacted based on the MAR.

[39] Three sets of guidance have been provided by CESR based on the MAD, and they will be discussed in this thesis for applicable parts. No level 3 guidance has yet been given based on the MAR. According to a prevailing opinion, Level 3 measures are not legally binding but they guide measures of the national regulators to whom they are directed. However, some scholars argue these measures should be considered to have a binding effect. See Di Noia & Gargantini 2012, 488; Möllers 2010.

The legal literature clearly falls within the category of supplementary sources of the EU law, even though it is not generally mentioned in the hierarchy of the EU law, and like soft law the legal literature is of unbinding nature but may gain significance in developing the interpretation of the EU law[40]. The legal literature discussed in this thesis primarily regards disclosure regulation, inside information and development of the EU securities market regulation. Literature regarding the legislation of the studied Member States has also been taken into consideration. In addition, the economic literature on disclosure, information asymmetries and securities market efficiency is discussed quite extensively and it provides important arguments for the teleological interpretation of the EU law discussed in more detail in the next chapter. Literature regarding the EU law in general and methodology, on the other hand, serves a supplementary source for this thesis.

1.3.3 Interpretation methods

After the entry into force of the MAR only the European doctrine should be applied in the interpretation of the disclosure regulation instead of national methods of interpretation[41]. The interpretation methods of the EU law have been developed by the ECJ case law, legal academics and legal practice to ensure the independence of the EU law from national legislation and the uniform interpretation across Member States even though they mainly consist of the methods also used in the Member States[42].

There are several interpretation methods in the EU law and no specific order of importance may be given to them. The method of *textual interpretation* is, however, a clear starting point for interpretation, according to which the wording of a provision is first examined and different language versions are compared. The method of *contextual interpretation* places a single provision to a larger context, takes into consideration the EU law as a whole and aims at eliminating conflicts within the legal system. Contextual interpretation has only recently started to gain importance in the securities market regulation as the full codification of EU legislation in the field is only emerging. The method of contextual

[40] For the soft law, see Ojanen 2010, 48. The prevailing European doctrine construes narrowly the concept of the sources of law. According to this view the sources of law include only those of binding normative nature whereas other sources that may influence the law but are not binding (e.g. legal literature, case law and administrative practice) are only informative sources. Möllers 2010, 385–386.

[41] Veil 2013b, 53. However, the securities regulation enacted as directives (e.g. the sanctions directive to be discussed in chapter 4.3) may still be interpreted according to the national methods, taking however into account the principle of conform-interpretation and indirect effect of the EU law. See e.g. Weatherill 2010, 143–153 and case 14/83, Von Colson and Kamann.

[42] Veil 2013b, 54. For the interpretation methods of the EU law see Veil 2013b, 55–58 and Ojanen 2010, 48–51.

interpretation is closely related to the method of *teleological interpretation*[43] which aims at interpreting a provision according to its spirit and purpose. The method takes into consideration the outcomes of the interpretation and the development of the EU law towards its general purposes. Teleological interpretation has a central role in the EU law and it is connected to the principle of *effet utile* according to which the EU law should be interpreted in a manner that ensures it the best possible effectiveness.[44]

Even though textual and also contextual interpretation provide a clear starting point for interpretation, it is clear that such methods do not provide a clear-cut interpretation for the disclosure provisions. That is because disclosure provisions are outcome-focused and open standards and they do not include any detailed rules that would provide a univocal answer to the interpreter of the law. Therefore, teleological method, which adds weight to the principles and real arguments[45], is needed. Such flexibility in interpretation is justified in the securities market regulation as the market environment is dynamic and under constant development[46] and the regulation needs to be adaptable to changing conditions. The disclosure regulation that is based on open standards and principles[47] leaves discretion to authorities and courts and enables them to take into consideration the case-specific circumstances, too. However, such a regulatory approach also contains risks. Due to the open nature of the provisions, the legal security and foreseeability of the regulation suffers[48]. Disclosure regulation includes penal provision, both administrative and criminal, and therefore the *principle of legality*[49] sets the ultimate limits for the interpretation.

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[43] A historical interpretation method, taking into consideration the preliminary works and then the intentions of the legislative bodies described in the recitals of the legislative act, is often described as a separate method, but here it is considered to be embedded in the teleological method. See Veil 2013b, 56−57; Ojanen 2010, 48.

[44] The interpretation methods of the EU law were established in the ECJ preliminary ruling in case C-283/81, CILFIT v. Ministero della Sanità. For the methods, see also Ojanen 2010, 48−51; Veil 2013b, 54−58; Itzcovich 2009 and Raitio 2005.

[45] Kurenmaa 2003, 72−73.

[46] Häyrynen 2007, 838.

[47] As an example, the UK financial supervisory authority FCA has explicitly engaged in such a principle based regulation, see FCA 2007.

[48] See e.g. Häyrynen 2007, 838 and Kurenmaa 2003, 71 who have criticised the far-reaching flexibility of the definition of the inside information for colliding with the principle of legality. The same critics also apply to the flexibility of the criteria for delayed disclosure.

[49] It has become established that the principle of legality consists of four sub-principles. Firstly, *the principle of non-retroactivity* prohibits a judge to impose a criminal sanction on an act that was not criminalised at the moment of the act. Secondly, *the prohibition against analogy* prohibits the judge to apply the law analogically to the detriment of a

As far as the principle of legality is taken into consideration, the teleological method should be used in interpreting the disclosure regulation. Teleological interpretation has gained a particularly significant position in advancing the economic objectives of the EU[50]. A teleological interpretation method used within the economic context may be called a *market-based method*[51], and such an interpretation method will also be used in this thesis, without forgetting the textual and conceptual interpretation as a basis. Using the market-based method in interpreting the disclosure regulation is crucial in order to take into consideration the market environment and the purpose of the regulation and to find an optimal balance for disclosure and delayed disclosure. Otherwise the regulation might end up in either over or under regulating disclosure[52].

As said, the teleological market-based method gives significant emphasis on principle-based argumentation. Principles can be described as discretionary optimizing commands, and often several, colliding principles apply to a specific situation. Therefore, principles need to be weighed against each other and balanced in a way that takes into consideration the (colliding) values and objectives behind the principles as far as possible.[53] Within the context of disclosure, interpretation constantly needs to balance between the ideals of transparency and confidentiality[54]. Issuer interests favour confidentiality and investor interests transparency. Thus, issuer's right to proprietary information and investor's right to disclosure collide, which will be discussed more in detail in chapter 2.3. For the interpreter of the law, such a collision means that the trade-off between benefits and harm[55] of disclosure needs to be discussed in order to find a solution to where the line between disclosure and delayed disclosure should be drawn.

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defendant. Thirdly, *the principle of certainty* prohibits legislator to enact inaccurate criminal sanctions. Fourthly, *the prohibition against uncodified criminal provisions* prohibits unwritten criminal provisions. See Tapani 2002, 940.

[50] Raitio 2005, 279.

[51] See Knuts 2011, 12–21 who has applied such a method in interpreting insider regulation.

[52] Knuts 2011, 13.

[53] Hirvonen 2011, 44; Siltala 2003, 497.

[54] Similarily, see Huovinen 2004, 354 and Häyrynen 2009, 75–76.

[55] The concepts of benefits and harm of disclosure will be used in this thesis instead of the traditional cost-benefit framework. Harm-benefit framework will be used since disclosure can result also in non-quantitative consequences. For example in a multi-stage decision-making process, a premature disclosure of inside information may result in a failure in negotiations but also in problems in future co-operation relationship and image problems, which in turn may result in costs but also in intangible harm.

2 DISCLOSURE[56] AT THE SECURITIES MARKET

2.1 Information asymmetries

The classic challenge of the economy and primary role of securities markets is the optimal allocation of savings to investment opportunities[57] (hereinafter the *efficiency problem*). In an ideal situation, the securities market would work according to the efficient capital market hypothesis (ECMH)[58], where prices would reflect all relevant information and guide investors to allocate their savings in a most efficient manner and in a way that best matches with their preferences. In such a perfectly efficient market[59] there would be no informational asymmetries between issuers and investors and the allocation of resources would be optimal.

Because of market failures[60], however, securities markets are not perfectly efficient. Perfect efficiency is only an unrealistic and impossible fiction, and in reality securities markets face extensive information asymmetries and often present only a very low degree of transparency[61]. Matching savings and investment opportunities faces thus two problems[62]. Firstly, issuers are better informed than investors of the investment opportunities they offer

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[56] In this chapter, the term disclosure refers exceptionally to disclosure in general and no difference is made on periodic and ongoing disclosure obligation.

[57] Fama 1970, 383; Healy & Palepu 2001, 407; Avgouleas 2005, 4.

[58] The hypothesis was introduced by Fama (1970). According to the hypothesis, securities markets can be said to be efficient when the security prices fully reflect all available information at any time. This has been called the null hypothesis of the theory and it represents therefore an unrealistic, extreme situation. Therefore, securities market efficiency has been divided into three forms – weak, semi-strong and strong form. In the weak form of efficiency, prices on securities markets reflect only the historical information. In the semi-strong form of efficiency, prices reflect all published, both past and present, information. In the strong form of efficiency, prices reflect all relevant information whether it is public or not. See also Enriques & Gilotta 2014, 5. For the later development and critics of the theory, see e.g. Gilson & Kraakman 1984; Gilson & Kraakman 2003, Gilson & Kraakman 2012, Grossman & Stiglitz 1980 and Tversky & Kahneman 1974. Gilson & Kraakman (2003, 45) point out that the ECMH was a product of an era of "elegant models of the workings of the capital markets in a frictionless world" from where we have moved on to understanding how the market works in an imperfect world. This more realistic understanding has been promoted by academics representing behavioural economics and finance, as a summary, see Knuts 2007, 48–55.

[59] In a perfectly efficient market e.g. competition would be perfect, there would be no frictions (i.e. transactions costs or market restrictions), individuals would be perfectly rational and information would be immediately and costlessly available to everyone. Avgouleas 2005, 45, footnote 120.

[60] E.g. the fact that information asymmetries exist, information is imperfect and costly, information is a public good by nature and externalities are related to it (Stiglitz 1989; Bator 1958).

[61] Avgouleas 2005, 54. Some scholars have argued that the securities markets would work according to the semi-strong form, but this view has also been criticised by stating that markets do not represent even the weak form. For the Finnish empirical evidence, see Norros 2009, 226–227 and Leppiniemi 2005, 117.

[62] Healy & Palepu 2001, 407.

to investors. This is called an *information problem* and it arises from the information asymmetries that exist between issuers and investors. Secondly, issuers remain better informed also after investors have decided to invest and have become shareholders. This is called an *agency problem* and it arises also from information asymmetries which create incentives to issuers to use the investments in their own interest and at the expense of investors.[63]

An information problem may result in significant inefficiencies and even a breakdown of the market which has been explained by the classic lemon theory[64]. If information asymmetries exist, buyers can by no means evaluate the quality of marketed goods. Therefore, there is no incentive to offer quality goods in the market as buyers cannot tell the difference between those and inferior goods and they value both at an average level. Inferior goods are thus overvalued and quality goods undervalued which keeps producers of quality products away from the market as the prices for their goods are too low. Finally, through a process of adverse selection, inferior goods, i.e. lemons, are left in the market. Consequently, in a lemon market there is no confidence in the market and market integrity is low.

Similarly to the information problem, an agency problem may result in significant inefficiencies. In a classic principal-agent[65] set-up the agent, i.e. management of a company, is better informed than the principal, i.e. a shareholder of the company. Therefore, the principle may not be sure that the agent acts as agreed, and the agent has an incentive to act opportunistically. The value of the agent's performance to the principal is reduced as the principal needs to engage in monitoring which involves agency costs. Regulation, i.e. disclosure obligation, may significantly decrease the agency costs and advance the welfare of both agents and principals.

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[63] The underlying rationales for regulating information asymmetries may be divided into *market-based theories* and *relationship-based theories*. Information problem relates to the market-based approach to information asymmetries and it has a macro focus on market efficiency. Agency problem, on the other hand, relates to the relationship-based approach to information asymmetries and it has a micro focus on fiduciary relationship. The EU disclosure regime has been based on the macro focus, whereas the US regime has its roots on the micro focus. See Moloney 2014, 701.

[64] Akerlof's (1970) lemon theory was not developed for securities markets in the first place, but it has however established its position in the Nordic securities law literature. However, the German literature does not refer to the theory. See Knuts 2011, 17. For the application of the theory to securities markets, see also Healy & Palepu 2001, 408 and Lau Hansen 2002, 7–8.

[65] For the principal-agent theory, see e.g. Armour, Hansmann & Kraakman 2009b, 35–53.

2.2 Disclosure as a solution

Information asymmetries are inevitable in the securities markets and create a demand for disclosure[66]. Disclosure is needed to enhance efficiency and to balance the information asymmetries between issuers and investors. In other words, disclosure provides a solution to efficiency, information and agency problem discussed in the previous chapter. In the legal and economic literature, the justifications for disclosure have been divided into three categories[67]: 1) efficiency justification (addressing the efficiency problem), 2) fairness justification (addressing the information problem) and 3) corporate governance justification (addressing the agency problem). There is no consensus on which one of them is the soundest justification for disclosure, but the efficiency justification may be argued to be the ultimate rationale and the "umbrella" for the two others as they both are linked with efficiency, as well.

According to the first justification, disclosure addresses the need to improve the securities market efficiency[68] as it has the potential to enhance price accuracy by disseminating relevant information and thus enabling information-based decision-making[69]. Enhanced price accuracy, in turn, benefits the whole economy as it increases liquidity, reduces volatility, decreases cost of capital (i.e. the risk premium required by the investors) and

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[66] Healy & Palepu 2001, 406. Disclosure is not the only way to reduce information asymmetries. Instead, alleviating information asymmetries by regulation has traditionally been achieved in three ways. The first measure is to oblige the informed party, i.e. the issuer, to disclose relevant information and thus eliminate the monopoly on information, and in the securities market regulation it is achieved by *disclosure obligation*. The second measure is to prohibit the informed party from making use of informational advantage, and in the securities market regulation it is achieved by *prohibition on insider dealing*. The third measure is to prevent the creation of new information asymmetries by prohibiting active misinformation, in other words lying, and in the securities market regulation it is achieved by *prohibition on market manipulation*. The first two, disclosure obligation and prohibition on insider dealing are often seen as supplementary to each other, since both prevent taking advantage of the information advantage. On the other hand, the first and the third are tightly related when it comes to communication: disclosure obligation enforces the issuer to disclose relevant information and prohibition on market manipulation forbids the issuer to disclose false information. Lau Hansen 2002, 248. Even though the disclosure obligation is in the focus of this thesis, all these three intertwine and require therefore certain attention.

[67] See e.g. Enriques & Gilotta 2014, 4–12. According to them the justifications for disclosure are: a) price accuracy enhancement, b) investor protection and c) agency cost reduction. Price accuracy enhancement addresses the efficiency problem, investor protection the information problem and agency cost reduction the agency problem.

[68] For the efficiency justification of insider dealing regulation, see e.g. Kurenmaa 2003, 28–31 and Knuts 2011, 16–18. Based on the efficiency justification it has even been suggested that insider trading should not be regulated at all. Allowing insider dealing would also mean that no mandatory disclosure regulation would be needed. Manne's works have been especially influential in this discussion; as a summary, see Sjödin 2006, 19–26; Avgouleas 2005, 200–201 and Knuts 2011, 16, footnote 33.

[69] Thus, by following the ECMH, disclosure serves the purpose of pursuing a more efficient form of the securities market efficiency.

promotes allocative efficiency[70]. According to the second justification, disclosure addresses the information problem by protecting investors. Investors are not protected just because of fairness or justice[71] but because investor protection is instrumental to the well-functioning and even the very existence of the securities market[72]. As the lemon theory indicates, scepticism among market actors results in lack of confidence, trust and market integrity, which, in turn, may result in investors withdrawing their savings and, finally, in a breakdown of the market. To retain investors in the market and avoid the collapse of the market, at least the minimum level of "equal access"[73] needs to be assured. Thus, the fairness justification can also be traced to the efficiency justification and the efficiency and fairness justifications are not necessarily contradictory[74]. According to the third justification, disclosure has an important role in corporate governance[75] and it addresses the agency problems by reducing agency costs and lowering the cost of capital[76]. Disclosure enables the shareholders to monitor that the management acts according to its fiduciary duties and it also increases transparency, prevents opportunism and misbehaviour of both management and controlling shareholder. Therefore, disclosure has been said to be instrumental to shareholder empowerment.[77]

In theory, disclosure may be achieved by either voluntary or mandatory disclosure, i.e. disclosure may be either non-regulated or regulated. Efficiency justification has been used to support both alternatives and it has even been argued that exploiting information

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[70] Enriques & Gilotta 2014, 10; Kahan 1992; Diamond & Verrecchia 1991; Leuz and Verrecchia 2000.

[71] Some scholars have argued that insider trading should be prohibited only because it is immoral, unfair and unethical regardless of its possible economic disadvantages or advantages. See e.g. Keenan 2000 and Snoeyenbos & Smith 2000. For the fairness justification of insider dealing regulation, see also e.g. Kurenmaa 2003, 31–33 and Knuts 2011, 19–21. Both fairness and efficiency justification have been discussed extensively in the literature. The fairness justification has been strongly supported by lawyers, whereas the efficiency justification has been supported by economists (Kurenmaa 2003, 33). It has also been argued that the fairness justification should be discarded *per se* and that the fairness justification is justified only as far as it contributes to better efficiency as well (Enriques & Gilotta 2014, 4−5; Sjödin 2006, 19–28).

[72] Enriques & Gilotta 2014, 4.

[73] Enriques & Gilotta 2014, 5. See also *infra* note 87.

[74] Enriques & Gilotta 2014, 4; Kurenmaa 2003, 34; Sjödin 2006, 26.

[75] The corporate governance justification has been especially important in the US practice which emphasises the management's fiduciary duties more than the European practice. See e.g. Fox 1999a and Mahoney 1995. For fiduciary duties in the Anglo-American practice, see e.g. Mähönen & Villa 2006, 4 & 108.

[76] Enriques & Gilotta 2014, 7; Mahoney 1995, 1048; Fox 1999a, 120. Reducing agency costs and lowering the cost of capital can, evidently, be traced back to the efficiency justification, as well (Mahoney 1995, 1048).

[77] Fox 1999a, 116−118; Fox 1999b; Enriques & Gilotta 2014, 8; Paredes 2003, 2. Yet, scandals such as Enron have not been avoided. See *infra* note 83.

asymmetries should not be prohibited at all[78]. According to some scholars issuers would disclose the relevant information also voluntarily, as disclosure will reduce the cost of capital and it is an important way to avoid any discount that may result if the investors consider that the issuer does not disclose enough information for them to evaluate the company properly or if they think that the issuer is hiding something[79]. Despite the fact that both voluntary and mandatory disclosure have been supported in the legal literature, regulating information asymmetries by disclosure obligation has established its position in the Western countries and it has become an indispensable part of the securities regulation[80].

Mandatory disclosure has been supported by several arguments[81]. First of all, information is a public good and voluntary disclosure would result in too little disclosure. Without mandatory disclosure there would be less information than would be optimal because higher production and dissemination costs would lead to its undersupply. Mandatory disclosure subsidises and encourages research and analysis and reduces transaction costs of multiple parties producing the same information. In other words, mandatory disclosure enables centralizing and collectivizing information production, and it also standardises the format of disclosure. In addition, mandatory disclosure ensures there is no incentive to withhold negative information. Mandatory disclosure has also been said to be an easy tool for regulators. Disclosure does not usually require direct governmental expenditure[82]. It is also one of the few concrete ways for politicians and regulators to respond to corporate scandals[83].

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[78] As a summary of the extensive discussion, see e.g. Sjödin 2006, 19−26; Avgouleas 2005, 179−183 & 200−201 and Knuts 2011, 16, footnote 33.

[79] E.g. Paredes 2003, 5 and Romano 1998, 2374−2375.

[80] Knuts 2011, 16; Paredes 2003, 2; Kurenmaa 2003, 33; Gilotta 2012, 48, footnote 3. Thus, because of the established position of disclosure regulation, the question of whether disclosure should be voluntary or mandatory will not be discussed in this thesis.

[81] See especially Coffee 1984; Fox 1999b; Easterbrook & Fischel 1984. As a summary of the main arguments, see Enriques & Gilotta 2014, 2 & 12−18 and Paredes 2003, 5.

[82] Except for the costs that result from setting up such a system, see Enriques & Gilotta 2014, 3. The MAR also results in monitoring costs which will be discussed in chapter 4.2 and 5.3.

[83] Enriques & Gilotta 2014, 3 & Paredes 2014, 2. A good example is the disclosure regulation in the EU. The MAD was enacted in the aftermath of IT bubble and the MAR after financial crisis. Both times the disclosure regulation was tightened. For the link between corporate scandals (e.g. Enron and Worldcom in the US and Parmalat in Europe) and tightened regulation (the Sarbanes-Oxley Act in the US and the MAD in the EU), see e.g. Huemer 2005, 1−2.

2.3 Limits for disclosure

Today, there is a general consensus of the necessity and desirability of mandatory disclosure, as the concise summary of the previous chapter indicated. Instead, it is highly controversial how extensive disclosure should be. In theory, the possible scale of disclosure varies from full disclosure, through high disclosure and low disclosure, to non-disclosure. The natural tendency of regulators seems to be towards expanding, rather than contracting, the scope of disclosure[84]. The assumption that more information is simply better than less in the securities market, which is also the underlying assumption of the ECMH, seems to be dominating[85]. Disclosure regulation has also in reality achieved a point where issuers are required to disclose more information than ever[86]. However, it should be acknowledged that there are also important arguments that go against expanding disclosure and support scaling back the disclosure obligation.

Firstly, investor interests in disclosure and issuer interests in keeping certain information unpublished collide. According to the US doctrine, inside information should be understood in terms of property rights in information[87], and from such a perspective, securities market regulation is regulation on allocating property rights to information[88]. Inside information may be considered to be corporate property and the property rights to

[84] Transparency is regarded as a synonym for prevention of opportunism and fraud. Legal literature has also often referred to a sunlight metaphor of Louis D. Brandeis from 1914: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." See e.g. Gilotta 2012, 77; Enriques & Gilotta 2014, 28–29 and Paredes 2003, 2.

[85] E.g. the EU regulation has been criticised from ever-increasing disclosure regulation which is driven by "an unfounded optimism of transparency" and "which does not take into account the regulatory waste", e.g. information costs and the need to strike a balance between issuer's interest in confidentiality and investor's in transparency. See Schön 2006, 28. Actually, the objective of *full* transparency has been explicitly stated in the MAR (preamble paragraph 7) and in the MAD (preamble paragraph 15), according to which market abuse prevents full and proper market transparency. Such an objective appears, however, totally unrealistic as companies are far from being fully transparent and certain degree of confidentiality is inevitable (Gilotta 2012, 48).

[86] Such seems to be the case both in US (Paredes 2003, 8) and in Europe (Schön 2006, 28). However, it is not only that regulation requires more disclosure than before, but also investors demand more and better information and modern information technology boosts the demand further. Thus, issuers also disclose voluntarily more information than before. Paredes 2003, 12.

[87] See e.g. Mahoney 1997; Bainbridge 2000 & Bainbridge 2001. Such a doctrine has also been adopted by SEC in interpreting the Rule 10b-5 of the US Securities Exchange Act, who has replaced the equal access approach (adopted in e.g. SEC v. Texas Sulphur Co.) by a property rights approach (Chiarella v. United States and Dirks v. SEC). See Mahoney 1997, 844.

[88] Mahoney 1997, 817. As a summary, see Avgouleas 2005, 200-201

information would therefore belong to the issuer[89]. Evidently, an issuer having in possession valuable information has an interest in keeping it confidential and denying third parties access to it as such access could harm the issuer[90]. Executing issuer's property rights to information requires thus confidentiality. Confidentiality is also a key for any company's competitive and strategic advantage as it protects bargaining power and company's competitive position against competitors. Resulting from the public-good nature of information, confidentiality is also needed to protect economic incentives to produce valuable information.[91]

Consequently, disclosure can be seen as an exemption, although quite an extensive one, from issuer's property right on inside information, and it is obvious that there is a conflict between issuer and investor interests. Issuer interests favour confidentiality and investor interests transparency. Thus, issuer's right to proprietary information and investor's right to disclosure collide. The magnitude of the conflict depends on the overlap between the information that an issuer would desire to keep confidential and the information that investors desire to have for price determination[92]. Thus, the scope of disclosure should be determined based on the trade-off between benefits and harm accruing from disclosure. In such an evaluation issuer interests should be taken into consideration as a factor limiting the optimal scope of disclosure and they should not be superseded altogether at the expense of the investor interests and market efficiency, although protecting issuer interests[93] has not gained similar attention as protecting investor interests.

Taking issuer interests into consideration is crucial, since too extensive disclosure obligation would seriously harm the company's competitive advantage[94] and the economy in general would suffer accordingly[95]. No company could create wealth for long if it were

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[89] Bainbridge 2000, 78−82 & Bainbridge 2001, 17−20. From such a perspective, disclosure is actually an exemption from issuer's right to private information, and delayed disclosure, on the other hand, is as an exemption of an exemption that leads back to the issuer's right to private information.

[90] Gilotta 2012, 48−50; Bainbridge 2001, 78−79.

[91] Gilotta 2012, 49.

[92] Gilotta 2012, 52.

[93] See however an extensive discussion regarding issuer interest, Gilotta 2012. See also Lau Hansen 2002, 259, BaFin 2009, 67 and ESME 2007, 5 who refers to "public good" instead of issuer interests.

[94] For an extensive discussion regarding competitive costs of disclosure, see Schön 2006. See also Häyrynen & Kajala 2013, 194.

[95] It should be noted that companies and economy in general may suffer even if all issuers are in an equal position and the scope of disclosure obligation is of equal coverage to all issuers (which is one of the targets of the EU-wide disclosure

to disclose all its private information[96], which would lead to reduced willingness of companies to be listed at all[97]. Companies might also end up changing or abandoning profitable projects, plans or strategies if they cannot be developed in secrecy. The premature or too detailed disclosure of such projects, plans or strategies enhances the competitor's free riding and may render previously profitable actions less attractive or even unprofitable.[98] In addition, the lack of confidentiality would discourage the production of new information and innovation, which, in turn, would prevent technology development and efficient use of resources[99].

Secondly, extensive disclosure is not always in the interest of investors, either. It is clear that disclosed information is needed for the disclosure regulation to be effective but besides disclosed information, the efficient use of information is also needed. This requires investors to be able to effectively process the information; otherwise the disclosed information will be useless.[100] The classic economic theories, e.g. ECMH, rely on the idea of a frictionless world, where investors are assumed to be perfectly rational market actors[101], which is represented by the concept of *homo economicus*[102]. The concept represents an assumption that investors are able to take into consideration all relevant information, and thus broadening disclosure obligation would univocally improve efficiency, as well. However, this classic assumption has been challenged by investor psychology and behavioural economics and finance[103] and by the fact that investors are only boundedly rational which means that investors[104] have limited information-processing

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regulation). Thus, even though competitive harm occurs equally to each company and all can benefit advantages of competitor free riding, after a certain threshold, disclosure generates an equilibrium of paralysis by removing the first-mover advantages, and passivity and waiting become more attractive strategies for companies instead of innovating and producing new information. For a more detailed discussion, see Gilotta 2012, 67–68.

[96] Enriques & Gilotta 2014, 19.

[97] Di Noia & Gargantini 2012, 528.

[98] Easterbrook & Fischel 1984, 708; Enriques & Gilotta 2014, 27–28.

[99] Lau Hansen 2002, 249.

[100] Paredes 2003, 2.

[101] For the rational-choice theory, see Posner 1997 and Posner 2007, 3–21.

[102] Paredes 2003, 3; Mackaay 1982, 119; Veil 2013c, 66.

[103] See *supra* note 58.

[104] However, investors are different in their information-processing capacities. It is clear that professional investors (e.g. securities analysts, institutional investors, sophisticated individual investors and brokers) have superior capacities than lay investors. Even though the risk of information overload may be lower for professional investors, the risk is not eliminated. Professional investors are still individuals with limited information-processing capacities, though their capacities are superior to those of lay investors. Therefore, the information overload is a significant risk regardless of the

capacities. According to this view, in a complex decision-making situation investors aim at satisficing instead of optimising, i.e. they search for alternatives that are good enough for them.[105] Therefore, investors are not able to take into account all disclosed information if they become overloaded with information, and actually they may make worse decisions than with less information. With a more complicated decision-making processes and a less information better decisions might be made than with less complicated decision-making processes and more information.[106] Thus, issuer and investor interests are not fully contradictory in this regard.

Thirdly, disclosure causes information costs, both to investors and issuers. Information costs have been divided into acquisition, processing and verification costs[107]. Issuers incur acquisition and verification costs[108] as they produce[109] the information in the first place and verify it. Investors, on the other hand, incur processing costs as they evaluate distributed information. Therefore, disclosure does not come without costs: increasing disclosure is efficient only until marginal revenue of a new piece of information is greater than the marginal cost of the new piece of information, i.e. the utility of a new piece of information exceeds the cost of the new piece. An optimal amount of disclosure would be reached at a point where marginal revenue equals marginal cost. Thus, more information is definitely not always better than less. On the contrary, balance between transparency and

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profile of the investors. For a more extensive discussion regarding the subject, see Paredes 2003, 30–36. Further, the information overload of professional investors may be even more detrimental to the efficiency since professional investors also protect the uninformed investors by offering them a free ride on information: the actions of informed traders influence the prices until they are satisfied and the uninformed traders get the same price without any effort of learning the information which is the basis for prices. In other words, an influential minority of informed traders, who control a critical volume of trading activity, have the power to influence significantly the price formation. Therefore, even if there was a lower risk of information overload of professional investors, the overload could have more serious consequences on efficiency. See Easterbrook & Fischel 1984, 694; Gilson & Kraakman 1984, 569–572.

[105] The concept of bounded rationality was first introduced by Simon (1955 & 1957). See also Simon 1972; Paredes 2003; Barros 2010; Bainbridge 2002, 19−27; Tversky & Kahneman 1974.

[106] Paredes 2003, 3. However, the suggestion of adopting the concept of bounded rationality and scaling disclosure according to it does not necessarily mean abandoning the rational-choice theory completely. The theory (and economics in general) aim at explaining, predicting and simplifying tendencies and aggregates and not necessarily the behaviour of an individual (Posner 2007, 17). Therefore, the rational-choice theory (and the ECMH) provides a starting point but bounded rationality should be considered a limitation when scaling disclosure obligation according to these theories.

[107] Gilson & Kraakman 1984, 594–595.

[108] Recipients of the information also incur acquisition and verification costs when they acquire access to the information. Disclosure collectivises information production by requiring issuers to distribute verified information which eliminates the repetitive acquisition and verification costs for individual investors.

[109] Producing information should be understood to contain all direct costs from compiling, editing and distributing the information, opportunity costs of the time of all who participated in the disclosure process and expenses related to disclosure. Easterbrook & Fischel 1984, 707.

confidentiality should be determined taken into account the mentioned limits for disclosure as indicators of up to what point more disclosure is better than less.

3 EU DISCLOSURE REGULATION: FROM MAD TO MAR

3.1 Current status of disclosure regulation across Member States

3.1.1 Disclosure regulation pursuant to MAD

The European Union has had a uniform legal framework to prevent market abuse since 2003 when the MAD came into force[110]. The MAD regulates both insider dealing and market manipulation which are referred together as market abuse, and it also covers the field of disclosure regulation. The high level objective of the MAD is to secure the integrity and proper functioning of the financial markets and ensure the investor confidence in markets in order to enhance market efficiency, economic growth and wealth in general. The MAD also aims at creating a genuine Single Market, reducing the fragmentation of the EU securities market regulation and integrating the EU financial markets in order to combat the cross-border market failures.[111] However, the MAD has, at least to a certain degree, failed to achieve the latter target as it has been implemented in Member States in various ways[112]. Therefore, despite the fact that a uniform framework exists, there is no uniform EU securities market law and the regulation has remained national until so far[113].

The definition of inside information represents a good example of the regulatory inconsistences in the implementation of the MAD. A significant change under the MAD was adopting a single definition of inside information, compared to the prior directives[114] where the "inside information" relevant for insider trading prohibition was different from the "major new developments" to be disclosed[115]. Pursuant to MAD Article 1(1), 'inside information' shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or

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[110] The MAD is part of the Financial Services Action Plan (FSAP) of the EU and it represents the first attempt to implement the four-level Lamfalussy process discussed in chapter 1.3.2.

[111] MAD preamble paragraph 1, 2 and 12; Moloney 2008, 27; ESME 2007, 1.

[112] ESME 2007, 1; Veil & Koch 2012, 6; Di Noia & Gargantini 2012, 488.

[113] Veil 2013b, 44.

[114] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, Article 68, and Council directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, Schedule C, paragraph 5.

[115] ESME 2007, 1; Di Noia & Gargantini 2009, 7.

more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Resulting from the mentioned definition, information to be classified as inside information needs to be a) precise, b) unpublished and c) have a significant price effect[116].

The mentioned definition of inside information has a dual-function and it thus applies both to the prohibition of insider dealing[117] and to the issuer's obligation to disclose inside information, the latter of which is set out in MAD Article 6(1). According to the said article Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers. The only difference between the inside information to be disclosed and the inside information relevant for insider trading prohibition is that the inside information to be disclosed has to concern directly the issuer whereas insider trading may also be based on the abuse of insider information that concerns the issuer indirectly. The disclosure obligation of MAD Article 6(1) is complemented with the delayed disclosure mechanism set out in MAD Article 6(2) which enables delaying disclosure in limited circumstances, i.e. when an issuer has a legitimate interest to delay disclosure, the delay is not likely to mislead the public and the confidentiality of the information can be ensured.

The adoption of a single definition of inside information has been a significant source of inconsistencies in the implementation of the MAD and failures in complying with the requirements of the directive[118]. ESME has even argued that the single definition of inside information is the fundamental flaw of the directive[119]. According to it the definition works well in defining the unjustifiable information advantage that a person should not be allowed to use in trading. However, problems arise when the same definition is used to determine when the issuer's disclosure obligation is triggered, which will inevitably result in situations where disclosure obligation is triggered at a stage when the information is too premature to be published and when it would be in the interest of the issuer and/or justified

[116] The interpretation of the criteria for inside information has been discussed extensively in the legal literature and the subject falls beyond the scope of this thesis. As a summary of the interpretation of the criteria, see e.g. Knuts 2011, 25−114; Annola 2005, 208−305; Kotiranta 2014, 269−296.

[117] MAD Article 2 – 4 prohibiting the use of inside information, selective disclosure of inside information and advice for another person on the basis of inside information.

[118] Di Noia & Gargantini 2009, 14.

[119] ESME 2007, 5.

by the public interest not to disclose the inside information yet. Surely there is a possibility to delay disclosure based on MAD Article 6(2), but it is meant to be applied only in the most limited circumstances. While trying to find a solution to this "fundamental flaw", issuers and regulators across Member States have adopted inconsistent approaches to disclosing inside information.

Such inconsistent approaches can be divided into two regulatory models, one-step and two-step model of inside information[120]. In a one-step model there is only one definition of inside information that triggers both the disclosure obligation and the prohibition of insider trading at the same time. As discussed above, the MAD is based on this model. Instead, in a two-step model the prohibition of insider trading is triggered first and the disclosure obligation later. A two-step model may not necessarily include two different definitions of inside information, but the definition is interpreted in a different way in case of insider trading prohibition and disclosure obligation.

If a certain piece of inside information concerns a matter that is initiated, prepared and decided within a very short time frame, the one-step and the two-step model do not differ significantly on the timing of the disclosure, and the inside information needs to be disclosed as soon as possible in both cases. However, this is much of a theoretical situation since inside information normally develops through a protracted process, e.g. multi-stage negotiation or decision-making process. If disclosure of inside information in a protracted process is regulated according to a one-step model, it is essential that disclosure may be delayed in certain circumstances. Otherwise, the premature disclosure could endanger the ongoing process, e.g. the negotiations of a company acquisition. On the contrary, in a two-step model a separate mechanism for delaying disclosure is less important as such a mechanism is embedded in the model itself.

The question of how to approach insider trading prohibition and disclosure obligation in a protracted process has divided the Member States. A one-step model has been adopted e.g. in Germany and France and a two-step e.g. in Finland and other Nordic countries, Italy and the UK. The choice between a one-step and a two-step model is of great significance regarding the mechanism of delayed disclosure. In a one-step model the possibility of delayed disclosure is crucial, because otherwise issuer interests could be at great risk. On

[120] Regarding the discussion on both models, see Lau Hansen & Moalem 2009; Di Noia & Gargantini 2012; Di Noia & Gargantini 2009; Krause & Brellochs 2013; Lepetić 2012; Kotiranta 2014, 60–69.

the contrary, the mechanism of delayed disclosure is of lesser importance in a two-step model which allows by nature the non-disclosure of uncertain information.

3.1.2 One-step model: Germany and France

As far as the law on books is concerned, Germany appears to be the most loyal jurisdiction to the literal interpretation of the MAD and implementation of a one-step model[121]. However, this is a new direction in Germany as well, since before the implementation of the MAD, Germany also relied on a two-step model, had adopted a double definition of inside information (*Insidertatsache,* i.e. inside fact relevant for insider trading and *Ad-hoc-Tatsache,* i.e. ad hoc fact relevant for disclosure obligation) and disclosure obligation was generally triggered only after a final decision[122]. Since the implementation of the MAD, the scope of disclosure obligation in the German Securities Trading Act[123] has extended. The use of the possibility to delay disclosure of inside information has also increased accordingly[124], which supports the presumption that the importance of the delayed disclosure mechanism is much greater in a one-step model.

However, the legal situation in Germany has not been all that clear and the disclosure obligation under the MAD has caused uncertainty in Germany, as well. The so far most important ECJ preliminary ruling regarding disclosure obligation has been the Daimler case[125] which was referred to by the German Federal Court of Justice. The most important insight of the case was the ECJ's confirmation of the fact that in case of a protracted process intended to generate a particular event, an intermediate step of that process which is connected to bringing about that future event may constitute inside information and

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[121] Such seems to be the case, even though a different wording of inside information has been chosen in implementing the directive, see German Securities Trading Act Section 13 (1). See also Veil 2013d, 151–152.

[122] Di Noia & Gargantini 2012, 513. Such an approach was actually quite close to the Nordic reality principle in force, which will be discussed in detail in chapter 3.1.3.

[123] See German Securities Trading Act Section 13 and 15.

[124] Koch 2013, 274.

[125] Case C-19/11, Markus Geltl v. Daimler AG. In short, the case was about the resignation of the CEO of Daimler AG. The CEO was considering an untimely resignation, he discussed his intentions with the Chairman of Daimler's Supervisory Board, the management was informed about his intentions and a press release was prepared before the resignation was actually proposed to the Supervisory Board. The matter was disclosed immediately after the decision of the Supervisory Board and the price of Daimler shares rose. Mr Geltl and other investors who had sold prior to the disclosure took proceeding for damages and claimed that the disclosure should have been made earlier. The German Court of Appeal referred the matter to the ECJ on the interpretation of the definition of inside information.

therefore trigger the duty to disclosure if there is a realistic prospect[126] that the event will occur[127]. The case thus confirmed the trend towards an extending disclosure obligation in the EU regulation which, nevertheless, has been criticised in Germany for creating new application problems and decreasing legal certainty[128].

In addition to Germany[129], France has also adopted a one-step model and implemented the MAD almost one-to-one[130]. However, in addition to implementing the MAD's general rule on delayed disclosure, the French regulation also includes a special provision on delaying disclosure in case of a material financial transaction if confidentiality is temporarily necessary to carry out the transaction and if the confidentiality is ensured[131]. This special provision differs from the MAD provision on delaying disclosure in that it does not require legitimate interests[132] of the issuer or prohibit misleading the public *per se*. Therefore, the French regulation seems to have wider possibilities of delaying disclosure compared to the MAD regulation and also to Germany, since the only criteria for delaying disclosure of a material transaction is confidentiality. This brings the French one-step model closer to a two-step model than the model adopted in the MAD or in Germany.

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[126] With the *realistic prospect* doctrine ECJ rejected the idea supported by some scholars as well as the advocate-general that even a likelihood of occurrence below 50% could suffice, especially if such an occurrence had a strong potential to impact market prices. Accordingly, the ECJ rejected the *probability/magnitude* doctrine (i.e. the idea that only a low probability is required of an event or circumstances to constitute inside information if the event or circumstance is likely to have a significant price effect) which would have extended the scope of the EU disclosure rules considerably and made it more difficult for issuers to comply with them. See Krause & Brellochs 2013, 6−8; Hellgart 2013, 872 & 874.

[127] Such a development towards extending disclosure requirements in Germany had however started already earlier, since argumentation similar to the Daimler case was adopted in the German legal literature already in 2004. According to Möllers (2004, 284) certain prognoses, plans, schemes, and strategies are likely to fall within the scope of the term "precise information" if they are *sufficiently likely to come true* and they should therefore be disclosed, if other criteria of inside information is met.

[128] Deutsches Aktieninstitut 2012, 7–8.

[129] Austria, the Netherlands and Portugal have also been mentioned as examples of Member States adopting a one-step model, Austria having followed the MAD even more closely than Germany. Koch 2013, 277; Krause & Brellochs 2013, 14.

[130] See AMF General Regulation Article 223-2.

[131] See AMF General Regulation Article 223-6. See also Di Noia & Gargantini 2012, 511–512 and Di Noia & Gargantini 2009, 15. However, the role of this provision is not all that clear. Couret et al. (2012, 1064) has stated that Article 223-6 would not have any independent meaning but that it would only complement Article 223-2 implementing the MAD provision of delayed disclosure. Therefore, the situation in France is somewhat unclear.

[132] Though, the provision requires that the delay is *temporarily necessary to carry out the transaction*, which points out that at least some legitimate interests are needed for the delay.

3.1.3 Two-step model: Nordic countries, Italy and the UK

Nordic countries (here Finland, Sweden and Denmark), Italy and the UK are examples of Member States that have implemented the MAD but, however, have adopted a two-step model in their respective legislation[133]. In the Nordic countries and in Italy, there exists a two-step model which includes two different triggering points for insider trading prohibition and disclosure obligation. Insider trading prohibition is triggered by inside information, as in the MAD, but for disclosure purposes there is another, "unofficial" mechanism that allows postponing disclosure of inside information which is embedded in the two-step model and which shall thereinafter be called *deferred disclosure* as a difference for delayed disclosure regulated in the MAD[134]. Deferred disclosure serves the same purpose as the delayed disclosure, but it offers more generous opportunities for postponing disclosure of inside information. Therefore, in Member States that apply the deferred disclosure mechanism there has not been much use for the delayed disclosure mechanism. The UK, on the other hand, has quite a unique two-step model in force, which will be discussed in detail at the end of this chapter.

Pursuant to the Finnish Securities Market Act, an issuer shall, without undue delay, disclose information about decisions or other facts and circumstances that are likely to have a material effect on the value of its securities[135]. However, an issuer may delay the disclosure of inside information for an acceptable reason[136]. The wording of the first provision indicates that the idea of the deferred disclosure has been adopted and the duty to disclose is attached to *actual decisions*, and thus there is no general obligation for an issuer to disclose decisions under preparation[137]. Therefore the provision of delayed disclosure is relevant only in cases where a matter has already been decided and should also be disclosed without undue delay, but the issuer considers that the criteria for delayed disclosure are met[138].

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[133] Spain is another example of a Member State with a two-step model in force. Di Noia & Gargantini 2012, 510.

[134] For such a choice of terminology, see also Di Noia & Gargantini 20012, 510.

[135] Finnish Securities Market Act Chapter 6 Section 4.

[136] Finnish Securities Market Act Chapter 6 Section 5.

[137] Such an interpretation has also been adopted in the Government's Bill (32/2012, 117).

[138] Such an interpretation has been adopted by the Finnish financial supervisory authority (FIVA 7/2013, 19). In reality, the provision of delayed disclosure has been applied very rarely in Finland (Knuts & Parkkonen 2014, 148 & 165).

Pursuant to the Swedish Securities Market Act, an issuer must make public such information regarding its operations and securities which is of significance for the assessment of the price of the securities[139]. The provision is supplemented by the regulations of the Swedish financial supervisory authority, according to which an issuer must make a disclosure promptly if a decision is made or if an event occurs that, in the light of previously disclosed information or otherwise, to a non-negligible extend influences the market's perception of the issuer[140]. Such an interpretation indicates that also the Swedish disclosure obligation is linked to an *actual decision* or an *occurred event*[141] in the same way as in Finland, which also restricts the scope of application of the delayed disclosure mechanism even if implemented in the Swedish regulation[142].

In Denmark, the wording of the Danish Securities Trading Act corresponds to the provisions of the MAD, but the contents of the provision have remained unaltered, i.e. a two-step model is still applied in practice[143]. In the Danish legislation, the information that is to be disclosed is attached to the concept of inside information[144], but in practice the duty to disclose is not triggered before it is clear that the circumstances will exist or the decision will be implemented[145]. Such an interpretation was confirmed by the government's bill, according to which information should not be disclosed before a decision has actually been made[146]. The purpose of the delayed disclosure mechanism has been interpreted in a similar way as in Finland and it will apply to a situation where a matter has become a reality but still needs to be kept unpublished for the sake of the issuer's interest[147].

As the examples indicate, Nordic countries have adopted an approach where disclosure obligation is linked to an actual decision or occurred event and the duty to disclose is triggered later than in the one-step model. Academic discussion regarding the one-step and

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[139] Swedish Securities Market Act Chapter 15 Section 6. For the translation see Boström 2014, 1028.

[140] FFFS 2007:17 Chapter 10 Section 3.

[141] See also Örtengren 2012, 176–177.

[142] Swedish Securities Market Act Chapter 15 Section 7.

[143] Lau Hansen & Werlauff, 2008, 49.

[144] Danish Securities Trading Act Part 7 Section 27 (1).

[145] Lau Hansen & Werlauff, 2008, 50.

[146] Government's Bill L 20 (2004-05 I), 27 and L 20 (2006-07), 20, for the translation see Lau Hansen & Werlauff, 2008, 50.

[147] Danish Securities Trading Act Part 7 Section 27 (2). For the interpretation see Lau Hansen & Werlauff, 2008, 52.

the two-step model of inside information has been especially active among certain scholars in Denmark[148]. In the Danish legal literature it has been pointed out that the two-step model adopted in the Nordic law is based on a *reality principle* which means that the duty to disclose is triggered when an event that meets the criteria for inside information becomes a reality. This could be the case even before the formalization of such an event, and therefore the principle has also been called the *principle of reality rather than formality.*[149] The reality principle had been established in the Nordic law already before the MAD and it has remained in force after the implementation of the MAD, as well.

Such an approach has been justified with two arguments in the Nordic countries. Firstly, the Nordic implementation has not been considered to collide with the MAD but to actually correspond to it[150], which clearly shows that the provisions of the MAD have been unclear and open to various interpretations within each national regulation. Secondly, the Nordic implementation has actually been argued[151] to be supported by the wording of the implementation directive[152] Article 2(2) pursuant to which the disclosure obligation of MAD Article 6(1) will be triggered upon the *coming into existence* of a set of circumstances or the *occurrence* of an event, albeit not yet formalised [emphasis added]. Based on this Article it seems justified to argue that the definition of inside information is more restricted in case of disclosure obligation than in case of insider trading.

The Nordic restrictive interpretation of the definition of inside information relevant for disclosure obligation differs from the definition of inside information relevant for insider trading in that only two of the criteria of inside information apply: the information needs to be unpublished and have a significant price effect. However, the precision criterion has been interpreted restrictively or actually it has been replaced by the reality principle which raises the threshold for duty to disclose. The precision criterion of inside information is the one defining the timing of the disclosure of information which meets the other criteria of

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[148] Lau Hansen & Werlauff, 2008; Lau Hansen & Moalem 2009. The matter has also been discussed in Italy (Di Noia & Gargantini 2009; Di Noia & Gargantini 2012) and in Germany (Krause & Brellochs 2013).

[149] Lau Hansen & Werlauff, 2008, 48.

[150] Häyrynen, 2009, 77; Lau Hansen & Werlauff, 2008, 49−51; Government's Bill 2004/05:142, 78.

[151] Häyrynen, 2009, 77; Lau Hansen & Werlauff, 2008, 49−51; Government's Bill 2004/05:142, 78. CESR Guidelines also pointed out to such a direction, see CESR/02-089d, 22 and also Ferrarini 2004, 731.

[152] Commission directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

inside information, and therefore, a two-step model of inside information has developed as a consequence of a more restricted interpretation of the precision criterion compared to a one-step model.

To be more precise, the Nordic disclosure obligation has not, in fact, even been attached to the concept of inside information but to one of its criteria, significant price effect. According to the Finnish and Swedish law, disclosure obligation is attached to "decisions or other facts and circumstances that are likely to have a *material effect on the value of its securities*" and to "information which is *of significance for the assessment of the price of the securities*", respectively [emphasis added][153]. On the contrary, the definition of inside information has been adopted in the Danish law, but the legal practice, however, corresponds to the Finnish and Swedish one. Such practice has also been explicitly stated in the stock exchange rules of each Nordic country which have an important practical relevance. Virtually the same wording has been adopted in the issuer rules of each country, according to which an issuer shall, as soon as possible, disclose information about decisions or other facts and circumstances that are *price-sensitive* [emphasis added][154].

Besides the Nordic countries, Italy is a frequently used example[155] of a Member State having adopted a two-step model of inside information[156], and it has also justified its choice based on the implementation directive Article 2(2) in the same way as in the Danish literature. Despite the fact that Italy has implemented the one-step model of the MAD, disclosure is mandated only when the final outcome of a process has been reached[157], and this has also been explicitly confirmed by the Italian financial supervisory authority Consob. According to Consob, information on future events may constitute inside information triggering the prohibition on insider dealing but not leading to the duty to disclose[158]. Further, in 2010, Consob decided to fine an issuer of disclosing incomplete

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[153] Thus, the wording of the disclosure provisions only contains the significant price effect criterion. The other two (the fact that the information needs to be unpublished and the Nordic reality principle) have only been discussed in the preliminary works (Government's Bill 32/2012, 117 and 2004/05:142, 76).

[154] See Nasdaq OMX Stockholm, 24; Nasdaq OMX Copenhagen A/S, 20; Nasdaq OMX Helsinki Ltd, 30. Price-sensitive information is further defined as information that is reasonably expected to affect the price of the issuer's securities.

[155] It has been suggested in the legal literature that the Italian approach is one of a kind in Europe (Koch 2013, 284). However, such a claim it is not correct since the Italian approach is actually quite close to the Nordic approach.

[156] ESME 2007, 6; Di Noia & Gargantini 2009, 16; Di Noia & Gargantini 2012, 511; Krause & Brellochs 2013, 15.

[157] Article 66, Consob Issuers Regulation.

[158] Consob 2006, for the translation see Koch 2013, 284.

information regarding pending antitrust proceedings which were not yet completed, and no significant event had therefore occurred[159]. Consob has also explicitly stated that when it comes to the disclosure obligation, the definition of inside information needs to be interpreted narrowly and therefore duty to disclosure arises if and only if the relevant event or set of circumstances has already occurred (but not necessary formalised)[160].[161] Such a view corresponds virtually to the Nordic reality principle.

The UK, on the other hand, has adopted quite a unique form of a two-step model and it differs significantly form the Nordic and Italian models. The UK has adopted a two-step model after implementing the MAD and it has two different triggering points for insider trading prohibition and disclosure obligation as the Nordic countries. However, the UK has not just adopted two different interpretations for the definition of inside information but it also has another concept in addition to the concept of inside information. The UK model includes the RINGA concept (which stands for *relevant information not generally available*), which had been adopted already before the MAD, in addition to the definition of inside information. The decision to retain the RINGA provision also after implementing the MAD can be considered gold plating.[162]

In the UK, the concept of inside information adopted in the MAD sets the criteria for the information that needs to be disclosed, and the concept of RINGA sets the criteria for the information that is not allowed to be used on trading. To be more precise, RINGA is information which is not generally available in the market, but which would be regarded (if it was available) as relevant when deciding the terms of a transaction, provided that a reasonable regular market user would regard the behaviour concerned to be unacceptable[163]. Consequently, the RINGA concept is broader than the concept of inside information and it extends the scope of inside information in the context of insider

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[159] Di Noia & Gargantini 2012, 511.

[160] Consob 2006, for the translation see Di Noia & Gargantini 2012, 511 and Krause & Brellochs 2013, 15.

[161] The Spanish legislation has gone even further and maintained a double definition of inside information. In the Spanish two-step model there is a clear-cut distinction between *información privilegianda*, relevant for insider trading, and *información relevante*, relevant for disclosure obligation, which enables postponing the time-limit for disclosure. Among the studied Member States jurisdictions, Spain appears to have the purest form of a two-step model of inside information. See Di Noia & Gargantini 2012, 510 and Di Noia & Gargantini 2009, 15.

[162] Krause & Brellochs 2013, 14; FSMA 2008, 3; FSMA 2011, 5.

[163] UK Financial Services and Markets Act Article 118(4).

trading.[164] The importance of the RINGA concept has been justified by the fact that information can be abused in trading before it is precise or certain enough to be disclosed. Such an approach was seen important in the UK especially by investors, who feared that the omission of the RINGA provision would allow people to trade to the disadvantage of others on the basis of information not generally available to everyone[165].

As indicated above, there is also another important difference between the Nordic and Italian two-step model and the UK two-step model: whereas the Nordic and Italian model *restricts* the definition of inside information adopted in the MAD for disclosure purposes, the UK model *extends* the definition of inside information[166] for insider trading purposes. Both approaches end up in a model where there are two different triggering points for insider trading prohibition and disclosure obligation, but the rationales differ. The Nordic countries and Italy appear to have ended up in a two-step model to protect issuer interests, i.e. to avoid a situation where an issuer would be obliged to disclose information which is too premature. On the other hand, the UK appears to have ended up in a two-step model to protect investor interests, i.e. to avoid raising the threshold for trading regarded as insider trading too high.

3.1.4 Comparison of the models

As it has been discussed, the implementation of the MAD across Member States is inconsistent and there is no common understanding of the definition of insider information. Two definite regulatory models stand out and the Member States rely basically on either a one-step and or a two-step model of inside information. However, some Members States even seem to be applying both models at the same time. An example of this is France: it has clearly implemented a one-step model, but it has, however, included a special provision regarding the delayed disclosure which gives more latitude for an issuer than the MAR at least as far as the law in books is concerned. Actually, the French provision appears to be quite close to the deferred disclosure mechanism adopted in the Nordic countries. This places the French model a bit closer to a two-step model than the German model.

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[164] FSMA 2008, 11; FSMA 2011, 5; Di Noia & Gargantini 2009, 16.

[165] FSMA 2008, 11.

[166] Or actually replaces it by the RINGA concept.

To conclude, the various implementation measures across Member States indicate that the MAD has clearly been considered too strict on its disclosure regulation since almost all studied Member States have enacted some alleviation in the implementation of the MAD. If a spectrum of the studied Member States is outlined, the two-step model of the Nordic countries and Italy will be at the other end of the spectrum with the most permissive disclosure regulation that clearly prioritises issuer interests more than the other Member States. The one-step model of France and Germany[167] will be placed on the spectrum next, France having, however, a bit more generous regulation, as discussed in the previous paragraph. Finally, the two-step model of the UK[168] is at the other end of the spectrum. The UK indeed has a two-step model in place but it has adopted a broader definition of inside information for insider trading, which actually tightens the regulation compared to the MAD and other Member States. The UK has clearly prioritised investor protection at the expense of issuer interests. The following table illustrates the regulatory differences in the chosen Member States.

[167] However, it should be noted that the German interpretation of the criteria for delayed disclosure has been quite expansive which significantly alleviates the *prima facie* strictness of the German regulation. Interpretation of the delayed disclosure criteria will be discussed thoroughly in chapter 4.1.

[168] Interpretation of the criteria for delayed disclosure alleviates the *prima facie* strictness of the regulation also in the UK.

	Nordic countries	Italy	France	Germany	The UK
Regulatory model	Two-step	Two-step	One-step	One-step	Two-step
Definition of inside information	Narrow for disclosure	Narrow for disclosure	One-to-one	One-to-one[169]	Broad for insider trading
Deferred disclosure	Yes	Yes	No	No	No
Delayed disclosure[170]	One-to-one, no practical relevance	One-to-one, no practical relevance	One-to-one, but also a special provision added	One-to-one, the criteria for delay has been extended	One-to-one, the criteria for delay has been extended
Informing authorities on the delay[171]	Required (except Denmark)	Required	Not required	Not required	Not required

Chart 1. Definition of inside information and disclosure of inside information in certain Member States.

What could then be the reason behind the mentioned regulatory choices and the different emphasis on either issuer or investor interests? An explanation may lie in the structure of corporate ownership and corporate governance, because of which it has been argued that the optimal amount of disclosure varies across countries[172]. The UK companies have the

[169] The wording of the definition differs but the content is consistent with the definition of the MAD.

[170] The delayed disclosure regulation of Member States is evaluated here only at a general level. The national interpretation of the criteria for delayed disclosure will be discussed in detail in chapter 4, which shows that there are significant differences in the interpretation of the criteria in Member States.

[171] For the procedure for delay, see chapter 3.2 and 4.2.

[172] Fox 1999a, 125.

most dispersed share ownership of the studied Member States which has led to investor-oriented regulation much in a same way as is the case in the US[173]. On the other hand, the continental European companies have traditionally had a concentrated share ownership structure with a controlling shareholder (e.g. family in Italy, another firm in Germany and a state in France)[174] and the same applies to the companies in the Nordic countries, which also typically have a dominant shareholder[175] (e.g. an institutional investor or state). Dominant shareholders are often in a powerful position and therefore do not need similar protection as the shareholders of companies with dispersed ownership.

However, the said does not explain the difference between Germany[176] (and France) and the other studied Member States. The difference could, on the other hand, be explained by the fact that German corporate governance system has been described to be very *stakeholder* oriented (e.g. shareholders, employees and the society in general) in a similar way as the British system is *shareholder* oriented[177]. In a shareholder and stakeholder oriented model the management of a company is not responsible to any particular shareholder or stakeholder but to all of them. The dispersed stakeholder structure may require similar emphasis on the stakeholder protection as the dispersed shareholder structure requires on investor protection. Such a rational could explain the differences of the regulation between Germany and especially the Nordic countries, where the disclosure regulation has been quite issuer-centric. The dominant shareholders of the Nordic companies have typically been selectively informed before the public disclosure of significant matters[178], and the investor protection has been considered less important. The "active ownership" of investors typical in Nordic countries has resulted in giving investors access to boards and allowing selective disclosure to them in confidence[179], which may explain disclosure regulation with a lower emphasis on investor interests in general as the

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[173] Armour, Hansmann & Kraakman 2009a, 29 & 32. Kraakman (2004, 110) has also pointed out that the mandatory disclosure is more important for companies with dispersed ownership structures and no controlling shareholder. Consequently, the US has been argued to be the country requiring the most disclosure (Fox 1999a, 125–126).

[174] Armour, Hansmann & Kraakman 2009a, 30.

[175] Lau Hansen 2008, 47.

[176] However, it should be noted that Germany applied in fact for a long time a similar two-step model as the other studied Member States as it was discussed in chapter 3.1.2, and the shift to a one-step model has taken place only recently, after the implementation of the MAD.

[177] Lau Hansen 2008, 46.

[178] Lau Hansen 2008, 46.

[179] Lau Hansen 2008, 52.

dominant shareholder's need for information has been satisfied also without public disclosure (i.e. via selective disclosure).

3.2 Disclosure regulation pursuant to MAR

In the future the Market Abuse Regulation[180] will be the main instrument for combatting market abuse. The regulation was given on 12th June 2014 and, unlike the MAD, the MAR will be directly applicable law in the Member States starting from July 2016. The objective of the MAR is unchanged compared to the MAD: the goal is still to create a genuine internal market and ensure the market integrity and investor confidence in order to enhance market efficiency[181]. The main reasons for reviewing the MAD were gaps in regulation, problems in enforcing the MAD, administrative burdens on issuers, especially SMEs, and lack of clarity and legal certainty[182]. The latter was related e.g. to the disclosure of inside information. Under the MAR the goal is the true harmonization of the EU securities market regulation instead of minimum harmonization which has been the actual level of harmonization in the era of the MAD[183]. The general trend of disclosure regulation in the Member States has been towards a broader disclosure obligation and increasing public disclosure[184]. The trend already started from enacting the MAD and has continued through the preliminary ruling of ECJ in the Daimler case, and the regulation will continue to tighten under the MAR. By extending the scope of inside information, the focus of the disclosure regime is shifting to the possibilities of delaying disclosure[185].

The most striking difference between the MAD and the MAR is the fact that the MAR has been enacted as a regulation and it will have a direct effect in the Member States[186]. The

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[180] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 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.

[181] MAR preamble paragraph 1 and 2.

[182] SEC(2011) 1217 final, 17–31.

[183] Though, there is no clear consensus on how far the MAD actually has permitted stricter regulation. See Koch 2013, 276 and Möllers 2010, 381. Whether a minimum harmonization level of the regulation has even been reached, is also unclear, because Member States have adopted alleviations in the implementation of the MAD, as it was pointed out in the previous chapters.

[184] For the empirical evidence see Veil 2013, 273.

[185] Koch 2013, 309.

[186] Siems & Nelemans 2012, 4–5. For the criticism of the transformation of the MAD into a regulation, see Siems & Nelemans 2012, 11 and Avgouleas 2005, 189–190. For the supporters of full harmonization, see Ferrarini 2004, 717–718.

decision to transform the MAD into a regulation was based on the fact that the regulatory framework within financial markets was lacking cohesion because of the options and discretions offered to the Member States in the transposition and implementation of the directive. In the legislative drafts of the MAR it has been argued that a regulation will avoid transposition leading to diverging national rules that are interpreted according to diverging cultures and it will best promote the harmonization and functioning of a single market. While a directive and its implementation leave space for national interpretation, a direct applicability of the MAR should offer greater legal certainty and greater emphasis on a pan-European interpretation.[187] After the entry into force of the MAR, only the EU doctrine of interpretation should be applied instead of national methods of interpretation[188].

It is true that the options and discretions of the MAD seem to have been an important source of inconsistencies, but such an explanation does not apply to the diverging implementation of the definition of inside information or the disclosure provisions of the MAD, which included hardly any[189] options or discretions regarding the national implementation. Thus, the application practices in Member States have been diverging mainly because of the lack of clear definitions of the key concepts which are still undefined unless EU institutions (Commission, ESMA and ECJ) draw clear lines in the future[190].

The MAR follows the regulatory path of the MAD and also codifies the ECJ's preliminary ruling on the Daimler case. Firstly, the definition of inside information will remain unchanged as MAR Article 7(1a) corresponds to MAD Article 1(1), and MAR Article 7(2) and 7(4) correspond to the implementation directive[191] Article 1(1) and 1(2), which have now been incorporated into the MAR. However, MAR Article 7(3) is new and it codifies the practice adopted by ECJ in the Daimler case and enacts that an intermediate step in a

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[187] SEC(2011) 1217 final, 69.

[188] Veil 2013b, 53.

[189] The only inconsistencies in the disclosure rules resulting from the options and discretions relate to the procedures for delaying disclosure as, under the MAD, Member States were allowed but not obliged to require an issuer to inform the competent authority of the decision to delay the disclosure of inside information, and under the MAR such informing is mandatory.

[190] Siems & Nelemans 2012, 4–5. EU regulator seems to have strong confidence on that transforming the MAD into a regulation will lead to consistency (draft MAR, 69), but a regulation alone does not lead to harmonised practices.

[191] Commission directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information. The preamble paragraph 16 of the MAR also confirms the realistic prospect doctrine and rejects the probability/magnitude doctrine consistently with the Daimler case. Secondly, disclosure obligation remains also the same as the first paragraph of MAR Article 17(1) corresponds to the first paragraph of MAD 6(1). Thirdly, issuer's right to delay the disclosure of inside information is allowed in the MAR Article 17(4) under the same criteria as in MAD Article 6(2). However, in the MAR the right to delay has also been extended to cover a delay of disclosure in a protracted process consistently with the amendment to the definition of inside information.

The most notable change in the disclosure regulation is the provision of MAR Article 17(4) according to which an issuer shall inform the competent authority of the delay in disclosure and provide, if a Member State so requires, a written explanation of how the conditions for the delay were met, immediately after the information is disclosed to the public. In the MAD, Member States were allowed to decide on whether to require an issuer to inform the competent authority of the decision to delay disclosure[192], but under the MAR this informing is mandatory.

An important consequence resulting from the fact that the MAR has been enacted in a form of a regulation is that the one-step approach adopted already in the MAD will in the future be directly applicable in all Member States. This means that the Member States having previously applied a two-step model should change their legal practices accordingly.[193] The adoption of a one-step model in the MAR was not obvious since a two-step model was first suggested in the draft MAR[194]. However, the Commission gave up on the idea of a new category of inside information that should trigger insider trading prohibition but not the duty to disclose, which had been supported e.g. by the ESME Report[195]. The preliminary

[192] The practices of informing of delayed disclosure also vary between Member States. Finland and Italy require an issuer to inform the competent authority of the decision to delay the disclosure of inside information, and Sweden requires notice to the stock exchange. Germany, Denmark, France and the UK, on the other hand, do not require such informing. CESR/09-1120, 40.

[193] Though, it could be argued that also the one-step model adopted in the MAR is actually a two-step model where the delayed disclosure enables the separation of inside information to be disclosed without a delay and inside information the disclosure of which may be delayed. Thus, the delayed disclosure mechanism actually replaces the deferred disclosure mechanism as the second step. Therefore, a "true" one-step model where all inside information would always be disclosed as soon as possible can be argued to be a practical impossibility.

[194] Article 6(1e) and preamble paragraph 14, which was modelled after the UK RINGA concept (Krause & Brellochs 2013, 16). For the discussion on the draft MAR, see also Veil & Koch 2013, 12–15 and Siems & Nelemans 2012, 7.

[195] ESME 2007, 5.

ruling of ECJ in the Daimler case was also in favour of such a choice. Consequently, a one-step model consistent with the MAD was adopted also in the MAR.

Resulting from the adoption of a one-step model, the scope of inside information will extend at least in those Member States that previously applied a two-step model. From the point of view of those Member States that have applied a one-step model already before, the disclosure regulation of the MAR does not introduce significant changes but only confirms the current legal practice. All in all, the general trend towards a broader disclosure obligation shifts the focus of the disclosure regime to the possibilities of delaying disclosure across Member States, and the delayed disclosure mechanism will have an increasingly important role in protecting issuer interests in the future.

To conclude, the most "revolutionary" element of the disclosure regulation of the MAR is the fact that it has been enacted as a regulation and the provisions are to be directly applicable in the Member States and that it is supposed to deepen the harmonization of the EU securities market regulation. However, if the EU institutions fail to elaborate on the disclosure requirements and main concepts, especially the definition of inside information and the criteria for delaying disclosure of inside information, which are open to various interpretations, this leaves substantial discretion to the Member States and enables inconsistences in the future as well. The national practices differ significantly, result from specific characteristics of each Member State and might thus be surprisingly deep-rooted. Therefore, new regulation alone does not result in harmonised practices but the national interpretation needs clear guidance in order to obtain a consistent interpretation practices across Member States.

4 DELAYED DISCLOSURE

4.1 Criteria for delaying disclosure

To tackle the problems arising from the adoption of a single definition of inside information, the delayed disclosure mechanism provides a possible solution[196] if the provision is interpreted in a way that actually is of value for issuers[197]. As it has been said, the focus of the disclosure regime is shifting to delaying disclosure, since the disclosure obligation has reached the summit and requires correction[198] not to jeopardise issuer interests. This correction is enacted in the MAR, as well as in the MAD, in a form of delayed disclosure mechanism. However, the delayed disclosure mechanism is by definition an exemption provision and it should be applied only in exceptional circumstances[199].

Following the regulatory path of the MAD, MAR Article 17(4) states that an issuer may, on its own responsibility, delay disclosure to the public of inside information provided that (a) immediate disclosure is likely to prejudice the legitimate interests of the issuer, (b) delay of disclosure is not likely to mislead the public and (c) the issuer is able to ensure the confidentiality of that information. All of the mentioned conditions need to be met at the same time. Disclosure of inside information related to an intermediate step of a protracted process may be delayed under the same criteria. Further, an issuer shall inform the competent authority that disclosure of the information was delayed, immediately after the information is disclosed to the public. The MAR does not define any specific time limit for delaying disclosure and it has been argued in the legal literature that the delay may continue as long as the criteria are met[200]. An issuer is responsible for evaluating whether

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[196] ESME (2007, 9) considered the delayed disclosure mechanism a second best solution whereas the adoption of a double definition of inside information would have been the best solution.

[197] ESME 2007, 8. According to the report, the current interpretation of the provision is only of limited value for issuers, and the interpretation should be extended in order for it to be useful.

[198] Koch 2013, 288.

[199] It is indisputable that the provision is by nature an exemption (see e.g. CESR/06-562b, 9) but, however, the current, very restrictive interpretation of the criteria has been strongly criticised. See e.g. BaFin 2009, 64. According to BaFin the restrictive interpretation can no longer be sustained because of the extending definition of inside information.

[200] When a criterion ceases to exist, information must be disclosed immediately. If the criteria continue to be met, the delay may theoretically continue indefinitely. Koch 2013, 290. It is also possible that the inside information ceases to exist during the delay and therefore needs no longer be disclosed. According to BaFin (2009, 63) an example of such a situation would be negotiations with a bank of renewing a credit, when the termination of the credit would lead to liquidity shortage. If a new agreement is reached, the liquidity problems threatened by the termination of the credit are no

the criteria are met and for the decision to delay[201], which is made even clearer by the MAR which requires an issuer to inform the authority about the delay only *after* the disclosure of the delayed information.

Under the MAD, the implementation of the delayed disclosure provision has varied across Member States[202], as the following chapters will indicate. The discussion has been intense especially in Member States having adopted a one-step model of inside information. On the other hand, in Member States applying a two-step model the delayed disclosure mechanism has not evoked discussion to the same degree, because the question of whether the delay should be allowed only rarely arises. However, the interpretation of the criteria for delaying disclosure will become a crucial question in all Member States in the future as the MAR comes into effect.

4.1.1 Legitimate interests of the issuer

MAR preamble paragraph 50 aims at clarifying the first criterion of MAR Article 17(4) and the concept of legitimate interests of the issuer. According to it legitimate interests may, in particular, relate to ongoing negotiations or management body decisions which need the approval of another body. These two situations are just examples and the list is not exhaustive. In 2007, CESR gave its guidance[203] on interpreting the criteria of legitimate interest of the issuer set out in MAD Article 6(2). The wording of the provision has remained substantially the same in MAR Article 17(4) and its recitals, and therefore the former CESR guidance is still relevant, at least until ESMA gives further guidance on the subject. According to CESR, the right to delay disclosure is a derogation from the general rule rather than a norm and therefore CESR refrains from extending the list of situations and provides only illustrative examples of the two mentioned situations. CESR further emphasises that the decision of delayed disclosure remains the responsibility of an issuer who needs to evaluate the specific circumstances of a certain situation[204].

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longer relevant. According to Koch (2013, 288), disclosure obligation may cease to exist, if the issuer has abandoned his plans, in general.

[201] CESR/06-562b, 10; BaFin 2009, 63.

[202] Koch 2013, 291.

[203] CESR/06-562b.

[204] CESR/06-562b, 9–10.

The first situation to which legitimate interests may relate is set out in MAR preamble paragraph 50 and it regards ongoing negotiations which can be divided into two categories: a) ongoing negotiation related to the normal course of business where the outcome or normal pattern of those negotiations would be likely to be affected by disclosure (referred hereinafter as *ordinary negotiations*) and b) ongoing negotiation related to ensuring the long-term financial recovery of the issuer (as long as the issuer is not insolvent) where disclosure would seriously jeopardise the interest of existing and potential shareholders (referred hereinafter as *financial recovery negotiations*). Ordinary negotiations are the general form of negotiations and financial recovery negotiations refer to a specific form of ongoing negotiations.

According to CESR the ongoing negotiations subject to a right to delay disclosure may concern e.g. confidentiality constraints related to a competitive situation, product development, patents, inventions, sales of major holdings or other impending developments which could be jeopardised by premature disclosure[205]. These examples give an idea of what sort of ordinary negotiations may form a legitimate reason for delaying disclosure. Otherwise the wording regarding ordinary negotiations is actually quite broad, since the only requirement is that the outcome or normal pattern of those negotiations would be *likely to be affected* by public disclosure. Therefore, the mere possibility of an effect on the normal course of negotiations should be regarded as a legitimate reason for delaying disclosure.

When it comes to financial recovery negotiations, the requirements are stricter. It is required that the disclosure *would seriously jeopardise* the interest of existing and potential shareholders. Thus a mere possibility of an effect is not enough but, on the contrary, the effect should be serious. Such a stricter wording is reasonable since delaying disclosure of information regarding financial recovery negotiations has a significant potential to conflict with the MAR's aim of investor protection. Information regarding the viability of an issuer is one of the most important areas of investor information because in case of a serious threat to the viability, the value of an investment may be endangered in its entirety[206].

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[205] CESR/06-562b, 10. When it comes to delaying disclosure of information regarding product development, patents and inventions it is clearly required that the information should be disclosed, in the first place (i.e. that the information is regarded as inside information and not a trade secret). CESR mentions results of clinical trials as an example of such information that would need to be disclosed.

[206] Knuts & Parkkonen 2014, 167.

Paragraph 50 also indicates that financial recovery negotiations are a legitimate reason for delay only if the difficulties do not amount to insolvency of the issuer. It is clear that allowing delayed disclosure of the risk of insolvency would place the investors' investments in great danger which would not be acceptable taking into consideration the purpose of the regulation, i.e. investor protection. Consequently, it has been argued in the Finnish legal literature that the legitimate interest in financial recovery negotiations should be interpreted restrictively and it should be connected only with particular negotiations carried out to ensure the viability of an issuer, and the interpretation of legitimate interest should not be extended to cover information regarding the viability of an issuer in general[207]. A similar approach has been adopted in France, where a court allowed delaying disclosure of information regarding the details of restructuring agreement but required, at the same time, disclosure of the fact that the company's financial situation had been deteriorated considerably[208].

The second situation to which legitimate interests may relate is set out in paragraph 50 and it regards decisions taken or contracts made by the management body of an issuer which need an approval of another body of the issuer in order to become effective. This provision applies to situations where an issuer has a hierarchical decision-making structure and public disclosure of the information before final approval, together with the simultaneous announcement that the approval remains pending, would jeopardise the correct assessment of the information by the public. This is a good example of a situation, where securities markets law and company law collide. Member States have very different corporate governance structures on which the importance of this exemption depends. For example Germany[209] has a *two-tier-system* of organising the management of a listed company with a separate management and a supervisory board, whereas the UK[210] has a *one-tier-system* with only a board of directors with both a management and supervisory role. The Nordic[211] corporate governance system, on the other hand, lies somewhere in between. The Nordic model may be described as a *dual executive system* with a board of directors and a board of

[207] Knuts & Parkkonen 2014, 167; Häyrynen & Kajala, 2013, 193. Similar interpretation has also been adopted in the UK, see FCA 2014, DTR 2.5.4.

[208] Case Metaleurop SA, see Couret et al. 2012, 1065–1066.

[209] For the German corporate governance system, see Lau Hansen 2003, 59–68 and Lau Hansen 2008, 45–46.

[210] For the UK corporate governance system, see Lau Hansen 2003, 68–72 and Lau Hansen 2008, 45–46.

[211] For the Nordic corporate governance system, see Lau Hansen 2003, 72–80 and Lau Hansen 2008, 47–49.

management (which may be a collective body or one person, i.e. the CEO), the latter of which being subject to the directions of the board of directors. Therefore, it is crucial to allow delayed disclosure for companies with a hierarchical system (i.e. the two-tier-system or the dual executive system) in case where the decision is subject to the approval of another body. Otherwise autonomy of the superior body would be endangered and the rules of national company regulation would be overridden.[212]

However, decisions which need the approval of another body as the legitimate reason for delaying disclosure also include a risk of abusing the exemption. As it was discussed in chapter 3.1.3, the reality principle has been adopted in the Nordic disclosure regulation, and according to this principle, an event can be regarded as reality even before the formalization of such an event, and therefore the principle has also been called the principle of reality rather than formality. Consequently, to avoid abusing the right to delay, the interpretation of this exemption should be restricted, and this exemption should not be applied in cases where the decision of another board is clear or only a formality. The exemption is only meant for situations where the discretion of the superior body needs protection.

Member States have adopted different approaches on interpreting the legitimate interest criterion. However, common to the different approaches is that all studied Member States have strived for expanding its interpretation, which again indicates the strictness of the EU disclosure regulation. Others have added relevant situations to the list of paragraph 50 and others have pursued a dogmatic approach on what constitutes a legitimate interest[213]. As it was discussed in chapter 3.1.3, the UK has emphasised the investor protection over issuer interests[214], which also shows in the fact that the UK financial supervisory authority FCA has adopted a restricted interpretation of the right to delay disclosure. According to FCA it is unlikely that there are other situations[215] where a delay would be acceptable, besides ongoing negotiations or decisions which need the approval of another body, the latter of which being, however, of low importance in the UK where a one-tier-system in

[212] Veil 2013c, 65.

[213] Koch 2013, 291.

[214] Davies & Worthington 2012, 955.

[215] However, FCA has added one situation to the list, which allows the delayed disclosure in case of liquidity support by the Bank of England or by another central bank to an issuer or to a member of the same group as the issuer. See FCA 2014, DTR 2.5.5A R.

management prevails[216]. However, FCA has added one specific situation in the regulation, according to which an issuer should not be obliged to disclose *impending developments* that could be jeopardised by premature disclosure[217]. Thus, such impending development should be considered as a legitimate interest for delay.

As it was discussed in chapter 3.1.2, the French regulation includes a specific provision on delaying disclosure in case of a material financial transaction if confidentiality is temporarily necessary to carry out the transaction and if the confidentiality is ensured[218]. This special provision differs remarkably from the MAD provision on delaying disclosure in that it does not require legitimate interests of the issuer or prohibit misleading public. The provision thus provides more extensive possibilities for delay than the MAD and is therefore closer to the deferred disclosure mechanism than delayed disclosure mechanism.

Regardless of the fact that the delayed disclosure mechanism has rarely been used in Finland, there exists some further argumentation regarding the legitimate interest criterion. First of all, it has been clearly stated that even price-relevant information may be regarded as legitimate interest and be delayed if disclosing such information separately from other premature information would mislead investors[219]. Also, it has been argued that disclosure of only a part of the information may be delayed if the criteria for delayed disclosure are met[220]. This could be the case regarding e.g. the price or other conditions of a corporate acquisition[221]. Such a view is consistent with what was said regarding the financial recovery negotiations and the fact that an issuer may not refrain from disclosing the considerable deterioration of the company's financial situation, but it may however delay the disclosure of the details of the restructuring negotiations.

In Germany, on the other hand, a dogmatic approach to the legitimate interest has been pursued[222]. The German legislation has clearly extended the concept of legitimate interest by stating that a legitimate interest may exist if issuer interests in keeping the information

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[216] FCA 2014, DTR 2.5.3–2.5.5.

[217] FCA 2014, DTR 2.5.5G.

[218] AMF General Regulation Article 223-6.

[219] Government's Bill 32/2012, 118.

[220] FIVA 7/2013, 20.

[221] Häyrynen & Kajala 2013, 194.

[222] Koch 2013, 291.

secret outweighs the interest of the capital market in complete and prompt publication[223]. In practice, the delay is allowed for any interest of certain relevance if disclosure of the information could be detrimental to the issuer, and a mere possibility of an effect on the interest is sufficient[224]. BaFin has specified that only the interest of the issuer shall be taken into consideration and not the interest of a third party, e.g. another negotiation party. BaFin has also interpreted the legitimate interest criterion in an expansive way and has not adhered to the examples of the EU regulation[225]. It has stated on its issuer guidelines that the so far adopted restrictive interpretation of the possibilities to delay disclosure may no longer be sustained in the future since the definition of inside information has broadened to also cover intermediate steps of a protracted process and the interpretation needs to be adjusted accordingly[226].

4.1.2 Misleading the public

If an issuer has a legitimate interest to delay disclosure of inside information, it must be evaluated whether the delay is likely to mislead the public. The MAR does not give any further advice on how to interpret this criterion which has been strongly criticised in the legal literature, as the definition of inside information regards information that a reasonable investor would use as a basis for decision-making, and so any delay in disclosure would be misleading by definition[227]. The provision may be regarded to have a fundamental flaw and it has even been suggested to delete this criterion all together[228]. However, the deletion of this criterion was not supported by the Commission[229] or CESR[230] who stated that such argumentation cannot be supported as it would mean that the criterion could never be met and the provision would have no practical relevance whatsoever.

To clarify the criterion, it has been suggested that a delay should be considered to be likely to mislead public only if the information runs counter to the market consensus i.e. only when the investment community clearly shows, through market prices, analyst coverage or

[223] German Securities Trading Reporting and Insider List Regulation Section 6.

[224] Koch 2013, 292.

[225] Koch 2013, 291.

[226] BaFin 2009, 64.

[227] ESME 2007, 8; Koch 2013, 295; Couret et al. 2012, 1065.

[228] ESME 2007, 8.

[229] EU Commission 2009, 9.

[230] CESR/06-562b, 11.

others, expectations that are contradicted by the information[231]. Thus, this approach suggests that, in case of inside information contradictory to the market consensus, the delay would not be acceptable at all. In Germany, on the contrary, it has been stated that it is inevitable that informational asymmetry exists always when disclosure of inside information has been delayed, and thus the asymmetry should not be regarded as misleading *per se*, but during the delay, the issuer may not provide any indications which are contradictory to the undisclosed inside information. A "no comment policy" would be acceptable in such a situation.[232]

This criterion is, in practice, the strictest of all the criteria of delayed disclosure[233]. Therefore, the interpretation of this criterion has an important impact on the applicability of the provision. Should this criterion be interpreted restrictively, it would mean narrowing the applicability of the entire exemption. As a solution, it has been suggested in the Finnish legal literature that the above discussed legitimate interests should constitute the main criterion for delay and the other two should be supplementary criteria taking into consideration the investor protection also in case of a delay. According to this view, the interest of an issuer must be weighted up against the interests of the public in assessing whether the criteria are met, and this assessment also defines how much weight must be given to the misleading criterion. Thus, the Finnish legal literature suggests that the misleading criterion may be superseded if the interests protected by the delay exceed the importance of prompt disclosure.[234]

The interpretation proposed in the Finnish legal literature seems reasonable as it supports the expansive interpretation and protecting issuer interests, which in the first place is the purpose of the provision, but it also takes into consideration investor protection. The

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[231] ESME 2007, 9; draft MAR, 178.

[232] BaFin 2009, 65.

[233] Knuts & Parkkonen 2014, 168; Häyrynen & Kajala 2013, 196.

[234] The Finnish approach has actually the same basic idea as the German approach described in chapter 4.1.1: the evaluation of the fulfilment of the legitimate interest and misleading criteria should be done together. The legitimate interest criterion emphasises issuer interests and the misleading criterion emphasises investor interests, and these possibly conflicting interests should be weighed against each other to resolve how much weight should be given to each criterion. Thus, the evaluation of the legitimate interest and misleading criteria should not be separated as they intertwine. It is also worth mentioning that a similar trade-off approach has actually also been adopted in the MAR, but only when it comes to information of *systemic importance*. In case of such information, delay should be acceptable for credit institutions or financial institutions (if they are experiencing e.g. liquidity problems and need central bank lending and emergency liquidity assistance) when it's clear that wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information, which is subject to delay. See MAR preamble paragraph 52.

approach suggesting that the delay should not be acceptable in case of inside information contradictory to the market consensus is too categorical and it endangers the interests of the issuer. However, it could be required that in case of inside information contradictory to the market consensus, the market should be "warned" about the impending developments or events (e.g. that certain negotiations are ongoing) for the sake of not misleading the public, but the publication of details of the situation (e.g. details of the ongoing negotiations) could be delayed. Such an approach has been adopted in France, where a distinction has been made between "general information" (*information générale*) and "particular information" (*information particulière*, e.g. particular facts and agreements). The first needs to be published in any case and the latter, even though it is information that could certainly affect the investor decision-making, may be kept unpublished as the public can be considered to be sufficiently informed by the publication of the general information already indicating the main consequences of the particular information. Therefore, the public cannot be considered to be truly misled[235]. Further, it is reasonable to require that the issuer may not provide any indications which are contradictory to the undisclosed inside information. When it comes to the definition of public, the misleading criteria should be assessed from the point of view of a reasonable investor[236], which would be in line with assessment of the criteria of inside information.

The wording of delayed disclosure provision of the MAR presumes that the *delay* of disclosure may only mislead public, but it does not recognise the possibility that the *disclosure* itself may also mislead the public if a piece of information is separated from its context and published prematurely. As it was discussed in the previous chapter, the Finnish interpretation has supported the idea that even price-relevant information may be delayed if disclosing such information separately from other information too premature for disclosing would mislead investors. Therefore, the misleading criteria should also include situations where a premature disclosure would actually mislead the public. The legitimate interest criterion would be met in such a situation, as it was discussed in the previous chapter, and the delay should be acceptable if the confidentiality criterion is also met.

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[235] For such an interpretation, see case Metaleurop SA and Couret et al. 2012, 1065−1067. In case Metaleurop SA, information about the accruing debt of the company was general information and had to be disclosed, but the details of the restructuring negotiations were particular information and the company had therefore legitimate interest to delay the disclosure of that information.

[236] Reasonable investor refers to an investor who would be likely to use certain information as part of the basis of his or her investment decisions (MAR Article 7(4)) and thus he or she could be misled if such information was not disclosed. As a summary of the concept of reasonable investor, see Kovanen 2014, especially 47−58.

4.1.3 Confidentiality of the information

When an issuer decides to delay the disclosure of inside information based on the fact that it has a legitimate interest to delay disclosure and the delay is not likely to mislead the public, it must ensure the confidentiality of the information. MAR Article 17(7) states that if confidentiality of the inside information is no longer ensured, the issuer shall disclose that inside information to the public as soon as possible. The mentioned article also applies to a situation where a rumour explicitly relates to inside information the disclosure of which has been delayed and that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured. Thus, when the inside information the disclosure of which has been delayed can either no longer be kept confidential or the information has leaked, it must be disclosed.

The MAR does not contain any details on which obligations result for an issuer from the criteria of confidentiality. Indication can be searched from the implementation directive of the MAD which further illustrates Article 3(2) on how the issuer is expected to control the access to unpublished inside information. Firstly, the issuer shall have established effective arrangements to deny access to such information to persons other than those who require it for the exercise of their functions within the issuer. Secondly, the issuer shall take the necessary measures to ensure that any person with access to such information acknowledges the legal and regulatory duties entailed and is aware of the sanctions attached to the misuse or improper circulation of such information. Thirdly, the issuer shall have in place measures which allow immediate public disclosure in case the issuer was not able to ensure the confidentiality of the relevant inside information. According to the Finnish approach, an issuer may maintain such readiness by drafting a disclosure plan in case of a loss of confidentiality[237]. Further, an issuer is also obliged to draw the list of insiders who have access to inside information. Besides insider lists, the MAR does not require any organised compliance structures or documentation of the measures taken to preserve the confidentiality, but such measures may, however, be recommendable[238].

Rumours have resulted in difficulties in interpretation. For example in Germany and in Finland it has been stated that if rumours are being spread regarding the delayed inside information, an issuer may however continue to delay the disclosure of inside information,

[237] Häyrynen & Kajala 2013, 197.

[238] Koch 2013, 296–297.

if it is certain that the rumours are not result of a leak[239]. This interpretation is reasonable since an issuer does not have an obligation to comment on rumours[240]. However, not all Member States have adopted the same interpretation, and e.g. in Spain the disclosure would be required in such a situation[241].

4.2 Procedure for delay

The provision regarding the delayed disclosure mechanism includes three criteria which have been discussed above. However, the provision also includes another criterion which regards the actual procedures of a delay, and these procedures will be discussed here only shortly. According to the MAD, Member States were allowed to decide on whether to require an issuer to inform the competent authority of the decision to delay disclosure, but under the MAR this informing is mandatory. MAR Article 17(4) requires an issuer to inform the competent authority of the delay in disclosure and provide, if a Member State so requires, a written explanation of how the conditions for the delay were met, immediately after the information is disclosed to the public.

Along with such a provision and especially in a Member State which decides to require a written explanation, the documentation of the decision-making procedures and of the evaluation on how the conditions for the delay were met will be crucial, even though such documentation is not required explicitly. In particular, it has been discussed whether an issuer is required to make an actual decision regarding the delay or whether it is sufficient that the criteria for delay are met[242]. According to the German view it has been quite clear that disclosure must be delayed actively and a conscious resolution of the management is required[243]. In addition, a question has been raised on whether a precautionary delay is accepted in a situation where an issuer is not certain of whether the information amounts to inside information[244]. As the definition of inside information is open to various interpretations it should be acceptable to use the delayed disclosure mechanism also in case there is no certainty of the character of the information.

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[239] BaFin 2009, 65; Knuts & Parkkonen 2014,169.

[240] BaFin 2009, 65; Nasdaq OMX Helsinki Ltd, 36.

[241] Koch 2013, 297.

[242] Koch 2013, 297.

[243] BaFin 2009, 63; Koch 2013, 299.

[244] Krause & Brellochs 2013, 13.

It is clear that as the importance of the delayed disclosure increases after the MAR coming into force, the burden of authorities and the bureaucracy regarding the delay will increase. On the other hand, the MAR should enable more efficient ways for authorities to supervise delayed disclosure, as the "informal" practices of delaying disclosure (e.g. deferred disclosure) should become eliminated and all cases of delayed disclosure should, at least in theory, come to the authorities' knowledge. This also means more efficient ways for supervising insider trading, as the authorities will be better informed on where to look for the possible abuse of inside information.[245]

4.3 Sanctions

Sanctioning breaches of disclosure regulation is mainly a matter of national law, especially when it comes to criminal sanctions. The MAD includes only light provisions regarding sanctions[246] and Member States have yet again adopted a wide variety of approaches to enforcement. Sanctions vary from civil liability and administrative sanctions to criminal sanctions[247]. Consequently, the inefficiency of the MAD sanctioning regulation has been an important concern and the MAR is about to introduce some significant changes to the regulation to prevent the regulatory arbitrage[248].

Compared to the MAD, the MAR regulates administrative measures and sanctions much more extensively in its Chapter 5. Criminal sanctions for market abuse are regulated in a complementary sanctions directive[249], the first directive adopted under TFEU[250] Article 83(2) which enables enacting minimum rules on criminal law at the EU level[251]. According to the directive, the Member States are required to provide criminal sanctions for at least

[245] See also chapter 5.3.

[246] See MAD Article 14(1) and preamble paragraph 39.

[247] For detailed discussion regarding different Member States, see Koch 2013, 299–308. CESR (CESR/08-099) has also published statistics on the sanctions in different CESR Members States. For example, breaches of MAD Article 6(1) on publication of inside information are sanctioned under criminal law in 8 out of 29 CESR Member States and breaches of MAD Article 6(2) on information of delay of publication only in 4 countries. On the other hand, MAD Article 5 on market manipulation is sanctioned under criminal law in 25 countries. See also a more recent ESMA report (ESMA/2012/270).

[248] Moloney 2014, 762, 764.

[249] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

[250] Consolidated Version of the Treaty on the Functioning of the European Union.

[251] Moloney 2014, 766.

serious cases of insider dealing, market manipulation and unlawful disclosure of inside information. On the other hand, breaches of disclosure obligation are not required to be sanctioned under the criminal law[252] but a Member State may adopt such sanctions in a national regulation[253]. If such a national regulation exists and an issuer decides not to disclose, for example because of the difficulties in evaluating whether the criteria of inside information are met, an issuer exposes itself to the risk of being held liable *ex post* for breaching its disclosure duties[254].

Breaches of disclosure obligation may, in addition, cause criminal liability under the market manipulation provisions. As it was stated in chapter 2.2, prohibition on market manipulation has been enacted in order to prevent active misinformation, in other words lying. The market manipulation has been sanctioned in the sanctions directive Article 5(2), according to which disseminating information which gives false or misleading signals to the market may be exposed to criminal sanctions where the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination. As set out in the directive, intention of obtaining benefit is a prerequisite for a criminal liability. Therefore, by disclosing premature, incomplete or even misleading information, an issuer exposes itself to the risk of being held liable *ex post* for market manipulation[255], if an intention of obtaining benefit can be proved. It is clear that the risk of criminal liability is particularly substantial in case of disseminating uncertain information: on the other hand an issuer is required to disclose uncertain information, but disclosing uncertain information may also be regarded as market manipulation, which leads to a clear paradox. Therefore, the interpretation of the criteria for delayed disclosure is of great significance: if the criteria are interpreted restrictively and the exemption is regarded applicable only in the most limited circumstances, an issuer's duty to disclose will be triggered at an earlier point of time and an issuer is forced to disseminate premature, incomplete or even misleading information. Such a restrictive interpretation exposes issuers to a substantial risk of being held liable for market manipulation.

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[252] Administrative sanctions, however, are required (MAR Article 30(1a)).

[253] E.g. in Finland such a criminal sanction has been enacted, see Criminal Code Chapter 51 Section 5 (in Finnish *tiedottamisrikos*).

[254] Enriques & Gilotta 2014, 27.

[255] Enriques & Gilotta 2014, 27; ESME 2007, 5.

As the breaches of disclosure duties may be sanctioned under the criminal law, either based on a criminal provision on breaches of disclosure obligation or on market manipulation, the *principle of legality*[256] sets the limits for how far the definition of inside information, i.e. the concept defining the triggering point for disclosure, may be extended[257]. However, the principle of legality should also be taken into consideration when interpreting the criteria for delayed disclosure. Even if the breaches of delayed disclosure as such are only rarely sanctioned under the criminal law of Member States, the mechanism is closely linked to the disclosure obligation, which is more often subject to criminal sanctions[258]. If an issuer decides to delay disclosure and it is regarded *ex post* that the criteria for the delay were not met, such an act may be considered as a breach of disclosure obligation and result in criminal sanctions. In addition, the delay can be regarded as a protective measure against market manipulation. Therefore, the principle of legality should be taken into a consideration also when interpreting the criteria for delay. As the definition of inside information is about to extend after the MAR coming into force, at least in Members States applying a two-step model, the importance of the delayed disclosure mechanism as the ultimate safe harbour for the issuer will also increase and the interpretation of the criteria for delay should be extended accordingly. Therefore, it may be argued that the principle of legality should prevent too narrow an interpretation of the criteria for delayed disclosure; i.e. it should prevent an interpretation[259] according to which the delayed disclosure mechanism would be applicable only in the most limited

[256] See *supra* note 49. ECJ has stated that the principle of legality is one of the general legal principles underlying the constitutional traditions common to all Member States (joint cases C-74/95 and C-129-95), and it has also been conformed by Article 49 of the EU Charter of Fundamental Rights (Charter of fundamental rights of the European Union (2010/C 83/02)) and Article 7 of the European Human Rights Convention. Melander 2010, 129–132 & Ojanen 2010, 81–82. However, at a national level, when it comes to white-collar crimes, such as securities crimes, the principle of legality may collide with the principle of *effet utile*, i.e. the principle of guaranteeing the full practical effect for EU law at a national level. When interpreting provisions of white-collar crimes at a national level, the spirit and purpose of the EU law should be taken into consideration to guarantee the *effet utile* for EU law. However, such an interpretation may collide with the principle of legality and result in a situation where colliding principles need to be weighed against one another. Melander 2012, 514–515. See also case C-45/08, Spector Photo.

[257] Knuts (2010, 107–142 & 2011, 11) has suggested that the principle of legality should also be taken into consideration when adjudging *administrative* sanctions as the European Human Rights Convention is applicable to such sanctions.

[258] For the statistics, see *supra* note 247.

[259] A similar argumentation has been used by Knuts (2010, 11–12) when it comes to interpreting the definition of inside information.

circumstances and that would significantly extend the liability of an issuer and the risk of market manipulation charges.[260]

The principle of legality should direct the interpretation of the definition of inside information and of the criteria for delayed disclosure in a way that is foreseeable from an individual's point of view. Therefore, a literal interpretation is the starting point for the interpretation. The principle of legality restricts an interpretation that extends an individual's liability, but however, it does not prevent adopting an interpretation that restricts such a liability.[261] Therefore, an extending interpretation of the criteria of the delayed disclosure would be perfectly in line with the principle of legality. Ultimately, the principle of legality becomes concrete in a court decision-making. It should be given specific importance when the fulfilment of the criteria for delayed disclosure is considered within an individual case. If an issuer is capable of proving that the criteria for delayed disclosure were carefully considered and the delay was justified *ex ante*, it would be against the principle of legality for the court to adopt an unexpectedly restricted interpretation of the criteria to the detriment of the issuer.

[260] The MAR can be criticised from this point of view, as the disclosure obligation is not unambiguous compared to the market manipulation provision (i.e. an issuer is required to disclose uncertain information, but disclosing uncertain information may also be regarded as market manipulation). Thus, it may be argued that the legislator has not complied with the principle of certainty (a sub-principle of the principle of legality, see *supra* note 49), according to which legislator may not enact inaccurate criminal sanctions.

[261] E.g. the economic arguments and the market-based interpretation may be used without limitation on defendants *benefit*. For the use of the principle of legality in interpreting the definition of inside information, see Knuts 2011, 11–12.

5 BALANCING DISCLOSURE AND DELAYED DISCLOSURE

5.1 Challenges of the regulation

As the previous analysis has pointed out, the current EU disclosure regulation has a strong focus on protecting investor interests by extensive disclosure regulation. Investor protection is favoured even at the expense of issuer interests, and the focus on investor interests is even stronger as the MAR comes into force. It seems that the counter arguments for expanding disclosure regulation discussed in the economic literature and in chapter 2.3 of this thesis have been ignored to a large degree if not altogether. No careful attention has either been paid to the principle of legality, which should set the ultimate limit for how far-reaching the disclosure obligation of uncertain information may be.

The regulator seems to have discarded the harm disclosure may cause to issuers and taken for granted that more information is better *per se*. The classical concept of *homo economicus* dominates in the MAR, and the restricted abilities of investors to process information have not been taken into consideration. Despite the exemption provided by delayed disclosure mechanism, no relevance has been given to the fact that protecting investors with too expansive disclosure regulation may actually end up harming investors and the entire market because of information overload and increasing information costs resulting from it[262]. Thus, increased investor protection does not result in corresponding market efficiency improvement, but there is a point where increased disclosure regulation turns against itself and actually ends up hampering the market efficacy. Therefore, investor and issuer interests are not completely opposite. The majority of economic literature clearly shows that balance should be tilted towards investor interests but not to such an extreme point where the MAR has gone. It is too late to take the mentioned arguments into consideration in the regulation, but the interpretation of the MAR is yet to develop and with market-based interpretation those arguments could be acknowledged.

The clearest sign of the MAR's stricter disclosure regulation is the adoption of the one-step model of inside information which results in tendency towards increasing disclosure of uncertain information. The reality principal adopted in many Member States has been

[262] In the legal literature the EU regulation has been criticised e.g. for ever-increasing disclosure regulation which is driven by "an unfounded optimism of transparency" and "which does not take into account the regulatory waste", i.e. information costs and the need to strike a balance between issuer interests in confidentiality and investor interests in transparency. See Schön 2006, 28.

rejected and replaced by the realistic prospect doctrine according to which the duty to disclose information may be triggered if there is a realistic prospect that the event will occur. Certainty of the occurrence is not required, nor a very high probability. At worst, the MAR may result in a flood of uncertain information to the market, which, in turn, would overwhelm investors and hamper market efficiency for sure. Further, a flood of uncertain information would lead to a spiral of correcting the information on and on again which would rather confuse than inform investors. The regulator has, however, recognised the risks of too extensive disclosure by providing the delayed disclosure mechanism (originally designed for very limited situations only) which offers an available solution to preventing the flood of uncertain information. However, it serves a solution only if the scope of delayed disclosure as an exemption rule is extended to the same degree as the disclosure obligation has been extended.

Delayed disclosure mechanism can be described as a safe harbour to issuers, the access to which is regulated by the criteria discussed in the previous chapter[263]. Interpretation is the key to defining when the access to this safe harbour can be granted. Since the scope of the inside information and thus disclosure obligation is broad according to the MAR, virtually any new piece of information regarding issuer's business which shows a sufficient degree of preciseness and appears *ex ante* to be likely to have a significant price-effect amounts to inside information and must be disclosed. It is clear that issuer interests (and even investor or public interests) may support confidentiality of such information at least temporarily and especially when the information is of uncertain nature. In order for the delayed disclosure mechanism to offer a solution to problems caused by too extensive disclosure, a market-based method should be used for interpreting the criteria for delayed disclosure. The purpose for the interpretation would be to find the optimal balance for disclosure and delayed disclosure that safeguards the investor interests but, at the same time, does not over-regulate disclosure, induce information overload, cause extensive information costs or discard issuer interests.

[263] Gilotta 2012, 72–73.

5.2 The available solution

5.2.1 Emphasising legitimate interests and adopting reality principle

In order to rationalise the current regulation and make sure that the delayed disclosure mechanism actually provides a safe harbour to issuers, the main attention should be focused on the legitimate interest criterion when evaluating the acceptability of the delay. As the Finnish legal literature has suggested[264], the legitimate interest criterion should be regarded as the main criterion for delay and the other two, misleading and confidentiality criterion, should be considered as supplementary criteria. Consequently, the fulfilment of the criteria for delay would consist of evaluating whether the legitimate interest criterion is met and whether the legitimate interest is so important that it requires protection even at the expense of the misleading criterion. According to this approach, issuer interests should be weighed against investor interests in assessing whether the criteria are met, and this assessment should also define how much weight could be given to the misleading criterion. Thus, the misleading criterion could be superseded partially or, in limited situations, altogether, if the interests protected by the delay exceeded the importance of prompt disclosure. Following the described approach, the available solution discussed in this chapter concentrates on the legitimate interest criterion. The misleading criterion, on the other hand, is considered to set the boundaries on how far the legitimate interests of the issuer may be emphasised. The misleading criterion thus brings the investor protection point of view to the analysis. The confidentiality criterion, on the other, has been left outside the discussion and it has been assumed to be fulfilled from now on.

When it comes to analysing legitimate interest criterion, it will be suggested to introduce the reality principle[265] in the delayed disclosure context. Even though the reality principle has been rejected as a trigger to the duty to disclose, adopting the principle in the delayed disclosure context is still reasonable. Earlier, the reality principle was applied to *restrict* the duty to disclose and only the issuer was aware of the use of it i.e. the delay was "informal". In the context of delayed disclosure the reality principle would *define* the access to delayed disclosure, which in turn requires informing authorities. Thus, the significant difference lies in the fact that an issuer must inform the competent authority

[264] See chapter 4.1.2.

[265] The suggested reality principle would correspond to the Nordic reality principle discussed in chapter 3.1.3. By following the Nordic doctrine, the reality could be reached already before the formalization of an event (*principle of reality rather than formality)*.

about the delay which prevents tendency to insider trading and enables more efficient and targeted monitoring of insider trading. In the next chapters an interpretation that takes into consideration the reality principle is suggested and discussed in the situations mentioned in the MAR, i.e. ongoing negotiations and multi-stage decision-making. The analysis is not meant to be exhaustive but instead it aims at highlighting elements that should be taken into account when interpreting the delayed disclosure provision.

5.2.2 Ongoing negotiations

Ongoing negotiations, both ordinary and financial recovery negotiations, are the first one of the situations mentioned in MAR preamble paragraph 50 where an issuer may have legitimate interest to delay disclosure of inside information[266]. Following the reality principle, the *maturity* (i.e. the degree of certainty) of inside information should be taken into consideration when interpreting the legitimate interest criterion, which would mean that the interpretation of the criterion would be different for uncertain and certain information. The criterion would be met more easily if the information was uncertain by nature. On the other hand, the delay would be permitted only in limited situation if the information was certain. However, when it comes to ongoing negotiations, evaluating the maturity of the information does not suffice but the *accuracy* (i.e. the degree of detail) of inside information should also be considered. The accuracy of inside information would mean dividing inside information into particular information and general information[267]. The criteria for delay would be met more easily if the inside information was particular by nature. On the other hand, the delay would be permitted only in limited situations if the inside information was general. The following chart illustrates the described approach[268].

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[266] It should be noted that from now on the thesis relies on the assumption that there is no uncertainty on whether a piece of information amounts to inside information. Thus, it is assumed that an issuer has evaluated the fulfilment of the criteria for inside information, concluded that a certain piece of information amounts to inside information and is now about to assess whether the criteria for delay is met. The criteria of inside information and their fulfilment have been discussed extensively in the legal literature (see *supra* note 116), which will fall beyond the scope of this thesis.

[267] Such a division has already been adopted in France and suggested in Finland regarding the financial recovery negotiations, as it was discussed in chapters 4.1.1 and 4.1.2.

[268] A similar approach has been used in Gilotta's (2012, 72) article, where he suggests that a competitive harm of issuer caused by disclosure is "a function of a) the degree of detail with which information is disclosed and b) the promptness of its public release". With promptness, however, Gilotta refers to how timely information should be disclosed after the occurrence of relevant facts. Therefore, Gilotta's argumentation would support permitting delay also after the occurrence of a certain event in case confidentiality is temporarily needed. As an example of such a situation Gilotta mentions an important discovery of a mining company where confidentiality would be needed until acquiring certain exploitation rights.

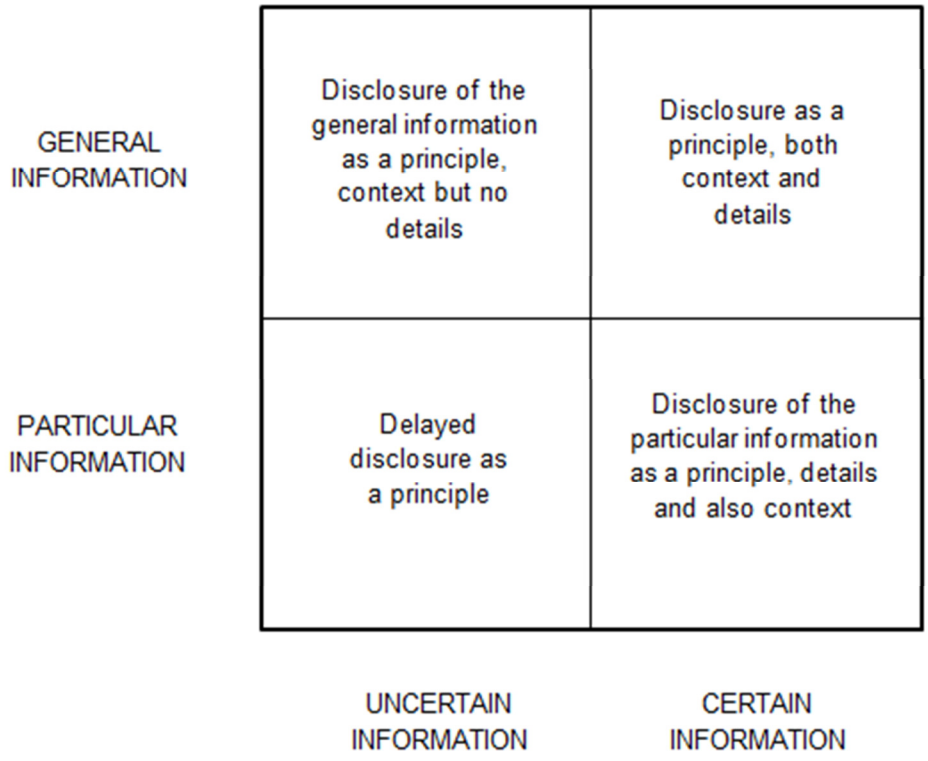

Chart 2. Disclosure and delayed disclosure of inside information regarding ongoing negotiations.

The chart indicates that both the maturity and the accuracy of inside information should be taken into consideration when interpreting the legitimate interest criterion in the context of ongoing negotiations. The maturity of inside information is illustrated on the horizontal axis, where the reality principle is used to divide the inside information into uncertain and certain inside information. The MAR clearly depicts that also uncertain information of events or circumstances may constitute inside information and trigger duty to disclose, if there is a realistic prospect that the circumstances or events will occur, and that has been taken into consideration in the chart. The accuracy of inside information, on the other hand, is illustrated on the vertical axis. There, the inside information is divided into particular and general information. Particular information refers to details of a larger context. An example of this would be information regarding details of an important agreement that relates to company's acquisition negotiations. It may also relate to intermediate steps of a protracted process, which may constitute inside information according to the MAR. General information, on the other hand, refers to information regarding that context in total. For example, it may mean the goal or end point of a protracted process (e.g. acquisition process) or underlying reasons for certain actions (such actions being particular information of that context).

By combining the maturity and the accuracy of inside information, four different categories emerge where the interpretation of the legitimate interest criterion should differ. Firstly, if information is both uncertain and particular, delayed disclosure should be a principle. Such information includes so strong uncertainties that disclosing it could be misleading and, at worst, considered manipulative. At this point, issuer interests (and the market in general) to keep the information confidential should clearly overweight the investor interests to receive such speculative information[269]. Secondly, if the information is both certain and general, disclosure should be a principle. Delaying disclosure of such information would be misleading and it is hard to imagine what sort of issuer interest could legitimate the delay and overweight the investor interests in that information. In case of both certain and general information, both information regarding the context and details, as far as not published already earlier, should be disclosed exhaustively. For example, when a protracted process reaches an end point, an issuer should "come clean" about all inside information regarding that process.

> Example 1. A listed medical company has been contacted by a potential research partner and promising negotiations regarding the suggested cooperation have been started. The cooperation would mean a completely new conquest for the issuer and a new strategic alignment, as well. However, the ongoing negotiations would be jeopardised by the disclosure. At this point the information is uncertain and particular, and the delay would be justified. However, quite soon the company should consider whether it should disclose the general information regarding the fact that the company is considering new strategic directions, even if the negotiations would have reached no concrete results yet.
>
> Example 2. A listed medical company has agreed and finalised negotiations regarding acquisition of three production plants. Earlier, the company has disclosed that a letter of intent regarding the acquisition was signed. At this point the information is general and certain. Now that the acquisition has been completed, also details of the acquisition should be disclosed.

Thirdly, if inside information is general but uncertain, the general information should be disclosed, but details could be kept unpublished. In such a situation information might be so preliminary that actually no details would even exist yet. The uncertain and general inside information could regard e.g. issuer's plans, strategies, future targets or goals or impending developments. Uncertain and general inside information could also concern the fact that an issuer is aspiring for a certain goal but negotiations are carried out with several counterparties. No details of those negotiations would be mature enough to be disclosed, but at the same time delaying the disclosure of the general information of pursuing certain

[269] For the national interpretation practices and discussion regarding the trade-off between issuer and investor interests, see also chapter 4.1.1 (especially Germany) and 4.1.2 (especially Finland).

goal could be misleading and therefore need to be disclosed. Fourthly, when inside information is particular but certain, the particular information and also the general context to which the particular information relates to, if it has not already been published, should principally be disclosed. However, if the legitimate interests of the issuer clearly overweigh the investor interests, publishing the general context to which the particular information relates could enable delaying disclosure of information that is particular and certain in exceptional circumstances. In such a case, the delay could be acceptable if investors can be considered to be sufficiently informed by the publication of the general information already indicating the main consequences of the particular information and the investors could thus not be considered to be truly misled[270].

> Example 3. A listed medical company is actively looking for a new research partner in order to start developing a new medicament for a purpose that has not been covered by its product range before, which would mean a new conquest for the company. At this point information is general but uncertain. Negotiations are ongoing with several potential partners, so no details of those should be disclosed and the disclosure of such facts could be delayed. However, the company should inform the market about its plans to expand on a new product market.
>
> Example 4. A listed medical company has signed a letter of intent regarding an acquisition of three production plants. Before, the company has informed a market that it is about to start an investment program of new production facilities, but no details on this specific acquisition has been disclosed. At this point the information is particular but certain and the company should disclose the fact that such an agreement[271] has been made and also that it is part of executing the mentioned investment program.

Ongoing negotiations are a good example of a protracted process where inside information may be formed in various phases of the process. Processes may also overlap in a way that several smaller processes form a larger entity (e.g. several investments that are related to an investment program). Several processes may also unite, a certain process may divide into multiple processes or a process may be interrupted and then continue again[272]. Further, the focus of the process may change during a certain process, e.g. an issuer may first be looking for a cooperation partner but then, as an opportunity arises, decide to acquire such a partner. Therefore disclosure related to a protracted process needs to be considered as an

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[270] For such an argument, see also chapter 4.1.2 and case Metaleurop SA.

[271] However, a letter of intent may not always indicate that the main contract will certainly be made. Thus, it has been argued that the degree of certainty of a letter of intent should also be considered and it cannot be categorically stated that the disclosure of information regarding a letter of intent could never be delayed. For disclosure regarding letters of intent, see Häyrynen 2009, 78–80.

[272] If the process has been interrupted, the disclosure has been delayed and the process will not continue, the inside information may remain unpublished for good. BaFin 2009, 63.

entity and previous publications may affect the need and content of future publications. For example, the need to come clean at the end of a protracted process may not include much new information, if the general intention of the process and particular negotiation results have already been published before. It is also possible, that during the same process the nature of the inside information (i.e. its accuracy and maturity) may vary or that at the same time there is inside information of varying maturity and accuracy and therefore the decision to delay or disclose might have to be evaluated multiple times during a certain process.

When it comes to ongoing negotiation, an important difference between the ordinary and the financial recovery negotiations should be noticed. According to the MAR preamble paragraph 50 ordinary negotiations may entitle delay if those negotiations would be *likely to be affected* by disclosure whereas financial recovery negotiation may entitle delay where disclosure *would seriously jeopardise* the interest of existing and potential shareholders. Thus, according to the MAR the threshold for legitimate interests is lower for ordinary negotiations than for financial recovery negotiations i.e. the legitimate interest are protected more extensively in case of ordinary negotiation compared to financial recovery negotiations, where the misleading criterion has more emphasis. The maturity and accuracy of the information are still a relevant question in case of financial recovery negotiations, as the disclosure of general and certain information regarding the company's financial situation may generally not be delayed but the particular information (at least when uncertain) regarding the details of restructuring negotiations may be delayed[273]. As a consequence, the decision on whether the delay is acceptable in case of financial recovery negotiations requires extreme caution and the delay is possible in more limited circumstances compared to ordinary negotiations.[274]

[273] See also chapter 4.1.1

[274] However, the approach adopted in the MAR may be criticised. Let us imagine an issuer in financial distress who is having financial recovery negotiations on reorganising its debt and an issuer who is planning to expand its operations and having ordinary acquisitions negotiations. The legitimate interests to delay disclosure might actually be much greater in case an issuer is in trouble than in case an issuer is in a stable condition. Thus, it could be argued that information on the issuer's financial recovery negotiations should be considered a legitimate interest more easily than information on acquisition negotiation as the harm caused by disclosure may result in much more devastating outcomes (e.g. lead to insolvency) than in case of acquisition negotiations (e.g. lead only to a failure in negotiations, but not in devastating consequences for the issuer). Such argumentation collides however with the fact that information regarding the viability of an issuer is one of the most important areas of investor information, and thus investor protection strongly favours disclosure of such information (see also chapter 4.1.1).

5.2.3 Multi-stage decision-making

Multi-stage decision-making is the second one of the mentioned situations in MAR preamble paragraph 50 where an issuer may delay disclosure. Multi-stage decision-making process differs significantly from the ongoing negotiations process. In a multi-stage decision-making process the question is about a certain decision which is confirmed by several steps. The maturity of the inside information is a crucial question also in this situation, and the reality principle should be applied to indicate when the inside information has become certain (even if not formalised) and when the delay would no longer be acceptable.

However, the accuracy of the inside information is not relevant here. An example illustrates the said. If the inside information relates to the resigning of a CEO[275], the information cannot be divided into particular and general. The information is therefore more simple and "undividable" as a contrast to the inside information regarding ongoing negotiations, where the information is dividable. Thus, the protracted process here relates to more or less same information (e.g. whether or not a CEO will resign or whether or not a certain decision will be approved by another body of an organisation) whereas in a negotiation process the information entity is more complex and several decisions may be done separately. It could also be argued that the ongoing negotiation process includes multiple pieces of inside information whereas the multi-stage decision-making process revolves around the same piece of inside information. The nature of the process thus differs and as the inside information is simpler, the evaluation of the delay and disclosure should also be simplified.

5.2.4 Evaluation and limitations of the solution

As the MAR preamble paragraph 50 indicates, the situations discussed in the two previous chapters are not meant for an exhaustive description of the circumstances in which the delay is possible. The Member States have also disagreed on whether delay should be acceptable in other situations. As the wording of the paragraph 50 indicates, the existence of such situations should not be denied. Thus the question raises on in what sort of situation the delay might also be possible. Should e.g. takeovers be treated differently from

[275] From this point of view, Daimler case (see *supra* note 125) was about a multi-stage decision-making process where the problematic question regarded the point of time when the information had become reality (even though not formalised) i.e. the maturity of the inside information.

ordinary negotiations because of their very price sensitive nature and special need for confidentiality and, on the other hand, the important risk related to insider trading? And how, on the other hand, impending developments regarding a certain condition, e.g. financial difficulties, should be regarded within the delayed disclosure context? Such questions[276] will not be discussed further within this thesis, but they would require further research.

As it was discussed in the previous chapter, the reality principle could be adopted in the delayed disclosure context both in case of ongoing negotiations and multi-stage decision-making. Introducing the reality principle would have certain quite obvious benefits. Firstly, it would decrease significantly the flood of uncertain information to the market. It would reduce the amount of situations where investors would need to make a significant effort on evaluating the degree of the certainty of the information (and even then the uncertainty of whether the evaluation proves to be correct) and prevent issuer opportunism of disseminating uncertain information that would be beneficial to it[277]. Thus, it would decrease the general uncertainty related to the information in the markets that would be an inevitable consequence of a narrow interpretation of the delayed disclosure exemption. Secondly, it would aid scaling back disclosure (or keeping it relatively stable in Member States which already apply reality principle) which in turn would reduce information overload and information costs. Thirdly, it would take into consideration issuer interests in keeping especially uncertain matters and matters that are under preparation confidential.

When it comes to the ongoing negotiations, evaluating the maturity of the information, i.e. applying the reality principle, does not suffice but the accuracy of the information should also be taken into consideration, which leads us to the categorisation described in chapter 5.2.2. The categorisation should be taken as suggestive. The negotiation processes are often so complex that no definitive answer can be given on the relationship between disclosure and delayed disclosure. Thus, it is inevitable that the evaluation needs to be done taking into consideration the case specific circumstances[278] even though it decreases

[276] In addition, the question of when disclosure itself is misleading or when disclosing only a part of inside information (e.g. a certain piece of particular inside information) without the context is misleading requires further research, since they have only been touched upon in this thesis (see chapter 4.1.1). The MAR recognises only the misleading potential of delayed disclosure but not of disclosure itself, which can be criticised.

[277] Though, an issuer would risk accuses of market manipulation in such a situation.

[278] E.g. the Finnish Supreme Court has emphasised such case-specific arguments, i.e. issuer's previous disclosure policy and line of business, in its recent rulings, e.g. case Perlos (especially sections 24 and 26).

the foreseeability of the regulation. Nevertheless, the categorisation helps analysing what sort of elements should be considered when evaluating the fulfilment of the criteria for delay. It also provides a fine classification of inside information by separating disclosure of certain and uncertain details and outcomes and thus enables warning of the impending developments which might not yet be certain.

Even though the categorisation suggests that the criteria for delay should be met more easily if inside information is uncertain and/or particular compared to information that is certain and/or general, the final decision should always be made by weighting the conflicting principles of transparency and confidentiality against each other. Thus, the delay should be accepted when the harm caused by the disclosure exceeds the benefits of disclosure[279]. The categorisation assumes that harm exceeds benefits more easily in case of uncertain and/or particular information, but the final evaluation needs to be done taking into consideration the case-specific circumstances and also the disclosure policy of the issuer. Such case-specificity is an inevitable outcome of the regulation that is based on open standards and principles. Thus, at the end of the day, analysing such trade-offs is the task of an issuer (and, eventually, of a court), which might prove to be demanding since the issuer may naturally value its own interests over those of investors.

When it comes to a multi-stage decision-making process, the evaluation of the legitimate interests criterion should be more straightforward. Here the legitimate interest to be protected is the autonomy of decision-making by a superior body and the delay should not apply to situations where the decision of another board is clear or only a formality. However, the analysis is not trouble-free here either, since evaluating at what point of time a decision has become a reality albeit not yet formalised may be difficult.[280]

5.3 Practical implications

Finally, the regulation of disclosure and delayed disclosure will also have some important practical implications. Firstly, finding the optimal balance for disclosure and delayed

[279] The view supported here suggests that a trade-off between issuer and investor interests should be taken into consideration (often such interests conflict, but sometimes they may also be parallel). ESMA has not adopted but neither rejected such an approach. Such an approach has, however, been adopted in Germany (see chapter 4.1.1.) and in Finland (see chapter 4.1.2). Further, it must be remembered, that in certain situation, i.e. recovery negotiations (see chapter 5.2.2), less emphasis is given on the legitimate interest of the issuer in the trade-off (i.e. the threshold for legitimate interests is higher than in case of ordinary negotiations).

[280] Daimler case is a good example of such difficulties. See *supra* note 125.

disclosure is of crucial significance to issuers. After the MAR has come into force, issuers will be required to disclose more information, and more uncertain information in particular, than ever. It is clear that the disclosure regulation has reached a point where, at least if the delayed disclosure exemption is interpreted narrowly, the legitimate interests of issuers are at danger and, at worst, issuers might be at risk for being accused of market manipulation by disclosing uncertain information which turns out being incorrect *ex post*. Should a permissive interpretation of the criteria for delayed disclosure be adopted, issuer interests could, however, be protected sufficiently.

The most crucial challenge for issuers at the moment, however, might be the regulatory uncertainty related to the balance between disclosure and delayed disclosure. From an issuer's point of view, it would be important to come up with an established practice for the interpretation, whatever that finally is, which would be equally applied in all Member States and thus prevent regulatory arbitrage. Consequently, whether the adopted interpretation will favour issuers or not, all issuers would be on the same line and no issuer could benefit from a more lenient regulation. In any case, however, issuers must bear a certain uncertainty regarding the disclosure regulation as it consists of flexible standards that enable taking into consideration case-specific circumstances and issuer's individual disclosure policy[281].

Regardless of what the interpretation of the disclosure regulation will be in the future be, issuers must pay attention to carefully documenting the course of negotiations and decision-making processes. Increasing attention must be paid to administering delicate information and evaluating constantly when a certain piece of information may amount to inside information. As the delayed disclosure mechanism will become more regularly used, procedures need to be developed for deciding, handling and documenting delays and guaranteeing the confidentiality of information the disclosure of which has been delayed. In addition, attention must be paid to not to provide any indications which are contradictory to the undisclosed inside information. Further, disclosure procedures need to be streamlined in order to enable fast disclosure of even unexpected events and circumstances. As a consequence, information costs of the issuer will most certainly increase in the future.

[281] On the other hand, flexibility and taking into consideration case-specific circumstances is also a positive thing from an issuer's point of view.

The disclosure regulation of the MAR will inevitably demand more resources from the authorities. The MAR complicates the procedure for delayed disclosure as an issuer is required to inform the authority about the delay and a written explanation may also be required after the delayed information has been disclosed. Thus, adopting an expansive interpretation of the delayed disclosure will further increase delayed disclosure which will, in turn, result in subsequent administrative burden for authorities. At the same time, however, the new procedure should enable more efficient and targeted monitoring of insider trading as all cases of delayed disclosure should, at least in theory, come to the authorities' knowledge and the authorities will thus be better informed of where to look for the possible abuse of inside information. Thus, the increasing volume of delays should also make the monitoring more efficient.

The disclosure regulation of the MAR will also require further guidance from authorities and possibly from the ECJ that clarify the concepts open to various interpretation, i.e. the criteria for inside information and delayed disclosure. While interpreting the regulation in individual cases, authorities and courts will probably face a difficult interpretation situation where, as a last resort, the principle of legality should protect the issuer from decisions where the unclear regulation would be interpreted to the detriment of the issuer and that would have been unforeseeable from the issuer's point of view.

Expansive disclosure regulation should, on the other hand, provide increasingly extensive protection for investors. However, investors will face the risk of information overload. As the amount of information in the markets will increase, the capacity of investors to process the available information will be challenged. By adopting an expansive interpretation of the criteria for delay, destructive flood of uncertain information to the market could however be avoided. Resulting from increased information in the markets, the role of professional investors and informed traders, e.g. securities analysts, institutional investors, sophisticated individual investors and brokers, even though not protected from the information overload either, can be expected to further increase in the future. Consequently, the correct price assessment of issuer securities will greatly depend on their analysis and transactions. Further, increasing volumes of information will result in increased information costs to investor, too.

In general, the MAR aims at more efficient and even fully transparent markets, which however is an unrealistic objective. The ideals of ECMH and *homo economicus* seem to

prevail in the current and future EU disclosure regulation, even though such a concept has been criticised for long. It is obvious that information is needed to enable efficient markets, but should the increased volume of information lead to information overload, increased information costs and overriding issuer interests, the increased disclosure will turn against itself and finally end up in less efficient markets.

6 CONCLUSIONS

The objective of this thesis was to find the optimal balance for disclosure and delayed disclosure and thus to solve the conflict of transparency and confidentiality by means of market-based interpretation that takes into consideration the economic theory of disclosure. Further, by means of comparative analysis, the thesis aimed at taking into consideration the national characteristics and the most appropriate practices of disclosure regulation adopted in the chosen Member States. On that basis the purpose was to find a "common ground" that would enable a pan-European interpretation of the criteria for delayed disclosure and that would be acceptable across Member States.

The economic analysis of disclosure carried out in the second chapter pointed out the importance of information in reducing information asymmetries. It was discussed how disclosure serves as a solution to decreasing information asymmetries, improving efficiency, enhancing investor protection and addressing agency problems in the securities markets. On the other hand, the flip side of disclosure was also discussed. Issuer's right to proprietary information, information overload and information costs all support scaling back disclosure obligation that is today more far-reaching than ever before.

The analysis of the current status of the EU disclosure regulation in chapter three indicated that the provisions of the MAD have been implemented in various ways in Member States and that the implementation approaches can be roughly divided into two categories, one-step and two-step model of inside information. The practices and the use of the delayed disclosure mechanism also vary, as discussed in chapter four, but what seems to be common to all Member States is that all have strived for some alleviation in the implementation of the MAD, which shows that the MAD disclosure regime has been perceived too strict in practice. Nevertheless, the MAR continues the same regulatory path and aims at tightening the disclosure regulation by the adoption of the one-step model of inside information which results in tendency towards increasing disclosure of uncertain information. Counter-arguments for expanding disclosure have thus been surpassed.

The delayed disclosure mechanism provides, however, a possible solution to alleviating the far-reaching disclosure obligation. In order to rationalise the regulation and make sure that the delayed disclosure mechanism actually provides a safe harbour to issuers, a broad interpretation of the criteria for delayed disclosure should be adopted. A market-based

solution to the interpretation was suggested in this thesis, the main idea of which can be summarised as follows. Firstly, the main attention should be focused on the legitimate interests of an issuer when evaluating the acceptability of the delay and it should be considered the main criterion for delay, whereas misleading and confidentiality would serve supplementary criteria for delay preventing too far-reaching interference in the investor protection. Focusing on legitimate interests would enable balancing the conflicting interests of issuers and investors and evaluating the trade-off between benefits and harm accruing from disclosure. Should the harm caused by the disclosure exceed the benefits of disclosure, the misleading criteria should be set aside and the delay should be acceptable.

When it comes to analysing the legitimate interest criterion, it was proposed to introduce the reality principle in the delayed disclosure context. A suggestive categorisation was also outlined to illustrate when the harm can be assumed to be greater than the benefits. Within the categorisation, adopting the reality principle would mean taking into consideration the maturity of the information when evaluating the acceptability of a delay. When it comes to ongoing negotiations, the accuracy of the information should be considered in addition to the maturity of the information, which enables separating disclosure of details and outcomes and thus disclosing a warning of impending developments without any details. Consequently, according to the categorisation, harm exceeds benefits more easily in case of uncertain and/or particular information compared to certain and/or general information, but the final evaluation needs to be done taking into consideration the case-specific circumstances and also the disclosure policy of the issuer. In case of multi-stage decision-making, however, only the maturity of the information should be evaluated.

By emphasising the legitimate issuer interests and adopting the reality principle in the delayed disclosure context several advantages could be obtained. A flood of uncertain information to the market could be prevented and scaling back disclosure could be enabled which, in turn, would reduce information overload and information costs. In addition, issuer interests in keeping especially uncertain matters and matters that are under preparation confidential could be taken into consideration and the worst, issuer's increased risk of liability for market manipulation, could be prevented.

By nature, delayed disclosure provision is an exemption rule. A broad interpretation would, however, extend the applicability of the exemption significantly almost to such an extent that delayed disclosure would become a principle rule or, at least, a widely applied

exemption. As this thesis has pointed out, keeping uncertain matters confidential is often not only in the interest of an issuer but also in the interest of investors and markets. Thus, transparency and confidentiality do not always collide, and, if they do, issuer interests should not be superseded by investor interests in such extensity as the literal interpretation of the MAR would indicate. The MAR has evidently gone a step too far in its disclosure regulation, and alleviating the regulation by a more lenient interpretation is needed despite the fact that the exemption nature of the delayed disclosure provision then needs to be compromised. To find the optimal balance between disclosure and delayed disclosure, adopting a broad interpretation is thus inevitable.

Finding the optimal balance between disclosure and delayed disclosure is important also from the point of view of the EU securities market regulation in general. Unlike the MAD, the MAR has been enacted as a regulation and it will be directly applicable in all Member States. The MAR is supposed to deepen the harmonization of the EU securities market regulation. In order to reach such a harmonization, a pan-European interpretation of the disclosure regulation is indispensable. Pan-European interpretation is also needed to avoid regulatory arbitrage and uncertainty related to the regulation. If a consistent interpretation is not reached, substantial discretion is left to the Member States and inconsistences are highly likely in the future as well.