



**Discussing Jesper Lau Hansen/When to  
disclose inside information**

*Langenbucher*

## disclosure?

### ECMH

Prices for financial instruments are based on calculating risk and future return. When assessing future return, (some) market actors seek out all available information. They trade and base their investment decisions on those informations. Aggregated, market price and „fundamentally right value“ are aligned. „Reasonable investor“ will act based on this assumption...?

„R

#### The US answer: „separate topics“

##### Insider trading prohibition, Rule 10b-5

- misappropriation

##### Disclosure, Form 8K & listing requirements

- transparency

#### The EU answer: „double track“

##### Disclosure & insider trading prohibition

- „unfair advantage“, „integrity“, „equal footing“
- „investor confidence“
- market transparency

# Setting the stage - why disclosure?

## ECMH

Prices for financial instruments are based on calculating risk and future return. When assessing future return, (some) market actors seek out all available information. They trade and base their investment decisions on those informations. Aggregated, market price and „fundamentally right value“ are aligned.

The US answer: „separate topics“

Insider trading

Disclosure, Form

### Example: Gettl

Discussing the resignation of a CEO → part of a protracted process → triggers a trading prohibition AND a disclosure requirement

### Example: Form 8K Item 5.02 (b)

„If a director has resigned [...] disclose the following information: The date of such resignation; a brief description of the circumstances [...] the Form 8-K reporting obligation is triggered by a notice of a decision to resign

No disclosure is required solely by reason of Item 5.02(b) of discussions or consideration of resignation, retirement or refusal to stand for re-election. Whether communications represent discussion or consideration, on the one hand, or notice of a decision, on the other hand, is a facts and circumstances determination.

tegrity“, „equal footing“

## ECMH

Prices for financial instruments are based on calculating risk and future return. When assessing future return, (some) market actors seek out all available information. They trade and base their investment decisions on those informations. Aggregated, market price and „fundamentally right value“ are aligned.

### The US answer: „separate topics“

#### Insider trading prohibition, Rule 10b-5

- misappropriation

#### Disclosure, Form 8K & listing requirements

- transparency

### The EU answer: „double track“

#### Disclosure & insider trading prohibition

- „unfair advantage“, „integrity“, „equal footing“
- „investor confidence“
- market transparency

# „Say when“ – Jesper Lau’s argument

- „The problem is the dual use of the concept“ (I agree! Langenbucher RTDF 2013, 35)
- **Unfortunately, I disagree that a „US-reading“ of the decisions in Geltl and in Lafonta is feasible** (although I concur with Jesper Lau that it would be an excellent outcome)
  - The court did not fill the term „precise“ with meaning
  - It only excludes „information that is vague or general“ (Lafonta) or „events the occurrence of which is implausible“ (Geltl)
  - On the face of it, the court claimed that no probability-magnitude-test would apply
  - Yet, it kept a „hidden force“ of this test with its repeated references to significant price impacts following precisely this test. Consider two possible pieces of information:
    - alternative 1: the „final event“. A two-step process applies of checking chances to come into existence and price significance. Possibly, checking chances (>50%?) will rule out too much disclosure.
    - alternative 2: the „preliminary event“. It „exists“ already and requires only price significance to qualify. As soon as it is of enough magnitude, disclosure kicks in
- **Lafonta confirms the broad reading**: even the price going up or down doesn’t matter
- **Delay will often not be an option** (consider questions, rumours, long negotiations)