Inside Information in Protracted Processes after the Listing Act: End of the Story?

Law Working Paper N° 944/2026
June 2026

Guido Ferrarini
University of Genoa, ECLE, EUSFiL and ECGI

Matteo Gargantini
University of Genova

ECGI Working Paper Series in Law

Inside Information in Protracted Processes after the Listing Act: End of the Story?

Working Paper N° 944/2026
June 2026

Guido Ferrarini
Matteo Gargantini

Abstract

The Listing Act marks a significant turning point in the European regulation of inside information by reshaping the treatment of protracted processes under MAR. Moving away from the original framework developed in Geltl v. Daimler, the new regime adopts a clearer two-step model that separates the prohibition of insider dealing from the issuer's duty of disclosure. While leaving the insider trading ban untouched, for protracted processes the new regime postpones disclosure until the occurrence of the final event. This reform aims to reduce the regulatory burden for listed companies and to reduce disclosure of preliminary information. Our paper shows, however, that the Listing Act does not fully eliminate legal uncertainty. Although the Commission Delegated Regulation provides a more detailed taxonomy of protracted processes and identifies numerous examples of "final events," the dividing line separating protracted processes and one-off events is a matter of interpretation and can occasionally raise doubts on its consequences. Following ESMA's technical advice, the Commission Delegated Regulation confines the concept of protracted processes to developments that depend, at least in part, on the issuer's own actions or decisions. This criterion leaves some questions concerning the boundaries of the new rules unresolved. One first question relates to the rationale for subjecting disclosure of external developments that evolve progressively over time to the old regime. A second question revolves around the treatment of inside information within corporate groups, including whether events occurring in controlled entities shall be treated as protracted processes or one-off events from the perspective of listed companies. A third question concerns disclosure relating to accounting data revealing profit warnings and earnings surprises. Overall, the new regime will likely have a positive impact in that it increases certainty concerning the timing of disclosure for protracted processes, including periodic financial reports. However, substantial interpretive discretion remains regarding the treatment of external events, the organisation of internal information systems, and the identification of the corporate actors whose knowledge is attributable to the issuer. The actual impact of the new rules on these matters will, therefore, crucially depend on the interpretation by issuers, supervisors, and ultimately courts.

Keywords: Disclosure of Inside Information, Geltl Case, Insider Dealing Prohibition, Listing Act, Market Abuse Regulation, MAR, Protracted Processes, Final Events

JEL Classifications: G18, G38, K22

Guido Ferrarini*
Emeritus Professor of Business Law
University of Genoa
Via Balbi, 22,
16126 Genoa, Italy
e-mail: guido.ferrarini@unige.it

Matteo Gargantini
Associate Professor of Business Law
University of Genova
Via Balbi, 22
16126 – Genova, Italy
e-mail: matteo.gargantini@edu.unige.it

*Corresponding Author

Inside Information in Protracted Processes after the Listing Act: End of the Story?*

Guido Ferrarini and Matteo Gargantini

1. Introduction

In this paper, we examine the recent reform of the Market Abuse Regulation (MAR)[1] brought about by the Regulation (EU) 2024/2809 (Listing Act)[2] with respect to the issuer's duty to disclose inside information in protracted processes. The story of protracted processes in the insider dealing regime started with the case of *Markus Geltl v. Daimler AG* decided by the CJEU under the Market Abuse Directive[3] and continued through the formation of MAR which adopted the concept of protracted process in its Art. 7(2). The treatment of protracted processes was then modified by the Listing Act to streamline the relevant regime and make the disclosure duty more effective. Therefore, the question presently arises whether the story of protracted processes in MAR has finally come to an end. In this paper, we offer a negative answer to this question, showing that the recent reform has only partially solved the problems posed by the previous treatment of protracted processes, giving rise to new issues in the interpretation of the insider dealing regime.

From a broader perspective, our analysis supports the thesis of evolving equilibria between "trust" and the law in financial markets.[4] While the objectives of fostering accurate price formation and ensuring a level playing field traditionally went hand in hand, the Listing Act has loosened the connection between them by giving issuers greater scope to withhold material information, while preserving the prohibition on trading on that information. This reflects a recalibration of priorities,

---

* An edited version of this paper is forthcoming in Roger Kiem, Alexander Sajnovits & Alexander Wilhelm (eds.), Festschrift für Peter O. Mülbert zum 70. Geburtstag am 1. April 2027 (De Gruyter Brill). The authors contributed jointly to the conception and overall development of the paper. For the purposes of academic assessment, Guido Ferrarini is responsible for Sections 2 and 3, while Matteo Gargantini is responsible for Sections 6 and 8. The remaining sections were written jointly.

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (OJ 2014 L 173, p. 1).

[2] The Listing Act is a package of measures meant to review the Prospectus Regulation, Market Abuse Regulation, Markets in Financial Instruments Regulation and Directive (MiFIR/MiFID II), and to introduce a new Directive on multiple-vote share structures. In this paper, by Listing Act we specifically refer to Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October 2024 amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (OJ 2024 L, p. 1).

[3] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16). On the *Geltl* case, see para 2 below.

[4] See Peter O. Mülbert and Alexander Sajnovits, 'The Element of Trust in Financial Markets Law' (2017) 18 German Law Journal 1.

where reliability of information prevails over short-term accuracy and enforcement of insider dealing becomes even more crucial in preserving market integrity. Therefore, our paper ideally shows that mature capital markets, where “trust in law”[5] is sufficiently strong, can support market participants’ confidence and, simultaneously, strike a better equilibrium between the costs and benefits of regulation. In a sense, the Listing Act is an answer to the dynamic of “regulatory tsunami” that has affected EU capital markets law in the recent decades,[6] leading to excessively burdensome requirements on listed companies. As our paper shows, interpretation – by issuers, supervisors, and ultimately the judiciary – will continue to play a role in determining the implications of the new rules, so that the equilibrium between trust and the law for the next years is yet to be determined.

2. Beginning of the story under MAD

The European notion of protracted process was firstly found in the judgement of the Court of Justice of the EU (Second Chamber, 28 June 2012) in the case of *Markus Geltl v. Daimler AG*.[7] This case was decided under the Market Abuse Directive (MAD), which defined inside information similarly to MAR as “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 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.”[8]

The facts of the case were straightforward. After a general meeting of Daimler AG on 6 April 2005, Mr Schrempp, Chairman of the company’s Board of Management, was thinking of resigning before the expiry of his mandate in 2008. He discussed his intentions with the Chairman of the Supervisory Board, Mr Kopper. Between June and July 2005, other members of the Supervisory Board and the Board of Management were also informed of Mr Schrempp’s plans to resign. Daimler began preparing a press release, an external statement and a letter to Daimler’s employees. On 13 July 2005, an invitation was issued convening a meeting of the Presidential Committee of Daimler’s Supervisory Board and the Supervisory Board on 27 and 28 July 2005, respectively; neither invitation mentioned a possible change of Chairman of the Board of Management. On 18 July 2005, Schrempp and Kopper agreed to propose Mr Schrempp’s early departure and Mr Zetsche’s appointment as his

---

[5] Ibid.
[6] Ibid and Peter O. Mülbert, ‘Regulierungstsunami im europäischen Kapitalmarktrecht’ (2012) 176 ZHR 369.
[7] CJEU, Case C-19/11, *Markus Geltl v Daimler* AG [2012] ECLI:EU:C:2012:397. For a comparative analysis of the case, see Hartmut Krause and Michael Brellochs, ‘Insider trading and the disclosure of inside information after *Geltl v Daimler* – A comparative analysis of the ECJ decision in the *Geltl v Daimler* case with a view to the future Market Abuse Regulation’ (2013) 8 Capital Markets Law Journal 283. On the influence of the case on the formation of MAR, see Guido Ferrarini, Inside Information in Protracted Processes, in Festschrift für Klaus Hopt zum 80. Geburtstag, De Gruyter, 2020, 223.
[8] See Art. 1(1) MAD, corresponding to Art. 7(1)(a) MAR.

successor at the Supervisory Board's meeting on 28 July 2005. Therefore, the Presidential Committee decided that it would propose to the Supervisory Board that it approve said departure and said appointment. As a result, Daimler's Supervisory Board decided that Mr Schrempp would step down at the end of the year and be replaced by Mr Zetsche. The decision was made public in the ways required under German law. Following that announcement, Daimler's share price rose sharply.

Mr Geltl and other investors had sold Daimler shares before that announcement. They brought an action against Daimler in Germany seeking compensation for what they considered to be a late *ad hoc* announcement. The *Bundesgerichtshof* referred two questions to the CJEU for a preliminary ruling. The CJEU answered the first question arguing that information is of a precise nature if two cumulative conditions are satisfied. First, a set of circumstances exists or may reasonably be expected to come into existence or an event has occurred or may reasonably be expected to do so. Second, this set of circumstances or event is specific enough to enable a conclusion to be drawn as to its possible effect on the prices of the financial instruments concerned or related derivative financial instruments. The Court further argued that an intermediate step in a protracted process may in itself constitute a set of circumstances or an event in the meaning normally attributed to those terms.

Moreover, the Court argued that the purpose of MAD was to protect the integrity of European Union financial markets and to enhance investor confidence in those markets; confidence that depends on investors being placed on an equal footing and protected against the improper use of insider information.[9] The Court therefore concluded that information relating to an intermediate step which is part of a protracted process may be precise information. The answer to the first question was in particular that "in the case of a protracted process intended to bring about a particular circumstance or to generate a particular event, not only may that future circumstance or future event be regarded as precise information within the meaning of those provisions, but also the intermediate steps of that process which are connected with bringing about that future circumstance or event."

As to the second question, the CJEU noted that, apart from the German version, all the other language versions of Article 1(1) of Commission Directive 2003/124[10] existing at the time used the adverb 'reasonably'. By using that term, the European Union legislature had adopted a criterion based on rules drawn from the common experience to determine whether future circumstances and events come within the scope of that provision. In order to determine whether it is reasonable to think that a set of circumstances will come into existence or that an event will occur, an assessment must be made on a case-by-case basis of the factors existing at the relevant time. The Court therefore concluded

[9] The CJEU referred to its previous judgements in Case C-45/08, *Spector Photo Group v. Van Raemdonck* [2009] ECR I-12073, paragraph 47, and Case C-445/09, *IMC Securities* [2011] ECR I-5917, paragraph 27.

[10] Commission Directive of 22 December 2003 implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339, p. 70).

that, in using the terms 'may reasonably be expected', Article 1(1) of Directive 2003/124 referred to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur.

3. Continuation of the story under MAR

The judgement in *Geltl v. Daimler* clearly influenced MAR's notion and treatment of protracted processes. Article 7 MAR defines the notion of inside information in para. (1) - in terms identical to those of Art. 1(1) MAD - and specifies in para. (2): "For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances." Almost the same language had already been used in Art. 1(1) Directive 2003/124. However, Art. 7(2) MAR continues in terms closely reflecting those of *Geltl* decision by specifying: "In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information."[11] Art. 7(3) further specifies: "An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article".

In October 2019, ESMA submitted its MAR Review Report to consultation, also touching upon protracted processes and the mechanism to delay the disclosure of inside information.[12] At that time, the notion of inside information applied indistinctly to the market abuse prohibition and to the obligation to publicly disclose inside information. However, inside information could undergo different levels of maturity and degrees of precision throughout its lifecycle.[13] From a policy

[11] In turn, precision is satisfied when information is specific enough to draw conclusions on price impact. The direction in which the price is going to move must not be clear in advance for the information to be precise, as stated by the CJEU in Case C-628/13 *Lafonta v. Autorité des marches financiers* [2015] ECLI:EU:C:2015:162. For a critical analysis of the direction of the price effect, see Marco Ventoruzzo and Chiara Picciau, 'Inside Information', in Marco Ventoruzzo and Sebastian Mock (eds), *Market Abuse Regulation. Commentary and Annotated Guide* (2022) Oxford, 2nd ed., p. 192 ff.

[12] ESMA, *Consultation Paper, MAR Review Report* (ESMA70-156-1459), 3 October 2019, 36 ff.

[13] See the comments made by the European Securities Market Experts for the MAD review: R*eport, Market abuse EU legal framework and its implementation by Member States: a first evaluation*, Brussels, July 6, 2007, at 10 ff. (on file with the authors; we are grateful to Carmine Di Noia for providing a copy of this report).

perspective, in certain situations inside information is mature enough to trigger the prohibition of market abuse, but insufficiently mature to be disclosed to the public. Under MAR, issuers dealt with this problem through the mechanism of delayed disclosure, assuming that the relevant requirements were complied with.[14] Another solution, which was however set aside in the drafting of MAR, would be to distinguish between two types of inside information on the basis of their level of maturity and require disclosure only of mature information, while enforcing the insider trading prohibition at an earlier stage.[15]

The question whether two definitions of inside information should be adopted – one for the insider dealing prohibition, the other for the disclosure duty (so-called two-step model) [16] – was therefore considered in the MAR Review. ESMA seemed to believe that similar outcomes could be reached in the one-step model through the regime of delayed disclosure. Information, which is not mature for publication despite being mature enough for the insider trading prohibition to apply, can be delayed when its publication could be prejudicial to the issuer and/or misleading to the markets. However, the delay regime might be regarded as an exceptional one, the rule being that of the publication of the inside information.[17] Therefore, the one-step and the two-step models should not be regarded as necessarily equivalent, for the number of cases in which information is seen as lawfully delayed in the first model is likely to be lower in practice than those in which information is considered as not yet mature for publication in the other.

In any case, the effectiveness of MAR in preventing market abuse and promoting market efficiency depended on the way in which the regime of delayed disclosure was implemented by regulators and enforced by supervisors. Requiring issuers to communicate the reasons for the delay to their supervisors could exercise a pressure on issuers to better analyse these reasons in practice. Weak supervision on delayed disclosure would render avoidance of the relevant regime possible and therefore make compliance with the same relaxed, thus reducing trust – in the sense specified above

---

[14] See ESMA, (n 7), at 36. The Commission reported to ESMA that the mechanism of delaying disclosure of inside information was used to a varying extent across jurisdictions in the Union. While in some Member States issuers relied on this mechanism regularly, issuers of others used it on an exceptional basis.

[15] This was the solution proposed in the ESME Report (n 8).

[16] For the distinction between the one-step model and the two-step model referred to in the text see eg Jesper Lau Hansen and David Moalem, 'The MAD disclosure regime and the two-fold notion of inside information: the available solution' (2009) 4 Capital Markets Law Journal 323; Carmine Di Noia and Matteo Gargantini, 'The Market Abuse Directive Disclosure Regime in Practice: Some Margins for Future Actions' (2009) 54 Rivista delle società 782; Carmine Di Noia and Matteo Gargantini, 'Issuers at Midstream: Disclosure of Multistage Events in the Current and in the Proposed EU Market Abuse Regime' (2012) 9 ECFR 484; Alain Pietrancosta, 'Article 17: Public disclosure of inside information' in Marco Ventoruzzo and Sebastian Mock (eds), *Market Abuse Regulation* (2nd end, OUP 2022) 457; Rüdiger Veil, 'Disclosure of Inside Information' in Rüdiger Veil (ed), *European Capital Markets Law* (3rd end, Hart Publishing 2022) 344.

[17] See ESMA, Final Report: Guidelines on the MAR: market soundings and delay of disclosure of inside information (ESMA/2016/1130) (13 July 2016), para. 52: "(…) the possibility to delay the disclosure of inside information as per Article 17(4) represents the exception to the general rule of disclosure to be made as soon as possible according to Article 17(1) and therefore should be narrowly interpreted". For comments, Pietrancosta, (n 18), at 451.

– in a context where enforcement is traditionally more important than law on the books.[18] The amount of insider trading which occurred before M&A transactions by listed companies could be evidence both of weak compliance and weak enforcement.[19]

Of course, similar problems of enforcement could be encountered also in a system which allows for two notions of inside information to apply (two-step model), for the news is assessed by supervisors with respect to its maturity and the approach could differ across legal systems. Indeed, both the surveillance over the reasons for delaying information and that over the maturity of information in a two-step system present a wide margin of discretion and therefore some uncertainty as to the outcomes. A partial remedy, in this respect, would be for regulators to specify *ex ante* the cases in which either the delay of disclosure is not allowed or the information is mature enough to be published (in a two-step system). The ESMA Guidelines on delay of disclosure of inside information went in a similar direction and reduced the uncertainty over the right timing of disclosure.[20]

Alternatively, the regulator could have adopted a solution based on rules rather than standards, by indicating analytically the cases in which a disclosure duty arises while omitting a general standard of disclosure such as that found in Article 17(1) MAR.[21] This is the case of the US model "which, while it contains an obligation for *ad hoc* disclosures, does not operate a continuous disclosure regime".[22] No doubt, a rule-based system is preferable in terms of certainty as to the issuers' disclosure duties, but may be underinclusive with respect to cases not expressly foreseen by the law.

[18] On the role of enforcement of insider trading laws, see Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 Journal of Finance 75. On the connection between (weak) enforcement and the EU system of ongoing disclosure before the Listing Act, see Alain Pietrancosta, 'Proposed changes to MAR in the EU Listing Act' (2023) Revue Trimestrielle de Droit Financier 13.

[19] See e.g. Arthur Keown and John Pinkerton, 'Merger Announcements and Insider Trading Activity: An Empirical Investigation' (1981) 36 Journal of Finance 855, who confirm statistically what most traders already know, i.e. that impending merger announcements are poorly held secrets and trading on this nonpublic information abounds. See more recently Anup Agrawal and Tareque Nasser, 'Insider trading in takeover targets' (2012) 18 Journal of Corporate Finance 598, showing that widespread profitable passive trading by target insiders during takeover negotiations points to the limits of insider trading regulation. For historical and up-to-date figures on abnormal share price movement before the takeovers see FCA, Market cleanliness statistics 2024/25 (1 July 2025), available at https://www.fca.org.uk/data/market-cleanliness-statistics-2024-25.

[20] ESMA (n 17).

[21] The 1st *alinea* of this provision states: 'An issuer shall inform the public as soon as possible of inside information which directly concerns the issuer.' For a proposal to consider a rule-based approach see Rüdiger Veil, Marc Wiesner and Moritz Reichert, 'Disclosure and Enforcement under the EU Listing Act' (2022) 20 European company and Financial Law Review 1, 46-7.

[22] See Jennifer Payne, 'Disclosure of inside information' in Vassilios Tountopoulos and Rüdiger Veil (eds), *Transparency of Stock Corporations: Rationales, Limitations and Perspectives* (Hart Publishing, 2019), at 5, who explains that in the US there is no requirement to disclose inside information which arises between the quarterly filings and which falls outside a specific list of events: "In other words, there is no general duty to disclose all material information to the market. The US regime is therefore said to be a system of periodic disclosure rather than continuous disclosure". See also Chiara Mosca and Chiara Picciau, 'Inside Information and Issuer Disclosure Obligations: The Long Way to Convergence between the European Union and the United States', in Iris H.-Y. Chiu and Iain G. MacNeil, Research Handbook on Global Capital Markets Law (Edward Elgar: 2023), 172.

4. Listing Act's changes to MAR

The MAR regime of timely disclosure in protracted processes was finally overhauled by the Listing Act, which adopted a two-step model for the regulation of inside information.[23] The timely information duty foreseen by Art. 17(1) MAR was amended by specifying: "That requirement shall not apply to inside information related to intermediate steps in a protracted process as referred to in Article 7(2) and (3) where those steps are connected with bringing about or resulting in particular circumstances or a particular event. In a protracted process, only the final circumstances or final event shall be required to be disclosed, as soon as possible after they have occurred".[24] Therefore, the regime applicable to protracted processes was almost reversed by the Listing Act: not the intermediate steps must be disclosed to the public, but only the final circumstances or event. Yet, as we argue below, this new rule is not so clear-cut, as the notions of protracted process, intermediate step and final event are ambiguous and often difficult to apply in individual cases.

The rationale for these changes is summarized in the Preamble to the Listing Act. While the prohibition of insider dealing should apply as soon as inside information is available, to prevent any possible exploitation of it, the requirement to disclose such information should primarily enable investors to take well-informed decisions. Certainly, "when information is disclosed at a very early stage and is of a preliminary nature, it might mislead investors, rather than contribute to efficient price formation and address information asymmetry".[25] Therefore, "in a protracted process, the disclosure requirement should not cover announcements of mere intentions, ongoing negotiations or, depending on the circumstances, the progress of negotiations, such as a meeting between company representatives".[26] Rather, the issuer should disclose information related to the particular circumstances or event that the protracted process intends to bring about (*final event*), as soon as possible after its occurrence. "For instance, in the case of a merger, disclosure should be made as soon as possible after the management has taken the decision to sign off on the merger agreement, once the core elements of the merger have been agreed upon. In general, for contractual agreements the final event should be deemed to have occurred when the core conditions of that agreement have been agreed upon. In the case of non-protracted processes related to a one-off event or set of circumstances, notably when the occurrence of that event or set of circumstances does not depend on

[23] For an overview see Pietrancosta (n 18); Matteo Gargantini and Carmine Di Noia, Disclosure of Inside Information, in Rüdiger Veil (ed), Regulating EU Capital Markets Union (OUP: 2025), 74.
[24] See Art. 2(6)(a) Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October 2024 amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (Listing Act).
[25] See recital 67.
[26] Ibid.

the issuer, the disclosure should take place as soon as the issuer becomes aware of that event or set of circumstances".[27]

However, the exact moment when a set of circumstances or an event becomes final is not always straightforward.[28] In order to enable the issuer to identify that moment, the Commission has been empowered to adopt a delegated act. New Art. 17 (12) MAR delegates the Commission, *inter alia*, to set out and review, where necessary, a non-exhaustive list of "final events or final circumstances in protracted processes and, for each event or circumstance, the moment when it is deemed to have occurred and is to be disclosed pursuant to paragraph 1".[29]

In its recently adopted Delegated Regulation, the Commission specifies when disclosure is required in a series of typical protracted processes. Following ESMA's technical advice, the Delegated Regulation identifies thirty-five examples of such processes (gathered in seven groups), each delineating the relevant "final event" and the disclosure deadline.[30] To name just a few, the list includes agreements and their termination, mergers, capital increases and share buy-backs, dividend payments, by-laws amendments, licences, patents, and insolvency. This list makes the EU system to some extent similar to the US event-based disclosure system,[31] but without relinquishing the continuous nature of its disclosure obligation under Article 17,[32] so that the open-ended nature of the list leaves the question of the moment of disclosure unanswered in some cases.[33] The key role of this simplification purpose can be seen in the development of the Delegated Regulation. While ESMA's technical advice referred to the approval of "core elements" or "core conditions" of the issuer governing body's resolution,[34] the Delegated Regulation refers more clearly to the signing of an agreement or the approval of the resolution.[35]

Moreover, a new paragraph 1a on confidentiality was inserted in Article 17 MAR under which an issuer should ensure the confidentiality of inside information "until such time as that information

---

[27] Ibid.
[28] See recital 68 and Art.
[29] See Art. 2(6)(f) Listing Act.
[30] Commission Delegated Regulation of 8 April 2026 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards disclosure of inside information in protracted processes and delay of disclosure (C(2026) 2149 final) (at the time of writing, the Delegated Regulation was not yet published in the Official Journal).
[31] See n 22 above. Indeed, the US Form 8-K (SEC, *Form 8-K. Current Report – Pursuant to Section 13 OR 15(d) of The Securities Exchange Act of 1934*, available at https://www.sec.gov/files/form8-k.pdf) lists a series of events to disclose and specifies that disclosure should take place "upon the occurrence of any one or more of the events specified" therein, and "within four business days after occurrence of the event" unless otherwise specified.
[32] The US Form 8-K (n 31), which identifies events to be disclosed under Regulation FD (Fair Disclosure), allows (but does not require) registrants to disclose, at their option, "any events, with respect to which information is not otherwise called for by [the] Form, that the registrant deems of importance to security holders." (item 8.01 – Other events).
[33] See Sections 6 ff below.
[34] See ESMA, *Consultation Paper. Draft technical advice concerning MAR and MiFID II SME GM* (ESMA74-1103241886-1086), 12 December 2024, 70-1 (identifying the moment of disclosure for – e.g. – share buybacks "as soon as possible after the issuer's governing body has taken the decision to carry out a buy back and on its core elements").
[35] See e.g. Annex I(7) Delegated Regulation (requiring disclosure "as soon as possible after the issuer's governing body has taken the final decision to carry out a share buy-back").

is disclosed pursuant to paragraph 1 of this Article”.[36] Recital 69 explains that issuers should ensure the confidentiality of information related to intermediate steps where the circumstances or event that a protracted process intends to bring about have not yet been disclosed: “Once there has been disclosure of those circumstances or that event, the issuer should no longer be required to protect the confidentiality of the information related to intermediate steps”. Furthermore, Art. 17 MAR on delayed disclosure was amended by adding a new paragraph 4 a stating that non-disclosure by an issuer of inside information related to intermediate steps in protracted processes “is not subject to the requirements laid down in paragraph 4”.[37]

In addition, Art. 17 (7) was replaced by the following: “7. Where disclosure of inside information has been delayed … or where inside information relating to intermediate steps in a protracted process has not been disclosed in accordance with paragraph 1, and the confidentiality of that inside information is no longer ensured, the issuer or the emission allowance market participant shall disclose that market information to the public as soon as possible.”[38] This paragraph includes situations where a rumour explicitly relates to inside information related to intermediate steps in a protracted process “that has not been disclosed in accordance with paragraph 1, where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured”. In brief, inside information relating to intermediate steps must be kept confidential. When confidentiality is no longer ensured, as also shown by possible rumours, the issuer must disclose that information as soon as possible.

5. End of the story?

The adoption of the two-step model for issuer disclosure is a major simplification in the legal regime of listed companies, which reduces uncertainty and the risk of publishing incorrect information. For protracted processes in areas covered by the Delegated Regulation’s Annex, issuers will not have to run complex analyses concerning the materiality of intermediate steps, contrary to what they previously needed to do either to disclose or to activate a procedure to delay disclosure. Whether this new regime strikes the right balance between the need to contain insider dealing and that to protect investor confidence is arguable. To the extent that inside information is withheld by the issuer waiting for it to mature, the same could be more easily exploited by insiders than under the prior regime. At the same time, the new regime entrusts the protection of equal footing to confidentiality obligations and the prohibition of insider dealing, rather than to the dissemination of inside information that is not yet fully mature.

---

[36] See Art. 2(6)(b) Listing Act.
[37] See Art. 2(6)(c) Listing Act.
[38] See Art. 2(6)(e) Listing Act.

Moreover, some room is left for legal interpretation. In the following analysis, we try to assess what remains uncertain in the new MAR from the perspective of issuer compliance. Compared to its original formulation, as originated by *Geltl v. Daimler*, the new regime brings about a more detailed set of provisions, mostly in the Delegated Regulation, concerning the scope and structure of protracted processes, particularly with regard to their final event. Indeed, a tripartite structure of material events can be envisaged for purposes of disclosure: (i) final events that occur at the end of a protracted process, as considered in the Delegated Regulation; (ii) final events occurring at the end of a protracted process that is not considered in the Delegated Regulation; (iii) events that do not occur at the end of a protracted process, but are not necessarily sudden events (in line with ESMA, we refer to these occurrences as "one-off" events).

As a result, the taxonomy of events to be disclosed after the Listing Act is more complex than it would appear at first sight, while the Level 2 Regulation, as evidenced by its preparatory works, includes a less straightforward framework whose implications remain to some extent uncertain. Moreover, the new rules on protracted processes require disclosure of inside information, but leave other aspects largely untouched, such as the insider dealing ban (Article 8 MAR), the ban on selective disclosure of inside information (Article 10 MAR) and the duty to keep insiders' registers (Article 18 MAR). These provisions have a remarkable impact on the governance of inside information within listed companies and their corporate groups.[39]

6. What is a "protracted process"?

The distinction between protracted processes and other events has important regulatory consequences. When inside information relates to protracted processes, issuers can wait for the occurrence of their final events before publishing a press release (Article 17(1) MAR). When inside information does not relate to protracted events, the general rule applies instead that events may be precise, and require disclosure, even when they can reasonably be expected to occur in the future. These two prongs of Article 17(1) MAR raise a crucial question: if protracted processes trigger disclosure only at the stage of final events, what space (if any) is left to the traditional analysis of "precision" under Article 7(1), for purposes of disclosure?[40] Indeed, the two combined prongs seem

[39] For a preliminary analysis see Carmine Di Noia and Matteo Gargantini, 'Corporate Governance, Financial Information, and MAR', in Danny Busch, Guido Ferrarini and Gerard van Solinge (eds), Governance of Financial Institutions (OUP 2019), 284.

[40] The question is all the more important if one considers the uncertainties that still surround the qualification of information as "precise" in certain circumstances: see recently CJEU, Case C-363/24, *Finansinspektionen v Carnegie Investment Bank AB* [2026] ECLI: ECLI:EU:C:2026:215 (for a comment see Alain Pietrancosta, 'Inside Information under MAR: Precision May Be Satisfied Notwithstanding the Indirect and Inaccurate Character of the Information' (2026), working paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6764300). The decision is one among many showing the problems relating to the interpretation of disclosure duties, including the recent CJEU, Case C-229/24, *Brännelius* [2026] ECLI: ECLI:EU:C:2026:298 (for a comment see Alain Pietrancosta, 'Publicly Available, Yet

to lead, *prima facie*, to a somewhat paradoxical consequence: the new regime would require early disclosure for events that can be predicted, but do not occur in a protracted process, and are thus not preceded by preliminary steps having their own materiality. This is rather counterintuitive, because the scope of disclosure is narrower when materiality is potentially higher.

This apparent conundrum highlights an uncertainty that will likely arise in the application of the new MAR regime concerning the overarching distinction between protracted processes and other events. Broadly speaking, almost no event can be said to occur suddenly in a narrow, objective sense, because every occurrence has a cause.[41] And indeed, the very fact that issuers are in a position to predict, with reasonable certainty, that an event will occur (so that information relating to it is precise) entails that they have access to preliminary information grounding that forecast.[42]

One way to solve this conundrum is to conclude that the new MAR regime allows for events that do not occur suddenly but are not protracted processes in a legal sense. This is the reading adopted by ESMA and followed by the Delegated Regulation. In other words, there are "one-off" events that occur in progressive stages. As ESMA put it, when answering the Commission's request for technical advice, such category of occurrences is based on the last sentence of Listing Act's Recital 67 already cited: "In the case of non-protracted processes related to a one-off event or set of circumstances, *notably when the occurrence of that event or set of circumstances does not depend on the issuer*, the disclosure should take place as soon as the issuer becomes aware of that event or set of circumstances" (emphasis added).

ESMA opined in its consultation document that Recital 67 considers non-protracted processes as one-off events that do not depend on the issuer. On the contrary, protracted processes should be understood as "a series of several actions or steps spread in time which need to be performed, in order to achieve a pre-defined objective or result."[43] The focus on the prior definition of objectives and results highlights ESMA's understanding that issuers must have some degree of control over the unfolding series of developments leading to the final event, whereas events occurring out of that reach cannot be "protracted."

Still Inside Information under MAR: A Critical Appraisal of an Unfortunate Generalisation in Brännelius (CJEU, 4th ch., 16 April 2026, C-229/24)' (2026), corking paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6752421). For an overview of such developments see Jesper Lay Hansen, 'Three Recent Cases on Market Abuse' (2026), Nordic & European Company Law Working Paper No. 26-01, available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6808138.

[41] Eminent philosophers have theorised the principle of causality in different shapes. See e.g. the entry 'Aristotle on Causality' in the Stanford Encyclopedia of Philosophy (2008), available at https://plato.stanford.edu/archIves/spr2010/entries/aristotle-causality/).

[42] Carsten Gerner-Beuerle, 'Article 7. Inside Information' in Matthias Lehmann and Christoph Kumpan (eds), *European Financial Services Law: Article-by-Article Commentary* (Hart Beck Nomos 2019), 687, 691; Mario Hössl-Neumann and Ulrich Torggler, 'Article 7. Inside Information' in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds), *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014* (Edward Elgar 2021), 66.

[43] ESMA (n 34), 16, esp. §§ 34-35.

ESMA further specified, in its final report and in the final draft Delegated Regulation, that protracted processes are such if they "depend 'at least partly' on the issuer" and are meant to achieve "an intended objective or result,"[44] thus excluding events completely outside the issuer's sphere of influence. In the final text of the Commission Delegated Regulation, Recital 1 consistently reads that a protracted process "involves a series of actions, steps, or decisions spread in time which need to be performed, at least in part, by an issuer, to achieve an intended objective or result."

Recital 1 of the Delegated Regulation should solve the conundrum mentioned above, as it provides an answer to the question concerning the space left, in the realm of disclosure duties, to the requirement of precision concerning inside information which does not concern protracted processes. No doubt, this answer is based on preparatory documents and recitals in both level 1 and level 2 legislation, rather than on specific provisions of either MAR or the Delegated Regulation.[45] However, Recital 1 of the latter supports the interpretation given by ESMA. The easiest alternative would seem to interpret Articles 7(2) and 17(1) as if, for purposes of disclosure, precision of information should only refer to events that have already occurred, because if it referred to future events it would necessarily entail a protracted process.

To be sure, Recital 67 could in principle be interpreted as merely stating that events under the control of issuers are more likely to constitute protracted processes than events outside their control, without implying different treatment of the two. This alternative interpretation would reduce legal uncertainty, as it would completely supersede, for purposes of disclosure, the consequences of *Geltl v. Daimler*.

In any event, if our understanding of ESMA's technical advice and the Delegated Regulation is correct and if that approach is to be followed despite it not being clearly enshrined in legal provisions, the tripartition that we sketched out above concerning protracted processes and one-off events should be further complicated and become quadripartite. Besides protracted processes within and outside the Commission's list, the taxonomy should also include one-off events that are totally unexpected (we might refer to them as "sudden one-off events") and one-off events that actually occur in stages. With some risk of falling into an oxymoronic expression, we may dub the latter as "multi-

---

[44] ESMA, *Final Report. Technical advice concerning MAR and MiFID II SME GM* (ESMA74-1103241886-1086), 7 May 2025, 12-14 and 64.

[45] Recitals alone do not have the effect of law, nor can they prevail over clear provisions: see Tadas Klimas and Jurate Vaičiukaitė, 'The Law of Recitals in European Community Legislation' (2008) 15 ILSA Journal of International & Comparative Law 61, 83-6. However, recitals can support, when clear, the interpretation of unclear provisions, when they are sufficiently clear (ibid. 86-7). See also CJEU, C-162/97, *Nilsson and Others* [1998] ECLI:EU:C:1998:554, § 54 (recitals cannot derogate from legal provisions); CJEU, C-755/21, *Kočner v EUROPOL* [2024] ECLI:EU:C:2024:202, § 59 (recitals have important interpretative value, in they can explaining the content of a provision and clarify the lawmaker's intention). On the increasingly problematic use of recitals to specify legal details see Maarten den Heijerm, Teun van Os van den Abeelen and Antanina Maslyka, Amsterdam Law School Research Paper No. 2019-31, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3445372.

stage one-off events" or, for the sake of brevity, "multi-stage events" – which, it is worth stressing again, are not "protracted processes" under MAR, as interpreted by ESMA and the Commission, and the Delegated Regulation.

Arguably, treating protracted processes and multi-stage events in different ways should be objectively justified.[46] A plausible explanation for subjecting protracted processes to lighter disclosure standards compared to multi-stage events is that the relaxed regime for protracted processes is meant to protect issuer operations, while similar reasons do not come into play for developments that are completely external to their control, such as one-off events (whether multi-stage or not). It is also true, however, that the declared purpose of the Listing Act in alleviating issuer disclosure duties is to avoid that information disclosed at a very early stage, while still being of a preliminary nature, "might mislead investors, rather than contribute to efficient price formation and address information asymmetry" (see Recital 67 Listing Act).[47] This rationale should apply to protracted processes and multi-stage events likewise. At the same time, however, the Commission proposal expressly relates its amendments to protracted processes alone, and not to future likely events in general,[48] which again could be seen as a hint in favour of ESMA's and the Commission's interpretation.

Be that as it may, the effects of ESMA's and the Commission's narrow reading of the concept of "protracted processes," which excludes developments that lie entirely outside the control of issuers, deserve some further analysis. The next section focuses on some of the implications from the perspective of issuer disclosure duties.

7. Processes that are not 'protracted': multi-stage (external) events

Excluding multi-stage (external) events from the scope of the Delegated Regulation prevents clarifying, through level 2 measures, some legal matters that are connected, just like in-scope protracted processes, to the timing of disclosure duties and their compliance. These legal matters are strongly intertwined and relate to two main questions. The first one concerns the point in time when

[46] More formally, the differentiated treatment should comply with the principles of equality and non-discrimination. See CJEU, Cases 117/76 and 16/77, *Ruckdeschel*. [1977] ECLI: ECLI:EU:C:1977:160, § 7 (affirming the principle of equality as a general principle of EU law and specifying it requires that similar situations shall not be treated differently unless differentiation is objectively justified). See also CJEU, Case 106/83, *Sermide SpA v Cassa Conguaglio Zucchero* [1984] ECLI: ECLI:EU:C:1984:394, § 28 (under EU law, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified). See, finally, CJEU, Case C-189/01, *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECLI: ECLI:EU:C:2001:420, § 129 (differential treatments require objective justifications).

[47]See, to the same effect, European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (COM(2022) 762 final), 7 December 2022, 5 and 7 (referring to compliance costs reduction and the need to ensure that prices reflect more stable information).

[48] Ibid, 7.

issuers can be said to have sufficient knowledge of complex events and, hence, to be held liable in the case of lack of timely disclosure. The second question involves the distinction between internal events (such as protracted processes) and external ones (such as multi-stage events) when companies of the same group are involved: to what extent do developments occurring in a controlled entity qualify under one or the other class of events, for the purpose of the controlling entity's disclosure duties?

Starting from the first question, the difference between one-off events (in a narrow sense) and multi-stage events (i.e. events that occur in stages but involve no actions, steps, or decisions by the issuer) often lies not in any intrinsic feature of the event itself, but rather in what the issuer knows about it. For instance, the bankruptcy of an important client may or may not be, from the point of view of the listed issuer, a multi-stage event leading to that client's default depending on whether the issuer was aware of the progressive deterioration in the client's financial conditions. This knowledge may originate from one or more missing payments, from disclosure by the client itself, or from the news that the client filed for bankruptcy.

Some crucial questions therefore arise concerning the legal framework for issuer awareness of external developments that are of direct concern to the disclosing entity. What role does issuer knowledge exactly play in determining the disclosure regime when one-off events or multi-stage processes are involved? Who, within the issuer's corporate organigram, should be privy to the relevant information for the issuer to "know" such information? And is the assessment of that knowledge a descriptive or a prescriptive one? In other words, should disclosure be subject to either one or the other regime depending on the actual knowledge of information by the relevant person(s)? Or does negligent lack of knowledge play a role in this regard? And, if so, against what standard should negligent ignorance be assessed?

All these questions relate to a classical issue of corporate law, namely when an issuer is deemed to "know" information – in our case, inside information – and who within the corporate structure is responsible for disclosure.[49]

Under MAR, disclosure obligations fall on issuers as legal persons, requiring them to publish inside information as soon as they become aware of it. In practice, however, awareness and decision-making depend on natural persons within the organization – employees, managers, and directors – who identify and assess such information. In this context, disclosure is triggered only once the competent corporate body becomes aware of the information and qualifies it as inside information deserving publication. MAR sets the objective of this process – namely, timely disclosure – but leaves

[49] Alexander Sajnovits, 'The Market Abuse Regulation and the Residual Role of National Law', in Filippo Annunziata e Michele Siri, *EU Banking and Capital Markets Regulation. Open Issues of Vertical Interplay with National Law* (Springer: 2025), p. 363, 372 et seqq.

issuers free to determine how to achieve it. The implications of such duties for corporate governance are largely left open in MAR, although ESMA highlighted that, in the typical default setting, responsibility for ascertaining and managing inside information lies with a senior executive director or the managing board (or one of its members).[50] ESMA had also previously noted that, in practice, listed companies adopt internal systems to manage information flows, verify whether these involve inside information and, in that case, decide on publication.[51] Now, these considerations are somewhat reflected in the Delegated Regulation, as it refers to cases where the board of directors has delegated its powers to a committee or to an executive director and allows such committee or executive director to fulfil the role of the governing body for the purpose of final approval within protracted processes (Recital 5).

Corporate procedures and their effectiveness draw the dividing line between what an issuer knows (in the sense we specified above) and what it should know. This distinction is at the basis of a request for preliminary ruling that the German Federal Court of Justice (*Bundesgerichtshof*) has recently referred to the Court of Justice of the European Union.[52] The case, originating from the "diesel scandal", concerns the question whether liability for lack of dissemination of inside information requires actual knowledge or breach of an organizational requirement determining liability when the issuer should have known about that information. If the latter is the correct answer, as the Higher Regional Court adjudicating the dispute and the Bundesgerichtshof assumed, listed companies would be subject to an obligation to "organise knowledge".[53] This would mean issuers should establish internal procedures to ensure effective internal information flows involving employees in sensitive roles, who should report relevant developments to the competent bodies or designated individuals for their assessment concerning disclosure.[54] However, national interpretations diverge as to the actual implications of internal procedures,[55] so that a decision by the Court of Justice will be an important opportunity for clarification.

---

[50] ESMA, *Final Report. Draft technical standards on the Market Abuse Regulation* (ESMA/2015/1455), 28 September 2015, § 239. See also Pietrancosta, (n 18), at 451.
[51] ESMA, MAR Review Report (ESMA70-156-2391) (2020), 66.
[52] Bundesgerichtshof, Federal Court of Justice refers questions to the Cout of Justice of the European Union in proceedings concerning violations of disclosure obligations in the "diesel scandal" (28 January 2026), available at https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2026_en/2026022.html.
[53] Ibid.
[54] Susanne Kalss and Clemens Hasenauer, 'Article 17. Public Disclosure of Inside Information' in Susanne Kalss et al (eds), *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014* (Edward Elgar 2021) 202, 209; Wolf-Georg Ringe, 'Article 17. Public Disclosure of Inside Information' in Matthias Lehmann and Christoph Kumpan (eds), *European Financial Services Law: Article-by-Article Commentary* (Hart Beck Nomos 2019) 785, 793; Rüdiger Veil, 'Disclosure of Inside Information' in Rüdiger Veil (ed), *European Capital Markets Law* (3rd end, Hart Publishing 2022), 353. See also Di Noia and Gargantini (n 39), 293-4.
[55] In this sense, ibid., 295; Filippo Annunziata, ''Madamina, Il Catalogo E' Questo…'. the Duty to Disclose Inside Information and the Proper Organization of the Company: The Market Abuse Regulation ('MAR') and Italian Company Law', Bocconi Legal Studies Research Paper Series (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3621359; Sajnovits (n 49).

But the request for a preliminary ruling has broader implications, as it involves information flows within corporate groups as well. The dispute originated from a claim for damages against Porsche Automobil Holding SE, the controlling entity of Volkswagen AG. As the fraud on the greenhouse gas emissions took place within the latter, the question arose on the impact of interlocking directorates between the two companies. In fact, the two companies shared some members of the boards of managers, including the chairman. Moreover, these members were subject to a duty of confidentiality towards Volkswagen. Hence, the reference for a preliminary ruling also involves questions concerning the interactions between national company law and the European regime on market abuse, namely whether the former can influence how the latter applies, i.e. whether the two regimes complement each other or, vice-versa, EU provisions should prevail.

While the Higher Regional Court deemed that the confidentiality duties under national law should prevail, the Bundesgerichtshof referred the question for a preliminary ruling based on the consideration that the directors, "taking into account [their] duties toward Porsche Automobil Holding SE, were required to bring about a decision of the entire Board of Management of Volkswagen AG on disclosing the information."[56]

For our analysis, these matters can influence the treatment of protracted processes occurring across different companies belonging to the same group, especially when the latter includes multiple listed companies. This is an area where the taxonomy of protracted and one-off events can play a key role for inside information concerning not only internal or external events but also consolidated accounts. Our analysis therefore now moves to financial reports.

8. Applications: financial reports, profit forecasts, profit warnings and earnings surprises

Some examples aptly illustrating the implications of the new taxonomy for one-off and protracted events come from the treatment of accounting data. ESMA classifies this information based not only on its role in the broader financial reporting process, but also on its contents and, to some extent, materiality. In principle, preliminary or intermediate data leading to financial reports are produced as part of a protracted process culminating in the preparation of the final documents, such as yearly or interim (half-yearly or quarterly)[57] reports. The Delegated Regulation, in line with ESMA, therefore requires disclosure ("as soon as possible") only once the governing body of the issuer has "acknowledged or approved" the financial results. Profit forecasts must be disseminated according to the same rule – of course, when they qualify as inside information.

---

[56] Bundesgerichtshof (n 52).

[57] Articles 3(1)(a) and 5 Directive 2004/109/EU on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

This approach is in line with the general understanding of protracted processes and shows that, most likely, the new regime will not only deliver more legal certainty as to the timing of disclosure but also make the treatment of preliminary or intermediate financial data more homogenous. At what point in time (results displayed in) preliminary and intermediate reports for internal use could qualify as inside information is indeed case-specific and highly dependent on market consensus, so that listed companies and supervisors might not necessarily provide the same answer despite the uniform regulatory framework. A widespread understanding was that preliminary or intermediate reports to be included in periodic financial reports were not in and of themselves inside information, but could nonetheless contain inside information, especially when they reached a sufficient level of stability and deviated from market consensus.[58] In that case, the results of such reports should be disclosed or made subject to delay. This created some uncertainty as to when exactly accounting data of different nature could be material enough to deserve disclosure and raised concerns about the risk to disincentivise the preparation of voluntary intermediate reports, due to the legal risks these could involve.[59]

After the Listing Act, disclosure of annual and interim financial reports as well as profit forecasts is due only after approval or acknowledgment by the governing body, while preliminary or intermediate reports qualify as intermediate steps. This reduces the dispersion of disclosure along the timeline of the events by concentrating dissemination at the end of the relevant timespan.

There are, however, some caveats to the ability of the new provisions to deliver legal certainty and uniformity. First, interpretive divergence and the ensuing dispersion of duties along the timeline will likely remain for ancillary provisions such as those concerning confidentiality and insider list management.[60] Second, although less obviously, some ambiguity will likely continue affecting the treatment of profit warnings and earnings surprises. The reason is that ESMA and the Commission

---

[58] See e.g., for Germany, *Bafin, Issuer Guidelines – Module C. Requirements based on the Market Abuse Regulation (MAR)* (2020), 15-16 (referring to financial data that has become "sufficiently concrete" and can be reasonably be expected to differ significantly from "the relevant benchmark" or, in its absence, "market expectations"). For France see AMF, *Position-recommandation. Guide de l'information permanente et de la gestion de l'information privilégiée* (DOC-2016-08) (2021), 19-20 (information that the profit target will not be achieved is considered precise, although the figures relating to the results were only provisional); see also AMF, *Position-recommandation. Guide de l'information périodique des sociétés cotées* (DOC-2016-05) (2021), 37-8 (recommending publication of preliminary estimates on closed reporting periods only when internal processes support their reliability). For the Netherlands see AFM, *Public disclosure of inside information* (2017), available at https://www.afm.nl/~/profmedia/files/wet-regelgeving/marktmisbruik/brochure-public-disclosure-inside-information.pdf (listing "significant deviations from earlier forecasts, and generally accepted market expectations or ratings" among the examples of precise information). For Italy see Consob, *Gestione delle informazioni privilegiate – Linee guida* (2017), 14, 29, available at https://www.consob.it/web/area-pubblica/abusi-mercato-orientamenti-consob (corporate strategies and periodical information can qualify as inside information when diverging from market consensus and previously published information).

[59] See e.g. Chiara Mosca, 'Il sottile confine tra informazioni interne e informazioni privilegiate', in Piergaetano Marchetti, Federico Ghezzi and Roberto Sacchi (eds), *Il caleidoscopio dell'informazione nel diritto societario e dei mercati: in ricordo di Guido Rossi* (Giuffrè: 2020), 193.

[60] On divergent interpretations on such matters the literature mentioned in n 23 above.

do not consider these as protracted processes and, therefore, do not make them subject to the general approach requiring disclosure upon board's acknowledgment or approval. This interpretation is meant to make disclosure more expeditious in critical cases but can also reduce legal certainty and homogeneity of conduct.

A preliminary source of ambiguity lies with the scope of application of this interpretation in comparison with the regime on protracted processes. In fact, neither ESMA's technical advice nor the Commission's Delegated Regulation provide a definition of "profit warnings" and "earnings surprises", leaving some uncertainty about possible misalignments between their use in the market jargon and their regulatory consequences, also considering that not all markets seem to adopt the same glossary.[61] In line with a common distinction, we can relate these expressions to unexpected variations, compared to the consensus forecast, in overall profits or earnings per share as made public in preliminary announcements (profit warnings[62]) or periodic reports (earnings surprises[63]). The regulatory treatment of information concerning profit warnings and earnings surprises is all the more sensitive because of its implications for issuer discretion in the context of ongoing disclosure duties. If profit warnings and earnings surprises contradict previous public announcements or communications by the same issuer, publication of inside information cannot be delayed as per Article 17(4)(b) MAR as well as Article 2(1) and Annex II (No 1) Delegated Regulation.

For the purpose of our analysis, we will consider both terms interchangeably as referring to any "material change to forecasted financial results or business objectives previously announced by the issuer", as this is what Annex II Delegated Regulation suggests about them when addressing situations where issuers cannot delay disclosure because inside information is in contrast with previous announcements.

ESMA and the Commission qualify profit warnings and earnings surprises as one-off events, even when these can be "multi-stage" under our taxonomy above. In accordance with the general understanding that purely external events cannot qualify as protracted processes, ESMA's consultation stressed that profit warnings and earnings surprises cannot be regarded as belonging to the process aiming at producing periodic financial reports, so that they shall be published as soon as they are available to the issuer.[64] Along the same line, the technical advice noted that, despite the

[61] Niamh M. Brennan, Victoria C. Edgar and, Sean Bradley Power, 'COVID-19 profit warnings: Delivering bad news in a time of crisis' (2022) 54 The British Accounting Review 1, 2 (noting that, while "profit warning" is primarily a UK expression, the equivalent US term is "large negative earnings surprise").
[62] Raymond A.K. Cox, Ajit Dayanandan, Han Donker and John Nofsinger, 'The Bad, the boom and the bust: Profit warnings over the business cycle' (2017) 89 Journal of Economics and Business 13 (profit warnings occurs irregularly and unpredictably across firms and time. as opposed to earnings surprises).
[63] Ibid. See also, e.g., Narasimhan Jegadeesh and Joshua Livnat, 'Revenue surprises and stock returns' (2006) 41 Journal of Accounting and Economics 147, 167.
[64] ESMA (n 34), 25, § 88

debate concerning its initial proposal, the need to ensure timely disclosure should prevail in this case.[65] In particular, ESMA noticed that "many respondents" pointed out that developments leading to profit warnings and earnings surprises "often involve an internal process of analysis and approval".[66] However, it also confirmed that "the process for the publication of profit warnings and earnings surprises is by design expected to occur in such a short timeframe to impede its qualification as a protracted process", so that these developments should be regarded as one-off events deserving immediate disclosure.[67] At the same time, the Commission concluded that it would be out of the scope of its delegated power to specify how the general principle requiring disclosure "as soon as possible" should be interpreted when the relevant information concerns profit warnings and earnings surprises,[68] so that the uncertainty affecting the previous regime will remain untouched in this case.[69]

The regulatory framework for information concerning profit warnings or earnings surprises, therefore, remains substantially unchanged after the Listing Act, as in this case quick disclosure prevails over thorough assessment by the management body. The problem with this approach is that nothing in the definition in Annex II or elsewhere seems to prevent profit warnings or earnings surprises from emerging out of the progressive consolidation of preliminary and intermediate financial records, for instance when these show that the expectations on the volume of sales were too optimistic (or pessimistic). Neither the magnitude of these expectations nor the intensity of their deviations from market's expectations says anything about how sudden their ascertainment is, which leaves the question open as to the treatment of these cases.

To be sure, neither the Recitals nor Annex I of Delegated Regulation address profit warnings and earnings surprises, which is in itself a source of ambiguity requiring compliance officers to consult the preparatory works to make sure they do not violate MAR when dealing with that information. However, if interpreted – as reasonable – in light of ESMA's technical advice, the effect of the Delegated Regulation seems to be that when profit warnings and earnings surprises are progressively ascertained to the point where they reach a sufficient level of certainty, issuers shall immediately react. In a nutshell, this is tantamount to delineating an autonomous protracted process requiring, more than in other circumstances, that the governing body or the delegated person (Recital 5 Delegated Regulation) urgently ascertain the extent of the divergence and publish an announcement.

9. Conclusion

[65] ESMA (n 44), 27, §§ 146, 149, 154.
[66] ESMA (n 44), 27, § 149.
[67] ESMA (n 44), 28, § 155.
[68] European Commission (n 30), 2.
[69] See e.g. Annunziata (n 55).

The Listing Act marks a significant turning point in the European regulation of inside information by reshaping the treatment of protracted processes under MAR. Moving away from the original framework developed in *Geltl v. Daimler*, the new regime adopts a clearer two-step model that separates the prohibition of insider dealing from the issuer's duty of disclosure. While properly leaving the insider trading ban untouched, for protracted processes the new regime postpones disclosure until the occurrence of the final event. This reform aims to reduce the regulatory burden for listed companies and to reduce disclosure of preliminary information.

Our analysis has shown, however, that the Listing Act does not fully eliminate legal uncertainty. Although the Delegated Regulation provides a more detailed taxonomy of protracted processes and identifies numerous examples of "final events," the dividing line separating protracted processes and one-off events is a matter of interpretation and can occasionally raise doubts on its consequences. Following ESMA's technical advice, the Commission Delegated Regulation confines the concept of protracted processes to developments that depend, at least in part, on the issuer's own actions or decisions.

This criterion leaves some questions concerning the boundaries of the new rules unresolved. One first question relates to the rationale for subjecting disclosure of external developments that evolve progressively over time to the old regime. A second question revolves around the treatment of inside information within corporate groups, including whether events occurring in controlled entities shall be treated as protracted processes or one-off events from the perspective of listed companies. A third question concerns disclosure relating to accounting data revealing profit warnings and earnings surprises.

Overall, the new regime will likely have a positive impact in that it increases certainty concerning the timing of disclosure for protracted processes, including periodic financial reports. However, substantial interpretive discretion remains regarding the treatment of external events, the organisation of internal information systems, and the identification of the corporate actors whose knowledge is attributable to the issuer. The actual impact of the new rules on these matters will, therefore, crucially depend on the interpretation by issuers, supervisors, and ultimately courts.

More broadly, the reform reflects a recalibration of the balance between market transparency and market integrity. Under the previous regime, accurate price formation and equal access to information largely coincided. The Listing Act partially loosens this connection by permitting issuers to withhold certain material information until it reaches a more mature stage, while relying more heavily on the effectiveness of insider dealing prohibitions and confidentiality safeguards. In this respect, the reform presupposes an increased role of trust in EU financial regulation,[70] one where it works both as a substitute and as a complement of law and allows for regulatory simplification.

[70] On the role of trust in financial regulation see Mülbert and Sajnovits (n 4).

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html