The subtle relationship between Paragraphs 1, 4, 7 and 8 of Article 17 of the Market Abuse Regulation

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Key points (227 words)

- Article 17 MAR sets out the legal framework with respect to the disclosure of inside information. Article 17(1) MAR contains the primary duty to disclose inside information and stipulates that the issuer must disclose inside information that directly concerns that issuer. Article 17(4) MAR grants the issuer the possibility to delay the disclosure of inside information if three cumulative conditions are met; once one or more conditions are no longer met, the primary duty revives.
- In addition to the primary duty, two separate duties to disclose have been included in Article 17 MAR: i) Article 17(8) MAR stipulates that the issuer must make complete and public disclosure of inside information that is disclosed to selected parties and ii) if the issuer had opted to delay the disclosure of inside information, Article 17(7) MAR stipulates that the issuer must make complete and public disclosure of that information if it has lost its confidential nature.
- One could raise doubts over the necessity and function of Paragraphs 8 and 7 of Article 17 MAR. However, in this Paper we defend the independent status of these Paragraphs. If the inside information has lost its non-public nature, the duty to disclose that information can no longer be based on Article 17(1) MAR. Paragraphs 8 and 7 of Article 17 MAR contribute to legal certainty and to achieving the goals of the MAR.

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1. Introduction

In this Paper we discuss several facets of the disclosure of inside information. In particular, we attempt to find an answer to the question which duty/duties of the disclosure regime has/have been violated in two situations: i) the situation in which inside information is selectively disclosed to third parties and ii), in case the disclosure of inside information has been delayed, the situation in which the confidential nature of that information is no longer ensured. The requirements of the public disclosure of inside information are stipulated by Article 17 of the Market Abuse Regulation (hereinafter: 'MAR').[2] The issuer's primary duty to disclose inside information follows from Article 17(1) MAR. Separate disclosure duties have been included in Article 17(8) and Article 17(7) MAR for, respectively, the two situations referred to above. Commentators have raised doubts over the necessity and function of Article 17(8) MAR.[3] Similar doubts could be raised over Article 17(7) MAR. In this Paper we defend the independent status of Paragraph 8 and Paragraph 7 of Article 17 MAR, mainly by focussing on their function of serving legal certainty.

As a preliminary remark we would like to emphasize that our discussion is not purely academic. Firstly, the national competent authority and the aggrieved investor must base their fine(s) or claim(s), respectively, on the correct provision(s). For example, in some cases the fine or claim cannot be based on an infringement of the primary duty following from Article 17(1) MAR, but must be based on an infringement of the duty/duties following from Article 17(8) and/or Article 17(7) MAR (see, respectively, § 4 and § 5.1). Secondly, the question of which duty/duties has/have been infringed in which situation is important in light of the doctrine of the *concursus idealis* and the *concursus realis* (see § 5.2).

The structure of this Paper is as follows. In § 2 we outline the basics of the legal framework regulating the disclosure of inside information. Then, in § 3, we briefly discuss the ban on the unlawful disclosure of inside information. In § 4 we examine the first situation referred to above and, in that context, discuss the subtle relationship between Paragraphs 1, 4 and 8 of Article 17

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[2] 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, OJ 2014 L 173/1. Since 3 July 2016, the MAR is the successor of the Market Abuse Directive of 2003 (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ 2003 L 96/16).

[3] Hoff even argues in favour of deletion of the provision; see GTJ Hoff, 'Openbaarmaking van voorwetenschap volgens het nieuwe regime van de Verordening marktmisbruik' (2016) Tijdschrift voor Financieel Recht 507, 522. See also GTJ Hoff, *Openbaarmaking van koersgevoelige informatie (Serie vanwege het Van der Heijden Instituut nr. 107)* (2011) 523.

MAR. In § 5 we examine the second situation referred to above and, in that context, discuss the subtle relationship between Paragraphs 1, 4 and 7 of Article 17 MAR. In § 6 we conclude with a few final remarks.

2. Legal framework and rationale of Paragraphs 1 and 4 of Article 17 MAR

According to Article 7(1) MAR inside information comprises information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. The fact that it must concern information of a non-public nature plays a vital role in our analysis in § 4 and § 5.

Article 17 MAR is the core provision setting out the legal framework regarding the duties to disclose inside information. Article 17(1) MAR contains the primary duty to disclose inside information, which, in short, stipulates that the issuer in question must disclose inside information that directly concerns that issuer as soon as possible. Hence, Paragraph 1 contains a continuous duty for issuers to disclose inside information. The main purpose of the disclosure duty put forth in Paragraph 1 is to prevent insider dealing. The idea is that timely disclosure of inside information puts investors on an equal footing and, hence, reduces the risk of insider dealing.[4] A subsidiary objective of the duty to disclose inside information is that all relevant information is made available to the investing public as soon as possible, which increases market transparency and, ultimately, improves the efficiency of the price formation process.[5]

Indeed, the primary duty obliges issuers to disclose inside information 'as soon as possible'. This implies that the issuer must first have had the opportunity to verify whether certain information actually constitutes inside information. Consequently, the issuer has a little more leeway than in the hypothetical case that Article 17(1) MAR stipulated 'prompt disclosure'.[6]

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[4] For a detailed analysis see TM Stevens, 'Openbaarmaking van voorwetenschap' in DR Doorenbos et al. (eds)., *Handboek Marktmisbruik (Onderneming en recht nr. 104)* (2018) 227-229 and MJ Giltjes, 'Ahold Delhaize en het gebod tot openbaarmaking van voorwetenschap' (2019) Ars Aequi 460, 463 and the references mentioned there. See in this respect also Recitals 24 and 49 of the preamble of the MAR.

[5] See in this respect, amongst others, J Payne, 'Disclosure of Inside Information' in V Tountopoulos & R Veil (eds), *Transparency of Stock Corporations in Europe. Rationales, Limitations and Perspectives* (2019) 89-107.

[6] JL Hansen & D Moalem, 'The MAD disclosure regime and the twofold notion of inside information: the available solution' (2009) Capital Markets Law Journal 323, 328; JL Hansen, 'The Hammer and the Saw – A Short Critique of the Recent Compromise Proposal for a Market Abuse Regulation' (2012) Nordic & European Company Law LSN Research Paper Series 10-35 1, 8-9 (available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193871); C

Moreover, the issuer must have had the opportunity to decide whether or not it opts for delaying the disclosure of the inside information in question. Considering that premature disclosure of inside information may in some cases harm the (financial) interests of the investing public and/or the issuer at stake, Article 17(4) MAR grants issuers the possibility to delay the disclosure of inside information.

An issuer may delay the disclosure of inside information if three cumulative conditions are met: i) immediate disclosure would be likely to prejudice the legitimate interests of the issuer; ii) the delay of disclosure is not likely to mislead the public; and iii) the issuer is able to ensure the confidential nature of that information. For our analysis in § 5, only the third condition is relevant; the first two conditions will not be addressed separately in this Paper.[7] If one or more of the aforementioned conditions are not/no longer met, the issuer cannot/can no longer delay the disclosure of inside information. At that moment, the primary duty of Article 17(1) MAR 'revives'.[8] The system of primary duty (Article 17(1) MAR) and exception (Article 17(4) MAR) can thus be understood as that the issuer has the possibility to suspend compliance with its primary duty if all three conditions of the exception are met.

3. Unlawful disclosure

As soon as inside information comes into existence, the risk arises that this information will be shared with other (natural and/or legal) persons. Therefore, Article 14(c) in conjunction with Article 10(1) MAR bans the unlawful disclosure of inside information. The ban not only applies to inside information that directly concerns the issuer within the meaning of Article 17(1) MAR, but also applies to information relating indirectly to the issuer or information relating (in)directly to the issuer's financial instruments or derivative financial instruments (cf. Article 7(1) MAR). However, an absolute ban on the disclosure of inside information would lead to unworkable situations. For this reason, disclosing inside information is excluded from the ban if the disclosure

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Di Noia & M Gargantini, 'Issuers at Midstream: Disclosure of Multistage Events in the Current and in the Proposed EU Market Abuse Regime' (2012) *European Company and Financial Law Review* 484, 494 and FGH Kristen, HJ de Kluiver & N Lemmers, *Market Abuse Regulation: Van Europese kaders naar uitleg en toepassing in Nederland. Preadvies voor de Vereniging voor Financieel Recht 2017 (Serie vanwege het Van der Heijden Instituut, Deel 138)* (2017) 117-120.

[7] For a detailed analysis of the first two conditions and the formal aspects surrounding the delay of disclosure of inside information, we refer to the relevant literature. See, for example, Hoff (n 4) 271-312; Di Noia & Gargantini (n 7) 504-506; Hoff (n 4) 516-521; DR Doorenbos, 'Openbaarmaking van voorwetenschap onder de Verordening marktmisbruik' (2016) Ondernemingsrecht 410, 412-415; Stevens (n 5) 303-327 and Giltjes (n 5) 466-468.

[8] Hoff (n 4) 308 and Hoff (n 4) 519.

is made in the normal exercise of an employment, a profession or duties. Therefore, many forms of internal communication involving the sharing of inside information are excluded from the ban.[9] Nonetheless, the aforementioned exception is interpreted rather strictly by the European Court of Justice.[10] According to the Court, the following two conditions must be met in order to successfully invoke the exception: i) there must be a close link between sharing the inside information and the employment, profession or duties, and ii) sharing the inside information must be strictly necessary for the exercise of that employment, profession or duties. The underlying idea of the ban on the unlawful disclosure of inside information is that by sharing inside information with other persons, the possibility arises that those persons or the persons to whom they pass on the inside information will use this information when trading, constituting insider dealing (although this is, of course, banned by Article 14(a) in conjunction with Article 8(1) of the MAR).

Sometimes it is not clear whether the disclosure of inside information takes place in the normal exercise of an employment, a profession or duties. This occurs, for example, if the (board of the) issuer maintains contacts with selected parties, such as certain (major) shareholders or investment analysts. For example, major shareholders are often asked to give their opinion on a proposed acquisition or (de)merger.[11] Article 11 MAR, and in particular Paragraph 4 of that provision, offers some guidance for the (representatives of the) issuer as to whether the disclosure of inside information to a selected party takes place in the normal exercise of an employment, a profession or duties. Nonetheless, due to the strict interpretation of the exception of Article 10(1) MAR and the complexities of the detailed compliance provisions of Article 11 MAR, the ban on the unlawful disclosure of inside information may lead to a reduction of shareholder involvement.[12] Moreover, apart from the strict interpretation, there is a risk of reduced shareholder involvement due to the fact that the issuer's board, in maintaining its contacts with (major) shareholders, must tread very lightly in order not to disclose any inside information; a slip of the tongue is easily made.

4. Selective disclosure of inside information

[9] Kristen, De Kluiver & Lemmers (n 7) 164.
[10] See Case C-384/02, *Grøngaard and Bang* [2005] ECR I-9962, Paras 31 and 34.
[11] In this respect, see Recitals 32-35 of the preamble of the MAR.
[12] Hoff (n 4), 572 and JL Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR' (2017) ECFR 367, 375.

The disclosure of inside information by an issuer in the course of its business, or by a person acting on behalf or for the account of the issuer in the normal course of the exercise of his employment, profession or duties, is further regulated by Article 17(8) MAR.[13] For the purpose of convenience we cite (the relevant parts of) this Paragraph:

> 'Where an issuer (…), or a person acting on their behalf or for their account, discloses any inside information to any third party in the normal course of the exercise of an employment, profession or duties as referred to in Article 10(1), they must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure, and promptly in the case of a non-intentional disclosure. This paragraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association, or on a contract.'

Sharing information with others in the normal course of the exercise of an employment, a profession or duties in the sense of Article 17(8) MAR, is referred to below as 'selective disclosure'. Selective disclosure includes, for example, sharing information with (major) shareholders, for instance during a shareholder meeting, or sharing information with investment analysts. For the sake of completeness, we point out that the disclosure duty of Article 17(8) MAR is not triggered if the disclosure does not take place in the normal course of the exercise of an employment, profession or duties. For example, if the CEO of an issuer discloses inside information directly concerning that issuer to her twelve-year-old daughter, the CEO probably violates the ban on the unlawful disclosure of inside information, but the issuer involved does not have the duty to publish the inside information concerned.

Article 17(8) MAR implies, on the basis of a grammatical interpretation, that the issuer must make complete and public disclosure of all inside information ('any' inside information, according to Article 17(8) MAR) that is disclosed to a third party by the issuer or by a person acting on its behalf or for its account. However, we doubt whether this interpretation is correct. This would lead to the unlikely result that the issuer would also have to disclose inside information ((in)directly) relating to, for example, (the financial instruments of) a different issuer. In the

[13] We would like to point out that Article 17(8) MAR makes no explicit reference to the disclosure of inside information by an issuer *in the course of its business*. However, this must have been the intention of the European legislator, since, linguistically, an issuer cannot disclose inside information in the normal course of the exercise of its employment, profession or duties. Indeed, an issuer does not work or carry out a profession or function.

remainder of this Paper, we will discuss inside information that **directly** concerns the issuer (cf. Article 17(1) MAR).

Article 17(8) MAR is the European counterpart of Section 243.100 of the American Regulation FD (hereinafter: 'Reg FD'), commonly referred to as 'Regulation Fair Disclosure'. In the United States of America, where federal law does not impose a continuous duty on issuers to disclose inside information, it was very common that important information, before it was made publicly available, was first shared with investment analysts.[14] Moreover, it was common for issuers and their representatives to comment on analyst reports, and to answer the questions of analysts without much reservation. This was seen as a highly undesirable practice by the U.S. legislator, as selective disclosure undermines the confidence of the investing public in the integrity of the securities markets. In response to this undesirable state of affairs, the Securities and Exchange Commission devised the aforementioned Reg FD.[15] In short, Section 243.100 Reg FD stipulates that if an issuer or a person acting on its behalf or for its account discloses 'material nonpublic information' (i.e.: inside information) to a third party, it must make that information publicly available. This must be done simultaneously in the case of an intentional disclosure and promptly in the case of a non-intentional disclosure. Partly based on the fact that a continuous duty to disclose inside information is absent in U.S. federal law, it has been argued that copying Section 243.100 Reg FD into the European legal framework governing the disclosure of inside information has the undesirable effect of (unjustly) granting issuers a second chance to disclose inside information. From this point of view, it has even been advocated that Article 17(8) MAR should be deleted entirely.[16]

Although Article 17(8) MAR is derived from a legal system with its own distinct disclosure regime, we believe that this provision also has its independent status in the European legal system. We will explain this by means of an example. Imagine that the chairman of the issuer's board

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[14] For the sake of completeness, we note that insider dealing – under certain circumstances - *is* prohibited under U.S. federal law. However, insider *dealing*, as opposed to the selective *disclosure* of inside information, does not constitute the main focus of this Paper, and, hence, we have excluded the regulation of insider dealing under U.S. federal law from our analysis.

[15] Apparently the U.S. legislator and the Securities Exchange Commission were of the opinion that Rule 10b-5 - the general ("catch-all") anti-fraud provision - was an instrument too weak or otherwise ineffective to counter the previously described practices of selective disclosure in the U.S. In our discussion, we restrict ourselves to a couple of key issues related to Reg FD. See about the origin of Article 17(8) MAR and its predecessors in detail Hoff (n 4) 512-520; Hansen & Moalem (n 7) 334-335; Hoff (n 4) 522; JJ Park, 'Insider Trading and the Integrity of Mandatory Disclosure' (2018) Wisconsin Law Review 101, 110-113 and Payne (n 5) 97.

[16] Hoff (n 4) 522.

accidentally discloses inside information during a presentation (e.g. a presentation given during the annual general meeting of shareholders), and the attendees of that presentation owe no duty of confidentiality in the sense of Article 17(8) MAR. This is the so-called 'slip of the tongue' we mentioned in § 3, a situation that occasionally occurs in practice. If the issuer has not opted to delay the disclosure of the inside information concerned, the infringement of Article 17(1) MAR will be a fact. After all, the issuer did not comply with its primary duty following from Article 17(1) MAR, or at least not in the appropriate manner prescribed by that provision. However, in our example, the issuer still has to disclose the relevant information based on Article 17(8) MAR, because the chairman unintentionally disclosed inside information in the normal course of his employment, profession or duties. Whether the duty to (fully) disclose the inside information can also still be based on Article 17(1) MAR depends on the circumstances following the selective disclosure. Indeed, if the inside information is disclosed during a presentation, it could be that the information has lost all or part of its non-public nature. If that is the case, that information no longer (fully) qualifies as inside information in the sense of Article 7(1) MAR. If, for example, it concerns a presentation for a large public such as the general meeting of shareholders, it is not unlikely that the information has lost its non-public nature. If the latter is the case, the duty to disclose can no longer be based on the primary duty of Article 17(1) MAR. In our opinion, the previous example illustrates the independent status of Article 17(8) MAR, because this provision states beyond any doubt that in the case of selective disclosure of inside information, the issuer must at all times disclose the information in question in full - and not only to the extent that it has retained its non-public nature. Therefore, after the selective disclosure of inside information, (the board of) the issuer does not have to (re)assess whether the inside information has (completely) retained its non-public nature.

The fact that it is the issuer itself that must disclose the information in question (and that it must do so in the manner prescribed by the MAR) is not a mere formal aspect of Article 17(8) MAR, since disclosure by the issuer ensures that the information is actually made available to the entire investing public. Hence, Article 17(8) MAR contributes to achieving the objectives of the MAR.[17]

Extending the previously illustrated example, consider that the issuer had lawfully delayed the disclosure of the inside information. In this case, the unintentional selective disclosure of that

[17] See in this respect Recitals 24 and 49 of the preamble of the MAR.

information during a presentation will not by itself give rise to an infringement of Article 17(1) MAR. After all, the primary duty of Article 17(1) MAR was lawfully suspended by invoking the exception of Article 17(4) MAR.[18] However, the inside information must still be made public (in full) on the basis of Article 17(8) MAR (after all, there still was an unintentional disclosure in the normal course of the exercise of an employment, a profession or duties within the meaning of Article 17(8) MAR). Whether the obligation to (fully) disclose the inside information can also be based on Article 17(1) MAR once again depends on the answer to the question whether or not the inside information has (fully) retained its non-public nature.[19] In our opinion, the previous scenario, in which an issuer initially lawfully invoked the exception of Article 17(4) MAR, once again demonstrates the independent status of Article 17(8) MAR.

The above is based on the example that inside information is selectively disclosed unintentionally. If, however, inside information is disclosed intentionally (within the meaning of Article 17(8) MAR), our reasoning as to whether the duty to disclose that information can also still be based on Article 17(1) MAR remains unchanged; whether the duty to disclose can still be based on Article 17(1) MAR depends on the (non-)public nature of the information after the selective intentional disclosure. Therefore, we will not discuss the intentional selective disclosure of inside information in further detail.

5. The confidential nature of inside information is no longer ensured

5.1 Legal framework of Paragraph 7 of Article 17 MAR

As long as the confidential nature of the inside information is ensured, the issuer may lawfully delay the disclosure of that information pursuant to Article 17(4) MAR, provided, of course, that the other two conditions of this provision are also met. If, however, the confidential nature is no longer ensured, Article 17(7), first sentence, MAR stipulates that the issuer shall disclose the information concerned as soon as possible. The duty for the issuer to disclose the information 'as soon as possible' is related to the fact that the issuer must first have had the opportunity to verify

[18] If the inside information has been disclosed during a presentation, this obviously raises the question whether the third condition of the exception to the primary duty of Article 17(1) MAR, namely that the confidentiality of the information concerned must be ensured, is still met (see Article 17(4)(c) MAR). For the answer to this question we refer to § 5.2.

[19] For the sake of completeness, we emphasize that the obligation to (fully) disclose the inside information can only be based on Article 17(1) MAR (or Article 17(7) MAR) if the confidential nature of the inside information is no longer ensured after the disclosure of the inside information during a presentation. Again, we refer to § 5.2.

whether the confidential nature of the inside information is indeed no longer ensured.[20] Article 17(7), second sentence, MAR explicitly states that this provision is particularly relevant in the context of rumours:

> 'This paragraph includes situations 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 sufficiently accurate to indicate that the confidentiality of that information is no longer ensured.'

At first glance it seems remarkable that the European legislator has chosen to separately include the disclosure duty of Article 17(7) MAR in the disclosure framework. After all, if the confidential nature of the inside information is no longer ensured, the issuer can no longer lawfully delay the disclosure of that information pursuant to Article 17(4) MAR and the primary disclosure duty of Article 17(1) MAR revives. Consequently, the disclosure duty of Article 17(7) MAR may seem superfluous. However, in our opinion, the provision has its independent status in the legal framework regarding the disclosure of inside information.

In practice, it may occur that inside information loses its confidential nature to such an extent that it also loses - at least in part - its non-public nature, as a result of which it no longer (fully) qualifies as inside information within the meaning of Article 7(1) MAR. From our perspective, this illustrates the role and function of Article 17(7), first sentence, MAR, because this provision states beyond any doubt, that if the confidential nature of the inside information is no longer ensured, the issuer must at all times disclose the information in question in full - and not only to the extent that the information has retained its non-public nature.[21] Thus, if the confidential nature of the information concerned is no longer ensured, (the board of) the issuer does not have to (re)assess whether the inside information has (completely) retained its non-public nature.

The fact that it is the issuer itself that must disclose the information in question (and that it must do so in the manner prescribed by the MAR) is once again not a mere formal aspect, since disclosure by the issuer ensures that the information is actually made available to the entire investing public (in this respect, see our comments on Article 17(8) MAR in § 4).

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[20] See also Kristen (n 7) 120-122.

[21] C Mosca, 'Article 10: Unlawful Disclosure of Inside Information' in M. Ventoruzzo & S. Mock (eds), *Market Abuse Regulation: Commentary and Annotated Guide* (2017) 279-280.

Considering a situation in which the confidential nature of the inside information concerned is no longer ensured, but has nevertheless retained its non-public nature (and so, the duties to disclose of both Article 17(7) MAR and Article 17(1) MAR are, at least in principle, applicable), raises the question as to whether the duty to disclose of Article 17(7) MAR could be characterised as a *lex specialis* with respect to the primary duty of Article 17(1) MAR. In our view, this question should be answered in the negative, which we base on the following two arguments. Firstly, as opposed to Paragraphs 1, 2, 4, 5 and 8 of Article 17 MAR, Paragraph 7 is not explicitly mentioned in Article 30 MAR, which contains the core provisions regarding the administrative sanctions and other measures related to market abuse. This means that the MAR does not make it mandatory for member states to sanction infringements of the disclosure duty of Article 17(7) MAR under national law (contrary to the infringements of Paragraphs 1, 2, 4, 5 and 8 of Article 17 MAR, see Article 30(1)(a) MAR). In our opinion, this has the consequence that - at least in the opinion of the European legislator - the disclosure duty of Article 17(7) MAR cannot be characterised as a *lex specialis*. If Article 17(7) MAR were to be characterised as a *lex specialis* of Article 17(1) MAR, it would have to be applied to the exclusion of Article 17(1) MAR in the context of administrative enforcement, which - again in the opinion of the European legislator - would mean that the infringement of Article 17(7) MAR could not be sanctioned. This, naturally, cannot have been the intention of the European legislator, because the current practice - and this is how the European legislator intended it to be - is that the national competent authority can also intervene if the confidential nature of the inside information is no longer ensured and the issuer subsequently fails to disclose the information concerned. Secondly, the European legislator has chosen to only include a separate duty to disclose inside information with respect to (no longer fulfilling) the third condition of Article 17(4) MAR; there are no separate disclosure provisions concerning the first two conditions of Article 17(4) MAR. This means that the system of the primary duty (Article 17(1) MAR) and the exception (Article 17(4) MAR) really is designed in such a way that the primary duty revives if one (or both) of the first two conditions of the exception is (are) no longer met. In our opinion, this system also applies in case the third condition of the exception is no longer met, which implies that the disclosure duty of Article 17(7) MAR cannot be characterised as a *lex specialis*. The point we make here is not purely academic, but also serves a practical purpose. Under Dutch law, the infringement of Article 17(7) MAR can be sanctioned by the national competent authority. However, still under Dutch law, this raises the question

whether the infringement of Article 17(7) MAR can indeed be sanctioned separately if the national competent authority also sanctions the infringement(s) of Article 17(1) and/or Article 17(8) MAR. The same question may arise in other member states that have equipped their national competent authorities to sanction the infringement of Article 17(7) MAR. We address this topic in some further detail in § 5.2.

In contrast to the first two conditions of the exception, the European legislator has not given the European Securities and Markets Authority (hereinafter: 'ESMA') the power to issue guidelines on the third condition of the exception.[22] Furthermore, the European legislator itself did not provide a clear definition of 'ensuring confidentiality'. In the remainder of § 5 we formulate some thoughts on this matter. In § 5.2 we first discuss whether or not the confidential nature of the information can still be ensured in the event of selective disclosure. Then, in § 5.3, we consider whether or not the confidential nature of the information can still be ensured once rumours regarding that information start spreading. In this respect, for the remainder of this Paper, we will assume that the issuer initially lawfully invoked the exception of Article 17(4) MAR.

5.2 Ensuring the confidential nature of inside information in the event of selective disclosure

If inside information is selectively disclosed to a group of investment analysts or (major) shareholders and the recipients of that information do not owe a duty of confidentiality in the sense of Article 17(8) MAR, the information will typically lose its confidential nature. Consequently, the issuer must publicly disclose that information as soon as possible pursuant to Article 17(7), first sentence, MAR. In addition, if, despite the loss of the confidential nature of the information, the inside information retains its non-public nature, the issuer's duty to publicly disclose that information can also still be based on Article 17(1) MAR. After all, the issuer can no longer lawfully delay the disclosure of that information on the basis of Article 17(4) MAR, and, as a result, the primary duty of Article 17(1) MAR revives. However, we do not think that the confidential nature of inside information is no longer ensured in all cases of selective disclosure. In this respect, think of, for example, the disclosure of inside information to an individual major shareholder who does not have any desire to act on the basis of that inside information. In that

[22] See Article 17(11) MAR. The guidelines for the first two conditions of Article 17(4) MAR are provided in ESMA 2016/1130, *Final Report. Guideline on the Market Abuse Regulation – market soundings and delay of disclosure of inside information.*

case, the disclosure duty of Article 17(8) MAR will probably be infringed (and possibly also the ban on unlawful disclosure of Article 14(c) MAR), but not necessarily the disclosure duty of Article 17(7) MAR (and Article 17(1) MAR). As long as the selective disclosure will not have an impact on the trading volume and, potentially, the price of the relevant financial instruments, and as long as there are no other rumours related to the inside information spreading on the markets, the confidential nature of the information concerned still seems to be ensured. Nonetheless, we realise that this is not an easy standard to use in practice (see also § 5.3).

The events constituting, respectively, the loss of the confidential nature and the loss of the non-public nature of the inside information can be closely related in practice, but should be distinguished from one another. For example, if inside information is selectively disclosed to various analysts and, as a result, the confidential nature of the information is no longer ensured, the information may still have retained its non-public nature. However, this changes if the group of analysts to whom the inside information is disclosed is bigger, the inside information is distributed further to other parties by the original recipients and, subsequently, incorporated (in whole or in part) into the price of the related financial instruments by the investing public.

In this respect, it is important to note that if the selective disclosure of inside information does indeed lead to a loss of the confidential nature of that information, the issuer could infringe *multiple* disclosure duties if it does not subsequently disclose the information in question. Firstly, the duty following from Article 17(8) MAR would be infringed; secondly, the duty following from Article 17(7) MAR would be infringed; and, thirdly, the duty following from Article 17(1) MAR would be infringed (given that the inside information - despite the loss of its confidential nature - has retained its non-public nature). In practice, the question may arise whether the national competent authority can impose a fine for all three infringements mentioned above. Under Dutch law, this question needs to be answered by paying due respect to the doctrine of the *concursus idealis* (*eendaadse samenloop*) and the *concursus realis* (*meerdaadse samenloop*). As similar doctrines exist across the European Union, the following analysis, which mainly builds on the Dutch doctrines of the *concursus realis* and *concursus idealis*, will probably also be relevant for other member states.

In our view, if both Article 17(1) and Article 17(7) MAR are infringed, this constitutes a *concursus idealis*.[23] We have three arguments to support this view. Firstly, the purpose and aim of both disclosure duties are the same: preventing insider dealing and increasing market transparency and the efficiency of the price formation process (see § 2). Secondly, by construction, the underlying facts constituting the infringements of Article 17(1) and Article 17(7) MAR will fully overlap one another. In other words, there will be unity of time and unity of place regarding the underlying facts. Thirdly, the MAR does not oblige member states to sanction infringements of Article 17(7) MAR (see Article 30(1)(a) MAR and our comments on this provision in § 5.1). This means that, in the view of the European legislator, sanctioning infringements of this provision should take place in light of sanctioning infringements of Article 17(1) MAR. Under Dutch law, this *concursus idealis* implies that a fine can only be imposed based on either of the two infringed provisions.

In our opinion, the analysis regarding the *concursus* is different with respect to the infringements of both Article 17(8) and Article 17(7) MAR (and possibly Article 17(1) MAR). Whereas the purpose and aim of Article 17(8) MAR *vis-à-vis* the purpose and aim of Article 17(7) and Article 17(1) MAR are not significantly different from each other, the underlying facts of the infringement of Article 17(8) MAR do not have to overlap with the facts constituting the infringement of Article 17(7) MAR (and possibly Article 17(1) MAR). Depending on the circumstances - whether there is unity of time and unity of place regarding the underlying facts constituting, respectively, the infringements of Article 17(8) and Article 17(7) MAR (and possibly Article 17(1) MAR) - the infringements will constitute a *concursus idealis* or a *concursus realis*. Under Dutch law, a *concursus realis* implies that both infringements can attract a fine.[24]

5.3 Ensuring the confidential nature of inside information in the event rumours start spreading

The market is full of news, fake news, opinions and other types of (non-)information. Rumours also form a big part of (non-)information, for example the rumour regarding an imminent

[23] In the Dutch legal system, the Administrative Division of the Council of State (*ABRvS*) applies the regime regarding the *concursus idealis* derived from criminal law *mutatis mutandis* in administrative law proceedings. It should be noted that there is no *concursus* in the actual sense of the word, if we were to follow the view that the disclosure duty of Article 17(7) MAR is a *lex specialis* of the primary duty of Article 17(1) MAR (*quod non*, see § 5.1). In this view, of course, only Article 17(7) MAR can be used as the basis for a(n administrative or criminal) sanction.

[24] With respect to Dutch law, we assume that the regime regarding the *concursus realis* derived from criminal law will be applied *mutatis mutandis* in administrative law proceedings.

acquisition. If the issuer concerned is not involved in any (proposed) acquisition at all, the rumour does not reflect reality and it is generally assumed that an issuer does not have to respond to that rumour.[25] This is different if the rumour does (partly) reflect reality. If this is the case, the confidential nature of the information concerned may no longer be ensured and one may suspect a leak.

Pursuant to Article 17(7), second sentence, MAR - which, apart from other situations, explicitly includes situations where a rumour related to inside information starts spreading, the disclosure of which has been delayed in accordance with Article 17(4) MAR - the confidential nature of inside information is no longer ensured if such a rumour is sufficiently accurate. Stevens believes that a rumour is sufficiently accurate if it is consistent with the inside information at hand.[26] However, still according to Stevens, the rumour does not have to contain all the details related to the inside information in order to be sufficiently accurate; it will have to be determined on a case-by-case basis whether the rumour is sufficiently accurate. We share this view. If, for example, a rumour is spreading in the market and according to that rumour an issuer intends to acquire company X, while, in reality, the issuer intends to acquire company Y, the confidential nature of the inside information may still be ensured if X and Y operate in completely different sectors. However, if the names of X and Y are quite similar (e.g. the rumour concerns the acquisition of the holding company, whereas in reality only the acquisition of a subsidiary of that holding is being negotiated) or if companies X and Y share other characteristics, one has to seriously doubt whether the confidential nature of the inside information concerning the acquisition is still ensured.

In practice, developments in the volume and/or price of the relevant financial instruments are often analysed in order to assess whether the confidential nature of the inside information concerned is still ensured.[27] An important court decision in this respect, under Dutch law, is *Super de Boer/VEB*, in which the Amsterdam Court of Appeal ruled that a statistically significant increase in the volume of trade over three consecutive trading days - without any plausible alternative explanation - is sufficient to conclude that the confidential nature of inside information

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[25] See for example Hansen & Moalem (n 7) 336; C Di Noia & M Gargantini, 'The Market Abuse Directive Disclosure Regime in Practice: Some Margins for Future Actions' 2009 (available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417477) 28-29 and Di Noia & Gargantini (n 7) 523-527.
[26] Stevens (n 5) 324.
[27] See in this respect BJ de Jong, 'Can Fluctuations in Prices or Volumes of a Security Trigger a Duty for Listed Companies to Disclose Inside Information?' 2016 *European Business Organisation Law Review* 523, 523-539.

is no longer ensured.[28] In the literature it has been argued that mere volume and/or price developments can never suffice to draw the conclusion that there is a leak, because, for example, those volume and/or price developments, without additional rumours concerning the underlying information circulating in the market, can always be attributed to (the trades of) 'noise traders' (i.e.: investors who do not base their investment decisions on (an analysis of) information and whose actions are often based on speculative considerations).[29] In general, we do not agree with this line of thought, because the evidence that there are *statistically significant* developments in volume and, potentially, price, given the fact that there is no plausible alternative explanation for those developments, demonstrates that those developments - statistically speaking - are not based on mere coincidence and, hence, should not be qualified as 'noise'.

Once again, but now with respect to volume and/or price developments that can be attributed to the leakage of inside information, it is important to distinguish between, respectively, the event that the inside information loses its confidential nature and the event that the inside information loses its non-public nature. The information regarding certain developments in trading volume and/or price is information which becomes public and which is picked up by investors. However, the fact that this information becomes public does not necessarily justify the conclusion that the information that constitutes the inside information driving those developments has become public. This information has only become public when it is available or accessible to (a large part of) the investing public, in order for them to incorporate it into the price of the relevant financial instruments.

If it must be concluded, based on volume and/or price developments, that the confidential nature of certain inside information is no longer ensured, the issuer must disclose that information on the basis of Article 17(7) MAR. Whether the duty to disclose can also be based on Article 17(1) MAR once again depends on the answer to the question whether the inside information - despite the loss of its confidential nature - has retained its non-public nature.

6. Epilogue

In this Paper we have discussed the subtle relationships between Paragraphs 1, 4, 7 and 8 of Article 17 MAR and, by means of various scenarios, we have defended the independent status of

[28] Amsterdam Court of Appeal 10 July 2012 ECLI:NL:GHAMS:2012:BX0488, Para 2.15 (*Super de Boer/VEB*).
[29] Amongst others Di Noia & Gargantini (n 7) 522-523; Kristen (n 7) 120-122 and Stevens (n 5) 325.

Paragraphs 8 and Paragraph 7. The independent status of these provisions is based on the fact that they state beyond any doubt that, in the event of selective disclosure of inside information or in the event the information has lost its confidential nature, respectively, the issuer must at all times disclose the information concerned in full - and not only to the extent that it has retained its non-public nature (see § 4 with respect to Paragraph 8 and § 5.1 with respect to Paragraph 7). In both events, (the board of) the issuer does not have to (re)assess whether the inside information has (fully) retained its non-public nature. Hence, Article 17(7) and Article 17(8) MAR contribute to legal certainty. Moreover, both provisions contribute to achieving the objectives of the MAR, because the issuer itself must disclose the information at hand (and in the manner prescribed by the MAR). This guarantees that the information is actually made available to the entire investing public (see again § 4 with respect to Paragraph 8 and § 5.1 with respect to Paragraph 7).

Furthermore, we discussed whether the confidential nature of inside information remains ensured in the case of selective disclosure and in the case rumours related to that information start spreading on the markets. In this respect, we have argued that the selective disclosure of inside information typically leads to the loss of the confidential nature of that information, but that this does not necessarily have to be the case (see § 5.2). By the same token, we have argued that in the case of selective disclosure of inside information, the events constituting, respectively, the loss of the confidential nature and the loss of the non-public nature of that information, can be closely related in practice, but that both events should be distinguished from one another (see again § 5.2). In addition, in the context of Article 17(7) MAR, we have defended that - without a plausible alternative explanation - volume and/or price developments may in principle be sufficient to conclude that the confidential nature of inside information is no longer ensured (see § 5.3). Additionally, we have argued that in the case of volume and/or price developments that can be attributed to the leakage of the inside information concerned, once again the aforementioned distinction must be made between the loss of the confidential nature and the loss of the non-public nature of that information (see again § 5.3).

To sum up, which duty/duties is/are infringed and when, will largely depend on (i) whether or not the inside information has been selectively disclosed to third parties, (ii) whether or not the confidential nature of that information remains ensured, and (iii) whether or not the inside information has retained its non-public nature. Our analysis does not give guidance only to issuers as to which duty/duties following from the disclosure regime of Article 17 MAR is/are applicable.

Indeed, our analysis is also relevant for the national competent authorities and aggrieved investors. After all, it is necessary that they base their fine(s) and claim(s), respectively, on the appropriate provision(s).