**Listed company disclosure: control of inside information and dealing with leaks**

This element outlines the key issues which arise in relation to controlling inside information, including how listed companies should deal with leaks.

**Introduction**

Where a listed company is delaying disclosure of inside information in accordance with Art. 17(4) MAR, it must take great care to maintain the confidentiality of that information in order to avoid leaks. This includes maintaining clear records of exactly who has access to the information at any given time by keeping insider lists

Listed companies may engage in selective disclosure of inside information within very limited parameters. This is an example of where the market sounding procedure may be useful.

If there is a leak of inside information, the listed company must act quickly to make any announcement which is required in order to ensure the market is trading on the basis of correct information.

The element goes on to examine the method by which listed companies make disclosures and the liability which may attach to such disclosures.

**Delaying disclosure: dealing with leaks and rumours**

Under Art. 17(7) MAR, where an issuer is relying Art 17(4) MAR to delay disclosure but the confidentiality of the inside information is no longer ensured, the issuer is required to disclose that inside information to the public as soon as possible.

In support of this MAR requirement, DTR 2.6.3 states that, if an issuer is relying on Art. 17(4) MAR to delay disclosure, it must prepare a holding announcement to be released in the event of a breach of confidence. This announcement is usually referred to as a "leak announcement". The issuer will prepare a draft version containing the inside information most likely to be revealed by a leak, including the parties involved, the nature of the transaction and the fact that no deal has yet been agreed. In the event of a leak, this draft announcement will be reviewed and updated, as appropriate, before being released asap. The announcement must be meaningful and should reflect the extent to which a leak is accurate.

Art. 17(7) MAR also specifically provides that disclosure must be made where a rumour explicitly relates to that inside information, if the rumour is sufficiently accurate to indicate that the confidentiality of the inside information is no longer ensured. However, MAR does not specify what (if anything) should happen in the event of a false rumour.

**Selective disclosure**

Arts. 10(1) and 14(c) MAR together make it an offence to disclose inside information other than in the normal exercise of an employment, a profession or duties. Therefore, an issuer may not make any selective disclosure of inside information to a third party that falls outside these limits.

Where a selective disclosure to a third party can be made within the normal course of employment, profession or duties, Art. 17(8) MAR further provides that the information in question must also be immediately disclosed to the public, unless the third party recipient owes a duty of confidentiality of some sort to the issuer.

Therefore, where announcement of certain inside information is being delayed under Art. 17(4) MAR, it is possible to make selective disclosure of that information to third parties, but only if the disclosure is:

* (a) in the normal course of an employment, profession or duties; and
* (b) made to someone under a duty of confidentiality.

One method of making a selective disclosure which meets these requirements is to undertake a “market sounding” in relation to the transaction which is the subject of the inside information, in accordance with Art. 11 MAR.

**Selective disclosure – FCA guidance**

In addition, FCA guidance in DTR 2.5.7 envisages that, where an issuer is contemplating a major transaction, it may make selective disclosure to certain other parties, including (but not limited to) its shareholders, advisers to the issuer and to other parties involved in the matter, unions, lenders and credit-rating agencies.

**‘Market soundings’ safe harbour (Art. 11 MAR)**

It is common for companies and their advisers to “sound out” selected shareholders and/or potential investors before embarking on transactions.

Art. 11 MAR provides a safe harbour for such market soundings which an issuer may choose to use. The market soundings regime is available in two, relatively narrow situations:

• where to an issuer is sounding out potential investors in a transaction in securities, such as a secondary share offering; or

• where a bidder is sounding out the willingness of target shareholders to accept a takeover offer.

The safe harbour is available if the issuer follows the procedural requirements prescribed in Art. 11 MAR and associated implementing regulations about how the sounding must be conducted and recorded.

If an issuer wanted to sound out shareholders in relation to any type of transaction or circumstance other than the two narrow categories set out on the previous slide (for example, a target company sounding out its own shareholders about a takeover bid) this will not fall within the definition of a market sounding. In order not to breach Art. 10 MAR, the disclosing company would need to be comfortable that the person disclosing was doing so in the normal exercise of their employment, profession or duties and that the recipient owed the issuer a duty of confidentiality.

Normal exercise of employment, profession or duties (Art. 11(4) MAR)

For the purposes of the prohibition on unlawful disclosure set out in Art. 10 MAR, a person who discloses inside information as part of a market sounding is deemed, pursuant to Art. 11(4) MAR, to have made the disclosure in the normal exercise of their employment, profession or duties provided they comply with the procedure set out in Arts. 11(3) and (5) MAR.

Information which ceases to be inside information (Art. 11(6) MAR)

Where information which has been disclosed during market soundings ceases to be inside information, the person disclosing must inform the person who received the information as soon as possible. This is known as “cleansing” the inside information.

**Insider lists: Art. 18 MAR**

One way in which a listed company will comply with the LP 1 obligation to ensure it has adequate procedures, systems and controls in place is to maintain insider lists.

Art. 18(1) MAR, states that an issuer and any person acting on their behalf or on their account must each:

“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...”.

ESMA considers that this obligation has direct application to advisers and consultants to the issuer who have access to inside information.

An issuer’s lawyers will therefore be under a direct obligation to draw up an insider list in relation to any inside information to which they have access: responsibility for ensuring that the firm’s insider list is prepared in a timely manner will often be a task for a junior associate within the team. If acting for another party in a transaction (e.g. an underwriter), a record would still be required in order to allow the issuer to complete its own insider list.

In addition, FCA guidance in DTR 2.5.7 envisages that, where an issuer is contemplating a major transaction, it may make selective disclosure to certain other parties, including (but not limited to) its shareholders, advisers to the issuer and to other parties involved in the matter, unions, lenders and credit-rating agencies.

Under Art. 18(3) MAR, the content requirements for an insider list include the identity of each person who has access to inside information, the reason for including the person on the list, the date and time at which the person obtained access to the inside information, and the date on which the list was drawn up. The requirement to record the time and date on which a person first had access to inside information requires careful policing.

Insider lists must also be updated promptly where circumstances change (e.g. a new person has access to inside information) (Art. 18(4) MAR). They must be kept for a period of at least five years after they are drawn up or updated (Art. 18(5) MAR).

Issuers or persons acting on their behalf must each take all reasonable steps to ensure that persons on insider lists acknowledge in writing “the legal and regulatory duties entailed” and that they are aware of “the sanctions applicable to insider dealing and unlawful disclosure of inside information” (Art. 18(2) MAR).

The requirement to keep insider lists will be reflected in the engagement and/or confidentiality letters entered into between the issuer and its advisers. In practice, each law firm has its own MAR-compliant procedures in relation to the obligation to maintain insider lists for listed company clients.

The secondary legislation relating to insider lists is the UK retained law version of Commission Implementing Regulation (2016/347/EU). This sets out the highly prescriptive templates for the format and content of insider lists which must be kept in an electronic format. Insider lists contain a substantial amount of personal data, including telephone numbers (work, home and mobile), dates of birth and home addresses).

**Summary**

* Where a listed company delays disclosure of inside information, it must take care to control this information carefully and be ready to make a disclosure immediately if the confidentiality of the inside information cannot be assured.
* It is possible for a listed company to make selective disclosure of inside information provided it complies with all requirements of MAR. This is an example of a situation where a market sounding may be useful.
* Both listed companies and their advisers must maintain insider lists under Art. 18 MAR.