ARTICLE

LISTED COMPANIES: AS OF DECEMBER 20TH NEW RULES WILL APPLY TO THE MANAGEMENT OF DELAYED DISCLOSURE OF INSIDE INFORMATION

Private Equity M&A | 19/12/16 | Jérôme Brosset

Following the entry into force of European Regulation 596/2014 on market abuse (the "Market Abuse Regulation" or "**MAR**") and its implementing regulation, the French Financial Markets Authority ("**AMF**") published, at the end of October 2016, two policy documents, having the value of a "position-recommendation", aimed at guiding issuers and directors on the proper application of these texts. One of these position-recommendations deals with periodic information to be given by companies listed on a regulated market. The other deals with ongoing information and the management of inside information for companies listed on a Euronext Paris market, Alternext or Marché Libre.

The contents of the guidance on ongoing information and on the management of inside information provide interesting clarifications on many points (specifically as regards the rules applicable to the drawing up of insider lists, obligations by directors to report dealings and to refrain from dealing during closed periods, and to the disclosure of inside information, etc.). The clarifications of these pre-existing rules are of immediate application.

As for the rules on "*situations likely to justify delayed disclosure of inside information"*, they will enter into force on December 20, 2016 concomitantly with the Guidelines of the *European Securities and Markets Authority* (**ESMA**) on delay in the disclosure of inside information[1] with which the AMF has decided to comply.

As of December 20, 2016, listed companies will be required, in the event they decide to delay disclosure of inside information to the public, to notify the AMF of this decision. The informal practice which hitherto prevailed will now be replaced by a far more constraining mechanism.

By way of reminder, pursuant to Article 17.1 MAR, "*[a]n issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.*"

Inside information is defined as *"information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments."**[2]***

To ensure that investors are placed on equal footing as regards information and also to prevent insider dealing when an issuer is in possession of inside information, the issuer is required to disclose such information to the market as soon as possible.

There is, however, an exception to this principle. In effect, an issuer may, under its responsibility, delay disclosure of inside information concerning it if immediate disclosure is likely to prejudice its legitimate interests.[3]

In accordance with the above legislation, Article 17.4 MAR provides that three cumulative conditions must be met in case of such delayed disclosure:

"*immediate disclosure is likely to prejudice the legitimate interests of the issue;*
delay of disclosure is not likely to mislead the public; and
the issuer […] is able to ensure the confidentiality of that information".
In this respect, ESMA now provides in its guidelines a non-exhaustive list of situations where legitimate interest (which cannot consist of a simple reference to the corporate interest) can justify delaying the disclosure of inside information (provided the other two conditions required under Article 17.4 have been met). The following cases can be cited on an indicative basis:

- significant negotiations are underway and immediate disclosure would likely jeopardize them;
- the information relates to a transaction approved by a management body of the issuer which requires approval of another body of the issuer, and immediate disclosure would jeopardize the correct assessment of such information by the public, and the issuer has arranged for the definitive decision to be taken as soon as possible; or
- the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardize its rights.

Conversely, ESMA also proposes a list of situations in which delayed disclosure is likely to mislead the public:

- the inside information disclosure of which the issuer intends to delay is materially different from a previous public announcement of the issuer on the matter to which the inside information relates; or
- the inside information disclosure of which the issuer intends to delay is regarding the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or

- the inside information disclosure of which the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market (such as interviews and roadshows).

The third condition is that the issuer must be able to ensure the confidentiality of the information. The AMF specifies in this respect, in its position-recommendation that efficient measures should be set up to ensure that such information is not disclosed internally to persons whose duties do not justify such access, that informed persons have knowledge of the penalties applicable in case of improper use or transmission of such information, and that measures be introduced in case of leaks or rumors to make immediate disclosure to the public (press release following a leak).

The new rule that will apply as of December 20, 2016 is that any issuer wishing to benefit from the possibility of delaying disclosure of inside information must so notify the AMF under the following conditions:

- Initially, the issuer shall record in writing the existence of the inside information and its delayed public disclosure. In accordance with the provisions of Article 4.1 of Implementing Regulation 2016/1055 of June 29, 2016, the issuer shall document in writing in a durable medium the dates and times when the inside information "first existed", the decision to delay disclosure was made and the scheduled date of disclosure. It must also indicate the identity of the persons responsible for making the decision to delay disclosure and ensuring the ongoing monitoring of the conditions for the delay and evidence that the associated conditions laid down in Article 17-4 MAR were met;
- Then, immediately upon the disclosure of the inside information, the issuer must inform the AMF in writing of its initial decision to delay disclosure. Article 4.3 of the Implementing Regulation cited above provides that such notification must include information on the identity and contact details of the persons making the notification, the date and time of the decision to delay disclosure and the identity of all persons responsible for this decision;
- Lastly, the issuer must be in a position to answer any requests for explanations made by the AMF at a later date and at its sole discretion. In case of such a request, the issuer must be able to provide written evidence to the AMF immediately[4] of the initial fulfillment of the three substantive conditions under MAR for delayed disclosure.

It should also be noted that some specific rules apply to requests made by issuers that are credit institutions or financial institutions to obtain authorization to delay the disclosure of inside information for public interest considerations relating to financial stability.[5] In such cases, the issuer must request the AMF's prior authorization by directly contacting the AMF's Corporate Finance Division.

Clearly, these new rules make the management of delayed disclosure of inside information more complex and constraining for issuers. Up until now, this issue was generally handled relatively informally. But in many situations the information to be given to the AMF is not clear. By way of example, it is often difficult for a company to know exactly when information becomes "inside information", especially when this information relates to a contemplated transaction the implementation of which has not been finally decided, and which may be subject to regulatory authorizations or permits.[6] Companies should therefore take a cautious approach when making a finding of inside information, especially since a recognition by the issuer that such information meets the conditions of qualification can be relied upon by the AMF against the issuer or its directors.

---

[1] ESMA MAR Guidelines – Delay in the disclosure of inside information –October 20, 2016.

[2] Cf. Article 7 MAR.

[3] Guide de l'information permanente et de la gestion de l'information privilégiée (Guide on ongoing information and on the management of inside information, available in French only) – AMF – Position-recommendation DOC 2016-08.

[4] Cf. Article 223-2 of the AMF's general regulations.

[5] Cf. Articles 17.5 and17.6 MAR and Guide de l'information permanente et de la gestion de l'information privilégiée – AMF.

[6] Traditionally precise information has meant information about a project that is "sufficiently defined for it to have a possibility of succeeding, regardless of the existence of uncertainties as to its effective implementation". Cf. Paris Court of Appeal, June 27, 2002 Gerbelot-Barillon.