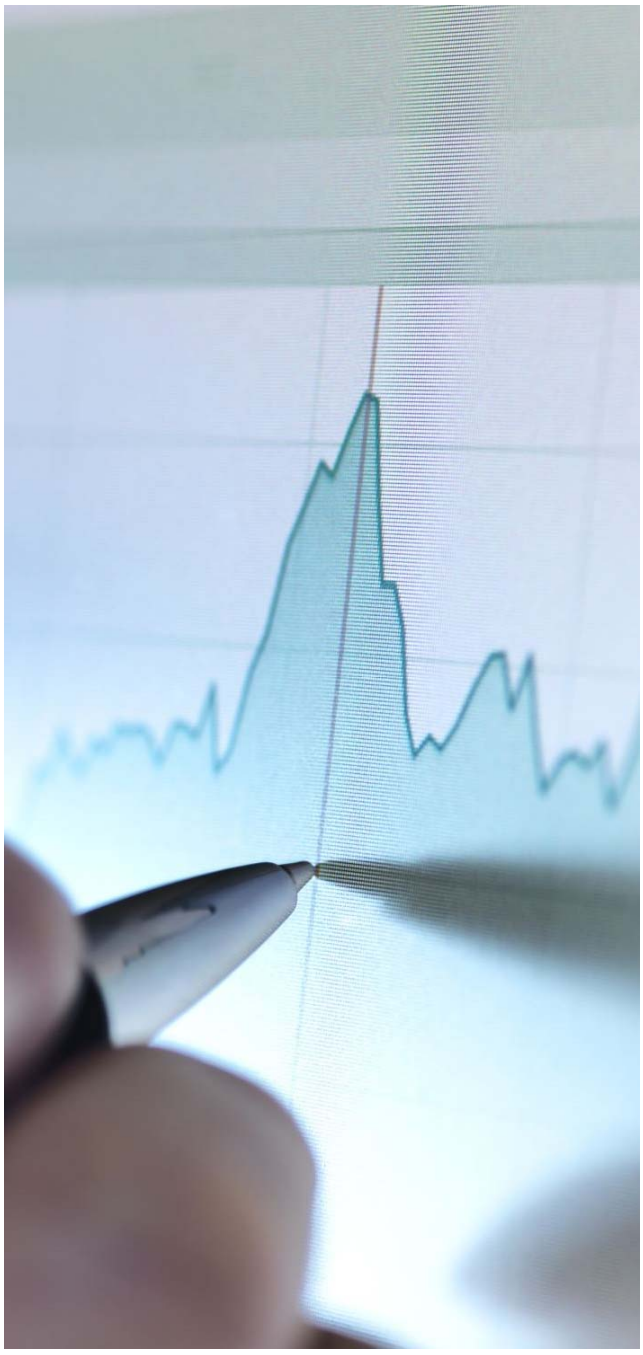
CUATRECASAS

CAPITAL MARKETS; CORPORATE AND M&A ; CORPORATE GOVERNANCE AND COMPLIANCE;

Listing Act: new developments concerning market abuse

Legal flash EU

November 20, 2024



Key aspects

- **Disclosure of inside information:**
  - In protracted processes (e.g., M&A transactions), the scope of the obligation to disclose inside information, is reviewed to allow notification of "final events" only and not the intermediate steps.
  - The conditions for delaying the disclosure of inside information are clarified, replacing the requirement that the delayed disclosure would unlikely mislead the public with the requirement that the delayed inside information is not in contrast with the latest public announcement or other type of communication on the same matter to which the inside information refers.
- **Market sounding.** It is stressed that the "safe harbor" is optional, and the protection is extended to notifications in potential transactions that are not finalized.
- **Dealings of persons discharging managerial responsibilities ("PDMRs").** The exceptions to the prohibition to operate during "blackout periods" are extended, and the reporting threshold for the transactions of PDMRs and any related persons is raised.
- **Insider lists**. The implementing technical standards on the alleviated format of the insider lists for issuers admitted to trading on SME growth markets to extend the use of such a format to all insider lists shall be reviewed.
- **Sanctions**. A sanctioning system more proportionate to the relevant company's size, based on total annual turnover and establishing maximum thresholds depending on the type of infringement, is established.

Introduction

On October 8, 2024, the Council of the European Union ("EU") adopted the Listing Act, a legislative package aimed at making EU public capital markets more accessible and more attractive for companies, particularly for SMEs. The Listing Act includes amendments to three key regulations— the Prospectus Regulation, the Market Abuse Regulation ("**MAR**") and the MiFIR—and approves a directive introducing a minimum level of harmonization in the EU on multiple-vote shares structures of companies seeking to list their shares on a multilateral trading facilities. For further details please refer to the Legal Post | The EU Listing Act has been published.

In this legal flash, we describe the main new developments introduced by *Regulation (EU) 2024/2809* regarding market abuse and their practical effects. The reform of MAR will come into force on December 5, 2024, but some provisions will not apply until 15 or 18 months later, due to the need to draft guidance or level-two measures. In this regard, most of the changes related to the delay in the disclosure of inside information and the provisions regarding protracted processes will be applicable from June 5, 2026.

The reform also grants certain flexibility to Member States to adapt some aspects of the regulation to their internal market conditions, meaning that the Spanish government could in the future legislate on this matter.

Disclosure of inside information

- **Protracted processes.** One of the most significant new developments of the amendments to MAR relates to the obligation to disclose inside information in protracted processes, such as M&A transactions which can involve several stages where there is inside information. Up until now in these circumstances, issuers could, at their own discretion, delay the disclosure of inside information if (i) its immediate disclosure could harm their legitimate interests, (ii) the delay in disclosure is not likely to mislead the public, and (iii) confidentiality of the information is guaranteed. Following the changes brought by the Listing Act, issuers will only have to disclose "final events" (as opposed to intermediate steps) as soon as possible after the occurrence of such events. This means the specific circumstances or events that the protracted process intends to bring about or results.

  The Commission shall adopt a delegated act that will include a non-exhaustive list of "final events" and indications about when they should be disclosed. Until then, *Regulation (EU) 2024/2809* of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public
  capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (the Listing Act Regulation), offers guidelines and examples that can help with this assessment:

  - The disclosure should not cover "announcements of mere intentions, ongoing negotiations or, depending on the circumstances, the progress of negotiations, such as a meeting between company representatives."

  - In the context of a merger, disclosure should be made as soon as possible after the

management has taken the decision to sign off on the merger agreement once the core elements of the merger have been agreed upon.

- In the case of contractual agreements in general, the final event should be deemed to have occurred when the core conditions of that agreement have been agreed upon.

In practice, this new development simplifies procedures for the issuers in protracted processes and provides for greater legal certainty. However, it is important to understand that, although an intermediate step is not a "final event," it can constitute inside information with the associated implications. Although the issuer does not have to meet the rules on the delay in disclosure of inside information, it must keep the information confidential and avoid its improper use at all times.

- **Delay in disclosure.** The conditions in which it will be possible to delay the disclosure of inside information are clarified by replacing the requirement that the delayed disclosure "is not likely to mislead the public" with the requirement that inside information is not in contrast with the latest public announcement or any other type of communication by the issuer on the same matter to which the inside information relates. This new development helps issuers in situations of uncertainty or change, as they only need to verify that the inside information is coherent with the information they have already communicated to the public.

- Also, the reform extends the subjective scope of the exception that allows delay of disclosure of inside information to credit institutions to maintain the stability of the finance system. As a new development, an issuer that is a credit institution or a financial institution or an issuer that is a parent company of such an institution, listed or not, can apply that exception.

Market sounding

- **Definition.** MAR establishes a special regime for gauging interest of potential investors or market sounding, enabling market participants to benefit from a "safe harbor" when disclosing inside information in these circumstances. In other words, market participants in this context benefit from the presumption of not having illicitly disclosed inside information provided that certain requirements are met. As a new development, the definition of market sounding is extended to include communications of information not followed by any specific announcement of a transaction.

  This is particularly relevant for M&A and capital market transactions, where inside information is often exchanged, but the transaction does not in the end go through. Given that the market participant can benefit from this "safe harbor", it could lead to the conducting of market soundings, which MAR itself (in recital 32) considers a "highly valuable tool" for the proper functioning of the financial markets.

- **Optional nature of the "safe harbor."** In the context of market sounding, market participants are always required to (i) assess and record in writing if they consider that the information communicated is inside information (article 11.3 MAR) , and (ii) inform the receiver when the information no longer classifies as inside information (article 11.6 MAR). The application of the safe harbor under article 11.4 MAR is voluntary, however, should they decide to benefit from it they need

to comply with the requirements therein. As a new development, the participants will not have to notify the receiver that the information provided is no longer inside information where the information has already been publicly disclosed.

Dealings of persons discharging managerial responsibilities (PDMRs)

- **Closed periods (blackout periods).** To prevent persons discharging managerial responsibilities ("**PDMRs**") from benefiting from inside information in relation to the issuer's financial situation, MAR prohibits PDMRs from trading the issuer's financial instruments during 30 calendar days before publication of intermediate or annual financial reporting (known as blackouts or closed periods).

  The reform broadens the scope of the exceptions to this prohibition, by including as exceptions transactions or activities that do not involve "active investment decisions" undertaken by the PDMRs, or that result exclusively from external factors or pre-determined terms. For example, transactions resulting from the exercise of derivatives, a discretionary asset management mandate executed by an independent third party, or the acceptance of inheritances, gifts and donations. The Listing Act also clarifies that the current exception allowing sales in exceptional circumstances or in the context of employee shares or saving schemes applies both to shares and other financial instruments.

  In summary, the prohibition to trade during closed periods becomes flexible, permitting PMDRs to carry out transactions that do not involve an active investment decision provided they have the issuer's authorization.

- **Reporting thresholds.** To increase transparency and prevent improper use of inside information, under MAR, PDMRs and persons closely associated with them must notify the issuer and the Spanish Securities and Exchange Commission ("**CNMV**") of transactions involving the issuer's financial instruments. The reform increases the threshold to reporting from €5,000 to €20,000 per year and permits the Member States to increase it to €50,000 per year or reduce it to €10,000 per year, depending on national market conditions. Currently, the minimum threshold in Spain is €20,000 per year, but it will be interesting to see whether the Spanish lawmaker uses its power to adjust this threshold as it has done in the past.

Proportionality of sanctions

- **Proportionate system**. A system is introduced under which sanctions for violations will be proportionate to the size of the company. In the case of companies, the criterion for calculating the amount of the sanction will be the total annual turnover of the company rather than annual profits or the market value of the relevant financial instruments. This ensures that the sanctions are proportionate to the economic capacity of the sanctioned company and do not depend on volatile or external factors.

- The Listing Act introduces **maximum thresholds to sanctions depending on the type of infringement and on the total annual turnover,** which **ranges** from 0.8% to 15% of the total annual turnover or from €1 million to €15 million, whichever is higher.

- **Adjustments.** Member States can establish the same maximum level for all types of issuers or can apply a lower maximum level of sanctions for SMEs, as expressed in absolute amounts, to ensuring their proportionate treatment.

  Also, the CNMV will be able to increase the amount of the sanction to the maximum established under national law, as expressed in absolute amounts, in special cases where the resulting amount of the calculation based on the total annual turnover is disproportionately low in relation to the seriousness of the infringement.

Other new developments

- **List of insiders.** The European Securities and Markets Authority ("ESMA") will review the technical standards for the alleviated format of the insider lists by September 5, 2025.

- **"Safe harbor" for buy-back programs and stabilization.** The procedure for notifying and disclosing transactions is simplified, enabling aggregated information to be communicated and only to the competent authority of the most relevant market in terms of liquidity.

- **Front running.** The definition of inside information is expanded to include information relating to pending orders in financial instruments. In addition to the information that the clients transmit to the person executing the transaction, all that information regarding future orders that persons managing proprietary accounts or managed funds may be aware of, even if they are not executing the orders inside information, is deemed to be inside information.

- **Liquidity contracts.** The process for entering into liquidity contracts in the SME growth markets is simplified by removing the requirement that liquidity contracts are accepted in writing by the market operators.

- **Powers and cooperation between competent authorities.** One of several planned measures is to create a mechanism to exchange order data between authorities supervising markets that have a high level of cross-border activity.

For additional information, please contact our *Knowledge and Innovation Group* lawyers or your regular contact person at Cuatrecasas.