

Disclose ASAP! And ASAP Means...

14 May 2019

In Europe, when negotiating a transaction which may affect the market price of listed instruments of the parties, a key question arises: when to disclose it to the market? The short answer is as soon as possible unless you have a legitimate interest in delaying the announcement, the delay will not mislead the market and the confidentiality remains protected. This note details what it means in practice.

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Pursuant to MAR (Market Abuse Regulation—EU Regulation No. 596/2014 of 16 April 2014), effective throughout the European Economic Area, an issuer is required to inform the public as soon as possible of inside information which directly concerns that issuer. The purpose is to ensure equal treatment and to limit the risk of disparity of information.

Any significant M&A transaction is likely to be deemed to be inside information (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 price of those financial instruments or on the price of related derivative financial instruments) and thus captured by these requirements.

In certain limited circumstances, an issuer may delay disclosure of inside information, provided that immediate disclosure is likely to prejudice the legitimate interests of the issuer, the delay is not likely to mislead the public and the issuer is able to ensure the confidentiality of the information. Any decision to delay disclosure must be internally documented and notified to the regulator after disclosure of inside information.

Although there is no consistent practice (which very much depends on the circumstances, including the structure of the deal and the existence of market rumors), it is generally considered to be appropriate to disclose the deal when there is sufficient certainty of the transaction or when a binding agreement is executed, frequently with conditions precedent and, in France, subject to particularities of prior consultation of works councils. In the event of a leak of the potential transaction before it is signed, parties may be forced to announce the transaction prematurely in order to comply with MAR, even if that may potentially jeopardize the deal.

In a decision dated April 25, 2019, the Enforcement Committee of the *Autorité des marchés financiers* (the “AMF”) gave a new indication of how regulators view how this rule should be applied, in the highly visible (but aborted) proposed acquisition of T-Mobile US Inc. by Iliad. In this decision, the AMF imposed sanctions for market abuses on several parties, including a pecuniary sanction (limited to 100,000 euros for a multibillion-dollar deal) on Iliad for having impermissibly delayed the announcement of its binding offer for T-Mobile US Inc. (This note only considers the Iliad sanction, not parallel insider trading aspects.)

In July 2014, Iliad, duly authorized by its board, submitted an offer to acquire T-Mobile but decided to postpone the announcement to a later stage. However, publication was suddenly accelerated because of a leak, but only after a publication of an article by *The Wall Street Journal* (the “WSJ”).

The AMF, after an investigation, considered that the information became sufficiently precise to warrant disclosure before the WSJ article because initial discussions had started some time previously and were well-advanced and positive; constructive meetings had already taken place between the parties; a board meeting of Iliad was held on July 1, authorizing senior management to submit a non-binding offer; and no impediment to the financing was identified.

Iliad objected that, as common in such a context, the deal was still largely uncertain, with no financing commitment; however, the AMF insisted that preciseness of information does not require certainty, even where the financing is not secured or when the price or parity is not yet final.

Iliad also argued in its defense that even if the information on the proposed transaction constituted “inside information”, it had the right to delay public disclosure of the information. The AMF rejected this argument as well to a certain extent.

Here, it was not contested that it was in the interests of Iliad to delay the announcement of the deal until secured. The AMF’s position resulted from the last condition, as many persons, third parties to the deal, were already aware of the transaction, in particular the WSJ, which had reached out to Iliad for comments on the potential transaction. Iliad argued that they had believed that they had been able to convince the reporter to delay disclosure and that confidentiality was accordingly preserved until the WSJ article was published. Emails produced in the proceedings acknowledged that it would be difficult to impose a blackout on journalists for very long. In any event, regardless of whether the WSJ planned to immediately publish an article on the transaction or not, the AMF held that, in their view, confidentiality was lost when it became clear from the contact with the reporter that they had become aware of the pending transaction.

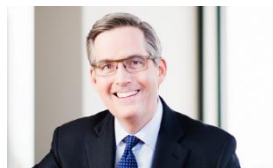
In addition to the reporter, information had been leaked to other third parties, including bankers that had not been mandated on the deal. Apparently, the leak occurred in an embarrassing, but still common, fashion: in a public space, in this case on the Eurostar, where the banker was sitting next to a working group member reviewing confidential documents for the deal.

Since confidentiality had not been maintained, the AMF held that Iliad had impermissibly delayed disclosure of the pending offer.

Holding inside information imposes on insiders various obligations, notably to refrain from using it, to protect it and to disclose it in a timely manner. Communication and timing are key in the success of a deal and require a careful attention and appropriate planning. The Iliad decision serves as a timely reminder for parties of the difficulties in judging when inside information must be disclosed and the dangers when that judgment is questioned by regulators.

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Please do not hesitate to contact us with any questions.

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