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Dealing with Corporate Scandal under European Market Abuse Law: The Case of VW

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Abstract

This paper uses the current proceedings against VW for violations of its continuous disclosure obligation as a backdrop for addressing fundamental questions of European market abuse law. Specifically, we ask how the Market Abuse Directive and Regulation (MAD/R) and Member State corporate law together shape management's disclosure policy vis-à-vis the stock market. Taking the perspective of German stock corporation law, our main findings are twofold: First, while European market abuse law severely limits management's discretion when market integrity is at stake, Member States can still largely control its influence on internal corporate governance – *i.e.*, on the distribution of information between management and shareholders. Second, MAD and MAR directly draw on conceptions of public interest in Member State law when determining the outer bounds of issuers' ability to delay disclosure, thereby potentially promoting compliance. Based on these insights, the paper then closes with a note of caution for national legislators and suggests a more profound discussion of their responsibility for the optimal functioning of European market abuse law.

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I. Introduction

This paper focuses on directors' responsibility in administering issuer disclosure policy under European market abuse law, especially when the board is confronted with "corporate scandal". We define corporate scandal as a scenario in which a corporation or persons acting on its behalf interfere with public interest, and in which monetary losses for the corporation's residual claimants (shareholders) follow.[1] For our purposes, harm to public interest corresponds to infringements of legal provisions that aim to protect public goods.

The initial motivation for our study is the ongoing shareholder litigation in the case of Volkswagen Aktiengesellschaft (VW) before the Higher Regional Court of Braunschweig, Germany.[2] The proceedings are based on allegations that VW, with its primary listing on the Frankfurt Stock Exchange, violated its continuous disclosure duty pursuant to § 15(1) of the German Securities Trading Act (WpHG)[3]. This provision, which has now been supplanted by Art. 17(1) of the European Market Abuse Regulation of 2014 (MAR)[4], then served to make Art. 6(1) of the European Market Abuse Directive of 2003 (MAD)[5] into German law. Following MAD's model, § 15(1) WpHG required the

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[1] Shareholders' losses are, of course, caused by many factors. Examples are fines to be paid by the corporation, void contracts, or reputational damage. All of these factors add to the direct depreciation of the market price. *Cf.* Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J Fin & Quant. Anal. 581 (2008); John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J Fin. & Quant. Anal. 1429 (2017).

[2] *See* the order of reference (hereto *infra* n. 9): Landgericht [LG] [Regional Court] Braunschweig, Aug. 5, 2016, 5 OH 62/16, https://www.bundesanzeiger.de (Ger.); *see also* Landgericht [LG] [Regional Court] Stuttgart, Dec. 6, 2017, 22 AR 2/17 Kap, https://www.bundesanzeiger.de (Ger.); Regional Court Stuttgart, Feb. 28, 2017, 22 AR 1/17 Kap, https://www.bundesanzeiger.de (the defendant being *Porsche Automobil Holding SE* as *VW's* majority shareholder).

[3] Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] Bundesgesetzblatt [BGBl] I 1998 at 2708, version until July 1, 2016 (Ger.), *English version at* https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html.

[4] 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, 2014 O.J. (L 173) 1.

[5] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), 2003 O.J. (L 96) 16.

disclosure of all inside information (as then defined in § 13 WpHG; *cf.* Art. 1(1) MAD, now Art. 7 MAR) as soon as possible.

The litigation is based on the claim that *VW* had been using manipulation software ("defeat devices") in its diesel cars for many years to conceal that they did not meet the regulatory requirements for nitrogen oxide emissions. The plaintiffs argue that this course of action constituted precise non-public information directly concerning VW, the foreseeable consequences of the fraud having a significant impact on the price of VW's issuances. According to the plaintiffs' brief, VW's malfeasances therefore constituted inside information under the requirements of § 13 WpHG and should have been disclosed well before the issuer's actual announcement by press release on September 22, 2015.

On these grounds, investors seek more than nine billion Euros in damages from VW.[6] The claim is based primarily on § 37b WpHG (now § 97 WpHG), which provides for damages in the case of grossly negligent or intentional failure to disclose inside information in accordance with § 15(1) WpHG (Art. 17 MAR).[7] The investors' complaint

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[6] *See* Gilbert Kreijger, *US Dieselgate charges against former VW boss add weight to investors' €9 billion claim*, HANDELSBLATT GLOBAL, May 4, 2018, https://global.handelsblatt.com/companies/us-dieselgate-vw-investors-9-billion-919046.

[7] The facts of the so-called "diesel emissions scandal" are also relevant for another suit in Stuttgart against VW's parent company, *Porsche*, where a shareholder challenges the lawfulness of a shareholders' resolution discharging *Porsche's* directors for the year 2015: Regional Court Stuttgart Dec 19, 2017, 31 O 33/16 KfH, DIE AKTIENGESELLSCHAFT [AG] 2018, 240 (ruling for the plaintiff; the decision has not become *res judicata*); *see* the comment on this decision by Bernd R. Mayer & Vicky Richter, *Konzerndimensionale Auskunfts- und Überwachungspflichten der Obergesellschaft bei Rechtsverstößen der Tochtergesellschaft*, AG 2018, 220-227 (partially critical). The plaintiff claims that *Porsche's* management illegitimately withheld relevant information concerning the scandal in the annual shareholder meeting in 2016, thus obstructing an informed shareholder decision: *see* Regional Court Stuttgart, Dec. 19, 2017, 31 O 33/16 KfH, AG 2018, 240, paras. 84-245. The defense objects, asserting that disclosure would have compromised the internal investigations within the VW group and weakened VW's position in the then ongoing negotiations with U.S. authorities: *see* Regional Court Stuttgart, Dec. 19, 2017, 31 O 33/16 KfH, AG 2018, 240, paras. 203-220 (referring to this argument, but dismissing it). The defense referred to VW's Press Release *Statement by Volkswagen AG regarding the status of the comprehensive investigation in connection with the diesel matter*, Apr. 22, 2016, https://www.volkswagen-media-services.com/en/detailpage/-/detail/Statement-by-Volkswagen-AG-regarding-the-status-of-the-comprehensive-investigation-in-connection-with-the-diesel-matter/view/3414210/2d3df181fad9036e33cdb4c1f651dc5?p_auth=vw5iHQlF:

is embedded in a so-called Capital Markets Model Case Litigation,[8] an instrument introduced in Germany in 2005 for the collective resolution of investors' damages claims.[9] The class consists of investors who bought VW financial instruments after the alleged manipulations should have been disclosed and who were still in possession of these instruments by the time of disclosure on September 22, 2015 (*i.e.*, the scenario laid out in § 37b(1) WpHG). The claim thus builds on the fact that those investors paid too much on the secondary market in *VW's* issuances and could not offset this harm by selling their stock because the market price subsequently reflected the information of which they had been deprived.

In its response to these claims, VW adopts a multi-layered defence strategy.[10] Firstly, VW pleads that there was no inside information prior to the U.S. Environmental Protection Agency (EPA)'s notice of violation on September 18, 2015. According to VW, information concerning the corporate scandal by publication of this notice both came into existence and (simultaneously) entered public knowledge, thereby rendering issuer

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> The further disclosure or characterization of interim results, which are currently available, would likely prejudice the rest of the investigation at this time, in particular because individuals who have yet to be questioned could align their statements with the contents of the interim report. […] In counsel's view, a disclosure would also significantly impair Volkswagen's cooperation with the Department of Justice and weaken Volkswagen's position in any remaining proceedings. […] In counsel's view, such disclosure could also jeopardize the credit that Volkswagen may expect to receive in the event of its full cooperation with the Department of Justice. According to Volkswagen's legal advisers, this could have very substantial negative financial consequences.

[8] KAPITALANLEGER-MUSTERVERFAHRENSGESETZ [KapMuG] [CAPITAL MARKETS MODEL CASE ACT] BGBL I 2012 at 2182, as amended (Ger.).

[9] The KapMuG aims to facilitate individual enforcement by establishing critical factual and legal precedent for follow-up litigation (in the *VW* case, *inter alia* facts revolving around the diesel exhaust scandal and the subsumption of those facts under § 37b WpHG); it is, however, not binding for non-represented parties (*see* § 2(1), § 22(1) KapMuG). The Higher Regional Court is competent by order of reference if at least ten different plaintiffs sue (*i.e.*, file a model case motion) on the same matter within six months (§ 4(1), § 6(1)). The model plaintiff and the model defendant can settle the case which may – under specific circumstances – affect other plaintiffs (court approval pursuant to § 18; non-exit by those other plaintiffs pursuant to § 19(2), § 23(1)).

[10] *See* defendant's goals of discovery, Regional Court Braunschweig, Aug. 5, 2016, 5 OH 62/16, under B., https://www.bundesanzeiger.de. The full 329-page response statement filed with the court on Feb. 28, 2018, is not public. *Cf.* Patrick McGee, *Volkswagen sets out robust defence against investor lawsuit*, FINANCIAL TIMES, Mar. 1, 2018, https://www.ft.com/content/368ad48e-1d75-11e8-aaca-4574d7dabfb6.

disclosure unnecessary. Secondly, the issuer asserts the delay of disclosure was justified under the exemption set out in § 15(3) WpHG / Art. 6(2) MAD, now Art. 17(4) MAR. Even if VW had actually been in possession of inside information, it was not under the obligation to disclose before its announcement on September 22, as early disclosure would have interfered with its legitimate interests. Finally, in case the criteria for delay were also not met, VW argues that it did not act culpably (as required by § 37b(2) WpHG), stating that its management had *ex ante* decided not to disclose because of a reasonable impression that it was possible to resolve all concerns without any substantial impact on the corporation's business.[11]

Building on this line of argument in our paper, we set out to analyse directors' discretion in determining issuer disclosure policy under MAD/R in times of scandal. This decision-making process is little discussed at the European level,[12] a likely explanation being that the corporate governance is traditionally dependent on the pertinent national corporate legislation. However, as the high ten-figure shareholder litigation against VW shows, the European continuous disclosure regime is capable of exerting great pressure on the governance dynamics of public corporations. The ongoing institutionalization of shareholder litigation in continental Europe[13] and the European Commission's

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[11] In this context, *VW* also argues that its management was only informed of the misconduct gradually and therefore lacked knowledge of the incriminating circumstances necessary to evaluate their impact on the corporation. Indeed, much of the court proceedings revolve around this question of fact; *see*, *e.g.*, Marcus Jung, *Kläger rüsten sich vor VW-Musterprozess*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 4, 2018, http://www.faz.net/aktuell/wirtschaft/unternehmen/klaeger-ruesten-sich-vor-musterprozess-gegen-volkswagen-15771390.html; *infra* n. 175. For the purpose of our analysis, however, we assume an informed decision-making process and engage with its legal parameters under MAD/R and Member State corporate law.

[12] *See* Jesper L. Hansen, *Issuers' duty to disclose inside information*, 18 ERA FORUM 21, 32-33 (2017) (raising the question of the appropriate standard of review when delaying disclosure). *Cf. also* Philipp Koch, *§ 19 Disclosure of Inside Information*, *in* EUROPEAN CAPITAL MARKETS LAW, paras. 95-99 (Rüdiger Veil, ed., 2nd ed. 2017) (discussing whether delay under Art. 17 MAR requires a conscious [active] decision).

[13] *Cf. Laying down the law – Europe is seeing more collective lawsuits from shareholders*, THE ECONOMIST, Dec. 7, 2017, https://www.economist.com/finance-and-economics/2017/12/07/europe-is-seeing-more-collective-lawsuits-from-shareholders (finding a "proliferation of financing options" for European shareholder litigation).

commitment to instruments of collective redress[14] are indicators that the empowerment of shareholders by capital markets law will be even more pronounced in the future. In our paper we seek to engage with the impact of European market abuse law on internal governance. On the other hand, we aim to identify how Member State corporate law can still shape management's decision-making process on continuous disclosure.

In light of the VW litigation before German courts, we take management's position under the GERMAN STOCK CORPORATION ACT (AKTIENGESETZ, AKTG[15]) as a starting point (*infra* II). Subsequently, we lay out the specific requirements for issuers under the European continuous disclosure regime as part of market abuse law (*infra* III). In the last part of the paper, we discuss how non-harmonised corporate law and harmonised capital markets law together shape the decisions made by directors of European public corporations to disclose (or not) (*infra* IV).

II. Disclosure Duties and Business Judgment under German Law

A. The Purpose of the German Stock Corporation

The central provisions governing the management of the German corporation and directors' duties are § 76(1) and § 93 AKTG. Thereunder, the management board has the responsibility to manage the company autonomously, while each board member is required to act as a conscientious manager of the corporation's business and to disregard

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[14] *See* recently European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), Jan. 25, 2018, COM(2018) 40 final (reiterating the importance of instruments for collective dispute resolution and formulating improved access to justice as a priority under the "New Deal for Consumers" announced in the Commission Working Programme for 2018).

[15] AKTIENGESETZ [AKTG] [STOCK CORPORATION ACT] BGBL I 1965 at 1089, as amended (Ger.).

adverse directions by shareholders or others. Management's latitude inherent in this legal framework is underlined by Germany's business judgment rule (BJR), which was introduced in 2005 mainly as a codification of prior case law from the German Federal Court of Justice[16].[17] According to this continental European variation of an originally United States concept,[18] directors are not considered to breach their fiduciary duties when making business decisions if they act on an informed basis and in good faith to benefit the corporation (§ 93(1) sentence 2 AKTG).

Already well before the codification of the BJR, the "company's well-being" – not to be confused with the Anglo-American principle of shareholder wealth maximization[19] – was acknowledged under German law to be the authoritative guideline for directors.[20] In practice, however, the company's well being has proved hard to pinpoint, revolving around the seemingly irreconcilable positions of shareholder primacy and stakeholder

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[16] Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 21, 1997, II ZR 175/95, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1997, 1926, 1927-1928 *ARAG/Garmenbeck* (Ger.).

[17] GESETZ ZUR UNTERNEHMENSINTEGRITÄT UND MODERNISIERUNG DES ANFECHTUNGSRECHTS (UMAG), BGBL I 2005 at 2802, Art. 1 no. 1a (Ger.); *see* Regierungsentwurf [Cabinet Draft] – Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), DEUTSCHER BUNDESTAG: DRUCKSACHEN 15/5092 (hereafter: Cabinet Draft UMAG), at 1, 10, 11 (Ger.) ("Business Judgment Rule"); Holger Fleischer, *Die „Business Judgment Rule": Vom Richterrecht zur Kodifizierung*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2004, 685-691; Fleischer, *in* KOMMENTAR ZUM AKTIENGESETZ, BAND 1 § 93, Rn. 62-65a (Gerald Spindler & Eberhard Stilz, eds., 3rd ed. 2015).

[18] *See* Luis Hernando Cebriá, *The Spanish and the European Codification of the Business Judgment Rule*, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW [ECFR] 2018, 41, 51-52 (on German law serving "as a bridge between systems of Common law and Civil law").

[19] *In re* Rural Metro Corp. Stockholders Litig. (I), 88 A.3d 54, 80 (Del. Ch. 2014) (clarifying that directors' fiduciary duties require them to "maximize [the corporation's] value over the long-term for the benefit of its stockholders"); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36-37 (Del. Ch. 2013); Leo E. Jr. Strine, *Can We Do Better by Ordinary Investors; A Pragmatic Reation to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 454 n. 16 (2014); however, see the critique by Lynn Stout, THE SHAREHOLDER VALUE MYTH, especially at 32, 95-115 (2012).

[20] Federal Court of Justice, Apr. 21, 1997, II ZR 175/95, NJW 1997, 1926, 1928 *ARAG/Garmenbeck* (Ger.); Federal Court of Justice, Dec. 21, 2005, 3 StR 470/04, NJW 2006, 522, 523, 525 *Mannesmann/Vodafone* (Ger.); on the relationship between the "company's well-being" and the "benefit of the corporation" see Klaus J. Hopt & Markus Roth, *in* AKTIENGESETZ - GROßKOMMENTAR, BAND 4/2 § 93, Rn. 98 (Heribert Hirte, Peter Mülbert & Markus Roth, eds., 5th ed. 2015).

protection.[21] Cause for this debate about the purpose of the stock corporation is a paradox: While board autonomy is stated as the overarching principle, directors' duties under German law are heavily specified by the German Stock Corporation Act compared to other corporate law systems.

The reason for this can be traced to the roots of the current German Stock Corporation Act in the GERMAN STOCK CORPORATION ACT OF 1937 (AKTG 1937)[22], which under fascist influence sought to restrain big business by implementing public interest concerns into corporation law.[23] Hence directors, perceived as custodians of public wealth, were directly obligated to consider the public good when managing the company (§ 70 AKTG 1937) or when deciding about the disclosure of information to shareholders in the general meeting (§ 112(3) AKTG 1937). Put differently, the historic Legislator of 1937 was reluctant to grant much direct influence to shareholders[24] – the concept of board autonomy essentially being used to facilitate state dirigisme. The power of the management board was further enhanced by shielding the board from shareholder actions:[25] Instead of establishing a full-fledged derivative suit, the AKTG 1937 delegated

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[21] *See* Federal Court of Justice, Dec. 21, 2005, 3 STR 470/04, NJW 2006, 522, 525 *Mannesmann/Vodafone* (Ger.) (arguing that a voluntary appreciation award for the target's management in course of a friendly takeover does not entail a future benefit for the corporation considering the interests of all shareholders, the corporation's creditors, its employees and the public and deeming the approval of the *future* sole shareholder as irrelevant); Para. 4.1.1 German Corporate Governance Code, *English version at* https://www.dcgk.de//files/dcgk/usercontent/en/download/code/170214_Code.pdf:

> The Management Board assumes full responsibility for managing the company in the best interests of the company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation.

See also Michael Nietsch, *Geschäftsleiterermessen und Unternehmensorganisation bei der AG – Zur haftungsbegrenzenden Wirkung des § 93 Abs. 1 Satz 2 AKTG im Bereich gesetzlicher Pflichtaufgaben unter besonderer Berücksichtigung von Compliance*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 2015, 631, 636; Hopt & M. Roth, *in* AKTIENGESETZ - GROßKOMMENTAR, BAND 4/2 § 93, Rn. 97, 99 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015).

[22] AKTIENGESETZ 1937 [AKTG 1937] [STOCK CORPORATION ACT OF 1937] REICHSGESETZBLATT [RGBL] I 1937 at 107 (Ger.).

[23] On the history of the AKTG 1937, *see* Susanne Kalss, Christina Burger & Georg Eckert, DIE ENTWICKLUNG DES ÖSTERREICHISCHEN AKTIENRECHTS 316-326 (2002).

[24] Kalss, Burger & Eckert, *supra* n. 23, at 318 ("shielding of the management board"), 321.

[25] Kalss, Burger & Eckert, *supra* n. 23, at 323.

the responsibility for enforcing liability of the management board to the supervisory board (§ 97 AKTG 1937), and *vice versa* – leaving shareholders only able to initiate a suit under narrow conditions (§§ 122-124 AKTG 1937).[26]

Although instruments to enforce shareholder interests were extended after 1937,[27] the current German Stock Corporation Act still contains relics of these earlier policy decisions. One example is § 87(1) AKTG, which not only delegates authority for deciding on management compensation to the supervisory board (*cf.* also § 120(4) AKTG), but already sets forth detailed parameters for its decision, thus indirectly specifying management's incentives.[28] More generally, shareholders' options to shape corporate structure are extremely limited by the general principle of "statute stringency" (§ 23(5) AKTG), under which corporate governance still is largely defined by mandatory law.[29] For example, shareholders can alter directors' duties or waive liability *ex ante* just as little as they can directly vote out management (*cf.* § 84(3) AKTG).[30] Again, historically this

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[26] *See also* § 84(5) AKTG 1937 (creditors' right to sue).

[27] *See* §§ 309 et seq., 317 et seq. (hereto Herbert Wiedemann, ORGANVERANTWORTUNG UND GESELLSCHAFTERKLAGEN IN DER AKTIENGESELLSCHAFT 47-52 (1989); Federal Court of Justice, Mar. 3, 2008, II ZR 124/06, NJW 2008, 1583 *UMTS-Lizenzen* (Ger.)); §§ 148 et seq. AKTG (hereto Cabinet Draft UMAG (*supra* n. 17), at 1, 19-25); *see also* Federal Court of Justice, Apr. 21, 1997, II ZR 175/95, NJW 1997, 1926, 1927-1928 *ARAG/Garmenbeck* (Ger.) (duty of the supervisory board to enforce liability of the management board). On the remaining limitations of the German derivative action compared to its U.S. equivalent see recently Tilman Bezzenberger, *Die derivative Haftungsklage der Aktionäre – Deutsches und US-amerikanisches Recht*, ZGR 2018, 584 (arguing against further expansion).

[28] *Cf.* Amtliche Begründung Aktiengesetz 1937 zu §§ 77, 78 [Official Justification for the AKTG 1937] (Ger.), cited from Kalss, Burger & Eckert, *supra* n. 23, at 645 (management compensation shall conform to popular conceptions). *Cf. also* § 77(3) AKTG 1937 (granting the public prosecutor a right to sue to ensure that management's profit based compensation does not fall out of an "appropriate relation" to the expenditures for employees and charitable institutions).

[29] *See* Eddy Wymeersch, *Comparative Study of the Company Types in Selected EU States*, ECFR 2009, 71, 109-113 (comparing the general flexibility of European company laws); Nadine Elsner, Mario Hössl & Ulrich Torggler, *Die Satzungsstrenge: Leitbild und Realität der AG*, DER GESELLSCHAFTER [GESRZ] 2017, 78-86 (discussing the limitations of German and Austrian stock corporation law from a comparative perspective).

[30] *See recently* Simon Deakin & Olaf Riss, *Directors' and Officers' Liability: Comparative Report*, *in* DIRECTORS' AND OFFICERS' (D & O) LIABILITY, paras. 127-137 (Simon Deakin, Helmut Koziol & Olaf Riss, eds., 2018); *contrast*, *e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2015).

has been justified by the argument of public interest.[31] But even in recent legislation, the thought of imperative duties is still present, seen for example in the 2009 amendment of § 93 AKTG which only allows D&O insurance for board members if a self-deductible exists as a deterrent (§ 93(2) sentence 3 AKTG).[32]

B. The Impact on Directors' Duties

To sum up the above, a historic distrust of shareholder primacy led to the detailed regulation of directors' duties, and the threat of court control was envisioned in Germany as the preferred mechanism for checking the behaviour of directors. German legal literature accounts for this, for example, when discussing *ex ante* efficient breaches of the law, deeming directors in principle liable vis-à-vis the corporation for all resulting *ex post* harm and thereby equating corporate and public interests ("duty of obedience"[33]).[34] This is primarily discussed for provisions aimed at specific third party effects (which the

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[31] On liability waivers see Bericht der IX. Kommission über den Entwurf eines Gesetzes, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften [Commission Report on the Draft for the AKTG 1884], *in* STENOGRAPHISCHE BERICHTE ÜBER DIE VERHANDLUNGEN DES REICHSTAGES, 5. LEGISLATURPERIODE – IV. SESSION 1884, Vierter Band, Aktenstück 128, at 1009, 1020 ("*erwidert, daß die bezüglichen Vorschriften, welche auch das Interesse der Gläubiger berücksichtigten, derartig öffentlichen Rechtes seien, daß sie nicht gemindert werden könnten*").

[32] Beschlussempfehlung und Bericht des Rechtsausschusses (6. Ausschuss) zu Entwurf eines Gesetzes zur Angemessenheit der Vorstandsvergütung (VorstAG) [Legal Committee's Resolution Recommendation and Report], DEUTSCHER BUNDESTAG: DRUCKSACHEN 16/13433, at 11 (Ger.).

[33] *Cf.* Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457 (2010-11); for a different explanation *cf.* Leo E. Jr. Strine, Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 650 (2010) ("When directors knowingly cause the corporation to do what it may not - engage in unlawful acts or unlawful businesses - they are disloyal to the corporation's essential nature").

[34] Holger Fleischer, *in* KOMMENTAR ZUM AKTIENGESETZ, BAND 1 § 93, Rn. 36 (Spindler & Stilz, eds., 3rd ed. 2015); Hans-Joachim Mertens & Andreas Cahn, *in* KÖLNER KOMMENTAR ZUM AKTIENGESETZ, BAND 2/1 § 93, Rn. 21 (Wolfgang Zöllner & Ulrich Noack, eds., 3rd ed. 2010); Gerd Krieger & Viola Sailer-Coceani, *in* AKTG KOMMENTAR, BAND I § 93, Rn. 15 (Karsten Schmidt & Marcus Lutter, eds., 3rd ed. 2015); Marcus Lutter, *Die Business Judgment Rule und ihre praktische Anwendung*, ZIP 2007, 841, 843-844; with qualification Christoph Grigoleit & Lovro Tomasic, *in* AKTIENGESETZ – KOMMENTAR § 93, Rn. 9-15 (Christoph Grigoleit, ed. 2013); critically from an Austrian perspective Ulrich Torggler, *Wider die Verselbständigung der Begriffe: Compliance, Legalitätspflicht und Business Judgment Rule*, *in* COMPLIANCE - BEITRÄGE ZUM 4. WIENER UNTERNEHMENSRECHTSTAG (2015) 97, 99-113, 123-127 (Susanne Kalss & Ulrich Torggler, eds. 2016).

corporation thereby internalises); however, considering the reasoning behind the principle of statute stringency, it also includes corporate governance rules within the corporation (limitations due to the corporate purpose, necessary approval of other bodies, allocation of duties and rules of procedure, etc.; *cf.* § 82(2) AktG).[35]

This historic background explains why current German scholarship devotes considerable attention to drawing a line between business decisions in a narrow sense and so-called "mandatory board tasks," which are regulated by a special provision in the German Stock Corporation Act (*e.g.*, § 87(1)) or elsewhere.[36] This is because even if such *leges speciales* employ sweeping clauses and/or involve entrepreneurial discretion (*e.g.*, the duty to file for insolvency, which entails prognostic assessments under § 19(2) of the Insolvency Act[37]), German courts appear to review directors' decisions not only against procedural standards of business judgment, but also on their merits.[38] If a particular decision is substantively predetermined, court review is supposed to be governed solely "by the applicable law and its purpose".[39]

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[35] *Cf.* Grigoleit & Tomasic, *in* Aktiengesetz – Kommentar § 93, Rn. 19 (Grigoleit, ed. 2013); for a broad understanding of the duty of obedience Hopt & M. Roth, *in* Aktiengesetz - Großkommentar, Band 4/2 § 93, Rn. 74, 78-79, 82, 132 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015).

[36] In detail Philipp Maximilian Holle, *Rechtsbindung und Business Judgment Rule*, AG 2011, 778-786; *see also* Hopt & M. Roth, *in* Aktiengesetz - Großkommentar, Band 4/2 § 93, Rn. 74-77 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015); Krieger & Sailer-Coceani, *in* AktG Kommentar, Band I § 93, Rn. 15 (K. Schmidt & Lutter, eds., 3rd ed. 2015); critically Nicolas Ott, *Anwendungsbereich der Business Judgment Rule aus Sicht der Praxis – Unternehmerische Entscheidungen und Organisationsermessen des Vorstands*, ZGR 2017, 149, 160.

[37] Mertens & Cahn, *in* Kölner Kommentar zum Aktiengesetz, Band 2/1 § 93, Rn. 17 (Zöllner & Noack, eds., 3rd ed. 2010).

[38] *Cf. already* Federal Court of Justice, Apr. 21, 1997, II ZR 175/95, NJW 1997, 1926, 1928 *ARAG/Garmenbeck* (Ger.) (indicating different categories of breaches of duties); Federal Court of Justice, June 6, 1994, II ZR 292/91, Deutsches Steuerrecht [DStR] 1994, 1054, 1057 (Ger.) (§ 19 Abs 2 InsO; acknowledging discretion "to some degree"); Federal Court of Justice, Feb. 12, 2007, II ZR 308/05, DStR 2007, 816, Rn. 16 (same) (Ger.).

[39] Holle, AG 2011, 778, 785; Uwe Hüffer & Jens Koch, Aktiengesetz § 93, Rn. 11, 16 (13th ed. 2018); Hopt & M. Roth, *in* Aktiengesetz - Großkommentar, Band 4/2 § 93, Rn. 75 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015); Mertens & Cahn, *in* Kölner Kommentar zum Aktiengesetz, Band 2/1 § 93, Rn. 19 (Zöllner & Noack, eds., 3rd ed. 2010); Ott, ZGR 2017, 149, 160-161.

In reality, the legal basis and the extent of director discretion relating to mandatory board tasks is widely disputed. Most of German literature opposes the application of the BJR,[40] implying a more stringent court review of all legally predetermined decisions.[41] Specifically, there is support for less court "abstention"[42] with regard to what is called "mandatory" judgments.[43] Others deny a significant difference between business decisions and mandatory board tasks and consequently argue in favour of the BJR.[44] The genesis of § 93(1) sentence 2 AKTG provides arguments for both sides.[45] In any event,

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[40] Holle, AG 2011, 778, 780-785 (explicitly drawing on the duty of obedience); Hüffer & Koch, AKTIENGESETZ § 93, Rn. 11, 16 (13th ed. 2018); Grigoleit & Tomasic, *in* AKTIENGESETZ – KOMMENTAR § 93, Rn. 36, 27-29, 31 (Grigoleit, ed. 2013); Fleischer, *in* KOMMENTAR ZUM AKTIENGESETZ, BAND 1 § 93, Rn. 69a with n. 418, 419 (Spindler & Stilz, eds., 3rd ed. 2015); Gerald Spindler, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 2 § 93, Rn. 75-83 (Wulf Goette & Mathias Habersack, eds., 4th ed. 2014); Gregor Bachmann, *Zehn Thesen zur deutschen Business Judgment Rule*, WERTPAPIER-MITTEILUNGEN [WM] 2015, 105, 109; *cf. also* Katja Langenbucher, *Vorstandshandeln und Kontrolle – Zu einigen Neuerungen durch das UMAG*, DSTR 2005, 2083, 2085-2086; Arbeitskreis „Externe und interne Überwachung der Unternehmung" der Schmalenbach Gesellschaft für Betriebswirtschaft e.V., *Praktische Empfehlungen für unternehmerisches Entscheiden*, DER BETRIEB [DB] 2006, 2189, 2190-2191; for a dissenting view see Mertens & Cahn, *in* KÖLNER KOMMENTAR ZUM AKTIENGESETZ, BAND 2/1 § 93, Rn. 17-20 (Zöllner & Noack, eds., 3rd ed. 2010); Nietsch, ZGR 2015, 631, especially 654-656; Krieger & Sailer-Coceani, *in* AKTG KOMMENTAR, BAND I § 93, Rn. 16 with n. 66 (K. Schmidt & Lutter, eds., 3rd ed. 2015); Ott, ZGR 2017, 149, 160-162; Torggler, *in* COMPLIANCE (*supra* n. 34) 97, 115 n. 123, p. 119 (BJR *per analogiam*); similarly Wulf Goette, *Zur Frage, welche Anforderungen an die Geschäftsleitung und ihre Berater bei der Fertigung einer Fortführungsprognose zu stellen sind (Teil II)*, DSTR 2016, 1752, 1753-1755 (§ 19(2) INSO); *cf. also* Andreas Cahn & Henny Müchler, *Produktinterventionen nach MiFID II Eingriffsvoraussetzungen und Auswirkungen auf die Pflichten des Vorstands von Wertpapierdienstleistungsunternehmen*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [BKR] 2013, 45, 52.

[41] Explicitly Hopt & M. Roth, *in* AKTIENGESETZ - GROßKOMMENTAR, BAND 4/2 § 93, Rn. 116-127, especially Rn. 124, 126 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015) (distinguishing between standards of review filtering out "unreasonable" vs. "irresponsible" decisions; *but cf. id.* at Rn. 75-77); Spindler, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 2 § 92, Rn. 66 (Goette & Habersack, eds., 4th ed. 2014) (§ 19(2) INSO); *see also infra* n. 51 *et seq.*; *but see* Walter Bayer, *Die Innenhaftung des GmbH-Geschäftsführers de lege lata und de lege ferenda*, GMBHRUNDSCHAU [GMBHR] 2014, 897, 900 (stressing limited court review).

[42] *Cf.* hereto Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

[43] Holle, AG 2011, 778, 785.

[44] *I.e.*, at least an analogous application of § 93(1) sentence 2 AKTG. *See* the references *supra* n. 40.

[45] On the one hand, its drafters sought to exclude what they called "legally bound" decisions from the BJR (Cabinet Draft UMAG (*supra* n. 17), at 11). On the other hand, the application of the BJR was explicitly rejected in the deliberations only when it comes to mandatory board tasks that do *not* comprise an element of board discretion (Cabinet Draft UMAG (*supra* n. 17), at 11; similarly Grigoleit & Tomasic, *in* AKTIENGESETZ – KOMMENTAR § 93, Rn. 19 (Grigoleit, ed. 2013); Lutter, ZIP 2007, 841, 843 (management cannot invoke BJR when it decides not to fulfill disclosure duties)). *Argumentum e contrario*, this could imply a legislative intent to limit court review with regard to such discretional board tasks (*cf.* Holle, AG 2011, 778, 780-781; Hopt & M. Roth, *in* AKTIENGESETZ - GROßKOMMENTAR, BAND 4/2 § 93, Rn. 77 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015)).

there is consensus that the scope of director discretion hinges on the degree to which the applicable law regulating the board task explicitly grants discretion or necessarily remains incomplete. German financial reporting law may serve as an example, putting emphasis on the goal of creditor protection and thus constraining the possible leeway granted by supporters of an "Accounting Judgment Rule".[46]

C. The Special Case of Corporate Disclosure

Against the backdrop of this legal framework, business judgment is little discussed under German law when it comes to decisions on corporate disclosure.[47] This is especially true for § 15 WpHG (Art. 17 MAR), as Gerald Spindler not long ago pointed out.[48] Even though the European continuous disclosure regime makes extensive use of indeterminate notions (*infra* III), Spindler is reluctant to depart from the basic principle under German stock corporation law that the BJR is not applicable when it comes to legally predetermined management responsibilities.[49] Making a case for this stance is the

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[46] *Cf.* Susanne Kalss & Georg Durstberger, *Die Business Judgment Rule bei der Aufstellung der Bilanz*, ZEITSCHRIFT FÜR RECHT UND RECHNUNGSWESEN [RWZ] 2016, 60, 64; Moritz Pöschke, *Wahlrechte und „Ermessensspielräume" im Bilanzrecht und die Business Judgement Rule*, ZGR 2018, 647, 648, 657 n. 46; on the Accounting Judgment Rule see also Hanno Merkt, *Bilanzierungsentscheidungen und unternehmerisches Ermessen*, DER KONZERN 2017, 353.

[47] This makes for a stark contrast to U.S. law, where business judgment is traditionally discussed as the basis of almost all continuous disclosure; *cp.* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 850 n. 12 (2nd Cir. 1968) ("the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC"); Financial Industrial Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514, 517-518 (10th Cir. 1973) (arguing that the BJR protecting *directors and officers* "is not directly applicable …, but the reasons for it are considered as extended to the corporate entity"); *cf. also* Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1070 (1990); for a dissenting view see Jeffrey D. Bauman, *Rule 10b-5 and the Corporation's Affirmative Duty to Disclose*, 67 GEO. L. J. 935, 959-960 (1979) (arguing that courts are better equipped to review "whether a … decision not to disclose constitutes a breach of an affirmative statutory duty" and that complete deference to management's judgment might "frustrate one of the basic purposes of the federal securities laws").

[48] Spindler, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 2 § 93, Rn. 84 (Goette & Habersack, eds., 4th ed. 2014).

[49] Spindler, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 2 § 93, Rn. 84 (Goette & Habersack, eds., 4th ed. 2014). *Cf.* Fleischer, *in* KOMMENTAR ZUM AKTIENGESETZ, BAND 1 § 93, Rn. 67 (Spindler &

plentiful jurisprudence on § 131(3)(1) of the German AktG, stating that management – acting on behalf of the corporation – may, in exceptional cases, deny information to shareholders in the general meeting if the disclosure would likely cause significant harm to the corporation's business.[50] Although § 131 AktG explicitly requires management's (business) judgment in estimating the potential harm (referring to "sound entrepreneurial appraisal" of the facts), German courts, supported by an extensive body of literature,[51] regularly scrutinise the merits of management's decision.[52]

It is questionable, however, whether § 131 AktG can serve as a guideline for the application of MAD/R even under German law.[53] This is because the stringent review applied to decisions to withhold information is shaped and supported by the legislative history of § 131 AktG, declaring an intention to constrain the discretion granted by its predecessor, § 112(3) sentence 2 AktG 1937.[54] In the absence of such an explicit legislative declaration, the argument for or against the application of the BJR therefore comes down to whether the provision at hand is implicitly sceptical of the decision-making process. A recent decision of the Austrian Supreme Court, dealing with a body of law largely comparable to the German Stock Corporation Act, may serve to illustrate

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Stilz, eds., 3rd ed. 2015) (mentioning disclosure duties vis-à-vis the capital markets as a negative example for entrepreneurial decisions but implicitly accepting exceptions to this rule); *see also* Fleischer, ZIP 2004, 685, 690, 689; similarly Arbeitskreis Unternehmensüberwachung, DB 2006, 2189, 2191.

[50] This is the central provision in the *Porsche* case, *cf. supra* n. 7.

[51] Christian Kersting *in* Kölner Kommentar zum Aktiengesetz, Band 3/1 § 131, Rn. 3, 289, 508 (Zöllner & Noack, eds., 3rd ed. 2010); Dietmar Kubis, *in* Münchener Kommentar zum Aktiengesetz, Band 3 § 131, Rn. 109 (Goette & Habersack, eds., 4th ed. 2018); Mathias Siems, *in* Kommentar zum Aktiengesetz, Band 1 § 131, Rn. 35 (Spindler & Stilz, eds., 3rd ed. 2015) (no discretion).

[52] *E.g.*, Regional Court Heilbronn, Mar. 6, 1967, KfH AktE 1/67, AG 1967, 81, 82; Higher Regional Court Düsseldorf, July 17, 1991, 19 W 2/91, AG 1992, 34, 35; in the *Porsche* case Regional Court Stuttgart, Dec. 19, 2017, 31 O 33/16 KfH, AG 2018, 240, para. 196.

[53] *But see* Markus Pfüller, *in* Wertpapierhandelsgesetz § 15, Rn. 382 (Andreas Fuchs, ed., 2009) (before MAR); *cf. also* Georg A. Frowein, *§ 10 Pflicht zur Veröffentlichung von Insiderinformationen (§ 15 WpHG)*, *in* Handbuch der Kapitalmarktinformation, Rn. 107 (Mathias Habersack, Peter O. Mülbert & Michael Schlitt, eds., 2nd ed. 2013) (same).

[54] *See infra* n. 192; Kersting *in* Kölner Kommentar zum Aktiengesetz, Band 3/1 § 131, Rn. 3 (Zöllner & Noack, eds., 3rd ed. 2010).

this point. In regard to the information duties of a private foundation vis-à-vis its beneficiaries, the court stressed that the BJR would not be applicable, simply because the relevant provision (§ 30(1) of the AUSTRIAN PRIVATE FOUNDATION ACT[55]) served to protect against agent overreach and therefore did not grant any discretion to management.[56] In the same vein, Spindler seems to be concerned that acknowledging wide discretion of management may run contrary to complete market information, in his opinion the fundamental purpose of continuous disclosure under § 15 WPHG (Art. 17 MAR).[57]

Approaching the topic from the perspective of capital markets law, Lars Klöhn seems to advocate a more liberal stance. To be sure, he draws on the majority position in Germany,[58] arguing that the BJR is not applicable when the board decides on the delay of disclosure under Art. 17(4) MAR, which in his view, is a legally predetermined duty (*i.e.*, not a business decision[59]).[60] However, Klöhn stresses that MAR itself grants

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[55] PRIVATSTIFTUNGSGESETZ [PRIVATE FOUNDATION ACT], BGBL No. 694/1993, as amended (Austria).
[56] Austrian Supreme Court Feb. 23, 2016, 6 Ob 160/15w, ZEITSCHRIFT FÜR STIFTUNGSWESEN [ZFS] 2016, 58, para. 8.3. (Austria) (commented by Martin Karollus).
[57] Spindler, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 2 § 93, Rn. 84 (Goette & Habersack, eds., 4th ed. 2014); likewise Pfüller, *in* WERTPAPIERHANDELSGESETZ § 15, Rn. 383 (Fuchs, ed., 2009) (explicitly drawing on § 131(3)(1) AKTG); Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19, para. 71; *cf. also* Bauman, 67 GEO. L. J. 935, 960 (1979). Luca Enriques & Sergio Gilotta discuss this concept as the "price accuracy enhancement" goal of mandatory disclosure (*Disclosure and Financial Market Regulation*, *in* THE OXFORD HANDBOOK ON FINANCIAL REGULATION 512, 518 (Niamh Moloney, Eilís Ferran & Jennifer Payne, eds., 2015)).
[58] *Supra* n. 40 et seq.
[59] Likewise Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19, para. 71.
[60] Lars Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 157 (Lars Klöhn, ed., 2018); Lars Klöhn & Klaus Ulrich Schmolke, *Der Aufschub der Ad-hoc-Publizität nach Art. 17 Abs. 4 MAR zum Schutz der Unternehmensreputation*, ZGR 2016, 866, 884 (citing *Fleischer*); *see also* Rüdiger Veil & Alexander Brüggemeier, *§ 10 Veröffentlichungen von Insiderinformationen*, *in* HANDBUCH ZUM MARKTMISSBRAUCHSRECHT, Rn. 103 (Andreas Meyer, Thomas Rönnau & Rüdiger Veil, eds., 2018) (describing "legitimate interests" as an indeterminate legal concept, dismissing the application of the BJR, but mentioning the possibility of acknowledging a legal judgment benefitting the management board); *cf.* Frowein, *in* HANDBUCH DER KAPITALMARKTINFORMATION (*supra* n. 53), § 10, Rn. 107 (mentioning § 93(1) sentence 1 AKTG and advocating for a distinct review standard similar to that under § 131(3)(1) AKTG (*cf. supra* n. 51 *et seq.*)); Pfüller, *in* WERTPAPIERHANDELSGESETZ § 15, Rn. 382-383 (Fuchs, ed., 2009) (explicitly drawing on § 131(3)(1) AKTG).

discretion to the issuer, thus restricting court review of disclosure policy.[61] He then goes on to identify a rationale for this abstention that effectively resembles the policy goals of the BJR,[62] namely providing an environment in which directors can optimally pursue shareholder value maximization.[63]

It is this conflict between the historical tendency of dirigisme in German corporate governance and a supposed European concept of shareholder primacy under MAD/R through which we can explain the divergence between corporate and capital markets law scholarship in Germany. Coming back to our original question, directors' room for manoeuvring corporate scandal under European market abuse law then appears to be determined to a large degree by how we conceptualize continuous disclosure as such. At this point, it therefore seems appropriate to engage with MAD/R more deeply on the European level before dealing with its effects on the relationship between management, shareholders and the public under German corporate law.

III. Issuer's Margin of Appreciation under the Continuous Disclosure Regime

A. The Basic Obligation of Continuous Disclosure (Art. 6(1) MAD/17(1) MAR)

Focusing on management's discretion when looking at the duty to disclose inside information under MAD/R, a differentiation between the fundamental obligation (Art. 6(1) / Art. 17(1)) and the issuer's option to delay disclosure (Art. 6(2) / Art. 17(4)) seems to be in order. This is because the European Court of Justice (ECJ), in its first two rulings

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[61] Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 157, 163 (Klöhn, ed., 2018).
[62] Lars Klöhn, *Der Aufschub der Ad-hoc-Publizität wegen überwiegender Geheimhaltungsinteressen des Emittenten gem. § 15 Abs. 3 WpHG*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT [ZHR] 178 (2014) 55, 86-87.
[63] Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 157-158 (Klöhn, ed., 2018); Klöhn & Schmolke, ZGR 2016, 866, 884, 886.

on MAD's continuous disclosure regime, already has conspicuously limited wiggle room for determining when the issuer is in possession of inside information. It has generally required companies to "inform the public as soon as possible":

In the case of *Geltl*, the German Federal Court of Justice (BGH) asked the ECJ to decide on a doctrinal conceptualization of inside information that in turn would have significantly limited issuer responsibility. The BGH had to establish the point in time when DaimlerChrysler AG had been in possession of issuer-related inside information after its CEO decided to step down, the ensuing change in leadership raising the car manufacturer's market capitalisation by almost 10 per cent.[64] Under the concept of "Sperrwirkung" (literally "blocking effect"),[65] the Higher Regional Court Stuttgart had found no inside information to disclose before the supervisory board committee proposal to terminate the directorship. The court instead classified all prior material non-public information as mere "intermediate steps" to the change of management and regarded their relevance under MAD as contingent on the precision of this "final event".[66] Thus, a disclosure obligation (ex § 15(1) WpHG, Art. 6(1) MAD) was held not to exist until the point in time when a new appointment could "reasonably be expected" (Art. 1(1) Directive 2003/124/EC[67]).[68]

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[64] *See* Gordon Smith & Richard Milne, *Schrempp quits as chief of DaimlerChrysler*, FINANCIAL TIMES, July 28, 2005, https://www.ft.com/content/0c8a9912-ff42-11d9-86df-00000e2511c8.

[65] On the prior German discussion and its implications, see Rüdiger Veil, *§ 13 Insider Dealing*, *in* EUROPEAN CAPITAL MARKETS LAW, paras. 38-41 (Rüdiger Veil, ed., 1st ed. 2013).

[66] Higher Regional Court Stuttgart Apr. 22, 2009, 20 Kap 1/08, ZIP 2009, 962, 964-969.

[67] 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, 2003 O.J. (L 339) 70.

[68] Similarly, the Austrian Supreme Administrative Court held in the case of *Raiffeisen Bank International* that preliminary internal board talks did not constitute inside information because the discussed merger was not, at the time, sufficiently probable; Austrian Supreme Administrative Court Apr. 29, 2014, 2012/17/0554, ÖSTERREICHISCHES BANKARCHIV [ÖBA] 2014, 627. On a related question before the Greek Supreme Court, see Panagiotis Staikouras, *Dismantling the EU insider dealing regime: the Supreme Court of Greece's muddled interpretation of "inside information"*, 9 L. & FIN. MKTS. REV. 210 (2015).

In its preliminary ruling, the ECJ decided against such a narrowing of the notion of inside information, joining the Advocate General in focusing on its adverse implications for the effectiveness of the prohibition of insider trading.[69] Interestingly, however, and without an imminent need to do so in *Geltl*, the court went one step further and discussed the general impossibility of objectively defining the category of final events as the necessary points of reference to "block" intermediate steps from qualifying as inside information on their own:

> The risk of [certain parties being in an advantageous position vis-à-vis other investors] is all the greater given that it would be possible, in certain circumstances, to regard the outcome of a specific process as an intermediate step in another, larger process.[70]

Following the ECJ, the issuer should not be in a position to defer deliberately the coming into existence of inside information by simply drawing on the endless repository of factors that might yet affect the outcome of any ongoing process.[71] This line of thought also echoes in the ECJ's second decision on continuous disclosure, the French case of *Lafonta*. Therein, the court decided on a low threshold for the criterion of precision, stating that otherwise

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[69] *See* Case C-19/11, Markus Geltl v. Daimler AG, paras. 33-36; *cf.* Opinion of AG Mengozzi, paras. 46-54.
[70] Case C-19/11, para. 37. *Cf. also id.* paras. 30-31 (finding no evidence for a – necessary – delimitation of the notion of intermediate steps in the directive).
[71] *See* Hellgardt, *The notion of inside information in the Market Abuse Directive:* Geltl, COMMON MKT. L. REV. 2013, 861, 870-871 (pointing out the "conceptual flaw" of leaving aside intermediate steps); *see also* Higher Regional Court Frankfurt Feb. 12, 2009, NJW 2009, 1520, 1521 (consolidation of intermediate steps under a final event abnegates the *lex scripta* and is contrary to legislative intent); *cf. also* UK Financial Services Authority Jan. 19, 2009, Final Notice to *Wolfson Microelectronics plc* (no offsetting of information under Art. 6 MAD).

> …the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other actors on the market.[72]

Again, the ECJ sought to put an end to a loophole that was potentially enabling issuers to avoid early disclosure – and thereby creating a hazard for outside market participants.[73]

Two recent decisions by the Austrian Supreme Administrative Court serve to illustrate how the ECJ's reasoning substantially reduces issuers' latitude under Art. 6(1) MAD (now Art. 17(1) MAR). In the case of *Verbund*, the eponymous Austrian energy company was on its way to conclude an asset swap deal with German competitor E.ON. After the negotiations leaked to the press, the Austrian financial market authority fined Verbund for having failed to disclose the ongoing negotiations. The defendant was at first able to convince the court of appeals that the closing of the deal was not yet precise at the time the press got wind, thus "blocking" the issuer's obligation.[74] However, the Supreme Administrative Court chose to side with the authority, which had *inter alia* argued that a delimitation of the notion of "final events" was logically impossible and only served to immunize the issuer.[75] In striking contrast to its own prior case law,[76] the court then drew on the ECJ's reasoning in *Geltl* and *Lafonta* in concluding that the signing of a preliminary Memorandum of Understanding between the companies was to be regarded

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[72] Case C-628/13, Jean-Bernard Lafonta v. Autorité des marchés financiers, para. 36.
[73] *Cf.* Hansen, ERA FORUM 2017, 21, 29-30. For a critical take on issuer disclosure in the case of *Lafonta*, see Lars Klöhn, *Inside information without an incentive to trade? What's at stake in* 'Lafonta v AMF', 10 CAPITAL MKTS. L. J. 162, 170-176 (2015).
[74] Austrian Federal Administrative Court July 1, 2015, W148 2014666-1.
[75] *See* Austrian Supreme Administrative Court Apr. 20, 2016, Ra 2015/02/0152, ÖBA 2016, 615, 616.
[76] *Supra* n. 68. In its first decision in *Verbund*, the court sought to distinguish the case from its prior judicature by pointing to the particularly high determinacy of the issuer's plans (Austrian Supreme Administrative Court Ra 2015/02/0152, ÖBA 2016, 615, 617). This approach has been criticized however, because it provides no explanation for a wholesale departure from consolidating intermediate steps under an appurtenant final event (*supra* n. 65): *See* Thomas Barth, *Zur Kursrelevanz eines Zwischenschritts in einem gestreckten Sachverhalt*, DER GESELLSCHAFTER – GESRZ 2016, 359, 362-363 (on the subsequent appeals decision after remand).

as inside information. The court argued that the information was firstly undoubtedly precise (it had already happened)[77] and secondly it was likely on its own to affect a reasonable investor's judgment when evaluating Verbund's issuances.[78]

This rigid construction of Art. 6(1) MAD clearly contrasts with issuers' option to delay the disclosure of inside information under paragraph 2 (Art. 17(4) MAR), which presupposes discretion in that the issuer "may under his own responsibility" choose to postpone.[79] In fact, the unaltered retention of the wide notion of inside information under MAR is premised on a common understanding between EU Member States that issuers should in turn be granted access to the exemption in Art. 17(4) broadly.[80] The compensating role of the delay mechanism can be seen in Art. 17(4), which explicitly encompasses intermediate steps (subparagraph 2).[81] Along the same lines, the procedural preconditions for delay under (4) have been harmonized to emphasise issuer discretion: Whereas under MAD, Member States could require *ex ante* notification of delay to the competent authority (Art. 6(3) sentence 2 MAD), MAR now abolishes this perceived hindrance (subparagraph 3).[82] In the context of the VW litigation, this does not pose a

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[77] *Cf.* Austrian Supreme Administrative Court Ra 2015/02/0152, ÖBA 2016, 615, 616. *See also* Katja Langenbucher, *Insider trading in European law*, *in* RESEARCH HANDBOOK ON INSIDER TRADING 429, 437-438 (Stephen M. Bainbridge, ed., 2013) (on the precision of intermediate steps and final events, respectively).

[78] *See* Austrian Supreme Administrative Court Aug. 22, 2017, Ro 2016/02/0020, ÖBA 2017, 642, 643 paras. 11-13 (upholding the court of appeal's decision, Austrian Federal Administrative Court July 20, 2016, W148 2014666-1).

[79] *See* Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19, para. 53 (delay mechanism as a "correction" for the far-reaching disclosure obligation); Federal Court of Justice Apr. 23, 2013, II ZB 7/09, NJW 2013, 2114, 2117 (Ger.) (same). *Cf.* Sergio Gilotta, *Disclosure in Securities Markets and the Firm's Need for Confidentiality: Theoretical Framework and Regulatory Analysis*, 13 EUROP. BUS. ORG. L. REV. 45, 75 (2012) ("[T]he whole regulatory equilibrium eventually revolves around how broadly – or narrowly – access to the safe harbour will be granted.").

[80] *See* Presidency compromise Oct. 31, 2012, doc. 15707/12; on the legislative process, see Jesper L. Hansen, *Say when: When must an issuer disclose inside information?*, LSN NORDIC & EUROPEAN COMPANY LAW WORKING PAPER 16-03, 21-23 (2016).

[81] *See*, *e.g.*, Niamh Moloney, EU SECURITIES AND FINANCIAL MARKETS REGULATION 734 (3rd ed. 2014); Hansen, ERA FORUM 2017, 21, 34. But *cf. infra* n. 113 (on ESMA's reluctant stance).

[82] *See* Alain Pietrancosta, *Article 17: Public Disclosure of Inside Information*, *in* MARKET ABUSE REGULATION: COMMENTARY AND ANNOTATED GUIDE, B.17.86-88 (Marco Ventoruzzo & Sebastian Mock, eds., 2017).

problem since Germany was one of the Member States to opt for notification *ex post* already under MAD.[83] The fact that Austria chose notification *ex ante* turned out to be inconvenient for Verbund: While the issuer argued for the authority's interpretation of § 48d(1) BÖRSEG (*cf.* Art. 6(1) MAD) to be overreaching, the Supreme Administrative Court was able to hedge its bet easily by pointing at the possibility of a delay (§ 48d(2) BÖRSEG, *cf.* Art. 6(2) MAD).[84] Given the lack of proper *ex ante* notification by Verbund, the court did not need to consider the conditions of delay seriously for the case at hand.

Regardless of these procedural requirements, the option to delay has another important implication specifically when brought up in shareholder litigation. This is because it establishes the conditions under which the law does not recognize harm to the market from issuers' silence. The option to delay hence excludes issuer liability for unlawful nondisclosure if it can demonstrate the hypothetical that shareholders would not be better off (*i.e.*, informed) even if the issuer had fully complied with European market abuse law.[85] VW of course does not fail to make this case;[86] its defense therefore turns on the question of whether all substantive requirements for the delay were met at the different cited points in time. It therefore seems adequate to deal with these criteria first before moving on to the specific organisational surroundings in which management has to embed its decision for the issuer's information policy under MAR.

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[83] For an overview, *see* Committee of European Securities Regulators, *Review Panel report: MAD Options and Discretions*, Mar. 29, 2010, CESR/09-1120, paras. 204-208; *cf.* Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19, paras. 69-70.
[84] Austrian Supreme Administrative Court Ro 2016/02/0020, ÖBA 2017, 644-645.
[85] On the irrelevance of procedural requirements, see Federal Court of Justice Apr. 23, 2013, II ZB 7/09, NJW 2013, 2114, 2118-2119 (Ger.); *cf.* Koch *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19, para. 97.
[86] *See* Regional Court Braunschweig Aug. 5, 2016, 5 OH 62/16, under B.3.

B. The Requirement of Confidentiality (Art. 6(2) sentence 1 MAD/17(4)(c) MAR)

The most important substantive requirement of Art. 6(2) MAD (Art. 17(4)(c) MAR) is arguably the confidentiality of the information during the delay. This is due to the systematic relevance of the precondition. Indeed, the continuous disclosure obligation was transferred from the Listing Directive of 1979 to the market abuse regime with the specific aim of preventing insider trading.[87] From this perspective, the retention of material information within the issuer's control constitutes a logical equivalent – there is no impairment to the level playing field between market participants.[88] Art. 6(3) MAD (now Art. 17 (8) MAR) unambiguously expresses this aim by enabling the issuer to administer non-public information as long as all persons authorised are subject to a duty of confidentiality.

For the purposes of shareholder litigation, the requirement of confidentiality can require substantial efforts from courts to determine the class of investors harmed by the issuer's nondisclosure.[89] For example, in the Dutch case of *Super de Boer*, the court tasked two separate expert witnesses to come up with the date when confidentiality had no longer

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[87] *See* Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), May 30, 2001, COM(2001) 281 final 8. *Cf.* Forum of European Securities Commissions, *Market Abuse - FESCO's response to the call for views from the Securities Regulators under the EU's Action Plan for Financial Services*, June 29, 2000, FESCO/00-096l, para. 45; Committee of European Securities Regulators, *Measures to promote Market Integrity – A follow-up paper to CESR's first paper on market abuse*, Feb. 2002, CESR/01-052h, para. 24; Proposal for a Council Directive coordinating regulations on insider trading, May 21, 1987, COM(87) 111 final 7-8. On this preventative character of continuous disclosure, see, *e.g.*, John Armour *et al.*, PRINCIPLES OF FINANCIAL REGULATION 174-175 (2016).

[88] *See*, *e.g.*, European Securities Markets Experts Group, *Market abuse EU legal framework and its implementation by Member states: a first evaluation*, July 6, 2007, 8; Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.85; *cf. also* Australian Stock Exchange, *ASX Listing Rules Guidance Note 8*, Jan. 1, 2003, 6:

> The intention of the exception is to protect the legitimate commercial interests of listed entities in those circumstances where market integrity is not adversely affected.

[89] On the question of harm, see William K.S. Wang, *Stock Market Insider Trading: Victims, Violators and Remedies – Including an Analogy to Fraud in the Sale of a Used Car with a Generic Defect*, 45 VILL. L. REV. 27 (2000); from a European perspective *cf.* Vassilios Tountopoulos, *Private Rechtsdurchsetzung des Insiderrechts? – Eine kritische Analyse unter besonderer Berücksichtigung des europäischen und griechischen Kapitalmarktrechts*, RECHT DER INTERNATIONALEN WIRTSCHAFT 2013, 33.

been warranted before settling on their middle ground.[90] In the case of *VW*, it remains unclear whether inside information has leaked. However, the issue seems less important compared to *Super de Boer*, where the market price was already adapting to merger information prior to the issuer's announcement.[91] In contrast, when the market opened again after the U.S. Environmental Protection Agency (EPA) issued its statement regarding the investigations against VW on Friday, September 18, 2015, VW lost about a fifth of its market capitalization day-on-day.[92] This serves as preliminary testimony to the fact that information about the extent of the infringements did not materially spread to the market until that date.[93]

More directly relevant to the present theoretical inquiry is the assertion that the requirement of confidentiality, determined by market reaction to the selective disclosure of inside information, constitutes a rather unambiguous question of fact. Indeed, CESR chose to avoid problems of accountability under MAD by aiming for a clear-cut delimitation of issuer responsibility for market rumours.[94] This approach was picked up by Art. 17(7)(2) MAR, establishing issuer liability:

> …where a rumour explicitly relates to inside information the disclosure of which has been delayed in accordance with paragraph 4 or 5, where that rumour is

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[90] Gerechtshof Amsterdam [Court of Amsterdam] Nov. 11, 2014, JURISPRUDENTIE ONDERNEMING & RECHT [JOR] 2015/71 VEB/Super de Boer (Neth.); for a review of the court's deliberations, see Bas de Jong, *Can Fluctuations in Prices or Volumes of a Security Trigger a Duty for Listed Companies to Disclose Inside Information?*, 17 EUROP. BUS. ORG. L. REV. 523, 528-530 (2016).
[91] *See* Court of Amsterdam July 10, 2012, JOR 2015/70 (Neth.).
[92] *See* Jack Ewing, *Volkswagen Stock Falls as Automaker Tries to Contain Fallout*, NEW YORK TIMES, Sept. 21, 2015, https://www.nytimes.com/2015/09/22/business/international/volkswagen-shares-recall.html.
[93] *Cf.* Recital 15 MAR (on the indicative function of *ex post* market movements).
[94] *Cf.* Committee of European Securities Regulators, *Market Abuse Directive: Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market*, July 2007, CESR/06-562b, para. 2.11.

sufficiently accurate to indicate that the confidentiality of that information is no longer ensured.

By focusing on external parameters, issuers are thereby prevented from gainsaying their own responsibility for the selective diffusion of non-public information. They cannot simply "deem" a particular piece of information confidential for the purpose of delaying disclosure, but – quite to the contrary – must assume a duty to monitor actual market discussion and price movements for anomalies.[95] As a result, Art. 17(4)(c) MAR does not seem to grant discretion to issuers and persons acting on their behalf.[96]

C. The Boundary not to Mislead (Art. 6(2) sentence 1 MAD/17(4)(b) MAR)

The second substantive requirement for delaying continuous disclosure quite similarly does not allow for issuer discretion, carried out by management. Art. 6(2) MAD stipulated issuers' freedom to delay "provided that such omission would not be likely to mislead the public" (now Art. 17(4)(b) MAR). Interestingly, the criterion was criticised early on based on the assertion that continuous disclosure served to satisfy investors' need for information and therefore any delay was inherently to be regarded as misleading.[97] However, this critique seems to be based on a misunderstanding of the functionality of market abuse law – clashing with the above-mentioned legislative choice to emphasise a level playing field between market participants over considerations of allocative

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[95] *See*, *e.g.*, Jesper L. Hansen & David Moalem, *The MAD disclosure regime and the twofold notion of inside information: the available solution*, CAPITAL MKTS. L. J. 2009, 1, 14-15; Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.85.

[96] *Cf.* Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 266, 283-285 (Klöhn, ed., 2018); Klöhn & Schmolke, ZGR 2016, 866, 892; *see also* Klöhn, ZHR 178 (2014) 55, 90 (confidentiality as an absolute).

[97] *See* Eilís Ferran, BUILDING AN EU SECURITIES MARKET 198 (2004); European Securities Markets Experts Group, *supra* n. 88, at 8; *cf. also* Moloney, *supra* n. 81, at 731; Konstantinos Sergakis, THE LAW OF CAPITAL MARKETS IN THE EU 109-110 (2018) ("conundrum").

efficiency. From the perspective of equal access to information, the withholding of information is not deemed dangerous because it deprives the market of a "complete" informational basis for decision-making but because it can potentially be used as a means to build up artificial informational asymmetries through the strategic withholding of information.[98]

This explains why ESMA decided under MAR to stress issuers' responsibility for misdirecting market expectations by failing to disclose relevant information contrary to their own prior guidance.[99] In its MAR Guidelines, the authority formulates three circumstances under which delay is not available to the issuer, all referring to the issuer's previous public announcements or other signals directly creating market expectations in contrast with new inside information.[100] Put differently, the requirement not to mislead according to ESMA does not interfere with the issuer's latitude so long as the issuer refrains from formulating its disclosures in a future-oriented way (*e.g.*, announcement of financial objectives)[101].[102] This happens to resemble closely the so-called reasonable person test employed by the Australian Stock Exchange following the reasoning in *GPG*

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[98] *Cf.* Jesper L. Hansen, *The trinity of market regulation: Disclosure, insider trading and market manipulation*, 1 INT'L. J. DISCLOSURE & GOVERNANCE 82, 83-85 (2001).

[99] Under MAD, CESR chose not to specify, however dismissing the fundamental critique directed at the criterion: *See* CESR/06-562b, para. 2.12.

[100] MAR Guidelines, para. 9. ESMA initially consulted on a duty to respond to inaccurate market perceptions, but after overwhelmingly negative responses chose to limit the scope of Art. 17(4)(b): *cf.* European Securities and Markets Authority, *MAR Guidelines: Delay in the disclosure of inside information*, Oct. 20, 2016, ESMA/2016/1478, para. 9; European Securities and Markets Authority, *Consultation Paper: Draft guidelines on the Market Abuse Regulation*, Jan. 28, 2016, ESMA/2016/162, paras. 99-102; European Securities and Markets Authority, *Final Report: Guidelines on the Market Abuse Regulation – market soundings and delay of disclosure of inside information*, July 13, 2016, ESMA/2016/1130, paras. 82-85. *Cf.* Hansen, ERA FORUM 2017, 21, 32-33; Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.84; Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19 para. 67.

[101] ESMA/2016/162, para. 99 lit. b.

[102] This resembles the duty to update and its limits as recognized by several U.S. Federal courts: *See*, *e.g.*, Ross v. A.H. Robins Co., 607 F.2d 545, 559 (2nd Cir. 1979); Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990); *In re* Time Warner Inc Securities Litigation, 9 F.3d 259, 267-268 (2nd Cir. 1993). For a dissenting view, *cf.* Sergakis, *supra* n. 97, at 110 (going further in suggesting that the "rate of investors' responsiveness" might limit issuers' ability to withhold disclosure).

(Australia Trading) Pty Ltd v GIO Australia Holdings Ltd.[103] Therein, the Federal Court of Australia held that a public offer directed to the defendant's minority shareholders amounted to deception simply because of it being silent on a material issue. Thus, the court argued,

> a reasonable reader would assume that there was no relevant change for the worse … compared with the announcements [prior].[104]

The issuer therefore cannot renege on its own behaviour if it serves outside market participants as a means to evaluate the meaning of silence for the future.[105]

The significance of requiring the issuer to put itself in a reasonable addressee's place and factor in prior signals can be seen most clearly when contrasted with the U.S. literature advocating for a legal recognition of "optimal dishonesty"[106] in issuer disclosure, including not only strategic withholding of information but also the emission of false signals to the market.[107] Although it may indeed prove socially advantageous in individual cases to allow issuers to cherry-pick disclosure for the maximisation of corporate opportunities, a sound argument can be made against the concomitant immunisation of management from market monitoring.[108] European law is

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[103] *See* ASX Listing Rules Guidance Note 8, para. 5.9.
[104] *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761, para. 101 (Dec. 11, 2001) (Austl.).
[105] On the notion of the reasonable person as an "outsider", *cf. Jubilee Mines NL v Riley* [2009] 40 WAR 299, para. 160 (Austl.).
[106] *Cf.* Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 137-142 (1982) (describing dishonesty as optimal if (i) simple nondisclosure is not available, (ii) not revealing the information is socially beneficial and (iii) misinformation will only cause the misinformed party to behave as they would have in case of nondisclosure).
[107] *See*, *e.g.*, Macey & Miller, 42 STAN. L. REV. 1059, 1091 (1990); Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 948-950 (1991).
[108] *See*, *e.g.*, Dale A. Oesterle, *The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Corporations: "Are We There Yet?"*, 20 CARD. L. REV. 135, 204 (1998); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 114-118 (1997); *cf. also* Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEO. INQ. L. 387, 402 (2001) (arguing that "[i]t is inconceivable that a securities regime would have no liability for fraud").

understandably sceptical on this issue, instead aiming for a compromise: While investors are not in a position to expect all material information (even relating to "final events") to be disclosed immediately, issuers cannot in turn use the delay mechanism for purposes of strategic misinformation.[109] Importantly, in gearing towards the perspective of a potential addressee, MAD/R does not allow the management to second-guess investor needs – truthfulness acting as the second strict precondition for issuers to freely determine what and when to disclose.[110]

D. Issuer's Legitimate Interests (Art. 6(1) sentence 2 MAD/17(4)(a) MAR)

1. Legitimacy as an Indeterminate Legal Concept under MAD/R

Essentially, the requirement of confidentiality and the boundary not to mislead just discussed can be classified as establishing both stringent and minimally invasive boundaries. They certainly constrain issuer discretion and in turn reduce the role of management in steering corporate information policy, while still granting substantial room for taking issuer-specific considerations into account. This places special significance on Art. 17(4)(a) MAR, which now is relatively clear in seeking to limit this sizable latitude by distinctly and separately requiring "legitimate interests" for delaying

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[109] *See also* Art. 12(1)(c) MAR, prohibiting misinformation by any means

> which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument … or secures, or is likely to secure, the price of one or several financial instruments … at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

While Art. 12 prohibits spreading false information, Art. 17(4)(b) sets out an exceptional duty of transparency concerning all facts potentially affected by the prior guidance when the statement was not false at the time it was made; *cf.* ESMA/2016/1130, para. 86.

[110] *Cf.* Klöhn & Schmolke, ZGR 2016, 866, 892; *see also* Klöhn, ZHR 178 (2014) 55, 90 (boundary not to mislead as an absolute).

continuous disclosure.[111] However, the regulation still does not provide any definition of legitimate interests itself, impeding an exact delimitation. This persistent vagueness seems to be a direct consequence of MAD not having devoted much room to the concept. Art. 6(2) treated the safeguarding of legitimate interests not so much as a precondition than as a mere consequence of the delay ("such as not to prejudice his legitimate interests"). And the preparatory material remains completely silent on the passage and its function.[112]

This did not keep authorities and courts in the Member States from attaching significant weight to the phrase, however – based partly on the principle of *singularia non sunt extendenda*, that exceptions ought to be construed and applied restrictively.[113] For example, after the ECJ ruling in the case of *Lafonta*, the French Court of Cassation required the showing of a significant disadvantage resulting from the disclosure if the issuer has withheld information from the market for a prolonged period.[114] And the French Authorité des Marchés Financiers requires issuers to explicitly and clearly determine the potential harm to the issuer, advocating for a narrow interpretation of the criterion of legitimate interests to prevent a perceived erosion of the principle of continuous disclosure.[115] Quite similarly, the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) requires the issuer's interests to outweigh the

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[111] As a comparison, the safeguarding of legitimate interests was not phrased as a prerequisite but as a consequence of delay under MAD, thus limiting the perceived importance of the criterion; *cf.* Niamh Moloney, EC SECURITIES REGULATION 797 (1st ed. 2002); Ferran, *supra* n. 97, at 198-199; Stefan Grundmann & Florian Möslein, EUROPEAN COMPANY LAW: ORGANIZATION, FINANCE AND CAPITAL MARKETS 472 (1st ed. 2007) (no discussion). On the constraining function of Art. 17(4)(a), *see*, *e.g.*, Koch, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19 para. 62 ("key element of the disclosure regime"); Hansen, LSN NORDIC & EUROPEAN COMPANY LAW WORKING PAPER 10-35, 9 (legitimate interests "rare").
[112] *Cf.* COM(2001) 281 final 9; COM(2011) 651 final 9-10; Presidency compromise, June 11, 2012, doc. 11183/12.
[113] *Cf.* ESMA/2016/162, para. 69.
[114] Cour de cassation [Cass.] [supreme court for judicial matters] com., May 27, 2015, 12-21361 (Fr.).
[115] Autorité des Marchés Financiers, *Position-Recommandation DOC-2016-08 sur l'information permanente et la gestion de l'information privilégiée*, para. 1.2.2.1.

deterioration of the market's decision-making basis resulting from the temporary withholding of information (§ 6 WPAV[116]).[117]

This narrow understanding has only recently been challenged. Against the backdrop of the directly applicable MAR, the argument has gained traction in German literature that BaFin's regulation was inapplicable because of it being contrary to EU law.[118] And the European Securities and Markets Stakeholder Group even made out a broader platform advocating to approach the delay-exception more generously after the ECJ defined the fundamental obligation to disclose broadly in the case of *Geltl*.[119] However, the exact consequences for the application of what is now Art. 17(4)(a) MAR are yet unclear, as demonstrated only recently by the British FCA consulting on the application of the delay mechanism in the context of financial reporting.[120] The remaining questions not only comprise whose interests the issuer is held to internalize, but also what then defines their legitimacy in the context of European capital markets law.[121] Again, we use the shareholder litigation against VW to guide our investigation into the delimitating function of the criterion.

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[116] WERTPAPIERHANDELSANZEIGEVERORDNUNG [WPAV] [SECURITIES TRADING NOTIFICATION REGULATION] BUNDESGESETZBLATT [BGBL] I 2004 at 3376, as amended (Ger.).
[117] *See also* Higher Regional Court Frankfurt Feb. 12, 2007, 2 Ss-OWi 514/08 para. 7 (equivalent business secrecy interests).
[118] *See*, *e.g.*, Lars Klöhn, *Ad-hoc-Publizität und Insiderverbot im neuen Marktmissbrauchsrecht*, AG 2016, 423, 430; Klaus J. Hopt & Christoph Kumpan, *§ 107 Insider- und Ad-hoc-Publizitätsprobleme*, *in* BANKRECHTS-HANDBUCH, Rn. 153 (Herbert Schimansky, Hermann-Josef Bunte & Hans J. Lwowski, eds., 5th ed. 2017).
[119] *See* Securities and Markets Stakeholder Group, *Advice to ESMA: Response to ESMA's Consultation Paper on Draft Guidelines on the Market Abuse Regulation*, Mar. 31, 2016, ESMA/2016/SMSG/010, para. 24. *Cf. also* Hansen, LSN NORDIC & EUROPEAN COMPANY LAW WORKING PAPER 16-03, 28 (on the need for issuer secrecy and the necessary access to the delay mechanism under MAR); Koch *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19 para. 53 (same).
[120] Financial Conduct Authority, *Technical Note: Periodic financial information and inside information*, June 2018, FCA/TN/506.2, https://www.fca.org.uk/publication/ukla/tn-506-2-consultation.pdf.
[121] *See also* Pietrancosta *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.81 (referring to divergences in Member State corporate law and established business practices as "obstacles on the road to uniformity and certainty").

2. VW's *View: Informational Market Timing by Delay of Disclosure*

As we already pointed out, VW's goals of discovery aim to establish that even if VW had been in possession of inside information prior to the EPA's announcement on September 18, 2015, investors were not harmed by its nondisclosure (*supra* 0). This argument is based on VW complying with the substantive requirements of the delay provision (ex § 15(3) WpHG / Art. 6(2) MAD). Explicitly, VW argues that it had a legitimate interest to withhold information about its unlawful use of manipulative "defeat devices" until it was able to evaluate the full impact of the scandal. Therefore, the argument goes, VW did not violate the continuous disclosure requirement by issuing a press release only on September 22, 2015 (informing about the provision of 6.5 billion Euros to resolve the scandal)[122].

VW's line of argument in effect draws on the uncertainty to estimate *ex ante* the outcome of its efforts resolving the issue without major financial implications.[123] Before the ECJ's above-mentioned verdict in *Geltl*, such cases were usually classified as protracted processes in Germany, thereby excluding issuer responsibility for nondisclosure of preliminary deliberations altogether due to lack of precision of the financially effective "final event" (*supra* III.A). However, a major take-away from *Geltl* seems to be that all difficulties arising from a potential early duty to disclose have to be dealt with not by restriction of the basic obligation, but on the terms of the delay mechanism. In adjustment to this restrictive approach under Art. 6(1) (Art. 17(1) MAR), German legal literature post

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[122] *See* Profit Warning of September 22, 2015, http://www.dgap.de/dgap/News/adhoc/volkswagen-volkswagen-informiert/?newsID=899395.
[123] *Cf.* Regional Court Braunschweig Aug. 5, 2016, 5 OH 62/16, under B.1.

Geltl generally seems to embrace that uncertainty can in some circumstances *per se* constitute grounds for the delay of disclosure under Art. 17(4)(1) and/or (2) MAR (the latter mentioning protracted processes as grounds for delay).[124]

Indeed, fine-tuning issuer disclosure duties via paragraph 2 (paragraph 4 under MAR) seems preferable from the perspective of market abuse law, as it has the important effect that an alleviation of the burden on the issuer does not inherently correspond to a partial legalisation of trading on material non-public information (an undesirable consequence of the so-called "dual function of inside information")[125]. As already discussed, access to the delay could in principle be granted broadly in regard to market abuse – on the conditions that (i) confidentiality is safeguarded and (ii) the issuer does not act contrary to its own prior signals (*supra* III.B, III.C).[126] The continuous disclosure regime would also still assume an important position in the regulatory framework of MAD/R. By placing responsibility with the issuer, disclosure as a default setting forces the cheapest cost verifier to engage with market rumours and investor expectations and can thereby facilitate the monitoring of market integrity.

Backing up this lenient approach, European law at first glance seems to exhibit a generous stance towards the delay of uncertain information. As one of two exemplary causes for delay, Art. 3(1)(b) of Directive 2003/124/EC, now transferred to Rec. 50 MAR,

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[124] *See*, *e.g.*, Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17 Rn. 210, 236 (Klöhn, ed., 2018); Stefan Grundmann, *3. Abschnitt: Marktmissbrauchsregime, Ad-hoc-Publizität und Directors' Dealing*, *in* STAUB HGB, ELFTER BAND, ERSTER TEILBAND, para. 512 (Claus-Wilhelm Canaris, Mathias Habersack & Carsten Schäfer, eds., 5th ed. 2017); Hopt & Kumpan, *in* BANKRECHTS-HANDBUCH (*supra* n. 118) § 107, Rn. 151; *cf. also* Hansen, ERA FORUM 2017, 21, 32-33. *But see* Koch *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), § 19 para. 83 (pointing out the incompatibility with ESMA's concept); *infra* n. 137.

[125] *Cf.* Hansen & Moalem, CAPITAL MKTS. L. J. 2009, 1, 5; *see also* European Securities Markets Experts, *ESME Report: Market abuse EU legal framework and its implementation by Member States: a first evaluation*, July 6, 2007, 5-8; Committee of European Securities Regulators, *Market Abuse Directive: Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market*, Oct. 2008, CESR/08-717, paras. 25-30.

[126] *Cf.* Hansen, ERA FORUM 2017, 21, 32; Sergakis, *supra* n. 97, at 109; Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17 Rn. 247 (Klöhn, ed., 2018).

mentioned decisions which need approval of another body within the issuer if disclosure "would jeopardise the correct assessment of the information by the public". This clause has specifically been drawn on in Germany to argue that in general, issuers under European market abuse law are competent to determine when information is "ripe" for the market to properly digest it – first presupposing a European (*supra* II.C) primacy of (informed)[127] shareholder interests under the continuous disclosure regime[128] and, second, asserting an aversion to volatility on behalf of this group.[129]

However, availing issuers of such discretion to "time the market" by choosing when information is sufficiently certain does not align easily with both the rationale of the boundary not to mislead (*supra* III.C) and the argumentation of the ECJ against the "blocking effect" in *Geltl* (*supra* III.A). This is because issuers' managements would be granted vast latitude in establishing a piece of information's present certainty, a decision made on parameters that are not subject to public scrutiny and could be potentially circular in nature. By equating issuers' interests with shareholders', the notion of legitimacy would then seem to be awkwardly redundant.

In fact, from a historical perspective Art. 3(1)(b) Directive 2003/124/EC also does not seem to promulgate the principle of issuer autonomy in determining the right time for disclosure and thereby ensuring the "correct" reception of the market by way of delay.

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[127] *See* Martin Thelen, *Schlechte Post in eigener Sache: Die Pflicht des Emittenten zur Ad-hoc-Mitteilung potentieller Gesetzesverstöße*, 182 ZHR (2018) 62, 84-85 (arguing against the consideration of uninformed market participants because of their ability to diversify).

[128] *See* Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17 Rn. 144-150 (Klöhn, ed., 2018); Klöhn & Schmolke, ZGR 2016, 866, 873-876; however, see *id.* 888-889 (subordinating shareholder to group interests by reference to German group law (§ 311 AKTG)).

[129] *See* Thelen, 182 ZHR (2018) 62, 86-87; *cf.* Klöhn & Schmolke, ZGR 2016, 866, 878-879; Lars Klöhn & Klaus U. Schmolke, *Unternehmensreputation (Corporate Reputation)*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 2015, 689, 695; *cf. also* Marco Ventoruzzo & Chiara Picciau, *Art 7: inside information*, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.7.37 (on the problem of "useless information").

When the European Commission first drafted the Directive with the help of CESR, one of its aims was to specify the meaning of disclosure "as soon as possible", a notion central to the disclosure regime that was rightly regarded as problematic in light of both harmonized implementation and application of the directive.[130] The Commission's approach was to limit issuer discretion on this point as well. In Art. 2(2) of Directive 2003/124/EC, it stated that disclosure was expected promptly "upon the coming into existence of an event, albeit not yet formalised".[131] This consequently prompted Germany to voice its concerns about an interpretation that it considered not to properly take into account the limited powers of the management board (*cf. supra* II).[132] Specifically, the German board of directors has to rely on mandatory supervisory board approval for a

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[130] On the use of a similar criterion as an implicit exemption under Council Directive 79/279/EEC, 1979 O.J. (L 66) 21, see Jesper L. Hansen, *The New Proposal for a European Union Directive on Market Abuse*, 23 U. PA. J. INT'L ECON. L. 241, 258-259 (2002).

[131] *See* European Securities Committee, *Commission Draft Proposal for a Directive Implementing Article 1 and Article 6 paragraphs 1 and 2 of the European Parliament and Council Directive 2003/6/EC on Insider Dealing and Market Manipulation (Market Abuse)*, July 10, 2003, Working Document ESC 22/2003, 4:

> As a principle, it is crucial for the prevention of insider dealing and for the best interests of the market to require issuers to inform the public without delay. That is why a general requirement is made to ensure that issuers take action to inform the public promptly after the set of circumstances comes into existence or event constituting inside information occurs.

See also Committee of European Securities Regulators, CESR/02-089b para. 81, CESR/02-089d para. 63:

> In meeting [the objectives of MAD] it is essential that the time lapse between the event to which the information refers is not longer than strictly necessary for the issuer to decide whether the event involves inside information that is subject to publication.

Notwithstanding this seemingly clearly stated intent, the criterion was drawn on by some Member States to defer the duty to disclose under MAD in accordance with the former approach under Directive 79/279/EEC (*supra* n. 130); *cf.* Jesper L. Hansen & Erik Werlauff, *A Stricter Duty to Disclose Information to the Market in Denmark? The Dilemma faced by Danish Companies, and their Options under the Decision by the Danish Securities Council in the* TDC *Case*, 5 EUROP. COMP. L. 47, 49-55 (2008) (for Denmark); Linda Hellstén, DISCLOSURE AND DELAYED DISCLOSURE OF INSIDE INFORMATION IN THE LIGHT OF THE EU MARKET ABUSE REGULATION, University of Helsinki Master's Thesis, 28-29 (2015) (for Finland and Sweden); Carmine Di Noia & Matteo Gargantini, *The Market Abuse Directive Disclosure Regime in Practice: Some Margins for Future Actions*, RIVISTA DELLE SOCIETÀ 2009, 782, 805 (for Italy). This approach has been ruled out in the conception of MAR: *Cp.* Presidency compromise Sept. 3., 2012, doc. 13313/12, with Presidency compromise Oct. 4, 2012, doc. 14601/12; *cf.* Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (MAR) - Progress Report, June 21, 2012, doc. 11535/12, 2 (on the resistance against both a limitation of the notion of inside information (*supra* III.A) and the broad interpretation of the notion "upon the coming into existence of an event"); Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), A.4.19.

[132] *Cf.* Jesper L. Hansen, *MAD in a Hurry*, EUROP. BUS. L. REV. 2004, 183, 201-202.

number of decisions typically constituting inside information (*cf.* § 111(4) sentence 2 AKTG). Before the implementation of MAD, disclosure duties in Germany were therefore held to be contingent upon this approval.[133] Conversely, under Art. 2(2) Directive 2003/124/EC it was feared that the board of directors would be brought in an uncomfortable position if it had to determine *ex ante* the probability of authorisation by its own supervisors.[134]

A compromise was then found by way of the inclusion of outstanding approval in Art. 3(1)(b) of Directive 2003/124/EC. Consequently, the clause meant to state the obvious: Just as the first exemplary cause for delay referred to negotiations "where the outcome … would be likely to be affected by public disclosure", the second served to clarify that the issuer could have a legitimate interest to withhold information about corporate strategy even though a decision by management on its implementation was already in place.[135] The reference to the correct assessment by the public therefore did not subscribe to a broadening of issuer discretion. Quite to the contrary, it added another necessary precondition ("…provided that…") in the event that it was solely the lack of supervisory board approval that was grounds for delay.[136] In doing so, the Directive basically told

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[133] *See*, *e.g.*, Klaus J. Hopt, *Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz*, 159 ZHR (1995) 135, 152; Andreas Cahn, *Grenzen des Markt- und Anlegerschutzes durch das WpHG*, 162 ZHR (1998) 1, 22, 25; Siegfried Kümpel & Heinz-Dieter Assmann, *in* WERTPAPIERHANDELSGESETZ § 15, Rn. 63 (Heinz-Dieter Assmann & Uwe C. Schneider, eds., 1st ed. 1995).

[134] *Cf.* Bundesanstalt für Finanzdienstleistungsaufsicht, *Emittentenleitfaden*, May 14, 2009, 67 (on legitimate interests stemming from the management board's incapacity to determine the likelihood of approval); *see also* Heinz-Dieter Assmann, *in* WERTPAPIERHANDELSGESETZ § 15, Rn. 144 (Heinz-Dieter Assmann & Uwe C. Schneider, eds., 6th ed. 2013).

[135] *See* Committee of European Securities Regulators, *CESR Market Abuse Consultation: Feedback Statement*, Dec. 2002, CESR/02-287b, para. 80; *cf.* Sven H. Schneider, *Selbstbefreiung von der Pflicht zur Ad-hoc-Publizität*, BETRIEBS-BERATER [BB] 2005, 897, 898-899; Alexander Veith, *Die Befreiung von der Ad-hoc-Publizitätspflicht nach § 15 III WPHG*, NZG 2005, 254, 256 (delay as a substitute for moving forward with the basic duty to disclose).

[136] *See* Committee of European Securities Regulators, CESR/02-287b, para. 81 ("in certain specific circumstances"); *cf.* Assmann *in* WERTPAPIERHANDELSGESETZ, § 15 Rn. 142 (Assmann & Schneider, eds., 6th ed. 2013). *See also* CESR/06-562b, para. 2.9, in which CESR chose not to build up on the second clause of Art. 3(1) Directive 2003/124/EC but rather treated it as an outlier. More articulately on this point ESMA/2016/1478, para. 8 lit. c.

issuers that they would be the ones to show that their audience was unfamiliar with the specifics of their two-tier model of corporate governance[137] – an astute move that took much wind out of Germany's sails.

To sum up, there seems to be little evidence in MAD/R for a general weakening of the continuous disclosure requirement by allowing issuers to align corporate disclosure with perceived parameters of information ripeness and market receptivity.[138] Rejecting informational "market timing" under the delay mechanism does not mean however that issuers have no discretion about what information to withhold. As a matter of fact, CESR under MAD clearly stated that only the issuer itself was in a position to determine whether, in its own specific circumstances, the interest-criterion was met.[139] Going from here, a thorough understanding of the continuous disclosure regime under European market abuse law accordingly seems to demand a more systematic survey of cases that both address potential harm to the issuer by untimely disclosure and that simultaneously do not put management in a position to second-guess market judgment. We will see that within these limits, European authorities actually endorse considerable discretionary room for issuers when deciding on the time of disclosure.

3. A Different Take: Containment of Positive Real Externalities by Delay

Clues for the interpretation of what constitutes legitimate interests under MAD/R can be found both in the first clause of Art. 3(1) Directive 2003/124/EC (reproduced in Rec. 50

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[137] *Cf.* ESMA/2016/1130, para. 69 (expressly rejecting that uncertainty of approval constitutes a legitimate interest *per se*).
[138] *Cf. also* Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.80 (depicting ESMA's stance as a rejection of uncertainty *per se* being grounds for delay).
[139] CESR/06-562b, para. 2.5.

MAR) and in CESR's guidance on MAD (now substantially taken up by ESMA's MAR guidelines). As an example for the adverse effects of disclosure remedied by delay, the first clause of Art. 3(1) referred to negotiations in course and specifically mentioned the interests of "existing and potential shareholders" in situations where publicity would potentially undermine efforts to ensure the long-term financial recovery of the issuer. In its guidance, CESR named the loss of a contract to another party in a competitive situation, the protection of the issuer's rights in R&D, and the negotiation of a block trade as three other concrete examples for legitimate interests under the clause.[140] Under MAR, ESMA builds on those cases and adds to them the scenario that authority approval of a deal is conditional upon requirements that can only be fulfilled while disclosure is deferred.[141]

Taken together, these examples seem to indicate that MAD/R grants issuers broad freedom to safeguard corporate opportunities. By doing so, the delay regime under European market abuse law returns to universal principles of issuer disclosure regulation. For example, when Australia first implemented a continuous disclosure regime in 1994, the Legislator tasked the Australian Stock Exchange with implementing broad carve-out clauses.[142] And in the U.S. debate on issuer disclosure, the fundamental necessity of open-ended exemptions was held to be a roadblock in the development of an efficient system of continuous disclosure.[143] Both jurisdictions are testimony to regulators being aware of

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[140] *See* CESR/06-562b, para. 2.8.
[141] ESMA/2016/1478, para. 8 lit. f.
[142] Explanatory Memorandum Corporate Law Reform Bill 1993, paras. 21, 235; *Australian Stock Exchange*, ASX Discussion Paper, para. 3.4.2.
[143] *See* Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 865-74 (1995); Romano, 2 THEO. INQ. L. 387, 446-64 (2001). *Cf.* also Basic Inc. v. Levinson, 485 U.S. 224, 234 (1988) ("Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress.").

the phenomenon of issuer idiosyncrasies in corporate disclosure, limiting their ability to design efficient standards applicable to all kinds of public corporations.[144]

In fact, it has been argued that the common denominator of all disclosure obligations under U.S. securities law has traditionally been their implicit consideration for the potential adverse effects of mandating disclosure of trade secrets. This is because U.S. disclosure regulation relies heavily on financial reporting, thereby using a "specialized disclosure language"[145] to convey information to the market.[146] Such standardized statements both limit issuer discretion in what to report and, by way of abstraction, make it possible to inform the market without handing corporate opportunities to competitors or obstructing favourable deals by giving negotiating partners the upper hand. Continuous disclosure obligations like Art. 6 MAD (Art. 17 MAR), then, are by nature much more susceptible to what the economist Ronald Dye called "real positive externalities".[147] If (as is generally the case under Art. 6(1) MAD/ Art. 17(1) MAR) all material issuer-related information has to be disclosed, it is argued that the ensuing limitations will make the affected corporations substantially less innovative,[148] thereby inhibiting economic growth

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[144] *Cf.* Anat R. Admati & Paul Pfleiderer, *Forcing Firms to Talk: Financial Disclosure Regulation and Externalities*, 13 REV. FIN. STUD. 479, 503-509 (2000). *See also* Art. 19a(1)(4) Directive 2013/34/EU as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1 (on the omission of "information relating to impending developments or matters in the course of negotiation" from CSR reporting).

[145] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 686-687 (1984).

[146] *See*, *e.g.*, Wolfgang Schön, *Corporate Disclosure in a Competitive Environment – The Quest for a European Framework on Mandatory Disclosure*, 6 J. CORP. L. STUD. 259, 284 (2006); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L. J. 2359, 2394 (1998).

[147] *See* Ronald Dye, *Mandatory Versus Voluntary Disclosure: The Cases of Financial and Real Externalities*, 65 ACC. REV. 1, 1-2 (1990).

[148] *See*, *e.g.*, Romano, 2 THEO. INQ. L. 387, 421-439 (2001); Donald C. Langevoort, *Towards More Effective Risk Disclosure for Technology-Enhanced Investing*, 75 WASH. U. L. QU. 753, 769-770 (1997); Mark Blair, *Australia's Continuous Disclosure Regime: Proposals for Change*, 2 AUSTRALIAN J. CORP. L. 54, 64 (1992); Entcho Raykovski, *Continuous Disclosure: Has Regulation Enhanced the Australian Securities Market?*, 30 MONASH U. L. REV. 269, 278-279 (2004). On the adverse economic incentives, *see*, *e.g.*, Jesper L. Hansen, *The Hammer and the Saw – A Short Critique of the Recent Compromise Proposal for a Market Abuse Regulation*, LSN NORDIC & EUROPEAN COMPANY LAW WORKING PAPER 10-35, 4-9 (2012).

and weakening competitiveness on the global markets. Not least, this can be seen as a direct consequence of the outsized adverse effects such disclosure rules would have on corporations that invest in corporate opportunities.[149]

Since growth thereby hinges on the degree to which economic actors can capture the profits of their own investments, the mandated degree of transparency has to be assessed not only in light of allocative efficiency ("price accuracy")[150] or agency costs, but also taking into account associated advantages conveyed to persons other than the issuer and its investor base (*i.e.*, "external benefits" or "positive externalities"). The genius of Dye's formulation then was to distinguish between direct benefits to competitors ("real" positive externalities) and other potential third-party gains *not* in the same way indirectly detrimental to social welfare. This is interesting because on closer inspection, CESR/ESMA's construction of the criterion of legitimate interests in fact seems to adopt an understanding quite similar to Dye regarding what the adequate limits to continuous disclosure are. For example, while potentially in the issuer's interest, it is not a sufficient reason for delay that by disclosure investors could better determine the issuer's worth relative to other entities competing for funding.[151] Nor do the authorities' examples turn on some measure of "stand-alone" harm to the issuer. Instead, all of the abovementioned cases refer to circumstances placing the disclosing entity and its shareholders at a relative disadvantage vis-à-vis competitors, target companies or (potential) contractual partners.[152] In this way, MAD/R reacts to the severe distortion of competition that would

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[149] *Cf.* Enriques & Gilotta, *in* OXFORD HANDBOOK ON FINANCIAL REGULATION (*supra* n. 57) 512, 529.
[150] *Cf. supra* n. 57.
[151] *Cf. also supra* III.C; on the externalities resulting from such comparability effects of disclosure, see Enriques & Gilotta, *in* OXFORD HANDBOOK ON FINANCIAL REGULATION (*supra* n. 57) 512, 524-525.
[152] *Cf.* Pietrancosta, *in* MARKET ABUSE REGULATION (*supra* n. 82), B.17.46; *cp.* the cases on § 131(3)(1) AKTG (*supra* n. 51 *et seq.*): Regional Court Heilbronn March 6, 1967, KfH AktE 1/67, AG 1967, 81, 82 (commented by G. Henn) (no duty to disclose license revenues and R&D costs; legitimate protection of trade secrets); Higher Regional Court Zweibrücken 3 W 148/89, AG 1990, 496, 497 (no duty to disclose gross profits gained from specific products indicating intern calculations and price policy); Higher Regional

result if public corporations were on principle put at a comparative disadvantage to private entities in their normal business.[153]

4. Legitimacy as a Question of (Negative) Property Rights

As soon as we approach the delay mechanism from this perspective of positive real externalities, we finally encounter the limiting function of requiring issuers' interests to be legitimate. Specifically, the case of *VW* in this context poses the interesting question of whether the issuer can, under MAD/R, resort to its own prior breach of law in delaying disclosure. This is of interest if there are potentially high benefits associated with (temporary) nondisclosure, for example because contractual partners are willing to agree to a better price or because an unfavourable market reaction at this point in time would inhibit the issuer from pursuing other profitable projects.[154] Consistent with the advocacy

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Court Berlin Jan. 31, 1996, 23 U 3989/94, AG 1996, 421, 424 (no duty to disclose price estimations that would weaken the corporation's position as a purchaser in ongoing negotiations); Higher Regional Court Frankfurt Jan. 30, 2006, 20 W 52/05, ZIP 2006, 613, 614-615 (legitimate withholding of individual executive salary information, since this reduces the risk of the corporation's employees being headhunted); hereto and to other examples Kersting *in* KÖLNER KOMMENTAR ZUM AKTIENGESETZ, BAND 3/1 § 131, Rn. 304 (Zöllner & Noack, eds., 3rd ed. 2010); *see also* Federal Court of Justice Feb. 16, 2009, II ZR 185/07, NJW 2009, 2207, paras. 38, 41-43 *Kirch/Deutsche Bank* (Ger.) (no duty to disclose details of the corporation's share sale transaction, since this may impair the corporation's ability to contract); Federal Court of Justice Jan. 14, 2014, II ZB 5/12, AG 2014, 402, para. 45 (Ger.).

[153] *See*, *e.g.*, Hansen, LSN NORDIC & EUROPEAN COMPANY LAW WORKING PAPER 10-35, 5; *cf. also* Schön, 6 J. CORP. L. STUD. 259, 285 (2006).

[154] Our examples thereby assume a pending benefit to the issuer conditional upon temporary non-disclosure of the information (*cf. also* Thelen, 182 ZHR (2018) 62, 88-90; Klöhn & Schmolke, ZGR 2016, 866, 877-880). As a prime example, in the simultaneous shareholder litigation against *Porsche SE* as *VW's* parent company (*supra* n. 7), the defendants argue that disclosing too many details about the diesel emissions scandal may have led to an increased fine (*see* Regional Court Stuttgart, AG 2018, 240, para. 230). *Cp.* Kristoffel R. Grechenig, *The Marginal Incentive of Insider Trading: An Economic Reinterpretation of the Case Law*, 37 U. MEM. L. REV. 75, 109-117 (2006) (arguing against disclosure obligations and for the legality of insider trading based on the assumption that the informational value to the issuer is depleted).

for issuer discretion under a concept of shareholder primacy,[155] in German literature this question has regularly been answered in the affirmative.[156]

However, building up on the above-depicted economic framework of externalities and examining what constitutes an externality in legal terms seems to suggest a quite different outcome. This is because, coming from the premise of aligning continuous disclosure obligations with the issuer's need to protect its investments relative to others, issuer discretion under MAD/R is a direct function of the property rights granted to the issuer.[157] Therefore, it is necessary to put the notion of property rights in legal terms. This leads to two problems requiring further discussion in the case at hand. First, European Union law is far from a self-contained legal regime, depending on Member State legislation not only when it comes to corporate law but also for such fundamental questions as how to define property. Secondly, jurisdictions can vastly differ in their answer to this question – turning for example on how they make use of relational and absolute rights and how they define a proprietor's position vis-à-vis the state. The latter aspect differentiates EU capital markets law from U.S. securities regulation, U.S. Federal courts in many cases being able to take the body of common law as a given and build up on a common understanding of it.[158]

In contrast, EU law has to take a different approach if it wants to draw on substantive Member State law. Indeed, market abuse law has to deal with similar difficulties on another important issue. Under Art. 10(1) MAR (Art. 3(a) MAD), the lawfulness of the

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[155] *Supra* III.D.2.
[156] *See* Thelen, 182 ZHR (2018) 62, 87-91; Klöhn & Schmolke, ZGR 2016, 866, 868, 893. But *cf. infra* n. 168.
[157] On a side note, this approach also bridges the gap to non-public corporations: They are generally also precluded from actively retaining information that does not legally "belong" to them.
[158] On property rights, *cf.* United States v. Craft, 535 U.S. 274, 278 (2002) (holding what constitutes property and rights to property "largely depends upon state law"); *but see* Carpenter v. United States, 484 U.S. 19, 26 (1987) ("Confidential business information has long been recognized as property").

selective disclosure of inside information is subject to the condition that it is made "in the normal exercise of an employment, a profession or duties" – without further explaining the criterion of "normality." What can be seen in the case of both Art. 10(1) MAR and what is now Art. 17(4)(a) MAR is that European law is effectively resorting to the legal environment in the Member States from a top-down perspective. For selective disclosure, this was articulated by the ECJ in the case of *Grøngaard and Bang*:

> It should be pointed out in this regard that the activities of a professional organisation … are subject, in their essentials … to the national legal system in question. It follows that the reply to the question whether [defendant] may disclose inside information to third parties in the course of his duties depends to a large extent on the applicable national law.[159]

EU law, in this regard, cannot undertake to regulate all instances where selective disclosure is needed by itself nor can it trust that the outcome will be exactly the same in all Member States. Instead, it reserves its right to interfere in two dimensions: First, by singular specific prohibitions (*e.g.*, MAR is understood to prohibit on its own terms the selective disclosure for the purpose of insider trading by the recipient)[160] and, secondly, by the general boundaries of loyalty and *effet utile* (*cf.* Art. 4(3) TEU[161]).

Looking at the notion of legitimate interests under Art. 17(4) MAR, this means that while EU law is unambiguously addressing the problem of positive real externalities, Member State law is, for the most case, pertinent to establishing whether the issuer can invoke a property right in a specific piece of information (*cf. Grøngaard and Bang*: "to a large

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[159] Case C-384/02, *Grøngaard und Bang*, paras. 50-51.
[160] *See*, *e.g.*, Financial Conduct Authority, HANDBOOK MAR, para. 1.4.2(2) (2016); Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG Art. 10 Rn. 191 (Klöhn, ed., 2018); *cf. also* Rüdiger Veil, *§ 14 Insider Dealing*, *in* EUROPEAN CAPITAL MARKETS LAW (*supra* n. 12), para. 74.
[161] Consolidated Version of the Treaty on European Union, 2012 O.J. (L 326) 13.

extent"). This not only applies to the obvious precondition that anyone can appropriate for themselves certain information and its benefits,[162] but also whether there is law to specifically revoke benefits accruing to a specific person because of certain behaviour. In other words, coming back to the initial question of whether breach of law excludes a legitimate interest under Art. 17 MAR, it is necessary to establish the framework of surrounding "negative property rights" – these potentially excluding the issuer specifically from the group of possible appropriators.[163]

From a similar perspective, Jonathan Macey has argued against issuer discretion when deciding on the confidentiality of information of criminal activity, based on the argument that this information "should not be considered the property of the firm engaged in [it]".[164] This seems to be quite intuitive, considering a renegotiation of the terms of criminal law to be antithetical to its public mandate. However, we are able to extrapolate Macey's important analysis to breaches in other areas of the law. This is because, on closer inspection, different legal norms can exhibit the characteristics that are relevant to argue against the "efficient breach"[165] of criminal law. Only with regard to a particular provision can we then determine whether the law aims for strict compliance or merely places a price

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[162] *Cf.* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-18 (1978); for a survey of possible justifications for property rights in information and their limits see Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337 (1997).

[163] On the notion of "negative property rights" and its application to insider trading policy see Zohar Goshen & Gideon Parchomovsky, *On Insider Trading, Markets, and "Negative" Property Rights in Information*, 87 VA. L. REV. 1229, 1266-1268 (2001).

[164] *See* Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1921-1922 (2007).

[165] For a seminal display of the idea of efficient breach *of contract*, see Richard A. Posner, ECONOMIC ANALYSIS OF LAW 57 (1st ed. 1972); Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289-1292 (7th Cir. 1985). *But see* Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDH. L. REV. 1085, 1093-1098 (2000) (on contrary case law).

on its contravention – "that you must pay damages if you do not keep it,– and nothing else"[166].

Specifically, looking at the property rights implication of a legal rule we need to determine whether it (in addition to a possible sanction) excludes all gains associated with its infringement, or if it displays indifference vis-à-vis concomitant benefits to the violator. As a result, not all breaches of law are treated equal under Art. 17(4)(a) MAR. On the one hand, an issuer involved in criminal activity will find it hard to argue legitimacy because criminal law usually provides for the forfeiture of profits in case of a conviction.[167] Since the issuer cannot appropriate corporate opportunities arising from the breach, disclosure in turn would not harm its recognized interests.[168] On the other hand, it does not seem illegitimate to delay disclosure of a mere breach of contract – on the condition that the issuer did not act as a fiduciary for the contractual partner and the latter's claims therefore do not extend to the full disgorgement of the proceeds arising from the breach.

Following this reasoning, it is relatively straightforward to argue against property rights in information in the case of VW. This is because of the direction in § 17(4) OWiG (for legal entities in conjunction with § 30(3) OWiG)[169] that any fine under German administrative law (including emission standards and rules on car approval) shall exceed

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[166] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (on the consequences of breach of contract at common law).

[167] *Cf.*, in the context of corporate criminal liability, Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, *in* CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 3, 46-47 (Mark Pieth & Radha Ivory, eds., 2011).

[168] To be fair, Klöhn also seems reluctant to disregard breaches of criminal law altogether, therefore advocating a boundary under (4)(a) for abuse of law (*in* MARKTMISSBRAUCHSVERORDNUNG Art. 17 Rn. 175-176 (Klöhn, ed., 2018); but *cf. supra* n. 156).

[169] Klaus Rogall, *in* KARLSRUHER KOMMENTAR ZUM OWiG § 30, Rn. 18 (Wolfgang Mitsch, ed., 5th ed. 2018); *see also id.*, Rn. 16 (on the preventive function of § 30 OWiG); hereto Regierungsentwurf [Cabinet Draft] – Entwurf eines Gesetzes über Ordnungswidrigkeiten (OWiG), DEUTSCHER BUNDESTAG: DRUCKSACHEN V/1269 (hereafter: Cabinet Draft OWiG), at 59-60 (Ger.).

the economic benefit drawn by the contravention. Under this provision, VW recently agreed to forfeit 995 million Euros (in addition to the maximum fine of 5 million Euros), a record sum calculated in estimation of the profits gained by its sales of manipulated cars in Germany. Even if the basis for calculating this sanction should not fully represent the adverse effect of the disclosure for VW, it serves to display the law's classification of its enrichment as unjustified.[170]

In effect, this argumentation resembles the Regional Court Stuttgart's reasoning in a recent decision on the legitimacy of withholding information relating to VW's breaches of law in the 2016 general shareholder meeting of Porsche Automobil Holding SE, VW being Porsche's subsidiary (§ 131(3)(1) AktG).[171] Therein, the court stated that even if disclosure had caused harm to VW and thus to Porsche, *e.g.*, by jeopardizing VW's negotiations with the American authorities and increasing the fine VW had to pay, such information cannot be withheld legally.[172] To underline its point, the Regional Court Stuttgart distinguished the case from one in which disclosure would compromise negotiations with a private party. Whereas § 131(3)(1) AktG could serve as a means to protect the freedom of contract, the interest of the public and of the shareholders in uncovering breaches of public law typically prevail.[173] In so doing, the court read a requirement of legitimacy into § 131(3)(1) AktG. Both disclosure obligations (§ 131(3)(1) AktG and Art. 17(4) MAR), then, are far from exhibiting conceptions of shareholder primacy. Quite to the contrary, by qualifying the required interests, they

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[170] *Cf.* Cabinet Draft OWiG (*supra* n. 169), at 52 (stressing the main functions of the fine, namely forfeiture of illicit gains, deterrence and prevention of harm to society).
[171] *See also supra* n. 7.
[172] Regional Court Stuttgart, Dec. 19, 2017, 31 O 33/16 KfH, AG 2018, 240, paras. 235-239.
[173] Regional Court Stuttgart, Dec. 19, 2017, 31 O 33/16 KfH, AG 2018, 240, paras. 235-236.

directly incorporate conceptions of public good – mainly as defined by Member State law.

IV. Management's Decision to Disclose as an Exercise in the Coordination of EU and Member State Law

A. The Decision to Disclose and the Prevention of Market Abuse

1. Market Abuse and Corporate Governance

As we have seen in the last chapter, European law seems to draw quite heavily on Member State law when regulating continuous disclosure of inside information. The extent to which the responsibility of management is shaped by the specific corporate law and property rights setting the corporation operates in varies considerably depending on what kind of aspect of Art. 17's disclosure regime we focus on. First, we notice European law having an unsurprisingly larger role when it comes to the (fully harmonized) notions of insider trading and market manipulation. Second, European law, albeit inconspicuously, appears to grant quite significant leeway to Member States with regards to the legitimacy of interests under Art. 17(4)(a) MAR. Both aspects, however, have in common that they provide for interesting follow-up questions in terms of management's incentive structure – the affected jurisdictions being presented with the challenge of ensuring compatibility between their use of the European concept and interacting "domestic" principles of corporate governance and corporate public mandate.

As a starting point, take into consideration that the main concerns of market abuse law – the confidentiality of inside information (Art. 17(4)(c)) and the prevention of artificial informational asymmetries (Art. 17(4)(b)) – affect decisions taken by management in

operation of the corporation's business. Acting in the best interest of the corporation (however it may be defined in national corporate law),[174] directors have to factor in the consequences under market abuse law even before they decide on corporate strategy. For example, it can be useful to know the costs of keeping information about a certain, price-relevant project confidential when weighing the project against other modes of doing business. Should it be uncertain *ex ante* whether management can comply with those prerequisites in the future, management's latitude may be considerably limited as a result, *e.g.*, by suggesting that it opts for disclosure or a corporate strategy that allows for the shortest period of delay. The decision regarding which project to pursue then constitutes a classic case of business judgment by management, which in most corporate laws is subject only to limited court review.[175]

However, the questions whether inside information exists and whether it is still confidential are clearly not – following the reasoning that the issuer itself is not in a position to dispose of the perils of market abuse.[176] If, therefore, at a certain point in time

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[174] For examples, see *supra* n. 19 *et seq*.

[175] On Germany, see *supra* n. 16. In our example, we assume both top-down dissemination of information and decision-making. However, the additional relevance of people's knowledge further down in the corporate hierarchy is yet to be clarified. Art. 18 MAR seems to impose high organisational standards, given that issuers are "fully responsible" for updated insider lists and for instructions about legal sanctions (paragraph 2). Art. 17 (8) serves a similar purpose: in case a recipient of inside information (Art. 10, Art. 17 (8)) decides herself to pass on that information to a third party, the issuer has to ensure that the disclosing person not only acts in accordance with Art. 10 (disclosure "in the normal exercise of an employment, a profession or duties"), but also informs the issuer about the further disclosure. This is in line with CESR/06-562b, para. 2.11:

> Once the decision to delay disclosure has been made, companies will need to ensure that knowledge of the information is restricted to those who need to have access to it and that those who are insiders are aware that the information is confidential and recognise their resulting obligations. If the issuer subsequently becomes aware that the information has not been kept confidential and there has been a leak, it should disclose the information as soon as possible in the manner specified. Issuers should also keep under review whether the delay in disclosing the information is likely to be misleading and, if they conclude that this is the case, again the information should be announced as soon as possible.

[176] *Cf.* CESR/06-562b, para. 2.10:

> Finally it should be emphasized that meeting the test for having a legitimate interest in delaying a disclosure is not by itself sufficient reason to delay the disclosure. In all the situations a further evaluation should be done to decide whether the other conditions in Article 6.2 of the MAD apply i.e. that the delay in disclosing the inside information would not be likely to mislead the public; and that the issuer is able to ensure the confidentiality of the information.

the board can conclude that it is not able to control the dissemination of the information going forward, it is not in a position to plead business judgment (or legal judgment)[177] in defense of an assessment to the contrary. As a case in point, the Higher Regional Court of Frankfurt has previously held that when it comes to preventing market abuse, there is little room to acknowledge mistakes of law as an excuse for administrative sanctions;[178] today, Art. 17(1) MAR even less regularly involves sufficient legal uncertainty, given the ECJ's clarifying case law in *Geltl* and *Lafonta* (*supra* III.A). Finally, only in exceptional circumstances will the qualification of the duty to disclose "as soon as possible" allow for some issuer discretion concerning the timing of the disclosure; this seems to concern primarily cases where the information is external and needs to be verified.[179]

2. Corporation Law and the Internal Responsibility of Management

In other words, VW's management will realistically encounter difficulties in maintaining its argument that it did not act negligently when it failed to act according to § 15(1) WpHG

Cf. also ESMA/2016/162, paras. 66, 94, 102.

[177] For a "Legal Judgment Rule" under German law (in a narrow sense, *i.e.*, applying § 93(1) sentence 2 AktG in context of legal uncertainty) Krieger & Sailer-Coceani, *in* AktG Kommentar, Band I § 93, Rn. 16 (K. Schmidt & Lutter, eds., 3rd ed. 2015); Nietsch, ZGR 2015, 631, 654-656; Torggler, *in* Compliance (*supra* n. 34) 97, 115 n. 123, p. 119, 126-127; for a "Legal Judgment Rule" in a wider sense (*i.e.*, acknowledging a discretional decision in such cases beyond § 93(1) sentence 2 AktG) Fleischer, *in* Kommentar zum Aktiengesetz, Band 1 § 93, Rn. 9c, 32, 35f, 69a (Spindler & Stilz, eds., 3rd ed. 2015); Spindler, *in* Münchener Kommentar zum Aktiengesetz, Band 2 § 93, Rn. 75-83 (Goette & Habersack, eds., 4th ed. 2014); Grigoleit & Tomasic, *in* Aktiengesetz – Kommentar § 93, Rn. 36, 31, 27-29 (Grigoleit, ed. 2013); for a lack of fault as a liability defense in such cases Hüffer & Koch, Aktiengesetz § 93, Rn. 19 (13th ed. 2018) (but see *id*., Rn. 11, 16 (on mandatory board tasks, *cf.* n. 36)); *cf. also* Federal Court of Justice, Sept. 20, 2011, II ZR 234/09, NZG 2011, 1271, 1272-1273 *ISION* (Ger.); differentiating by disaggregating the decision process Dirk A. Verse, *Organhaftung bei unklarer Rechtslage – Raum für eine Legal Judgment Rule?* ZGR 2017, 174, 192-193; not determined Bachmann, WM 2015, 105, 109 with n. 49.

[178] Higher Regional Court Frankfurt, Feb. 12, 2009, 2 Ss-Owi 514/08, WM 2009, 647, 648.

[179] *Cf.* ESMA/2016/162, paras. 64, 67 (on the case of a parent corporation needing to check accounting data provided by a subsidiary).

prior to September 22, 2015.[180] By its high degree of determination, European law directly influences the relationship between issuer and management and affects management's incentives when deciding on a corporate strategy. One should not overlook, however, that this state of affairs is a product of both European market abuse law and Member State corporate law – the latter theoretically still remaining in a position to reign in the spillover effects on corporate governance by allowing for the efficient breach of market abuse law.[181]

The waiver of internal responsibility for external violations remains available for Member State control over corporate governance when it comes to market abuse law. By allowing for the efficient breach of continuous disclosure duties vis-à-vis the corporation, Member States can modify management's incentives *ex ante* to accommodate a more risk-affine corporate strategy. Insulated from personal liability, directors could, for example, be induced to weigh the consequences of market abuse for the corporation (in terms of cost-of-capital, but also accounting for fines and civil damages) against the accompanying benefits of a corporate strategy where confidentiality *ex ante* cannot be warranted.

Coming back to our example of German law, legal literature seems disinclined to accept deliberate contraventions of continuous disclosure by management as Art. 17 MAR would probably be deemed a "mandatory board task" (*supra* II.C).[182] This is based on the

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[180] *Cf.* Regional Court Braunschweig, Aug. 5, 2016, 5 OH 62/16, under B.4., https://www.bundesanzeiger.de.

[181] This does not necessarily run contrary to Art. 17 MAR since this provision establishes a duty of the issuer and not of its agents.

[182] The rationale being that the agent (director) is bound by her mandate (corporate governance rules) and has no authority to second-guess the efficiency of the principal's (corporate) orders by way of breach, including competence allocations and accompanying disclosure duties: Hopt & M. Roth, *in* AKTIENGESETZ - GROßKOMMENTAR, BAND 4/2 § 93, Rn. 74, 78 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015). Even critics of the duty of obedience (*cf. supra* n. 40) do not go that far, concentrating their critique on breaches of administrative and other law "beyond" the corporation's corporate governance: *see* Torggler, *in* COMPLIANCE (*supra* n. 34) 97, 100; *cf. also* Grigoleit & Tomasic, *in* AKTIENGESETZ – KOMMENTAR § 93, Rn. 9-15, 18-19 (Grigoleit, ed. 2013).

above-discussed understanding of Art. 6 MAD / Art. 17 MAR as an instrument of shareholder information, thereby in part serving to ameliorate agency conflicts.[183] To conceptualize continuous disclosure in this way – as (minority) shareholder protection – is intuitive. It cannot be disregarded that many disclosure rules do play a critical role in monitoring management and that any limitation of responsibility on part of the agents potentially constrains this effect.[184]

However, it is questionable whether agency costs are a necessary consideration of the European continuous disclosure regime, which goes a long way in acknowledging agent discretion if only confidentiality is warranted – *i.e.*, in exactly the setting where informational asymmetries are highest (*supra* III.D, *infra* IV.B). Following this line of thought, market abuse law serves a distinct purpose, reacting to problems not of the agency-cost-ridden public corporation *per se*, but of the subset whose issuances are traded on anonymous markets and are therefore especially susceptible to insider trading and market manipulation.[185] As a result, the interaction between market abuse law and corporate governance on closer examination does not seem to be an automatism, the

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[183] *Cf. generally* Cabinet Draft UMAG (*supra* n. 17), at 11 (distinguishing between unsuccessful business decisions and the violation of disclosure duties when discussing the BJR's scope of application; hereto already *supra* n. 49, 59 *et seq.*). On this more or less pronounced "agency cost reduction" goal of mandatory disclosure, see Enriques & Gilotta, *in* OXFORD HANDBOOK ON FINANCIAL REGULATION (*supra* n. 57) 512, 516-518.

[184] *See*, *e.g.*, Luca Enriques, Gerard Hertig, Reinier Kraakman & Edward Rock, *Corporate Law and Securities Markets*, *in* THE ANATOMY OF CORPORATE LAW 243, 248 (Reinier Kraakman *et al.*, eds., 3rd ed. 2017).

[185] Indeed, the origins of market abuse law can be traced back to the discussion of sellers' remedies in anonymous transactions against better-informed counterparties. *See In re* Cady, Roberts & Co, 40 SEC 911, 915 (1961) (distinguishing the SEC's approach from the case law excluding contractual remedies in stock market transactions); SEC v. Texas Gulf Sulphur, 258 F. Supp. 262, 279 (S.D.N.Y. 1966) (same). The repercussions of this can be seen clearly in MAR's delimitation of the perimeters of market abuse law, expanding the Regulation's scope beyond so-called regulated markets (Art. 4(1)(21) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349 (MiFID 2)) to all marketplaces bringing together multiple third-party sellers and buyers on a non-discriminating basis.

corporate law Legislator arguably free to decide whether to draw on market abuse law for the internal functioning of corporate governance.

B. The Decision to Disclose and the Pursuit of Legitimate Interests

1. Legitimate Interests and Corporate Governance

As we have just seen, Member State corporate law can enable management to translate disclosure policy into a business decision even if European market abuse law – now under Art. 17(1),(4)(b) & (c) MAR – holds the issuer itself accountable on more static terms. Such an intervention is generally not necessary under Art. 17(4)(a), as the criterion of legitimate interests itself confers considerable discretion to the issuer when deciding on disclosure (*supra* III.D.3). This discretion is substantively informed by the entire legal environment the corporation is operating in, corporate law in this context determining which actions to attribute to the issuer.[186]

Within these borders, management, acting for the issuer and exercising its discretion, formulates corporate disclosure policy as a business decision.[187] This classification is a direct consequence of Art. 17(4)(a) relying on a prognostic judgment that involves weighing profits and risks from (deferred) disclosure[188]. Indeed, even though market abuse law generally seems to be agnostic on the details of its implementation, a twofold

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[186] *See infra* n. 203.
[187] However, see the dissenting capital markets literature in Germany *supra* n. 59 et seq.
[188] Klöhn & Schmolke, ZGR 2016, 866, 884; *cf.* Cabinet Draft UMAG (*supra* n. 17), at 11. Considering the capital markets context, the disclosure policy decision involves an active anticipation of market needs, giving due consideration to what CESR called the "specific circumstances" and the "applicable conditions" (CESR/06-562b paras. 2.5, 2.7; *cf. also* ESMA/2016/162, para. 70: "case by case basis", European Securities and Markets Authority, *Questions and Answers on the Market Abuse Regulation [MAR]*, last updated Mar. 23, 2018, ESMA70-145-111, A5.1 (same)). § 93(1) sentence 2 AKTG – and judicial deference to business judgment in general – is precisely designed for cases in which management needs to balance market chances and risks: see Holle, AG 2011, 778, 784.

argument can be made for limiting court review of the board's disclosure decision under clause (a). First, even though European market abuse law does not formulate a principle of full disclosure, management's risk-aversion might lead to early-on disclosure and the abandonment of corporate opportunities to avoid personal liability for damage arising from *ex post* suboptimal delays.[189] And second, management usually is the only body equipped to make an informed disclosure decision *ex ante*, any consultation raising the risks of leakage and therefore increasing the costs of a delay.[190]

The latter point is of special significance when comparing directors' judgment under MAD/R with the above-mentioned example of § 131 AKTG, a "pure" corporate law disclosure duty, which therefore is taken in German literature as a point of reference in determining directors' liability vis-à-vis the issuer.[191] Notably, § 131 AKTG is subject to shareholder initiative which – given management's prior silence (*cf. also* § 120 AKTG) – indicates an agency conflict, as the preparatory works on § 131 explicitly acknowledge.[192]

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[189] For the potential negative effects of incentivizing early-on disclosure under MAD/R, see Klöhn & Schmolke, ZGR 2016, 866, 884; Sergakis, *supra* n. 97, at 104-105. *Cf. also* Enriques & Gilotta, *in* OXFORD HANDBOOK ON FINANCIAL REGULATION (*supra* n. 57) 512, 532-533 (negative effects of extensive disclosure duties on investment decision-making); Financial Industrial Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514, 518 (10th Cir. 1973) (mentioning hindsight review as a contributing factor).

[190] *See* Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 157 (Klöhn, ed., 2018); Klöhn & Schmolke, ZGR 2016, 866, 884, 886. German corporation law generally delegates the decision concerning the pursuit of the corporate interest into management's hands – typically the party with superior access to corporate information (§ 76(1), § 93 AKTG). § 93(1) sentence 2 AKTG, the German BJR, is a mere consequence of this allocation of information and power: Nietsch, ZGR 2015, 631, 638, 644 (arguing that the BJR is protecting the rules of competence); Grigoleit & Tomasic, *in* AKTIENGESETZ – KOMMENTAR, § 93, Rn. 26 (Grigoleit, ed. 2013); from a U.S. perspective Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 522 (1988); Financial Industrial Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514, 518 (10th Cir. 1973) (disclosure decision). In exceptional cases, a duty of the supervisory board (members) arises to decide on disclosure versus delay, namely when facts constituting legitimate interests fall within the ambit of the supervisory board's competences, so that it (and not the management board) has relevant information (*e.g.*, need for confidentiality in the management job application process; *see* Veil & Brüggemeier, *in* MARKTMISSBRAUCHSRECHT (*supra* n. 60), § 10 Rn. 135; *cf. also* Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 159 (Klöhn, ed., 2018)).

[191] *See*, *e.g.*, Kubis, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, BAND 3 § 131, Rn. 176 (Goette & Habersack, eds., 4th ed. 2018).

[192] Begründung zu § 125 des Regierungsentwurfs [Explanation on § 125 of the Cabinet Draft] (Ger.), cited from Bruno Kropff, TEXTAUSGABE DES AKTIENGESETZES VOM 6.9.1965, 185 (1965) (referring to the

While corporate law again is theoretically able to extend continuous disclosure under market abuse law to encompass considerations of agency costs, there is no European requirement for it to do so (*cf. supra* IV.A.2).[193] To the contrary, the regulatory equilibrium under MAD/R seems to hinge on the fundamental policy decision that – subject to the effective prevention of market abuse – issuers and their managements enjoy wide discretion weighing the costs and benefits of communication to the market.

The corporate law concept which arguably best serves this European purpose is the BJR.[194] For lack of special provisions in Germany that constrain management's discretion under Art. 17(4)(a), the BJR of § 93(1) sentence 2 AktG should be applicable when the board opts for disclosure or decides for delay in order to protect firm-specific assets "that could be jeopardised by premature disclosure"[195].[196] The safe harbour applies if the board collects relevant information,[197] assesses probabilities *ex ante*,[198] and pursues in good faith the protection of the corporation's property rights by deciding[199] to disclose more or

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critique (which identified managers as "judges in their own case") and reacting to it by constraining the leeway granted to the management board by the predecessor provision, § 112(3) sentence 2 AktG).

[193] On the differences between § 131 AktG and Art. 17 MAR see also *supra* n. 53 (with references for a dissenting view regarding § 15(3) WpHG).

[194] *See*, from a German perspective, Federal Court of Justice Apr. 21, 1997, II ZR 175/95, NJW 1997, 1926, 1927-1928 *ARAG/Garmenbeck* (Ger.) (on the risk-aversion rationale of the BJR); Cabinet Draft UMAG (*supra* n. 17), at 1, 10, 11, 20 (same); hereto in the light of a comparative perspective Andreas Baumgartner, *„Funktionale Rezeption" am Beispiel der österreichischen Business Judgment Rule – (mehr als) ein Vergleich mit Deutschland und Delaware*, *in* Jahrbuch Junger Zivilrechtswissenschaftler 2017, 27, 30-36, 43-44 (Gregor Christandl *et al.*, eds., 2018); *see also Langenbucher*, DStR 2005, 2083, 2084-2085; Hopt & M. Roth, *in* Aktiengesetz - Großkommentar, Band 4/2 § 93, Rn. 101 (Hirte, Mülbert & M. Roth, eds., 5th ed. 2015); Goette, DStR 2016, 1752, 1754 (discussing negative implications of a stringent court review in the context of § 19(2) InsO); more generally in the context of rules of competence Torggler, *in* Compliance (*supra* n. 34) 97, 115 n. 123 (risk of overdeterrence); *but see* Holle, AG 2011, 778, 782 (arguing that mandatory board tasks (*cf.* n. 36) differ from business decisions).

[195] Examples are "ongoing negotiations", including M&A-transactions, "purchases or disposals of major assets", ambitions aiming at the issuer's financial recovery, planned strategic investments and disinvestments, "[p]roduct development, patents, inventions"; *cf.* CESR/06-562b, para. 2.8; ESMA/2016/162, paras. 72-74, 83-88; ESMA/2016/1130, para. 56; Recital 50(a) MAR.

[196] However, see the dissenting capital markets literature in Germany *supra* n. 59 *et seq*.

[197] For details, see Klöhn, *in* Marktmissbrauchsverordnung, Art. 17, Rn. 160 (Klöhn, ed., 2018); Klöhn & Schmolke, ZGR 2016, 866, 884-885.

[198] *See* ESMA/2016/162, paras. 72-73, 83, 85-86, 88.

[199] *Cf.* European Securities and Markets Authority, *Draft technical standards on the Market Abuse Regulation*, Sept. 28, 2015, ESMA/2015/1455, para. 239 (mandating the specification of persons

less. The authoritative maxim is the benefit of the corporation, as defined by national (in our case, German) law.[200] Conflict of interests (such as delaying the disclosure of prior management behaviour that may result in management liability) lead to a more stringent review of the board decision.[201]

2. Corporation Law and the Public Responsibility of Management

This deference to management regarding the issuer's corporate interest, however, does not translate to disclosure decisions that involve issuer interference with public interest (*i.e.*, cases we termed "corporate scandal"). Contrary to VW's claim that management acted on behalf of the issuer's legitimate interests when withholding information about the use of defeat devices until September 22, 2015,[202] what is now Art. 17(4)(a) MAR effectively precludes the latter from taking into account adverse consequences of self-incrimination by disclosure (*supra* III.D.3). From management's perspective, this will regularly result in stringent review of the disclosure decision and concomitant liability towards the issuer if illicit gains were taken into account when delaying disclosure.

However, this conclusion rests on two assumptions, the application of the continuous disclosure regime again being substantially determined by corporate law. First, it has to be established that the contravention, whether of administrative or criminal law, can be attributed to the issuer.[203] If the corporation is not legally accountable for the breach, it is

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responsible within the issuer to decide on delay). Specifically on the requirement of conscious decision-making under German law see Mertens & Cahn, *in* KÖLNER KOMMENTAR ZUM AKTIENGESETZ, BAND 2/1 § 93, Rn. 22 (Zöllner & Noack, eds., 3rd ed. 2010).

[200] *See supra* II.A, II.B, n. 128 (including references for a dissenting view).

[201] Klöhn & Schmolke, ZGR 2016, 866, 886-892; Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Art. 17, Rn. 161-162, 164 (Klöhn, ed., 2018); *see generally* Cabinet Draft UMAG (*supra* n. 17), at 11.

[202] *Supra* 0.

[203] This is particularly important from a European perspective since in continental jurisdictions, the body of criminal law traditionally does not apply to legal entities directly: *See* from a comparative perspective

usually not excluded from claiming property rights (*cf. supra* III.D.3) in its direct and indirect effects. Theoretically, it would be possible for national legislators to insulate legal entities from any responsibility for public law violations, regardless of whether they were committed by representatives exercising their corporate function, and to sanction exclusively the acting natural persons. On the other end of the spectrum, Member States can formally hold corporations criminally liable similar to natural persons.[204] Second, turning to the responsibility of management, we have to again face the question of whether corporate law allows management to escape liability *ex post* in cases of the *ex ante* efficient breach of market abuse law. Especially the latter question turns on the extent to which the legal status of the corporate body approximates that of a natural person – the more the issuer is deemed to internalize the consequences of illegal behaviour, the less management has to be held accountable.[205]

German law in particular seems to adopt an intermediary position. § 30 OWiG enables courts and agencies to impose fines on corporations themselves for crimes and administrative law violations committed by their representatives and executive

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Thomas Weigend, *Societas delinquere non potest? A German Perspective*, 6 J. INT'L CRIM. JUST. 927, 927-929 (2008); Pieth & Ivory, *in* CORPORATE CRIMINAL LIABILITY (*supra* n. 165) 3, 7-14 (on the staggered development of corporate criminal liability).

[204] On the policy options for structuring corporate criminal liability, see, *e.g.*, Klaus Tiedemann, *Corporate Criminal Liability as a Third Track*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 11, 15-17 (Dominik Brodowski *et. al.*, eds., 2014); on the implications for criminal procedure and available sanctions, see Pieth & Ivory, *in* CORPORATE CRIMINAL LIABILITY (*supra* n. 165) 3, 38-48.

[205] *Cf.* Cabinet Draft OWiG (*supra* n. 169), at 59 (arguing that sanctions against legal entities are necessary because sanctioning the acting natural persons alone would not capture the legal entities' illicit profits and therefore would not achieve sufficient deterrent effect); explicitly VERBANDSVERANTWORTLICHKEITSGESETZ [VBVG] [ACT ON CRIMINAL LIABILITY OF LEGAL ENTITITES] BUNDESGESETZBLATT [BGBL] I No. 151/2005, as amended (Austria), § 11 (excluding recourse liability of employees and representatives vis-à-vis the legal entity for sanctions and other consequences under the VBVG); hereto Regierungsvorlage Verbandsverantwortlichkeitsgesetz [Cabinet Draft], Nationalrat [NR] [National Council] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 994, at 30 (arguing that recourse liability would run contrary to the purpose of the law, *i.e.*, concentrating sanctions on the legal entity); on the implications of § 11 VBVG for the problem of efficient breach, see Torggler, *in* COMPLIANCE (*supra* n. 34) 97, 107, 109.

employees[206] when acting for the corporation, if the infringement amounts to a breach of duty of the corporation or if the infringement was intended to enrich the corporation (paragraph 1).[207] This includes the forfeiture of profits (§ 30(3) in conjunction with § 17(4) OWiG).[208] Additionally, German corporate law on different points relies on the direct responsibility of management as well as shareholders to take public interests into account when carrying out their respective corporate mandates.[209] This, of course, fits neatly within the above-depicted political background of German stock corporation law (*supra* II.A). Just as the concept of legal personality is fundamentally based on liberal ideals,[210] it would be illogical to channel public interest violations of natural persons through an entity that is imbued with public interest itself.[211] In fact, § 396(1) AktG goes so far as to require the dissolution of the corporation if the unlawful behaviour of the management board exerts a negative effect on the common good.

This reasoning has two important consequences. First, it does not seem that German issuers can claim property rights from violations of public interest committed by their representatives or otherwise in their favour as defined by § 30(1) OWiG. They acquire no property right in corporate opportunities resulting from the breach and are consequentially not able to argue their legitimate interests in withholding the information

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[206] As defined by § 30(1)(1-5) OWiG.
[207] For details see Cabinet Draft OWiG (*supra* n. 169), at 60-61 (company-related duties); Klaus Rogall, *in* Karlsruher Kommentar zum OWiG § 30, Rn. 89-105 (Mitsch, ed., 5th ed. 2018).
[208] On the rationale, see *supra* n. 170.
[209] While the AktG 1965 purged in § 76 AktG on board powers this reference in contrast to § 70 AktG 1937 (but only considering it self-explanatory, *cf.* Begründung Regierungsentwurf zu § 73 & Ausschußbericht [Committee Report] zu § 73 des Regierungsentwurfs [on § 73 of the Cabinet Draft] (Ger.), cited from Kropff, *supra* n. 192, at 97-98), § 241(3) AktG still explicitly provides for the nullity of resolutions by the shareholder assembly if they infringe on law designed to safeguard public interest.
[210] *Cf.* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, Yale Law School Working Paper No. 235; NYU Working Paper No. 013; Harvard Law School Discussion Paper No. 280; Yale SOM Working Paper No. ICF - 00-09 (2000).
[211] *Cf.* Committee Report on § 73 of the Cabinet Draft, cited from Kropff, *supra* n. 192, at 98 (linking it to § 76(1) AktG) (arguing that all corporations, including those which aim for profit maximisation, have to adapt to the interests of the economy as a whole and to the public interest and referring to § 396 AktG).

about the breach.[212] Second, since the respective actors are responsible for unlawful behaviour on their own, it seems self-evident that they also bear the costs of their behaviour vis-à-vis the corporation.[213] Both aspects touch upon the fundamentals of corporate law and are as such not harmonized by European market abuse law.

V. Conclusion

In our paper, we have undertaken to explore the interaction between European and Member State law when it comes to evaluating corporate disclosure policy under MAD/R.

When looking at European market abuse law, we noticed that MAD/R neither presuppose an autonomous concept of shareholder primacy nor unboundedly accede to Member State corporate law for the decision as to which interests justify the delay of disclosure. Instead, European law seems to rely fundamentally on a compatible corporate law framework, however leaving room for variations in directors' incentive structures through Member State law to influence indirectly the functioning of the European disclosure regime.

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[212] On a side note, violations solely to the detriment of the issuer itself, be they sanctioned by means of public (administrative, criminal) law, are at the disposal of the corporate entity. Of course, the remainder of public law not primarily safeguarding public interests is small. In Germany, it amounts primarily to crimes solely prosecuted on private initiation, important examples for our purposes being libel and slander (CRIMINAL CODE [STRAFGESETZBUCH] [STGB] BGBL I 1998 at 3322, as amended (Ger.), §§ 185 *et seq.*), betrayal of secrets (ACT AGAINST UNFAIR PRACTICES [GESETZ GEGEN UNLAUTEREN WETTBEWERB] [UWG] BGBL I 2010 at 254, as amended (Ger.), § 17) and damage to property (§ 303 STGB). In case such an infringement (*e.g.*, the betrayal of the corporation's trade secrets by members of the management board) constitutes inside information, Art. 17(4) can therefore provide for a relief from disclosure under Art. 17. Importantly, when weighing the issuer's interests in such cases, management will usually be interested. Vis-à-vis the issuer, the management's delay decision will therefore be subject to stringent review even if we assume it generally to be a business decision, *cf. supra* n. 201.

[213] *See* Gerhard Wagner & Fabian Klein, *Directors' and Officers' Liability in Germany*, *in* DIRECTORS' AND OFFICERS' (D & O) LIABILITY (*supra* n. 30), paras. 67-70 (on directors' liability from shareholder-authorised unlawful conduct); *contrast supra* n. 205 (on the exclusion of recourse under the Austrian corporate criminal liability Act).

Based on the example of Germany, we then sought to explain that the choice of how to translate European standards into the fiduciary duties of management can have severe and potentially unintended consequences for the internal corporate governance of the affected companies.[214] Because the appropriate standard of review depends not only on the relative importance of the protected interests, but also on management's stakes in the decision and the availability of other means of monitoring agent behaviour, a sound understanding of MAD/R can be crucial for ensuring the effective application of European law when courts rule on directors' duties in corporate disclosure. The BJR (for Germany § 93(1) sentence 2 AKTG) in this context can function as a vehicle for translating European policy goals into efficient corporate governance under Member State law.

On the other hand, we also looked into the possible ways in which European market abuse law itself can reflect public interest concepts originating in Member State law. If MAD/R's reference to legitimate interests functions as another word for "property rights" in the inside information, European law then enables national Legislators to draw on capital markets law in shaping the parameters of corporate public responsibility. This should be considered both when devising the external regulatory environment public corporations operate their business in and when determining the internal repercussions of external (public) infringements for the acting persons.

In this two-way exchange, we see European capital markets law interacting with, complementing, and replacing Member State corporate law, not wholly unlike the phenomenon referred to as Federal corporation law in the United States.[215] An important

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[214] This is potentially alleviated by D&O insurance; *see* hereto *supra* n. 32.

[215] *Cf.* Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG, Vor Art. 17, Rn. 57-58; on the U.S. perspective see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663, 666, 692-696 (1972); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859-910 (2003). On the transformation of corporate law through European capital markets law, see Supreme Court, May 8, 2013, 6 Ob 28/13f, GesRZ 2013, 212

aspect thereof is the influence MAD/R exerts on the traditional relationship between management and shareholders. This dynamic is especially interesting from the perspective of corporate law systems, which – like the German stock corporation law – have historically been reluctant to grant control to shareholders directly. The VW shareholder litigation is testimony to the fact that while Member States might have some room to adapt MAD/R for their purposes, they cannot control that international convergence in capital markets law will continue to shake up the enforcement of fiduciary duties in continental Europe.

(Austria) (referring to Susanne Kalss, *Aktiengesellschaft*, *in* ÖSTERREICHISCHES GESELLSCHAFTSRECHT, Rn. 3/25 (Kalss *et al.*, eds., 1st ed. 2008) in acknowledging a gradual bisection of stock corporation law and softening the principle of statute stringency (*supra* II.B) for non-listed entities).