CENTRE DE DROIT
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Swiss Stock Exchange

New rules on ad hoc publicity : reason and sensitivity

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SIX Exchange Regulation SA, the regulatory and supervisory body of the SIX Swiss Exchange, has announced a change to the Listing Rules (LR), the Directive on Ad hoc Publicity (DAP) and the Directive on Information relating to Corporate Governance (DCG) concerning ad hoc publicity, which will come into force on 1 July this year.

This revision introduces an obligation to qualify event-driven announcements as such (‘*flagging*’). It modifies the definition of facts likely to have an influence on prices in order to include a reference to the informed market participant and to abolish the practice of facts deemed to have a notable influence on the price, subject to the announcement of annual and interim results. It also introduces an express obligation to use ‘appropriate and clear internal rules and processes’ to ensure the confidentiality of facts likely to have an influence on prices if an issuer decides to delay an announcement. Finally, the corporate governance report must state the general trading blackout periods (*Handelssperrzeiten*, *quiet periods*), subject to the application of the ‘*comply or explain*’ rule (art. 7 DCG).

‘*Flagging*’

Until now, Swiss law on event-driven publicity was part of the continuation of current relations with investors. Issuers were certainly obliged to make event-driven announcements and, in this context, had to comply with the procedures laid down in the RC and the DPE, but it was not necessary to distinguish between an ordinary press release and an event-driven announcement. Under the new regime, issuers will need to determine whether their announcement constitutes advertising or not and include the words ‘event-driven announcement in accordance with Art. 53 RC’ (art. 53 para. 2^{bis} RC) and to allow investors to filter on their website in chronological order the announcements made in this respect over the last three years (art. 9 para. 1 DPE), thus extending the custody period by one year. With digitalisation gaining ground, issuers of primary listed equity securities will be required to use the ‘*Connexor Reporting*’ announcement platform to transmit their announcements to SIX Exchange Regulation SA from 1 ^{October} 2021. Other issuers may continue to use other channels.

This measure will increase transparency in the markets and make life easier for investors, who will be able to use this signalling to distinguish facts that influence prices from others. As a result, the revision places a heavy burden on issuers, who must judge themselves not only with regard to the stock exchange, but also – indirectly – with regard to the market, which must now be able to identify and distinguish event-driven announcements from others. Art. 4 para. 3 DPE,

however, mitigates the burden by recognising that issuers have a legitimate power of discretion that they can exercise in accordance with the internal rules relating to the distribution of powers within the company. This results in a margin of discretion for issuers who, moreover, may, in accordance with the law, the articles of association, the organisational regulations and the division of powers more generally, delegate the task of deciding the issue. However, Circular No. 1 of the Issuers Committee is clear : the abuse of event-driven announcements for marketing purposes is not admissible and will be subject to sanctions.

Changes to the definition of facts having an influence on prices

Essentially, the definition has been revised on three points : firstly, to now refer to 'facts having an influence on prices' and no longer to 'facts likely to have an influence on prices'. According to Circular No. 1 of the Issuers Committee, which serves as an explanatory memorandum, the change is purely terminological with no material influence on the concept, as the term 'influence' already includes an element of potentiality, which is actually more the case for the terms used in other languages (*Relevanz*, *sensitive*).

Basically, it is a question of assessing *in advance* whether a fact that has occurred in the company's sphere of activity is likely to lead to a significant change in prices. Taking up the case law on insider information within the meaning of Art. 2 let. j LIMF, Circular No. 1 explains that it is thus a prognosis on the likelihood that the fact will lead to a significant change in prices, i.e. price fluctuations well above average. This concept does not therefore refer to the amplitude of the fluctuation in absolute or percentage terms (Circular no. 1, ch. 8 ; see also ATF 145 IV 407, c. 3.4.1), but must be compared to the volatility of the price. It is therefore a question of determining whether the change is statistically significant, without it being clear whether a fluctuation significantly above the average falls outside the 95 % or 99 % confidence interval deduced from the historical volatility of the price.

Secondly, the definition has also been amended to replace the notion of the 'average market participant' with that of the 'informed market participant' (*verständige Marktteilnehmer* in German and *reasonable market participant* in English). This is in fact a reasonable market participant, as the German and English texts suggest, as is European law, which defines insider information by reference to information that a reasonable investor (*reasonnable investor*, *verständiger Investor*) would be likely to use as part of his investment decisions (art. 7 (4) of the Regulation on market abuse). This market participant thus meets a normative definition of an investor familiar with securities trading, company law and financial market practices, but who does not have specific skills or constitute a qualified investor (Circular no. 1, ch. 9). However, this is more than just an alignment with European law, because as a result, like the European Market Abuse Regulation, which views ad hoc publicity as a means of combating market abuse, Swiss law on ad hoc publicity is moving closer to insider trading law, despite their different roots, the former in stock exchange self-regulation and the latter in the LIMF.

Thirdly, Art. 4 para. 2 DAH reverses previous practice with regard to facts deemed to have an influence on prices and, in particular, the assumption that changes in the board of directors and management are deemed likely to have an influence on prices (cdbf.ch/546/). From now on, it will generally be necessary to assess on a case-by-case basis whether the event will have a significant influence on prices, except for the publication of management reports and interim reports, which will continue to be deemed to have an influence on prices. Although this change is a factor of legal uncertainty for issuers, it is more generally a welcome change that will reduce

the noise on the markets and the risk of making technical errors related to the announcement of personnel changes with no real impact on prices.

Internal rules and processes

The third part of the revision aims at the express obligation to use 'appropriate and clear internal rules and processes' to ensure the confidentiality of facts likely to have an influence on prices if an issuer decides to defer an announcement (art. 54 para. 2 RC). From now on, issuers will not only have to ensure the confidentiality of facts that have an influence on prices, but also put in place appropriate and clear internal rules and processes for this purpose. Art. 54 para. 2 RC is similar to the recognised *safe harbour* for the disclosure of inside information provided for in art. 128 OIMF and requires issuers to take concrete measures. Issuers certainly retain organisational freedom. However, the expectations are clear and the good practices are partly described in Circular No. 1 of the Issuers Committee, which states that : '*Good practices' for guaranteeing the confidentiality of a fact that has an influence on prices include : i) the smallest possible number of information holders ('need to know' principle) ; ii) restricted and secure access to information ; iii) confidentiality declarations from all information holders, both internally and externally (e.g. advisers) ; and iv) keeping an insider list.*'

In other words, the revision does not yet go so far as to impose on issuers the obligation to keep a list of insiders as in Article 18 of the EU Market Abuse Regulation, but it is moving strongly in that direction. In view of this communication, an issuer who decides not to keep a list of insiders must expect to have to provide explanations and establish that it made a conscious choice to do so and that other measures were more suitable for maintaining confidentiality. Incidentally, it seems to me that a broadcaster who proceeded in this way would be in the right, since the main purpose of keeping a list of insiders is to be able to reconstitute the circle of insiders in the event of a leak or insider trading, rather than to guarantee confidentiality by limiting the size of this circle. Therefore, although it is a widespread instrument, it is not an adequate tool to guarantee confidentiality.

Publication of blocking periods

The latest amendment relates to the DCG, which now requires issuers to publish in their corporate governance report the general blocking periods for trading in the past financial year, with the deadlines, the recipients, their scope and any exceptions. This obligation does not extend to *ad hoc* blocking periods due to certain transactions or other special circumstances. Furthermore, it is in principle possible to waive the publication of this information, although it is difficult for me to imagine the reasons justifying an exception under the '*comply or explain*' of art. 7 DCG.

Conclusion

The revision of the law on ad hoc publicity is not revolutionary. On the whole, it formalises the processes : both for the decision to proceed with an ad hoc announcement and to classify it as such, and for the decision to delay a publication, the new law expects issuers to put in place internal rules and clear processes. Basically, it marks an important turning point, but, in reality, it is more of an alignment with European market abuse law and, thus, indirectly, a rapprochement with insider trading law. Consequently, it is to be expected that this revision will have repercussions in this second area, which does not fall within the competence of the stock

exchange or SIX Exchange Regulation, but of FINMA and the federal criminal authorities.
