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How to Identify Inside Information – A Helpful Guideline Provided by the Italian Securities and Exchange Commission

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The Italian Securities and Exchange Commission ("CONSOB") has recently approved the amendments to its regulations on issuers, markets, and related party transactions in order to implement the EU Regulation no. 596/2014 ("MAR") on market abuse, and its relative delegated acts, into the Italian legal system.

Given the complexity of the market abuse regulation, together with the mentioned amendments, CONSOB announced the publication of operational guidelines in order to clarify the market abuse legal framework and offer an interpretation of the main provisions of MAR from a practical perspective.

A draft of the operational guidelines concerning the management of inside information and the preparation of the insider lists ("Guideline on Inside Information") has been published. The consultation on such operational guidelines closes on 6 June of this year.

The Guideline on Inside Information, providing, *inter alia*, a deep analysis of the classification of information under MAR and setting out specific and practical criteria, helps issuers identify and assess whether they are managing inside information.

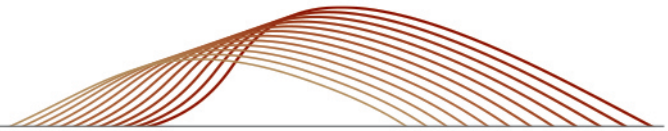
Guideline on Inside Information

The Guideline on Inside Information is intended to help issuers implement procedures for the management of inside information. According to the document, such process starts with identification of the information and its relevant classification.

The Guideline on Inside Information helps issuers to recognize information relevant under MAR, i.e., 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 (Article 7 of MAR).

The Guideline on Inside Information provides two lists, similar to those published by CESR in 2006, drawing a distinction between inside information as a general category of information relevant under MAR, and inside information that directly concerns the issuer, related to the publication duty provided for under Article 17 of MAR.[1]

The first list covers information directly related to the issuer, relevant under Article 17 of MAR, and includes, *inter alia*, information related to patents and registered trademarks, legal disputes, and



changes in control or in management and supervisory boards. The second list covers information that indirectly refers to the issuer (and, therefore, which is not subject to the duty provided for under Article 17 of MAR). The list mentions, *inter alia*, data provided by public institutions and decisions issued by public authorities.

Both lists are clear examples of factors to be considered when assessing whether information is relevant under MAR and, in particular, whether the issuer has to make such information available to the public.

Moreover, the Guideline on Inside Information provides certain criteria to assess whether information is "precise."[2] In that regard, the Guideline on Inside Information specifies that:

1. the assessment whether information is "precise" has to be based on objective evidence (rumors need not be taken into account);

2. the information could be considered "precise" even if it mentions alternative options (e.g., the issuer did not decide yet which of the two target companies it will acquire); and

3. the information is considered "precise" when it could be immediately used for trading activities.

Furthermore, the Guideline on Inside Information clarifies that information is considered "public" only once the issuer publishes it under Article 17 of MAR. According to the document under exam, there are certain exceptions to such rule: for instance, when the information is anticipated by a journalist who reports that the information comes from the issuer (otherwise, the news is not considered public) or when other issuers involved in the transactions have already published the information.

With reference to the "significant effect on the prices" requirement, the Guideline on Inside Information provides that a fixed threshold would not be helpful. The document lists certain criteria that could help to assess whether the information is likely to have a significant effect on prices:

1. the type of information had already had an effect on the prices;

2. experts' opinions confirm that that kind of information is price sensitive; and

3. the issuer has already managed that kind of information as inside information.

Last, the Guideline on Inside Information lists certain elements that should be considered when assessing whether information is relevant under MAR. In particular, an issuer should consider the following aspects of the information:

1. the relevance of the information in connection with the industry where the issuer operates (i.e., the bigger the impact of the transaction to which the information refers affects competitors' positions, the greater the possibility that the issuer is managing inside information);

2. relevance of the transaction compared with the revenues or capitalization of the issuer (i.e., the more the transaction is relevant for the issuer, based on capitalization, revenues, etc., the greater the possibility that the issuer is managing inside information);

3. impact on investors' expectations (i.e., the more the issuer's strategies or financial results vary from investors' expectations, the greater the possibility that the issuer is managing inside information);

4. engagement of external counsel or advisors;
5. process based on top management instructions (top-down process);
6. application for an *ad hoc* financing in connection with the potential transaction; and
7. impact on information already made public by the issuer.

Conclusions

The legal framework for market abuse is codified by the European legislature with several acts and is implemented by the national legislature and national authorities through amendments to sets of rules that may be very intricate.

The clarifications provided by the Guideline on Inside Information are a clear example of "authentic" interpretation of the market abuse regulation by one of the authorities in charge of the administration of such legislation (CONSOB).

Therefore, issuers should implement their procedures on management of inside information following the instructions contained in the Guideline on Inside Information and taking into account the criteria and elements listed by CONSOB in order to assess the nature of their information.

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[1] According to Article 17 of MAR, "*an issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.*"

[2] According to MAR: (a) "*information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments; in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information*" (Article 7 of MAR); (b) "*An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information*" (Article 7 of MAR).

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