**Introduction to disclosure by listed companies**

This element outlines the key aspects of the disclosure regime which applies to listed companies. It focuses in particular on obligations under the UK Market Abuse Regulation.

**Introduction**

A premium listed company must ensure that it abides by the Listing Principles (‘**LPs’**) set out at UKLR 2.2.1. The LPs are designed to ensure that companies listed on the Official List pay due regard to the fundamental role they themselves play in maintaining market confidence and ensuring fair and orderly markets (UKLR 2.1.3). The LPs assist listed companies in identifying their obligations and responsibilities under the LPDT Rules (UKLR 2.1.4).

Two principles are particularly relevant:

LP1: ‘A listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations.’

LP 6: ‘A listed company must communicate information to holders and potential holders of its listed securities in such a way as to avoid the creation or continuation of a false market in those listed securities.’

**Introduction – UK Market Abuse Regulation ‘UK MAR’**

Chief among a listed company’s continuing obligations is its obligation of disclosure under UK MAR.

UK MAR is part of the ‘retained’ EU law that took effect at the end of the Brexit transition period on 31 December 2020. UK MAR is derived from the EU Market Abuse Regulation (Regulation 2014/596/EU) (‘EU MAR’) which is directly applicable in the European Union and which applied in the UK until that date. Minor amendments have been made to UK MAR to reflect the fact that the UK is no longer an EU Member State.

EU MAR is supported by secondary European legislation as well as guidance formally issued by the European Securities Markets Authority (‘**ESMA**’). These resources continue to be relevant to the interpretation of UK MAR.

In particular, ESMA has published the ESMA MAR Guidelines on Delay in the Disclosure of Inside Information (2016/1478) (the ‘**ESMA Guidelines’**).

UK MAR regulates behaviour in relation to qualifying ‘financial instruments’ (including shares) that are traded (or are the subject of an application for trading) on a regulated market, such as the Main Market of the London Stock Exchange, or on an MTF, such as AIM.

UK MAR also regulates behaviour in relation to other ‘related’ financial instruments, whose price or value depends on (or has an effect on) the price or value of the qualifying financial instruments referred to above - this includes (for example) credit default swaps and contracts for difference.

DTRs 1, 2 and 3 contain FCA guidance on the disclosure obligations in UK MAR. The FCA has also issued non-statutory guidance on the market abuse provisions of UK MAR (contained in the ‘FCA’s Market Conduct Sourcebook’, which is also referred to as ‘MAR 1’).

**Disclosure under UK MAR**

**Arts. 17-19 UK MAR**

**General disclosure obligation**

* UK MAR applies to all issuers of qualifying ‘financial instruments’ (includes companies admitted to the Main Market and AIM).
* UK MAR disclosure obligations intended to avoid insider dealing and investors being misled (Recital 49 MAR).
* The ESMA Guidelines continue to have a significant influence in the UK.

**Associated disclosure provisions**

**DTRs 4 onwards:** set out Transparency Rules which implemented the Transparency Directive which forms part of the ‘retained’ body of EU law. As the name suggests, the aim of the Transparency Directive was to ensure adequate transparency of, and access to, information in the financial markets. Example disclosure obligations include the requirement to disclose historical financial information under DTR 4.

**DTRs 1, 2 and 3:** supplementary FCA guidance on the application of the relevant disclosure obligations in UK MAR. Although not technically binding, the FCA will generally treat a person as having complied with a provision (in this case, the relevant provision of UK MAR) if they act in accordance with the related guidance.

**UKLR 6** also sets out ‘continuing obligations’ which require a company that has a listing of equity shares in the equity shares (commercial companies) category (‘**ESCC**’) to disclose certain specific information to the public. For example, an ESCC company is required to disclose details of any proposed changes to its capital structure (UKLR 6.4.4) or in its directors’ details (UKLR 6.4.6).

**UK MAR Art. 17 general disclosure obligation**

Art. 17(1) UK MAR contains the general obligation on a listed company, requiring the disclosure of inside information.

Under Art. 17(1) UK MAR:

‘an issuer shall inform the public as soon as possible of inside information which directly concerns the issuer’.

Art. 17(1) provides that the information concerned must not be combined with the marketing of the issuer’s activities. Any announcement of inside information must identify that the information communicated is inside information.

**UK MAR Art. 7 definition of inside information**

The definition of inside information is the same for both the disclosure and market abuse provisions of UK MAR. Under Art. 7(1)(a) UK MAR, inside information is information which:

• is precise;

• has not been made public;

• relates directly or indirectly to one or more issuers or one or more financial instruments; and

• if made public, would be likely to have a significant effect on prices of those financial instruments (or related derivatives).

The DTRs give supplementary FCA guidance to assist listed companies in applying this definition.

**UK MAR Art. 7(2) definition of ‘precise’**

Information is deemed to be precise for this purpose if it indicates:

• a set of circumstances which exists (or may reasonably be expected to come into existence); or

• an event which has occurred (or which may reasonably be expected to occur),

where the information is sufficiently specific to enable a conclusion to be drawn as to the possible effect of the circumstances or event on the price of the financial instruments (or related derivatives).

In practice, there is a judgement to be made as to whether particular circumstances are sufficiently precise, and companies will often seek advise from their lawyers and brokers as to whether inside information exists.

Where there is a protracted process that is intended to bring about particular circumstances or a particular event, Art. 7(3) UK MAR specifically provides that each intermediate step in that protracted process may also be deemed to be inside information if, by itself, it satisfies the inside information definition.

**UK MAR Art. 7(4) reasonable investor test**

In interpreting the definition of inside information, Art. 7(4) UK MAR states that information which would, if made public, have a significant effect on the price of financial instruments is information which a reasonable investor would be likely to use as part of the basis of their investment decisions.

DTR 2.2.5 contains additional guidance from the FCA on the reasonable investor test, setting out factors that an issuer may wish to take into account when considering whether the information in question would be likely to be used by a reasonable investor as part of the basis of their investment decision.

The references in UK MAR to ‘precise’ information and the ‘reasonable investor test’ both use concepts that were included in the previous FSMA definition of inside information. As such, case law relating to the previous regime remains relevant in construing the UK MAR provisions.

**Exceptions to the obligation to disclose inside information**

Unexpected and significant event

Legitimate interests

**Clarifying the situation: unexpected and significant event**

The obligation to disclose under Art. 17(1) UK MAR requires disclosure of inside information to be made ‘as soon as possible’.

There is no specific provision for a delay in announcement just because an event is unexpected. DTR 2.2.9(2) states that, if there is an unexpected and significant event, a ‘short delay’ may be acceptable if it is necessary to clarify the situation. The FCA referenced this guidance in the Gent decision (2022), adding that ‘as soon as possible’ does not mean immediately if the information is not in a state to be announced.

In these circumstances, a ‘holding announcement’ should be released if the issuer believes that there is a danger of inside information leaking before the facts and their impact can be confirmed. The holding announcement would be followed as soon as possible by a further, more detailed announcement to clarify the situation. At all times, the company must be conscious of the fact that its shares are being traded on the basis of the information available to the market.

**Delaying disclosure: legitimate interests (Art. 17(4) UK MAR**

Under Art. 17(4) UK MAR, an issuer may ‘on its own responsibility, delay disclosure to the public of inside information’ provided that all of the following conditions are met:

a) immediate disclosure is likely to prejudice the ‘legitimate interests’ of the issuer;

b) delay of disclosure is not likely to mislead the public; and

c) the issuer is able to ensure the confidentiality of the information.

The ESMA Guidelines incorporate ESMA’s guidance on both the meaning of ‘legitimate interests’ and on situations in which the delay of disclosure is likely to mislead the public.

**Categories of legitimate interest**

According to the ESMA Guidelines, circumstances in which the immediate disclosure of inside information is likely to prejudice the issuer’s legitimate interests include situations where:

* the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure (and examples of this include mergers, acquisitions, purchases/ disposals of major assets, restructurings and reorganisations);
* the financial viability of the issuer is in grave and imminent danger, and immediate public disclosure of the inside information would jeopardise the conclusion of negotiations designed to ensure financial recovery;
* the issuer has developed a product or invention, and immediate public disclosure is likely to jeopardise the intellectual property rights of the issuer;
* a transaction publicly announced is subject to a public authority’s approval (e.g. competition clearance from the CMA), and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them.

**Note:** inconvenience or PR reasons (e.g. delaying disclosure of bad news until there is some good news to disclose too) are not a legitimate interest.

**Guidance on avoiding misleading the public**

The ESMA Guidelines set out a further non-exhaustive list of situations in which delay of disclosure of inside information is likely to mislead the public. Where any of these situations apply, an issuer would be unable to delay the release of inside information under Art. 17(4) UK MAR, even if the disclosure of the information might harm its legitimate interests.

Circumstances in which a delay might mislead the public include situations where:

* the inside information is materially different from ‘the previous’ (i.e. the most recent) public announcement of the issuer on the matter to which the inside information relates;
* the inside information relates to the fact that the issuer’s financial objectives are unlikely to be met, where such financial objectives have previously been publicly announced; or
* the inside information is in contrast to the market’s expectations, and such expectations are based on ‘signals’ that the issuer has previously made to the market, including through interviews, roadshows or any other type of communication organised by the issuer or made with its approval.

**Example of a delay which might mislead the public**

By way of illustration, an issuer in confidential negotiations relating to the purchase of a large new business would usually be able to rely on Art. 17(4) UK MAR to delay making an announcement in relation to the transaction until a binding agreement had been signed. However, if that issuer has previously announced that it is only interested in organic growth and is not intending to make any acquisitions that year, then it would not be able to rely on Art. 17(4) UK MAR, as delay would risk misleading the public.

**Delaying disclosure: informing the FCA**

**Informing the FCA**

If an issuer has relied on Art. 17(4) UK MAR to delay a disclosure, and subsequently discloses the relevant inside information, it must at that point inform the FCA that it has delayed disclosure under Art. 17(4) UK MAR. It must also provide the FCA with a written explanation of how the relevant conditions were met, if the FCA so requests.

**Delaying disclosure: record keeping**

Where an issuer delays announcing inside information on ‘legitimate interests’ grounds under Art 17(4) UK MAR, it must also maintain detailed records covering:

* the dates and times when;
  + the inside information ‘first existed within the issuer’;
  + the decision to delay disclosure of the inside information was made; and
  + the issuer is likely to disclose the inside information;
* the identity of persons who made key decisions (e.g. about when to delay, monitoring of the conditions of the delay and about when to disclose the information publicly); and
* evidence of the issuer’s compliance with Article 17(4) (e.g. by putting in place ‘information barriers’).

In addition, the issuer must keep a list of ‘insiders’ who have access to the inside information (an ‘insider list’) which must be provided to the FCA on request (Art. 18 UK MAR). Together, these are onerous requirements; the need to keep such detailed records is an ongoing burden for listed issuers.

**Summary**

* A premium listed company must comply with the Listing Principles and Premium Listing Principle, including establishing and maintaining adequate procedures, systems and controls to enable it to comply with its obligations.
* Art. 17(1) UK MAR requires a listed company to disclose inside information which concerns it as soon as possible.
* Art. 7 UK MAR defines inside information.
* The listed company may delay such disclosure in very limited circumstances:
  + Where an expected and significant event has occurred; or
  + In order to protect its legitimate interests (subject to strict conditions).
* Strict procedural rules apply where a listed company delays disclosure under Art. 17(4) UK MAR.