The Inside Information Regime of the MAR and the Rise of the ESG Era

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Abstract

The rise in ESG investing has been characterized as an “investor revolution” and a manifestation of “social change”. The current coronavirus pandemic will arguably intensify the impact of such social change, with the “S” and “G” components of ESG, in particular, having been brought into sharper focus during the crisis. The issue of the extent to which ESG factors are (currently) of considerable importance – and, in particular, are likely to become even more so in the future – for the performance of share prices remains a highly controversial one in financial economics. However, where an empirically substantiated effect of ESG-related information on the prices of financial instruments can be shown, the question of whether such information is also of relevance to the inside information regime of the Market Abuse Regulation (“MAR”) arises and must be answered. This article explores the potential effect of ESG-related information and an increase in ESG-compliant investments on the prohibition on insider dealing and the obligation to publicly disclose inside information. We believe that the ESG preferences of a critical mass of real-life investors and, as a corollary, ESG-related information, are and will continue to be of great importance to the inside information regime. However, the intense debate regarding the precise depiction of the ‘reasonable investor’ within the meaning of Art. 7 MAR indicates that the relevance of ESG-related information to the inside information regime of the MAR is by no means clear. In light of these uncertainties, and given its efforts to promote sustainable finance, the EU legislature would be well advised to further specify the concept of inside information with a particular focus on ESG-related information.

Keywords: ESG, sustainable finance, investor preferences, market abuse regulation, insider dealing, inside information, reasonable investor, materiality.

JEL Classifications: G30, G32, G41, K22, Q51.

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A. Introduction

Environmental, social and governance-compliant investing (“ESG investing”) has emerged as a major social topic in recent years. While ESG investments to date represent only a small portion of the overall assets under management worldwide, and an even smaller portion of the total assets invested, the sector is experiencing considerable growth. This development has been driven, in particular, by institutional investors, who in many cases have certainly been encouraged to make such investments by regulatory requirements imposed in the wake of the stewardship movement which has been gaining ground at the global level. In April 2019, for example, more than 2,000 organizations representing a total investment volume of USD 86

This article is a revised and amended English language version of the article “Insiderrecht und Ad-hoc-Publizität im anbrechenden ESG-Zeitalter”, which was dedicated to Klaus J. Hopt on the occasion of his 80th birthday and published in WM - Zeitschrift für Wirtschafts- und Bankrecht 2020, 1557-1567.

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1 See infra B.I.1.
3 BlackRock (fn. 2), p. 3. This is also pointed out by Köndgen (fn. 2), 671, 674 et seqq.
4 See infra B.I.3.
trillion signed the United Nations Principles of Responsible Investment (UNPRI). Then, in January 2020, Blackrock once again addressed open letters to both the CEOs of the companies in which it invests and its investor clients, announcing that it would be taking greater account of ESG criteria when selecting investment securities in the future. Key market observers expect that there will be a (re)allocation of capital on a massive scale to ESG-compliant investments in the near future as the result of fundamental social change, and regulatory measures are being, and will continue to be, introduced at the national, supranational and international level to further bolster this development. The current coronavirus pandemic will arguably intensify the impact of such social change, the “S” and “G” components of ESG, in particular, having been brought into sharper focus during the crisis.

7 Available at: https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
8 Available at: https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter.
9 See Attracta Mooney/Billy Nauman, “Larry Fink rules on the best global standards for climate risk reporting”, in: Financial Times, 20 January 2020. In any case, BlackRock was subsequently commissioned to advise the EU on its “green regulation for banks”. With regard to the latter point, see Patrick Temple-West/Mehreen Khan, “BlackRock to advise EU on green regulation for banks”, Financial Times Online, 13 April 2020, available at: https://www.ft.com/content/da821c64-b2f8-4119-aafa1-fdafa9a57918.
11 See infra B.I.3.
12 See infra B.I.2.b.
13 See infra B.I.2. So far, the development in the EU is much more driven by regulatory pressure then it is in the US. Cf. Coffee (fn. 2), p. 4, 8.
In any case, stock prices will not remain unaffected by the aforementioned (re)allocation of capital throughout the (long) transition period, in light of increasing demand for securities from issuers with a positive ESG track record.\textsuperscript{15} The issue of the extent to which ESG factors are (currently) of considerable importance – and, in particular, are likely to become even more so in the future – for the performance of share prices remains a highly controversial one in financial economics.\textsuperscript{16} However, where an empirically substantiated effect of ESG-related information on the prices of financial instruments can be shown, the question of whether such information is also of relevance to the inside information regime of the Market Abuse Regulation (“MAR”) arises and must be answered.\textsuperscript{17} Pursuant to the MAR, information will only be deemed to constitute inside information, the existence of which is decisive for both the insider dealing prohibitions imposed by Article 14 of the MAR and the disclosure obligations imposed by Article 17 of the MAR, if its public disclosure would be likely to have a significant effect on the prices of the financial instruments in question or on the price of related derivative financial instruments.\textsuperscript{18}

This article will explore the potential effect of ESG-related information and an increase in ESG-compliant investments on the prohibition on insider dealing and the obligation to publicly disclose inside information in the following manner: Chapter B. will give an overview of the upcoming ESG era, in which we briefly take stock of developments to date (B.I.) and then describe the theoretical and empirical foundations of capital market theory which are relevant in that context (B.II.). Section C. will address the implications of the trend towards socially responsible investing for the prohibition on insider dealing and the obligation to publicly disclose inside information. Here, the focus is on the concept of inside information, which is central to both regimes, and, in particular, on the situations in which public disclosure of information would be likely to have a significant effect on the prices of financial instruments (C.II. and C.III.) and the impact that changing investor preferences may have in this respect (C.IV.). The article will conclude with a brief outlook as to what the future may hold in this regard (D.).

\textsuperscript{15} See infra B.II.2.
\textsuperscript{16} See infra B.II.
\textsuperscript{17} Cf. for the concept of materiality under US securities law, Coffee (fn. 2), p. 14; Sabrina Bruno, “Climate Corporate Governance: Europe vs. USA?”, European Company and Financial Law Review 2019, 687, 707 et seqq. with regard to climate change related risk.
\textsuperscript{18} See infra C.I.
B. The Rise of the ESG Era

I. ESG: Taking Stock of the Trend towards ESG-Compliant Investing

1. Definition

ESG investing is an umbrella term for investment decisions which take environmental, social and governance aspects into account. Other terms which are often used synonymously with it are “sustainable finance”, “sustainable investing” or “socially responsible investment” (“SRI”).19 However, a uniform terminology has not yet been established.20 On the contrary, these terms have to date been used to refer to a wide range of different investment strategies and styles. This raises two issues, in particular:

Firstly, the specific role of ESG criteria in investment decisions remains unclear. Portfolio management, in practice, usually distinguishes between strategies of negative, positive or so-called norm-based screening and active ESG integration, on the one hand, and so-called impact investing, on the other hand.21 In the case of screening strategies and ESG integration techniques, the maximization of financial returns remains the overriding guiding principle, although ESG criteria may influence the selection of portfolio assets.22 More extensive ESG integration places greater importance on the pursuit of ESG objectives relative to the maximization of financial returns, with impact investing being the strongest manifestation of this approach.23 In impact investing, the provision of financial support to a company with positive ESG characteristics takes precedence over the financial return which may be generated by any such investment. In addition, there are strategies of genuine shareholder activism which

22 Bueren calls this form of investment “Sustainable Finance 1.0”; see Bueren (fn. 19), 822 et seq.
not only provide for an influence of ESG concerns on investment decisions but also involve shareholders actively seeking to improve the ESG profile of a company.24 A more recent example of the latter scenario is the enormous pressure faced by the board of Rio Tinto in the wake of a scandal over the destruction of an historic Aboriginal site as part of the expansion of an iron ore project, which ultimately resulted in the resignation of the company’s CEO.25

Secondly, the definition does not provide any information about the specific ESG criteria which are to be taken into account, the manner in which the fulfilment of these criteria is to be assessed and the identity of the parties undertaking such assessment, or the approach to be taken in the event of conflicting objectives.26 This is where various rating agencies, index providers and other data vendors27 (the market leaders being Morningstar, Bloomberg and MSCI) and, more recently, the EU, with its Taxonomy Regulation28, have taken the lead.

The development of uniform criteria will play a major role in improving the means of assessing the economic consequences of ESG investments, on the one hand, and ESG-compliant corporate conduct, on the other hand. Currently, the market is still a long way from having any such uniform and reliable criteria in place.29


26 Bueren (fn. 19), 817; Köndgen (fn. 2), p. 671, 680 (fundamental and irresolvable conflict of objectives); cf. Schanzenbach/Sitkoff (fn. 2), 381, 430 emphasizing the necessarily subjective judgement decisions.

27 See Bueren (fn. 19), 831.

28 See infra B.I.2.b.

2. Regulatory “Nudging”

a) The Status Quo: A Prevalence of Soft Law, a Dearth of Mandatory Rules

Within the EU, no specific legal framework currently exists for ESG investments. Rather, various soft law initiatives\(^{30}\) have shaped the market to date,\(^{31}\) with a number of legal requirements only recently having been introduced:

Directive 2014/95/EU (the “CSR Directive”) obligates companies to disclose matters which are of relevance from an ESG perspective in their financial statements.\(^ {32}\) Although this obligation applies to companies rather than to investors,\(^ {33}\) it provides an essential basis for the determination of ESG ratings and benchmarks, for example, which are of little informative value in the absence of company-specific disclosure.\(^ {34}\)

By way of contrast, the requirements imposed by Directive (EU) 2017/828\(^ {35}\) (the “Shareholder Rights Directive”) apply to institutional investors and asset managers and oblige them to draw up a participation policy (stewardship approach\(^ {36}\)), which must also disclose the manner in which these companies monitor portfolio companies with regard to their social and environmental impacts (second sentence of Article 3g(1)(a) of the Shareholder Rights Directive).\(^ {37}\)


\(^{31}\) \textit{Bueren}, (fn. 19), 835.

\(^{32}\) \textit{Möslein/Engsig Sørensen} (fn. 20), 391, 410 et seq.; \textit{Veil} (fn. 30), 1093 et seq. with reference to the dual materiality restriction.

\(^{33}\) For a critical view, see \textit{Wolfgang Schön}, “Der Zweck der Aktiengesellschaft – geprägt durch europäisches Gesellschaftsrecht?”, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 180 (2016), 278, who speaks of a subjugation of the stock corporation to politically influenced public welfare concerns by means of a “refined mechanism of action” (authors’ own translation).

\(^{34}\) Cf. \textit{Coffee} (fn. 2), p. 32. In that regard, it seems desirable that the big four accounting firms have recently published a framework for ESG reporting standards. See \textit{Gillian Tett}, “Big Four accounting firms unveil ESG reporting standards”, FT-Online, 22 September 2020, available at: https://www.ft.com/content/16644eb2-f0c1-4b32-b44c-647eb0ab938d.


In addition, Article 8(3)(c)(ii) of Regulation (EU) No. 1286/2014 (the “PRIIPs Regulation”), for example, requires that certain environmental or social objectives to be attained by a financial product should be stated in the product information sheet.\(^{38}\) Furthermore, Regulation (EU) 2015/760 on European long-term investment funds and Regulation (EU) No. 346/2013 on European social entrepreneurship funds provide for ESG-related investment vehicles of their own – and even a partial sustainability label.\(^{39}\)

**b) New Initiatives Paving the Way for Greater Juridification**

Prior to the outbreak of the coronavirus pandemic, sustainable finance was one of the defining topics in European financial market law in recent times, with the European Commission, the EU agencies\(^ {40}\) and also the ECB as part of the Network for Greening the Financial System\(^ {41}\) launching initiatives to promote ESG investment.\(^ {42}\) In the midst of the coronavirus crisis, the European Commission has confirmed that the “ongoing COVID-19 outbreak in particular shows the critical need to strengthen the sustainability and resilience of our societies and the ways in which our economies function”.\(^ {43}\)

By way of contrast to the situation in the US, where no such *regulatory* pressure seems to exist\(^ {44}\), – these initiatives also tie in with the next steps in the process of juridification, some of which are of a distinctly libertarian paternalistic nature, as set out, in particular, in the “Action

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\(^{38}\) See [Bueren (fn. 19), 850 et seq.]; furthermore, [Petra Buck-Heeb, in: Heinz-Dieter Assmann/Uwe H. Schneider/Peter O. Müllbert (ed.), Wertpapierhandelsrecht, 7th ed. 2019, Article 8 of Regulation (EU) No 1286/2014 mn. 45 et seqq., who, however, doubts that this constitutes essential product information for retail investors.\(^ {39}\)

\(^{39}\) [Bueren (fn. 19), 851.]


\(^{42}\) For an overview, see [Bueren (fn. 19), 813.]


\(^{44}\) Cf. [Coffee (fn. 2), p. 4, 8. However, also in the US, an increasing pressure from institutional investors on companies is reported, see Thomas Lee Hazen, “Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures”, Working Paper 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=203615327; Coffee (fn. 2), p. 12.]
Plan: Financing Sustainable Growth” of the European Commission. The catalogue of measures contained in the action plan explicitly aims to “reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth”. This is to be achieved by means of the following ten measures:

1. Establishment of a clear and detailed EU taxonomy, a classification system for sustainable activities,
2. Creation of an EU Green Bond Standard and labels for green financial products,
3. Fostering of investment in sustainable projects,
4. Incorporation of sustainability considerations into financial advice,
5. Development of sustainability benchmarks,
6. Improved integration of sustainability considerations within ratings and market research,
7. Clarification of the duties of asset managers and institutional investors as regards sustainability,
8. Introduction of a “green supporting factor” into the prudential rules applicable to banks and insurance companies within the EU,
9. Strengthening of sustainability disclosure and accounting rule-making, and
10. Fostering of sustainable corporate governance and attenuation of short-termism in capital markets.

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In May 2018, the European Commission presented its first legislative package for the implementation of the Action Plan. This included (i) a proposal for a regulation on the establishment of a framework to facilitate sustainable investment (the so-called Taxonomy Regulation), (ii) a proposal for a regulation on disclosures relating to sustainable investments and sustainability risks, and (iii) a proposal for a regulation on low carbon benchmarks and positive carbon impact benchmarks.

Regulation (EU) 2019/2088 on disclosures relating to sustainable investments and sustainability risks (the second proposal in the legislative package put forward in May 2018) and Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (the third proposal in the legislative package put forward in May 2018) entered into force on 10 December 2019. An agreement on the Taxonomy Regulation was reached by way of the trilogue procedure on 18 December 2019. On 22 June 2020, the Taxonomy Regulation was published in the Official Journal; it subsequently entered into force.

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3. A Massive Increase in ESG Investments and Social Change

The total volume of ESG-compliant investments is difficult to determine – in part, because ESG criteria have not yet been standardized.\(^5\) According to the Global Sustainable Investment Review 2018 of the Global Sustainable Investment Alliance (GSIA), which is widely used by industry stakeholders, at the beginning of 2018, the total volume of ESG investments was 30.7 billion US dollars, an increase of 34\% in just two years.\(^5\) The 2018 report of the US Forum for Sustainable and Responsible Investment likewise indicates an investment volume of 12 billion US dollars for the US alone.\(^5\) The European SRI Study 2018 conducted by EuroSIF assumes similar volumes for Europe, taking account of all of the aforementioned investment strategies.\(^5\)

According to Morningstar, ESG-oriented collective investment schemes generated an additional volume of approximately 120 billion euros in Europe in 2019 alone, a 58\% increase as compared to 2018.\(^6\) Following on from the corona pandemic sell-off in the first quarter of 2020, global inflows into ESG-oriented collective investment schemes were up 72\% in the second quarter of 2020, with Europe clearly taking the lead and accounting for 86\% of these inflows.\(^6\) While these investment volumes still account for only a small proportion of the assets invested in collective investment schemes overall, and for an even smaller proportion of total assets invested, including private investments,\(^6\) the trend towards a significant reallocation of capital is clearly discernible.

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\(^{56}\) See supra B.I.1.


\(^{58}\) Available at: https://www.ussif.org/files/US%20SIF%20Trends%20Report%202018%20Release.pdf.


\(^{62}\) BlackRock (fn. 2), p. 3.
This development has been driven by social change, which is set to intensify greatly over the years and decades to come, not least due to two factors: The demographically induced shift in wealth towards younger generations (from Baby Boomers to Millennials) with their greater awareness of ESG issues and the increasing frequency of natural disasters due to climate change.63

US legal scholars and industry participants argue that the fiduciary duties of many institutional investors in the US (particularly trustees subject to ERISA) will pose an obstacle to this development, given that the sole interest rule does not permit trustees to include other (moral) considerations in their investment decision-making than the financial interests of their beneficiaries.64 Asset managers in other jurisdictions face quite similar restrictions.65 However, it appears unclear whether these restrictions will substantially hamper this trend towards ESG. Most of these restrictions will be subject to the terms of the individual contractual relationship (investment contract) which may be adopted in the wake of the aforementioned social change and changing investor demands.

II. The Impact of ESG-Related Information on Share Prices

The impact of ESG-related information on the development of share prices has to date been assessed quite differently in the context of financial economics. At the outset, one must distinguish between the question of whether ESG factors, as potential mechanisms of impact, are relevant to the fundamental value of securities, thus making them relevant to share prices on the basis of neo-classical capital market theory (B.II.1.), and the question of whether a substantial shift in investor preferences is to be expected, which will impact share prices by way of rising demand even in the absence of any relevance of the ESG factors in question to said fundamental value (B.II.2.).

63 BlackRock (fn. 2), p. 5; Barzuza/Curtis/Webber (fn. 10), p. 41 et seqq. describing said transfer of wealth and citing numerous evidence that Millennials are less concerned about financial returns and more interested in ESG issues than previous generations (Baby Boomers, in particular).

64 Schanzenbach/Sitkoff (fn. 2), 381, 399 et seqq. with further references.

1. The Neo-Classical Capital Market Theory

In capital market theory, the fundamental value of a financial instrument is dependent on future cash flows and the risk associated with the financial instrument.\(^66\) It is determined by discounting all future cash flows, i.e. by determining the present value of the financial instrument (discounted cash flow method).\(^67\) While the future cash flows for shares are largely dependent on the future earnings potential of the company in question,\(^68\) the discount factor corresponds to the return expected by investors and thus to the issuer’s cost of capital. According to the capital asset pricing model (CAPM), which remains the dominant methodology in practice,\(^69\) the beta of the financial instrument determines the expected return.\(^70\) The beta expresses the (historical) sensitivity of an individual security to the market portfolio, i.e. the percentage change in the return on the security in relation to a percentage change in the return on the market portfolio. The beta is calculated by multiplying the standard deviation/volatility of the individual security by the correlation of the individual security to the market portfolio and dividing the result by the standard deviation of the market portfolio.\(^71\)

In the capital markets, the information held and valuations undertaken by all investors are manifested in their behaviour affecting supply and demand. According to the semi-strong variant of the efficient capital market hypothesis (ECMH), the market price will be at least very

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\(^{66}\) Cf., in general, Jonathan Berk/Peter DeMarzo, Corporate Finance, 4\(^{th}\) ed. 2017, chap. 3.3, 3.4 and 3.5.

\(^{67}\) Alternatively, valuations are also carried out on the basis of comparable financial instruments. This is particularly appropriate in the case of companies not listed on a stock exchange. For a discussion of share valuation on the basis of comparable shares of companies, see Berk/DeMarzo (fn. 66), chap. 9.4, p. 326 et seqq.

\(^{68}\) On the basis of the dividend discount model, dividends alone are used as future cash flows (Berk/DeMarzo (fn. 66), chap. 9.1, 9.2). Alternative approaches are the so-called total pay-out and free cash flow valuation models. The former takes not only dividends but also share buybacks into account (for further details, see Berk/DeMarzo (fn. 66), chap. 9.3.). The free cash flow valuation model takes cash flows to equity and debt capital providers into account (Berk/DeMarzo (fn. 6, chap. 9.3.). In the present context, the distinction between these models is irrelevant, given that all in any case proceed on the same basis, namely that only future cash flows and the discount factor, i.e. the financial risk, are relevant for valuation purposes.


\(^{70}\) \(E[R_i] = r_f + \beta_i (E[R_{Mkt}] – r_f)\), whereby \(E[R_i] = \) expected return; \(r_f = \) risk-free rate; \(\beta_i = \) beta security to market portfolio; \(E[R_{Mkt}] = \) expected return market portfolio.

\(^{71}\) \(\beta_i = \frac{(SD(R_i) \times Corr(R_i, R_{Mkt}))}{SD(R_{Mkt})}\), whereby \(SD = \) standard deviation; \(Corr = \) correlation. For further details as regards the CAPM, see Tim Koller/Marc Goedhart/David Wessels, Valuation. Measuring and Managing the Value of Corporations, 6\(^{th}\) ed. 2015, p. 283 et seqq.; Richard A. Brealey/Stewart C. Myers/Franklin Allen, Principles of Corporate Finance, 11\(^{th}\) ed., 2014, p. 200 et seqq.; Berk/DeMarzo (fn. 66), chap. 11.7, p. 417 et seqq.
close to the fundamental value at any point in time, given that the share price will immediately reflect all publicly available information concerning future cash flows and the discount factor.72

In taking only the future cash flows and the discount factor into account for the determination of the fundamental value of securities, the commonly used methods proceed on the assumption that investors – at least when taken as a whole – are solely interested in maximizing their financial returns.73 The manner in which, or the business activity by means of which, the cash flows in question are generated will be irrelevant from the outset.74

ESG factors may, within the framework of these neo-classical assumptions, affect share prices where they affect either (i) future cash flows or (ii) the discount factor.75 Specifically:

(i) Firstly, as regards the impact of ESG factors on future cash flows, a positive ESG profile can lead to increased competitiveness – for example, through improved innovation management or human capital –, which in turn can lead to higher returns (the so-called cash flow channel).76 It is also conceivable that future cash flows could be impacted by ESG factors affecting the risk profile of the company in question.78 By virtue of their superior compliance systems, companies with a positive ESG profile are less likely to commit serious compliance violations which could have a negative impact on their value and thus their share price.79 In

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72 Berk/DeMarzo (fn. 66), chap. 9.5, p. 333 et seqq.; Koller/Godehardt/Wessels (fn. 71), p. 65 et seqq.
73 Eugene F. Fama/Kenneth French, “Disagreement, tastes, and asset prices”, Journal of Finance 83 (2007), 667, 668. It is a recognised fact that not all traders act on the basis of a rational evaluation of fundamental information (information traders). There are also so-called noise traders in the market who do not base their trading decisions on an evaluation of fundamental value information. However, provided that the latter type of trader does not gain the upper hand over the information traders, the neo-classical theory holds that arbitrage transactions undertaken by information traders will keep the market price close to the fundamental value. See Koller/Godehardt/Wessels (fn. 71), p. 66 et seqq.
76 Giese/Lee et al. (fn. 75), 3.
79 Giese/Lee et al. (fn. 75), 5 et seqq.
addition, climate change can have a negative impact on the revenues and operating profits of certain companies and sectors.  

(ii) Secondly, it is conceivable that ESG factors could affect the discount rate by influencing the cost of capital, due to the operation of the so-called systemic risk transmission channel. Based on the assumptions adopted in accordance with the CAPM, the beta of the financial instrument determines an issuer’s cost of capital. A positive ESG profile should make companies less susceptible to systematic market shocks, thereby exposing them to a lower level of systematic risk. According to the CAPM, in which the beta is a measure of a company’s systematic risk exposure, lower systematic risk results in a reduction in the expected return and thus the cost of capital. Since the cost of capital corresponds to the discount factor for shares, lower systematic risk results in a higher fundamental value for the shares in question, provided that the predicted cash flows will remain unchanged.

Despite these theoretically plausible implications, no consensus has emerged to date in the context of capital market research with regard to the impact of ESG factors on cash flows and the cost of capital. For example, some commentators argue that the investments associated with an improvement in the ESG profile could also indicate agency problems, given that there is a risk of overinvestment in cases in which company managers wish to improve their company’s ESG profile primarily on the basis of external factors. Moreover, from the

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81 Giese/Lee et al. (fn. 75), 6.

82 See supra fn. 71.


84 Giese/Lee et al. (fn. 75), 6.

85 Giese/Lee et al. (fn. 75), 6.


perspective of the assumptions of portfolio theory, some scholars doubt that investors will withdraw capital from non-ESG-compliant stocks, as any restriction of investable financial stocks could lead to sub-optimal diversification, especially in the case of non-ESG-compliant financial stocks having little or no correlation with ESG-compliant financial stocks.\(^{88}\) In contrast, Madison Condon and then John C. Coffee have recently pointed out that, due to the lower susceptibility of companies with a positive ESG profile to systemic risks (especially climate risk), broadly diversified institutional investors, in particular, have a special interest in actively influencing their portfolio companies to improve their ESG profile.\(^{89}\) This will hold true, in particular, for passive index funds, which do not have the option of disinvestment.\(^{90}\) For such investors, pushing for a better ESG profile might be a viable strategy even if it reduces the profitability of the individual portfolio company in question, as long as this strategy lowers the overall susceptibility of their portfolio to systemic market shocks and tail events.\(^{91}\) Therefore, rather than disinvestment, we may see active improvement of the ESG profile of individual companies to the detriment of their share price.

Finally, no unambiguous empirical evidence as yet exists with regard to a correlation between ESG factors and stock market performance.\(^{92}\) While empirical studies relating to the period from 2002 to 2010 indicated only minor reactions in share prices to ESG-related news,\(^{93}\) recent empirical studies have increasingly shown a positive correlation between a favourable ESG

\(^{88}\) Köndgen (fn. 2), p. 671, 682 et seq.

\(^{89}\) Coffee (fn. 2), p. 13 ff., 28 ff.; Condon (fn. 25), 1, 18 et seqq.

\(^{90}\) Cf. Condon (fn. 25), 1, 18.


\(^{93}\) Gunther Capelle-Blancard/Aurélien Petit, “Every Little Helps? ESG News and Stock Market Reaction”, Journal for Business Ethics 157 (2019), 543, with the authors also identifying a small but significant impact of negative ESG-related news.
profile and company value. Some commentators expect these effects to intensify further in the years to come.

2. Changing Investor Preferences: From the Maximization of Financial Returns to Impact Investing

Significant changes in investor preferences could play a major role in shaping the impact of ESG factors on share prices in the future. Were a sufficiently large number of investors to cease to exclusively pursue the goal of maximizing financial returns and instead take ESG factors into account, assigning them equal weighting or even priority when making investment decisions, the resultant share prices would systematically deviate from the assumptions adopted in accordance with common capital market equilibrium models. A rise in demand for financial instruments from issuers with a positive ESG profile would lead to a higher market price for the securities in question – irrespective of the impact of ESG factors on future cash flows or the discount factor. Conversely, companies with a negative ESG profile will face

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95 Albuquerque/Koskinen et al. (fn. 78), 4452.


97 With regard to the question of when and under what conditions investors are subjectively willing to accept lower returns resulting from ESG-oriented investment: Arno Riedl/Paul Smeets, “Why Do Investors Hold Socially Responsible Mutual Funds?”, Journal of Finance 72 (2017), 2505; cf. also Köndgen (fn. 2), p. 671, 677 et seqq., 684 et seqq.

98 Cf. supra B.II.1.
increasing equity costs, which in turn will lead to a decline in their enterprise value. The more investors are inclined to attribute a greater importance to the ESG profile of an issuer in relation to its potential to maximize financial returns, the stronger this effect will be. Moreover, herd behaviour could even provide further impetus for this development, i.e. by prompting investors who do not themselves have a preference for ESG-compliant stocks to also invest in such financial securities in anticipation of, or at least by way of speculation on, the shift in preference described herein.

Some commentators believe that current market prices fully anticipate, and thus already reflect, this impending reallocation of capital. However, the trend towards greater ESG investing is still in its infancy and the duration of the reallocation process cannot be reliably predicted – as such, it does not lend itself to analysis at the present time, a phenomenon which has also been known to arise in connection with other long-term and structural developments.

C. Implications for the Inside Information Regime

I. Inside Information as a Core Element of the Prohibition on Insider Dealing and the Obligation to Publicly Disclose Inside Information

Pursuant to the MAR, the concept of inside information is a core element of both the prohibition on insider dealing and the obligation to publicly disclose inside information. Some commentators believe that current market prices fully anticipate, and thus already reflect, this impending reallocation of capital. However, the trend towards greater ESG investing is still in its infancy and the duration of the reallocation process cannot be reliably predicted – as such, it does not lend itself to analysis at the present time, a phenomenon which has also been known to arise in connection with other long-term and structural developments.
Article 14 of the MAR contains a reference to inside information, as defined in Article 7 of the MAR, in its prohibition of insider dealing (Article 14(a)), the recommendation to, or inducement of, others to engage in insider dealing (Article 14(b)) and unlawful disclosure of inside information (Article 14(c)), either directly (in the case of Article 14(c)) or at least indirectly (in the case of Article 14(a) and (b)). Article 17 of the MAR obligates issuers to disclose to the public, as soon as possible, any inside information which directly concerns them.

Pursuant to Article 7(1)(a) of the MAR, inside information is information of a precise nature, which has not been made public, and 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.

II. The Reasonable Investor as a Benchmark for Determining the Precise Nature of Information and the Likelihood of it Having a Significant Effect on Prices

In identifying whether, and if so, when ESG-related information may be considered to constitute inside information, and the potential implications of ESG-related information and changing investor preferences for this assessment, the degree of precision of the information in question and the likelihood of it having an effect on prices will be of particular importance.

1. A Starting Point: Recitals and Wording of the MAR

Pursuant to the first sentence of Article 7(2) of the MAR, information will be deemed to be of a precise nature\(^{107}\) if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument. At the same time, information which, if it were made

public, would be likely to have a significant effect on the prices of financial instruments or
derivative financial instruments means information that a *reasonable investor* would be likely
to use as part of the basis of his or her investment decisions (first sentence of Article 7(4) of the
MAR).  

The impact of information on the price of the financial instrument in question is thus decisive
for determining the existence of both of these elements (specificity and likelihood of an effect
on prices), which in each case must be assessed from the perspective of a ‘reasonable
investor’.  

Given that the characteristic of price specificity is of no independent significance,
at any rate where the information is relevant to the price, the following section focuses on
whether and, if so, when ESG-related information will be likely to affect prices from the
perspective of a ‘reasonable investor’.

In that regard, recital 14 of the MAR states as follows: “Reasonable investors base their
investment decisions on information already available to them, that is to say, on *ex ante*
available information. Therefore, the question whether, in making an investment decision, a
reasonable investor would be likely to take into account a particular piece of information should
be appraised on the basis of the *ex ante* available information. Such an assessment has to take
into consideration the anticipated impact of the information in light of the totality of the related
issuer’s activity, the reliability of the source of information and any other market variables
likely to affect the financial instruments, the related spot commodity contracts, or the auctioned
products based on the emission allowances in the given circumstances.” Recital 15 states that
“*ex post* information can be used to check the presumption that the *ex ante* information was
price sensitive, but should not be used to take action against persons who drew reasonable
conclusions from *ex ante* information available to them”.

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108 For further details of the significant potential for impacting share prices pursuant to Article 7 of the MAR,
see Ventoruzzo/Picciau (fn. 105) Article 7 mn. B.7.60 et seqq.; Jasper Lau Hansen, “Market Abuse Case Law –
Where Do We Stand With MAR?”, European Company and Financial Law Review 2017, 367, 385 et seqq.;
Assmann (fn. 107), Article 7 of Regulation (EU) No. 596/2014 mn. 78 et seqq.; Klöhn (fn. 107), Article 7
mn. 156 et seqq.; Hopt/Kumpan (fn. 107), § 107 mn. 54 et seqq.; Michael Breullochs, “Insiderrecht”, in: Mathias
Habersack/Peter O. Mülbert/Michael Schlitt (ed.), Handbuch der Kapitalmarktinformation, 3rd ed., 2020, § 1
mn. 80 et seqq.; Andreas Meyer, “Insiderrecht”, in: Siegfried Kümpel/Peter O. Mülbert/Andreas Früh/Thorsten

109 Hopt/Kumpan (fn. 107), § 107 mn. 43; cf. Gerner-Beuerle (fn. 107), Article 7 MAR mn. 18 for the precise
nature of the information.

110 Klöhn (fn. 107), Article 7 mn. 82.
2. Divergent Conceptions in Statements of National Competent Authorities, in the Case Law and in the Legal Literature

National competent authorities, the legal literature and national courts have thus far defined the concept of the reasonable investor quite differently. However, there is agreement that it is a normative legal concept and that it must be determined objectively but with due regard to the particularities of the individual case. In other respects, opinions differ, sometimes quite substantially. To date, the divergent conceptions particularly disagree as to whether and to what extent the ‘reasonable investor-concept’ should take irrational investor behaviour into account.

a) The Reasonable Investor as the Average Investor

The arguably predominant view considers the reasonable investor to be an average individual. A more detailed depiction of this average individual usually does not include the retail investor who is unfamiliar with the stock exchange, but rather an investor who possesses an average degree of expertise in handling the financial instrument in question, who is familiar with the market conditions and who is interested in maximizing his, her or its financial

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112 See Brellochs (fn. 108), § 1 mn. 83; Klöhn (fn. 107), Article 7 mn. 268.


114 See supra C.1.2.a) and b).

115 Cf. ESMA SMSG (fn. 111), para. 34; Ventoruzzo/Picciau (fn. 105) Article 7 mn. B.7.63 et seqq.; Veil (fn.106) mn. 44 et seq.


returns. The majority of the proponents of this view describe such an investor as a rational market participant.

However, there is no agreement as to whether such rational market participants will also take irrational market behaviour on the part of others into account. Some commentators argue that the concept of the reasonable investor must at least be extended to include speculative investors who simply wish to take advantage of a short-term price movement. Reasonable investors will also take predictable irrational behaviour of other market participants into account. In contrast, other commentators put forward valid arguments as to why the ‘reasonable investor’ should not have regard to any such irrational market behaviour.

b) The Reasonable Investor as a Reflection of the Market as a Whole

The opposite view, which is currently gaining ground, describes the reasonable investor as a reflection of the market as a whole and thus as a collective entity. The decisive characteristic is therefore not that of an average investor who can be defined in any way, but the (hypothetical) market reaction as such. However, the proponents of this view do not agree on a means of defining this collective entity in greater detail.

Some commentators advocate for the relevance of model assumptions to be taken into account and define the reasonable investor as the embodiment of the ECMH. They tend to take only information into account which relates to the economic opportunities and risks associated with the financial instrument in question and thus to the fundamental value of the issuer’s

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118 FCA (fn. 113), Section 2.2.5: “... the likelihood that a reasonable investor will make investment decisions relating to the relevant financial instrument to maximise his economic self interest”; cf. Ian Charles Hannam v The Financial Conduct Authority, 27 May 2014, [2014] UKUT 0233 (TCC), para. 101.


122 Cf. supra C.IV.2.

123 Kumpan/Misterek (fn. 111), 193.

124 Kumpan/Misterek (fn. 111), 193.

securities. As a corollary, the actual *ex post* share price movement should not be of any relevance.

In contrast, other authors are inclined to (also) include real market events, the effects of which must be predicted *ex ante*. This approach is not based on any model assumptions regarding the potential of certain information to impact share prices. Rather, it aims at forecasting the actual share price movement, for example by using event studies. Given that irrational market behaviour can in some cases be predicted, it may, in such cases, be deemed relevant.

### III. Fundamental Value-Related ESG-Information

As a normative matter, where ESG-related information has an impact on the fundamental value of the financial instrument in question, *i.e.* where it affects the amount of the future cash flows or the relevant discount factor, the divergent opinions regarding the reasonable investor will coincide at this juncture: that the information should be taken into account.

### IV. Non-Financial Investor Preferences and the Inside Information Regime

1. The Legal Perspective: Determining the Normative Characteristics of the Reasonable Investor

To the extent that the change in investor preferences described in the foregoing leads to a predictable reaction of prices to ESG-related information, *without* the degree of such sensitivity being justified by the impact of the underlying circumstances on the *fundamental value* of the financial instrument, there are significant differences between those approaches which are based on idealised model assumptions and those which take account of (predicted) real

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126 Klöhn (fn. 107), Article 7 mn. 284 et seqq.; Ventorezzo/Picciau (fn. 105) Article 7 mn. B.7.63 et seq.; Hopt/Kumpan (fn. 107), § 107 mn. 55; Kumpan/Misterek (fn. 111), 214 et seqq.; Kumpan/Misterek (fn. 111), Article 7 of Regulation (EU) No 596/2014 mn. 136 et seqq. Trading-related information is of no relevance to fundamental values, although, according to the prevailing opinion, such information can also constitute inside information within the meaning of Article 7(1) of the MAR (see Article 7(1)(d) of the MAR; see only Brellochs (fn. 108) § 1 mn. 90 et seq.; Klöhn (fn. 107), Article 7 mn. 290). However, the ESG-related information of interest here does not constitute trading-related information in accordance with the common understanding of this term, as the latter typically confers an advantage in the form of information about the specific order situation (“order-acceptance”) (see Klöhn (fn. 107), Article 7 mn. 300). In this context, however, we are dealing with a market valuation of a financial instrument which deviates from the classic fundamental value.

127 Klöhn takes a different view, see Klöhn (fn. 107), Article 7 mn. 249. According to Klöhn, the actual price movement in an efficient market (!) does indicate that the *ex ante* information was price sensitive. Therefore, for him, the crucial question is whether the market in question was an efficient one (mn. 250).

128 For an approach along these lines, see Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), Emittentenleitfaden, Modul C, dated 25 March 2020, 1.2.1.4.1., p. 12; cf. Langenbucher (fn. 111), 419 et seqq.

129 Cf. Langenbucher (fn. 111), 420.

130 Supra B.II.1.

131 Supra C.I.2.a) and b).

132 Supra B.II.2.

133 Supra fn. 125 et seq.
market behaviour. Indeed, commonly used models, including the ECMH and the CAPM, proceed on the assumption that rational investors take only fundamental value-related information into account. Such idealized model investors would not change their investment behaviour on the basis of ESG-related information which had no impact on the fundamental value of the financial instrument in question.

Therefore, from a legal point of view, the crucial question is whether the MAR implicitly prescribes the adoption of certain model assumptions, in particular the assumptions on which the ECMH is based, and thus predetermines the outcome in a manner which is binding on the legal practitioner, the supervisory authorities and the courts. Were this the case, non-financial investor preferences would not be of any relevance to the prohibition on insider dealing and the obligation to publicly disclose inside information, and ESG-related information would necessarily be relevant only where it affects future cash flows or the discount factor.

2. The Irrelevance of Irrational Investor Behaviour as an Analogous Case?

The discussion as to whether irrational investor behaviour should be taken into account provides some instructive insights. On closer inspection, the arguments in favour of the sole relevance of fundamental value-related information, which are quite convincing in that context, scarcely touch on the issue which is of interest here, i.e. whether the shift in investor preferences to include non-financial considerations may be deemed to be of significance for the prohibition on insider dealing and the obligation to publicly disclose inside information. The following discussion addresses this aspect in greater detail.

a) The Irrelevance of the Rationality Argument

Firstly, mere reference to the rationality of the reasonable investor does not constitute a compelling line of argument with regard to the issue at hand. The impact of ESG factors will depend on a critical mass of real-life investors with an ESG-preference, as opposed to model investors, aligning their supply and demand behaviour with criteria other than the maximization of financial returns. The rationality of such investors is not contested, on the grounds that, in order for an investment decision deemed to be rational, that decision must merely be based on

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134 Supra fn. 121, 128.
135 In particular, Klöhn (fn. 107), Article 7 mn. 267 et seqq.; Kumpan/Misterek (fn. 111), 203 et seqq.; Ventoruzzo/Picciau (fn. 105) Article 7 mn. B.7.63 et seq.
136 With regard to this line of argument in connection with irrational investor behaviour, see Klöhn (fn. 107), Article 7 mn. 274; Kumpan/Misterek (fn. 111), 207 et seqq.
factors which are consistent, i.e. free of contradictions, future-oriented\textsuperscript{137}, transitive\textsuperscript{138}, invariant and independent of irrelevant alternatives.\textsuperscript{139}

\textbf{b) The Purpose of the Prohibition on Insider Dealing and the Obligation to Publicly Disclose Inside Information}

The underlying purpose of both the prohibition on insider dealing and the obligation to publicly disclose inside information does not argue against the consideration of ESG-related information – in contrast to the situation as regards irrational investor behaviour.\textsuperscript{140}

Taking into account irrational and purely speculative investor behaviour when determining the information to be published pursuant to Article 17 of the MAR could potentially result in fundamentally unjustified price distortions.\textsuperscript{141} The purpose of Article 17 of the MAR, which is to protect the integrity and transparency of the market, would be undermined were companies to be obligated to publish such information.\textsuperscript{142} However, this does not hold equally true for ESG-related information which directly affects the issuer. While the price movements resulting from the disclosure of ESG-related information may not be fundamentally justified in the neoclassical sense, a market which reacts to such information in line with changing investor preferences will not necessarily be one of lesser efficiency, integrity or transparency.

The purpose of the prohibition on insider dealing provides an even stronger argument in favour of the consideration of ESG-related information. The prohibition aims at preventing the gaining of special advantages through arbitrage opportunities with a view to preventing a loss of investor confidence, which could deprive the market of liquidity and compromise its efficiency (see recital 23 of the MAR).\textsuperscript{143} If, however, ESG-related information concerning an issuer


\textsuperscript{138} Donald Davidson/J. C. C. McKinsey/Patrick Suppes, “Outlines of a formal theory of value”, 22 Philosophy of Science (1955), 140.


\textsuperscript{140} Cf. Venturuzzo/Picciau (fn. 105) Article 7 mn. B.7.63 et seqq.; Klöhn (fn. 107), Article 7 mn. 275 and Kumpan/Misterek (fn. 111), 207 et seqq.

\textsuperscript{141} Cf. Klöhn (fn. 107), Article 7 mn. 275 and Kumpan/Misterek (fn. 111), 207.

\textsuperscript{142} Wolf-Georg Ringe, in: Matthias Lehmann/Christoph/Kumpan (ed.), European Financial Services Law: Article-by-Article Commentary, 2019, Article 17 MAR mn. 3; Klöhn (fn. 107), Article 7 mn. 276. Besides, underlying purpose of the issuer disclosure obligation is the prevention of insider dealing.

would be likely to have a considerable impact on the share price because it is likely to influence the supply and demand behaviour of a critical mass of investors, an insider will have arbitrage opportunities arising from his or her possession of this information, the exploitation of which is likely to undermine market confidence.

c) Legal Certainty and Practicability of the Issuer Disclosure Regime

Moreover, the aspects of legal certainty and practicability\(^{144}\) cannot be invoked as arguments against the relevance of ESG-related information which has no impact on fundamental value. Given that we are concerned with a critical mass of real-life investors with ESG-preferences, and are not calling into question the rationality of their decisions, it is, in principle, also possible to make predictions about the impact of ESG-related information on the development of share prices and, therefore, to create models which take account of such changing preferences.\(^{145}\)

d) Function-Based Considerations

Finally, function-based considerations – according to which the primary beneficiaries of both the prohibition on insider dealing and the obligation to publicly disclose inside information are exclusively fundamental value-oriented information traders\(^{146}\) – are not compelling in the rising ESG era. Professional investors are increasingly exploiting the potential to achieve positive alphas by means of ESG-compliant investments.\(^{147}\) These investors are information traders. Therefore, at least at first glance, no argument can be discerned in favour of them being deemed less worthy of protection.

3. Preliminary Conclusion and Implications

In the light of the foregoing discussion, and assuming a critical mass of real-life investors with ESG-preferences, one cannot dismiss the relevance of ESG-related information to the inside

\(^{144}\) Cf. Klöhn (fn. 107), Article 7 mn. 278; Ventoruzzo/Picciau (fn. 105) Article 7 mn. B.7.68 et seq. in the context of irrational behaviour.

\(^{145}\) Cf. supra B.II.2.

\(^{146}\) Klöhn (fn. 107), Article 7 mn. 279.

\(^{147}\) See, in particular, BlackRock (fn. 2); furthermore, e. g., UBS recently made sustainable investments its preferred solution for wealth management (https://www.ubs.com/microsites/sustainable-investing/en.html). Without question, any strategy based on the ESG channels (B.II.1.) or changing investor preferences (B.II.2.) described herein will be based on the assumption that current market prices do not yet reflect those considerations. However, this will be the case with any stock picking strategy. Apart from this, ESG investing can also be used via the systemic risk channel to hedge entire portfolios against systematic shocks and tail risks (cf. Coffee (fn. 2), p. 12). However, the issue of whether it may be capable of outperforming the market remains a highly controversial one. See, e. g., Robert Armstrong, “The dubious appeal of ESG investing is for dupes only”, FT-online 23 August 2020, available at: https://www.ft.com/content/e9f00cb2-3cd8-499e-9e8a-dd837f94657e. Indeed, based on the foregoing, a case can also be made in favour of investment in companies with a poor ESG profile also being a worthwhile endeavour. Were the cost of capital of companies with poor ESG profile to rise, they would be called upon to pay out higher returns. Cf. Schanzenbach/Sitkoff (fn. 2), 381, 398.
information regime by referring to the arguments put forward against the consideration of irrational investor behaviour.\textsuperscript{148}

Furthermore, it is rather doubtful that the MAR subscribes to particular economic model (ECMH) and its assumptions. The legislative history of the MAR\textsuperscript{149} and the incorporation therein of the wording of comparable provisions of US law\textsuperscript{150} are not necessarily indicative of a wholesale adoption of either the concepts underlying said provisions or the interpretation thereof by the US courts or US legal scholarship,\textsuperscript{151} nor do the relevant legislative materials contain any indication of the existence of any such intention on the part of the EU legislature. Moreover, recital 15 of the MAR considers the actual price movement to be an indication in favour of the presumption that the \textit{ex ante} information was price sensitive. However, in the case of sole reliance on model assumptions for the determination of price sensitivity, the actual price movement should not be viewed as being of any relevance. Finally, reliance on the development or adoption of more or less reliable (economic) model assumptions touches upon the issue of whether, when and how economic models should be transposed into law, which, as a general matter, remains a highly controversial one.\textsuperscript{152}

Our inclination to acknowledge the relevance of ESG preferences of a critical mass of real-life investors to the inside information regime notwithstanding, the intense debate regarding the precise depiction of the ‘reasonable investor’ indicates that the relevance of ESG-related information to said regime is by no means clear. In light of these uncertainties and given its efforts to promote sustainable finance,\textsuperscript{153} the EU legislature would be well advised to further specify the concept of inside information with a particular focus on ESG-related information.\textsuperscript{154}

\textsuperscript{148} \textit{Supra} C.IV.2.

\textsuperscript{149} With regard to the consideration of the legislative history, cf. CJEU, CJEU Case C-628/13 para. 37: “It should also be noted in that context that the \textit{travaux préparatoires} for Directive 2003/124 disclose that a reference to the possibility of drawing a conclusion as regards the ‘direction’ of the effect of the information on the price of the financial instruments concerned, made in the version, subject to public consultation, of technical advice CESR/02-089d issued in December 2002 by the Committee of European Securities Regulators (CESR), for the European Commission and entitled ‘CESR’s Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive’, was later deleted precisely in order to avoid such a reference being used as a pretext for not making information public”.


\textsuperscript{151} This is arguably also the opinion held by Moloney (fn. 105), VIII.6.1.6.

\textsuperscript{152} For a critical view in this regard, see, e.g., Fritz Rittner, “Das Modell des homo oeconomicus und die Jurisprudenz”, JuristenZeitung 2005, 668.

\textsuperscript{153} \textit{Supra} B.I.2.b.

\textsuperscript{154} It is therefore somewhat surprising that ESMA, in its recently published MAR review, argues against the making of any changes to the definition of ‘inside information’.
D. Outlook

The rising ESG era will pose great challenges for financial market research and will also impact European capital market law, company law\textsuperscript{155} and corporate governance\textsuperscript{156}, in particular.

As regards company law, it should be pointed out – by way of illustration – that, under the traditional concept of shareholder value, an increase in the share price which is sustainable from the company’s point of view can only be achieved by maximizing its fundamental value. It is questionable whether this will or should continue to be the case in the future in view of the developments described in the foregoing. Can shareholder interest really be equated with the maximization of the fundamental value of the shares of a company if a substantial proportion of its shareholders are no longer investing primarily with the aim of maximizing financial returns, but rather in pursuit of other, ESG-related objectives as well?\textsuperscript{157} Even if the concept of the maximization of the share price does retain its relevance, investment decisions may also have to take account of the fact that the share price may change in response to changing investor preferences, irrespective of whether this has any impact on future cash flows or the discount factor – to name just one of the challenges to be faced going forward.


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