t. LXXIII • nr 6/2020 (864) • DOI 10.33226/0137-5490.2020.6.2

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Insider list in a capital group

Lista insiderów w grupie kapitałowej

Abstract

The article presents the issue of maintaining the insider list referred to in Article 18 MAR in the capital group. The main research problem analysed by the authors is whether the provisions MAR constitute the legal basis for including the employees of the issuer's subsidiaries in the insider list maintained by the issuer (the parent company). In the authors' opinion, employees of subsidiaries having preferential access to inside information produced in a subsidiary should be considered as persons to be included in the insider list maintained by the issuer. The proposed interpretation is consistent with all views treating the capital group as a single economic unit, pursuing an interest that is essentially convergent for all participants of the group.

Key words: insider list, inside information, MAR, market abuse, issuer, capital group

Streszczenie

Artykuł porusza problematykę obowiązku sporządzania listy osób mających dostęp do informacji poufnych (lista insiderów), o której mowa w art. 18 MAR. Główny problem badawczy analizowany przez autorów polega na udzieleniu odpowiedzi na pytanie, czy przepisy MAR stworzą podstawę do uwzględniania pracowników spółek zależnych od emitenta (spółkę matkę) na liście insiderów. W ocenie autorów, pracowników spółek zależnych, mających preferencyjny dostęp do informacji poufnych tworzonych w otoczeniu tych spółek zależnych, należy uznać za osoby, które powinny zostać uwzględnione na liście osób mających dostęp do informacji poufnych prowadzonej przez emitenta. Zaproponowana wykładnia jest spójna z poglądami traktującymi grupę kapitałową jako jeden organizm gospodarczy (*single economic unit*).

Słowa kluczowe: : lista insiderów, informacja poufna, MAR, nadużycia na rynku, emitent, grupa kapitałowa

Introduction

This article presents the issue of maintaining the insider list referred to in Article 18 MAR — Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation — MAR) 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 L 173, 12.06.2014, pp. 1–61) — in the capital group. The main research problem analysed by the authors is whether the provisions MAR constitute the legal basis for including the employees of the issuer's subsidiaries in the insider list maintained by the issuer (the parent company). The authors also draw attention to other aspects of this issue and present its broader context, i.e. the principles and basis for the flow of information within the capital group in the context of performing information obligations of public companies, including the interest of the capital group as a standard for the conduct of directors and overriding objectives MAR. The article, therefore, shows a broader context of the problem of inside information (As defined in Art. 7 MAR) flow in the capital group, taking into account MAR provisions imposing on the issuer — being the parent company — the obligation to disclose inside information which directly concerns that issuer, including inside information generated by its subsidiaries, and to take action to prevent an unlawful disclosure of inside information (e.g. by maintaining the insider list). In our opinion, employees of subsidiaries who have preferential access to inside information created in such subsidiary should be considered as persons to be included in the insider list maintained by the issuer.

Internal relations in a capital group

It should be observed that it is rare to operate on a large scale as only one entity. It is much more common for capital groups to carry out activities with the help of many companies and existing links between them, often of a transnational nature. This phenomenon takes on particular significance among listed companies. The use of a group of companies allows for more effective competition on the market, and by creating complex structures it enables separating individual business segments and diversifying the business activity, which in turn strengthens economic benefits. Within a capital group there may even be several companies whose shares or bonds are listed on the financial instruments trading system. However, in most cases the company at the head of the group is a listed company, and its main objective is to manage the entire capital group. The share price performance of this company reflects the economic strength of the group as a whole (instead of many Hopt, 2015, p. 3). These companies are obliged to comply with the obligations and prohibitions set forth in MAR (*vide* Art. 2(1) MAR). By adopting MAR terminology, these entities will be hereinafter referred to as 'issuers'. Conducting business within a capital group undoubtedly brings benefits, but also leads to greater complexity of the legal situation of its participants, which translates, among other things, into interpretation doubts, referred to later in this article.

Subsidiaries, in turn, are fully owned by the issuer and constitute a significant asset contributing to the assets side of its balance sheet. Therefore, it should not be surprising that certain events occurring in the area of subsidiaries may seriously affect the value of the issuer. Examples include, among others, transactions concluded by these companies in the form of purchase or sale of assets of significant value, the occurrence of unprofitable conditions in certain areas of activity conducted by the subsidiaries, or even the issuance of a court ruling constituting a considerable financial burden for these subsidiaries. Such events may generate obligations for the issuer (the parent company), such as public disclosure of inside information. Issuers managing a capital group are therefore interested in obtaining the widest and fullest possible access to information on the legal and economic situation of subsidiaries, which in turn may be classified as inside information concerning the issuer.

The first issue to be raised, therefore, is the legal possibility for an issuer to obtain from its subsidiaries particularly sensitive and confidential information. It should be mentioned that each company in the capital group, despite the existence of factual and legal links, constitutes a separate, independent legal entity, which also determines the scope of their duties and rights. Relations occurring in capital groups lead *de facto* to subordination of subsidiaries to the parent company (issuer). Therefore, the right of access to information about subsidiaries must take into account their own interest. Interest, which is read as the main directive of the conduct of the subsidiary's governing bodies (Opalski, 2008, p. 16; Sołtysiński, Mataczyński, 2017, p. 84). The scope of mutual relations between companies in the capital group should therefore be considered, in order to identify the overriding interest, i.e. the interest of the subsidiary or the interest of the entire group of companies. For example, Polish juridical literature indicates that a potential conflict of these interests may argue in favour of refusing to provide information to the parent company (Topór, 2019, p. 44). This issue therefore requires at least a brief discussion.

A capital group as a single economic unit in the context of disclosure requirements — the views of the jurisprudence of Polish administrative courts

The fact that companies forming a capital group are in fact a single economic unit, contributed significantly to the ruling of the Supreme Administrative Court, which was widely discussed in Polish doctrine — judgment of the Supreme Administrative Court of 24 June 2016 (II GSK 366/15) — and concerned the rules governing circulation of inside information within the capital group and the beginning of the period for disclosing inside information to the public.

In the facts constituting the basis for the ruling, the issuer was fined PLN 500,000 for failure to timely disclose inside information to the public. The information concerned activities undertaken by the issuer's subsidiary, i.e. conclusion of a financial advisory agreement which was secured by a pledge agreement on all shares held by the subsidiary in other company ('company R'). The issuer, on which the fine was imposed, held directly and indirectly 66% of shares in R. The stake was then valued at PLN 592.700.000, whereas the pledge agreement provided for the possibility of selling the entire stake of the pledged shares for any amount, also below their market value.

The issuer's investment was therefore threatened not only because of the financial result of this operation, but also because of the risk of losing control over a company controlled by a subsidiary. It should also be noted that the issuer was put into voluntary arrangement bankruptcy. Both Polish supervisory authority (KNF) and the administrative court of first instance, have deemed this information to be inside information directly related to the issuer. It was considered that the information about the pledge agreement in question was directly related to the issuer, as it was related to its assets held through an 'investment vehicle', which was a direct subsidiary of the issuer and which did not conduct any business activity. The consequences of the pledge execution would therefore have a direct effect on the operations and financial results of the issuer and its capital group.

However, the axis of the legal dispute in this case concerned the beginning of the time for disclosing the information in question to the public, which happened just after the issuer became aware of conclusion of the pledge agreement, i.e. more than three months after this conclusion. The issuer took the position that it had no possibility to fulfil the disclosure obligation with due diligence earlier, as it was not aware of the conclusion of the aforementioned agreement.

A different position, which was subsequently shared by the court of first instance and the Supreme Administrative

Court, was taken by KNF, who made a noteworthy distinction between the legal situation of subsidiaries and that of other 'external entities' when performing disclosure requirements. KNF equated the position of the issuer's subsidiaries with that of the issuer, treating them essentially as an issuer — one organism. It was indicated that inside information generated by the issuer, including its subsidiaries, must be disclosed to the public immediately, and the period for disclosure starts to run from the moment of its creation. *A contrario*, the beginning of the period for public disclosure of inside information produced by an 'external party' starts to run from the moment at which the issuer becomes aware of inside information.

In the presented case, a position was shown equating the subsidiaries with the issuer from the perspective of the fulfilment of inside information disclosure requirements. The arguments presented by the supervisory authority and administrative courts refer to the same aspects as those raised by the authors of this article when discussing the notion of the company's interest or the characteristics of the activity of entities in a capital group in general, and therefore deserve to be approved. Thus, it is appropriate to assume that, in the context of the fulfilment of disclosure requirements, companies within a group constitute a single economic unit within the framework of which the flow of information should be organised in such a way that the issuer can comply with the disclosure requirement laid down in Article 17(1) MAR in a timely manner, i.e. as soon as possible (see also the judgment of CJEU of 27 April 2017 in case C-516/15 P *Akzo Nobel NV and Others v European Commission*). The issuer, being the parent company, is therefore responsible for creating conditions for close cooperation between it and its subsidiaries. The deadline for disclosure of inside information to the public starts at the moment of its creation and not at the moment of its disclosure to the issuer by the subsidiary.

In this respect, it should be pointed out that the disclosure of inside information to the issuer by employees of the subsidiary for the purposes of complying with the issuer's disclosure requirements cannot be regarded as unlawful. However, in accordance with Article 10 MAR, the above refers only to the disclosure of inside information to persons on the issuer's side in the normal exercise of their employment, profession or duties, and only to those who may have access to such information by virtue of their employment, profession or duties. As indicated by the CJEU in the judgment of 22 November 2005 in case C-384/02 Knud Grongaard and Others v. Kobenhavns Byret, the exception to the prohibition on disclosing inside information should be interpreted strictly. The prerequisites for legal disclosure of inside information are: (i) there is a close causal link between the disclosure of inside information by the person concerned and his or her employment, profession or duties; and (ii) the disclosure of inside information is strictly necessary for the exercise of his or her employment, profession or duties. Despite the fact that the above view was expressed by the CJEU before the application MAR, it has not lost its validity, and furthermore, it supports the authors' arguments on the legitimacy of proper flow of information within the capital group. The aim of such actions is to strengthen the protection against unlawful disclosure of inside information and, consequently, unlawful use of such information.

Obligation to maintain an insider list and the nature of the research problem

According to Article 18(1)(a) MAR, issuers or any person acting on their behalf or on their account, shall draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies (insider list). The insider list must be promptly updated in accordance with Article 18(4) MAR and delivered to the competent authority as soon as possible, upon its request.

Nevertheless, the problem goes beyond MAR and beyond this article, as it affects other regulations. The subsidiaries, in order to protect themselves against the allegation of unauthorised disclosure of personal data, will require a proper explanation of this basis. This issue also takes on importance in the light of the proposed amendments to MAR — proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, Brussels, 24 May 2018 COM(2018) 331 final, 2018/0165 (COD) — aiming to make it easier for companies listed on the SME growth markets to meet their obligations under MAR. It should be observed that these companies are to be obliged to maintain a list of persons having permanent access to inside information, instead of the *ex post* lists (see Art. 18(6) b MAR).

Therefore, it was necessary to present this issue in a comprehensive manner and then propose a solution in order to eliminate legal doubts, as well as sensitising to possible risks both on the part of issuers and subsidiaries. These considerations should contribute to a better and more comprehensive understanding of the nature and scope of the examined regulation for the benefit of the obliged entities.

Methods of interpretation

The aim of the second part of this article is to answer the question whether employees of subsidiaries should be included in the insider list maintained by the issuer pursuant to Article 18(1) MAR. To reach this goal, the achievements of case law and literature related to the rules of interpretation of law were used, taking into account the specificity of the interpretation of EU law.

In addition to presenting the justification originating in the text of the legal act (linguistic interpretation), the authors point out the purpose of the regulation as an important

interpretation guide (teleological interpretation) — see, e.g. Lenaerts; Gutiérrez-Fons, 2014; Rasmussen, 1992, p. 167–171; Rösler, 2012, p. 979–982; Itzcovich, p. 537–560, 2009; Fennelly, 1996 Art. 4. Therefore, each of the classical methods endorsed by ECJ in CILFIT were used (see ECJ: Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, point 18–20, ECR 1982-03415).

It was also necessary to pay attention to the practical significance of the problem, including its perception by supervisory authorities. In this area, the authors see insufficient sensitivity to the presented problem, and this gap should be filled by this paper.

Motives for the obligation to maintain an insider list

The main objective of MAR is to prevent market abuse, i.e. unfair action and undermining of confidence in the capital market. As indicated in recital 2 MAR, the smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives. Particularly sensitive are those areas where it is possible to use the information advantage of a privileged position. This is indicated in recital 23 MAR, which states that: '*The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor confidence*' (see also Kinanderm, p. 367). These objectives already date back to Article 2 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, and their importance is confirmed by the numerous references to them in the rulings of the CJEU (ECJ: Case C-384/02 Grongaard & Bang, points 23, 33, ECLI:EU:C:2005:708; Case C-391/04 Ypourgos Oikonomikon, Proistamenos DOY Amfissas v. Charilaos Georgakis, points 37–38, ECLI:EU:C:2007:272; Case C-45/08 Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen (CBFA), points 47–48, ECLI:EU:C:2009:806; Case C-628/13 Jean-Bernard Lafonta v. Autorité des marchés financiers, point 21, ECLI:EU:C:2015:162).

In order to achieve the above objectives, MAR provides for a number of obligations and prohibitions, some of which relate to the protection against insider dealing by persons with special privileged access to inside information. This relates to the obligation to notify transactions by persons discharging managerial responsibilities and persons closely associated with them (Art. 19(1) MAR), the prohibition on making transactions in closed periods (Art. 19(11) MAR), and, finally, the obligation to draw up and update the insider list (Art. 18(1) MAR and in respect of companies listed on SME growth markets — Art. 18(6) MAR). These measures are highly abuse preventive in nature, addressing the main objectives of MAR. On the other hand, these measures significantly increase transparency and confidence of capital market participants (see Ventoruzzo, Mock, 2017, p. 397). The introduction of intra-corporate obligations, followed by their proper implementation, is the key determinant in ensuring compliance and thus protecting other market participants.

The insider list has a particular role to play, as has been repeatedly highlighted in the various initiatives taken by ESMA. In the Draft technical standards on the Market Abuse Regulation it is indicated that this list represents an '*important tool for competent authorities when investigating possible market abuse*' — Consultation Paper. Draft technical standards on the Market Abuse Regulation of 15 July 2014 (ESMA/2014/809), p. 65). It is therefore an extremely important tool not only for prevention and transparency, but also for ensuring the possibility of effective subsequent actions (verifying the existence of abuse). It is further indicated that it is extremely important for '*receiving adequate information to perform the important task of protecting the integrity of the financial markets and detecting possible insider dealing. In particular, it is critical that competent authorities receive sufficient information to determine whether people with access to inside information have connections with or have communicated at critical times with those who have undertaken suspicious trades — orders*' — Consultation Paper. Draft technical standards on the Market Abuse Regulation of 15 July 2014 (ESMA/2014/809), p. 66.

Authorities' approach — references to an insider list

Starting from the oldest document — it was Consultation Paper Draft technical standards on the Market Abuse Regulation, where ESMA proposed an exemplary list of persons to be included in the insider list. The list included such persons as: members of the management and/or supervisory board, executive officers such as CEOs, persons discharging management responsibility, related staff members (such as secretaries and personal assistants), internal auditors, persons having access to databases on budgetary control, or balance sheet analyses, persons who work in units that have regular access to inside information — Consultation Paper. Draft technical standards on the Market Abuse Regulation of 15 July 2014 (ESMA/2014/809), p. 66 (point 298). It should be noted that ESMA's list does not include persons employed in the subsidiaries, but only those persons who work in the branches of the issuer, and therefore legally are within its organisational structure. Moreover, these persons were not listed among persons performing activities for the issuer when employed by third parties — Consultation Paper. Draft technical standards on the Market Abuse Regulation of 15 July 2014 (ESMA/2014/809), p. 66 (point 298).

In Q&As, on the other hand, ESMA only indicated that the legislative aim of the insider list regime under MAR is to

cover any person that, by virtue of their action, on behalf or account of the issuer, has access to inside information. However, in this respect, ESMA has left the impression of agreeing with the broadest possible interpretation of the obligation to maintain the insider list (Questions and Answers On the Market Abuse Regulation (Q10.1), ESMA70-145-111, Version 14, Last updated on 29 March 2019, p. 34).

Also, the proposed amendments to MAR do not list the persons employed by subsidiaries: 'This list of '*permanent insiders*' *would include all the persons that have regular access to inside information relating to that issuer due to their function within the issuer (such as members of administrative, management and supervisory bodies) or their position (executives in a position to make managerial decisions affecting the future developments and business prospects of the issuers and administrative staff having regular access to inside information)*' — Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, Brussels, 24 May 2018 COM(2018) 331 final, 2018/0165 (COD), p. 15.

The absence of a clear position of the EU supervisory authority confirms that research in this area was necessary (Ventoruzzo, Mock, 2017, p. 391). Thus, the following part of this paper will present a proposal for interpretation of MAR provisions governing the obligation to maintain the insider list.

Linguistic basis for justifying the inclusion of employees of subsidiaries in the insider list maintained by issuers

It should first be pointed out that the obligation under Article 18(1) MAR is addressed not only to the issuer but also to a person acting in the name of or on behalf of the issuer, as confirmed by ESMA (Questions and Answers On the Market Abuse Regulation (Q10.1), ESMA70-145-111, Version 14, Last updated on 29 March 2019, p. 34). In our opinion, subject to certain exceptions referred to below, subsidiaries may not be treated as entities performing activities on behalf of or for the issuer. They are entities acting independently (although legally and factually related to the issuer), and their access to certain inside information results from ownership structures. These entities generate inside information (as a significant asset of the issuer) independently from the activity of the issuer itself. On the other hand, other persons referred to in Article 18(1) MAR shall be granted access to inside information generated within the issuer's structure by, for example, performing contractual obligations (provision of legal services). Such entities may be described as performing certain activities 'on behalf of' the issuer (e.g. auditing the issuer or in the course of court or administrative proceedings). That classification is not altered by the fact that subsidiaries, on the basis of the codes and rules indicated in part one of this paper, are required to identify and communicate inside information to the issuer without delay, which could lead them to consider that they are carrying out certain activities for the issuer. Nevertheless, these activities are secondary to the creation of inside information, which, according to the authors, distinguishes this situation from the situation of third parties (outside the capital group). Preferential access (due to ownership relations) to inside information is given to persons employed in the subsidiary, and only as a result of this event actions are taken to disclose this information to the issuer.

At this stage it is necessary to take the view that subsidiaries do not maintain their own insider lists (assuming they are not issuers themselves, within the meaning of MAR). However, it cannot be excluded that subsidiaries may perform certain activities for the issuer on the basis of a legal relation, as a result of which they gain access to inside information generated within the issuer's structure. They should then be considered as 'other persons' as referred to in Article 18(1) MAR. However, this is a different situation from the initial knowledge of inside information resulting only from the fact that they remain within the structure of a capital group (single economic unit).

For the above-mentioned reasons it should be assumed that the creation of inside information in the subsidiary's structure updates the issuer's obligation under Article 18(1) MAR. This obligation arises as soon as the information is created, as does the obligation to inform the public immediately under Article 17(1) MAR. However, it is necessary to consider — and this is the main research problem presented in this paper — whether the insider list maintained by the issuer may include employees and directors of subsidiaries as a result of the creation of inside information directly related to the issuer in the structure of these subsidiaries.

With regard to the interpretation of Article 18(1) MAR, a precondition for inclusion in the insider list is, of course, access to inside information ('*all persons who have access to inside information*'). The exception to the above is a supplementary section of the insider list with the details of individuals who have access at all times to all inside information ('permanent insiders') — Art. 2(2) Regulation 2016/347; Template 2 to the Regulation 2016/347. In line with the proposals to amend MAR, this case will also apply to companies whose financial instruments are listed on the SME growth markets — Proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets, Brussels, 24 May 2018 COM(2018) 331 final, 2018/0165 (COD).

As a second condition to be included in the insider list, insiders must work for the issuer under a contract of employment, *or otherwise performing tasks through which they have access to inside information*. In basic terms, employees of subsidiaries are bound by an employment contract with the subsidiary, not with the issuer. Therefore, they cannot be included in the insider list as persons who work for the issuer under a contract of employment. Nevertheless, the most

interesting element of Article 18(1) MAR is the following text: 'or otherwise performing tasks through which they have access to inside information', which does not categorically exclude recognition of employees of subsidiaries as persons who should be included in the insider list maintained by the issuer. However, this provision also categorically fails to confirm the proposed interpretation, leaving the issue open.

In our opinion, the linguistic interpretation of Article 18(1) MAR does not preclude the recognition that persons employed by a subsidiary carry out certain tasks for the benefit of the issuer which derive from the issuer's special relationship with its subsidiaries. This relation is visible in the case of identification of inside information (created within the subsidiary's organisation) and its disclosure to the issuer by employees of such subsidiary. The creation of inside information in a subsidiary and the significance of this event for the issuer's disclosure requirements allows a link between the activities performed by persons employed by subsidiaries having access to this information with the sphere of the issuer's activity. Thus, Article 18(1) MAR in so far as it refers to: '*otherwise performing tasks*', does not require that the person must have a legal relationship with the issuer. The wording used by the legislator ('*working for them*' and '*otherwise performing tasks*'), allows the conclusion that a lower level of formalisation of the relation between a person having access to inside information and the issuer is possible. This is indicated by the Oxford English Dictionary according to which 'otherwise' means 'in another way'. Perform something is 'to carry out in action, execute, or fulfil (a command, request, undertaking, threat, *etc*.); to carry into effect, discharge (a service, duty, *etc.*)'. And finally 'task' means 'a piece of work imposed, exacted, or undertaken as a duty or the like; originally, a fixed or specified quantity of labour or work imposed on or exacted from a person; later, the work appointed or assigned to one as a definite duty'. There is no connection or requirement for a specific legal ground for these types of activities. Other language versions also distinguish work for the issuer under an employment contract from activities performed in a different way (emphasis is placed on other circumstances for privileged access to inside information). This is particularly apparent in the German ('auf Grundlage eines Arbeitsvertrags oder anderweitig Aufgaben wahrnehmen'), French ('et qui travaillent pour eux en vertu d'un contrat de travail ou exécutent d'une autre maniere des tâches') and Spanish language version where the second link with the issuer is to 'perform functions' through which these persons have access to inside information ('o que desempenen funciones a través de las cuales tengan acceso a información privilegiada'). The issue is a little different in the Italian language version, where the emphasis is on professional cooperation ('e con le quali esiste un rapporto di collaborazione professionale') regardless of whether it is an employment contract or another way ('si tratti di un contratto di lavoro dipendente o altro'). Also a little different, however, is the Polish language version, in which it is indicated that these persons work for the issuer under an employment contract or on another basis ('pracujących dla nich na podstawie umowy o pracę lub na innej podstawie'), which may erroneously (in the authors' opinion) suggest that they are employees in the broad sense, i.e. those carrying out activities under an employment contract or under a civil law contract, which is widely used in Polish law.

Considering the above, employees of subsidiaries having preferential access to inside information produced in a subsidiary should therefore, based on linguistic interpretation, be considered as persons to be included in the insider list maintained by the issuer.

The nature of this problem is also important in the view of the teleological interpretation, which can strengthen the presented thesis.

The grounds for including employees of subsidiaries in the insider list maintained by issuers

As indicated earlier, the main objective of MAR is to prevent abuse through the creation of preventive mechanisms (e.g. maintaining and updating the insider list) as well as dissuasive sanctions as a subsequent mechanism. This ensures the smooth functioning of the EU capital market and increases the confidence of its participants. The insider list, as a preventive measure, has a special role to play for several reasons. Firstly, it sets a certain standard of conduct for issuers in terms of ensuring appropriate transparency. This standard must be respected, which means that activities within the structure of the capital group concerning inside information are rooted in the awareness of all persons having access to it. Secondly, the measure significantly increases the transparency of the issuer's activities. We tend to think that elimination of employees of subsidiaries from the insider list maintained by the issuer would be to a significant detriment in all aspects mentioned above. This would result in weakening the possibility of achieving MAR's objectives.

The exclusion of people with particularly preferential access to inside information, even those who are ahead of the issuer's knowledge, deserves special treatment from MAR perspective. It is impossible not to refer to the adage: The darkest place is under the candlestick. It would also be difficult to find a justification for a situation where external entities (e.g. advisors) performing activities for the issuer under a contract would be included in the insider list, whereas the list would not include other persons who often had the first access to such information — employees of subsidiaries. It should also be emphasised that while advisors generally obtain access to inside information produced by the issuer, employees of subsidiaries are often the factors that generate it themselves by managing the activities of these entities.

We should also observe that the interpretation adopted herein makes it possible to strengthen to a greater extent the effectiveness of control activities undertaken by the supervisory authority. This would enable such authorities to

gain a broader knowledge of persons having access to inside information generated within the structure of a subsidiary, and consequently to determine the real circulation of given inside information from the moment of its creation to its disclosure to the public.

Finally, it should be pointed out that the proposed interpretation is consistent with all views treating the capital group as a single economic unit, pursuing an interest that is essentially convergent for all participants of the group. Since the issuer remains responsible for establishing close cooperation for the timely implementation of the information requirements under Article 17(1) MAR, this conclusion should also be complemented by other obligations, in particular the obligation to maintain the insider list, as discussed in this paper. Otherwise, there is an impression of inconsistency in the treatment of capital groups from the perspective of obligations stated in MAR.

Summary

The information requirement referred to in Article 17(1) MAR shall only cover information directly related to the issuer. It should be noted that the activity of subsidiaries may give rise to significant events affecting the financial results of not only those companies, but also the issuer being the parent company. Subsidiaries constitute a significant component of the issuer's assets, and therefore these events have a great potential for affecting the issuer's financial results directly. Subsidiaries may therefore be the source of the information that directly concerns the issuer, of a precise nature, which has not been made public, and after such disclosure would be likely to have a significant effect on the prices of the issuer's financial instruments (Article 7 MAR).

The insider list has two important functions to take into account when interpreting MAR. The first, preventive, is to provide insiders with clear information on the legal significance of their knowledge and the obligations arising from their possession. The second, and consequential, is to provide the supervisory authority with an extremely important tool in the form of a document containing the data of all persons having access to inside information, in order to verify potential abuses. In general, this list contributes to the basic objective MAR, namely to fight against abuse. Greater transparency also means greater confidence of market participants.

A close cooperation of entities within a capital group and their perception from the perspective of a single economic unit, is also in favour of an interpretation recognising the obligation to include employees of a subsidiary having access to inside information in the insider list maintained by the issuer. The obligation to draw up a list of insiders and update it immediately should therefore be imposed on the issuer, and the persons on the list should also include employees of subsidiaries who have access to inside information. Due to the existence of ownership and personal relations, knowledge of the occurrence of an event generating inside information in the area of operation of a subsidiary may constitute a significant advantage for a person performing tasks in that company, not only over other market participants, but even over the issuer itself, who may be provided with the information with a delay. This area therefore appears to be one of the most sensitive in terms of potential abuse prevention. The issuer should make every effort to ensure that the information reaches it as quickly as possible. Consequently, it ensures that inside information can be protected more effectively and the supervisory authority will have effective access to the data of all persons who had access to inside information prior to its public disclosure by the issuer.

Bibliografia/References

Fennelly, N. (1996), Legal Interpretation at the European Court of Justice, *Fordham International Law Journal*, *20* (3), Article 4.
Hopt, K.J. (2015). *Groups of Companies. A Comparative Study on the Economics*, Law and Regulation of Corporate Groups, ECGI Law Working Paper, p. 286.
Hopt, K.J., & Zimmermann R. (eds), *Max Planck Encyclopedia of European Private Law*, Oxford: Oxford University Press.
Itzcovich, G., The Interpretation of Community Law by the European Court of Justice, *German Law Journal*, *10* (5).
Kinanderm, M., Ten years after: the Spector presumption in MAD, MAR and MAD II, *Capital Markets Law Journal*, *14* (3).
Lenaerts, K. Gutiérrez-Fons, José A. (2014). To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, 20 Colum. J. Eur. L., 3.
Opalski, A. (2008). O pojęciu interesu spółki handlowej [The concept of interest of partnerships and companies], *Przegląd Prawa Handlowego* 11, p. 16
Sołtysiński, S., Mataczyński M. (2017). In: A. Koch, J. Napierała (eds), *Prawo spółek handlowych* [Partnerships and companies law], Warsaw.
Rasmussen, H. (1992). *Towards a Normative Theory of Interpretation of Community Law*, U. CHI. LEGAL F. 135.
Rösler, H. (2012). Interpretation of EU Law. In: J. Basedow, K.J. Hopt, & R. Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford: Oxford University Press.
Topór, M. (2019). Problem przepływu informacji w holdingu [The problem of information flow in holding companies], *Przegląd Prawa Handlowego*, 3.
Ventoruzzo, M., Mock, S. (2017). *Market Abuse Regulation. Commentary and Annotated Guide*, Oxford University Press, p. 397.

Judgements

Judgement of NSA [Supreme Administrative Court] in Warsaw of 24 June 2016 (II GSK 366/15).
Judgement of ECJ of 27 April 2017 in the case C-516/15 P Akzo Nobel NV and Others v European Commission, ECLI:EU:C:2017:314
Judgement of ECJ of 6 October 1982 in the case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, ECR 1982-03415.
Judgement of ECJ of 22 November 2005 in the case C-384/02 Grongaard & Bang, ECLI:EU:C:2005:708.

Judgement of ECJ of 10 May 2007 in the case C-391/04 Ypourgos Oikonomikon, Proistamenos DOY Amfissas v. Charilaos Georgakis, ECLI:EU:C:2007:272.
Judgement of ECJ of 23 December 2009 in the case C-45/08 Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen (CBFA), ECLI:EU:C:2009:806.
Judgement of ECJ of 11 March 2015 in the case C-628/13 Jean-Bernard Lafonta v. Autorité des marchés financiers, ECLI:EU:C:2015:162.

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