The obligations of issuers who delay the disclosure of inside (ahem, "relevant") information

The new Market Abuse Regulation ("**MAR**") follows, in substance, the former Market Abuse Directive ("**MAD**") in relation to the obligation of listed issuers to inform the market, as soon as possible, of any inside information concerning them, while also giving them the corresponding faculty to delay such disclosure when a series of conditions are met.

However, the MAR has attempted to reduce issuers' discretion regarding the decision to delay disclosure, so as to ensure greater uniformity in their practices, and to enhance the supervisory authorities' capacity to monitor and oversee the use that is made of this faculty.

Key points:

- Relevance of the MAR in relation to issuers' decision to delay the disclosure of inside information
- The MAR imposes strict recording and notification obligations on issuers who delay disclosure
- The aim of the MAR is to give supervisory authorities greater capacity to monitor and oversee in this context

As a consequence, the MAR imposes a large and complex series of obligations upon issuers in those cases in which they decide to delay disclosure of any inside information.

Relevance of the MAR in relation to the disclosure of inside information

Although the main principles of the Market Abuse Regulation (MAR) in this context match those contained in the former Market Abuse Directive (MAD), the transposition of the MAD by the Spanish legislator, which is still reflected in the Spanish Securities Market Act (*Ley del Mercado de Valores*, "**LMV**") and in Royal Decree 1333/2005 on market abuse, was defective. In particular:

- The LMV establishes the general principles regarding the delay in disclosing inside information in Article 228.4 thereof, stating that an issuer may do so only if the immediate disclosure will harm its legitimate interests, and requiring in this case that it "immediately" inform the Spanish Securities Market Commission ("**CNMV**"). However, it regulates separately, and not merely as scenarios or examples of these general principles, those more noteworthy cases in which a delay is usually justified, such as in the negotiations for major corporate transactions (Art. 230 LMV), approaching them exclusively from the –partial and limited– perspective of the issuers' duty of confidentiality.
- Unlike the MAD and now the MAR, Spanish law has traditionally made a distinction between the categories of 'inside information', for the purpose of the prohibition against using it to perform transactions, and 'relevant information', which is the one that applies to the issuers' duty to disclose to the public. But since there are no material or substantive differences between the two (apart from the cases in which the notification of relevant events serves as a means for

disseminating information that is not inside information, such as meeting announcements, corporate governance reports and remuneration reports, etc.), it is more precise to use a unitary concept of 'inside information', as the MAR does. In this way, information is considered inside information right from the time of its creation (due to its specific nature, because it can have a significant effect on share prices, etc.) and as a rule it must be disclosed "as soon as possible" (Art.17.1 MAR). But the issuer can delay the disclosure of this information in certain cases, in order to avoid harming its legitimate interests, despite its being considered inside information for the purpose of the prohibition against transacting with it.

Conditions required in order to delay disclosure

The conditions or prerequisites set in order for an issuer to be able to delay disclosing inside information are the same as those already contained in the MAD. But their actual scope and meaning has been clarified by the European Securities and Markets Authority (ESMA) in its MAR Guidelines on the Delay in the disclosure of inside information, dated October 2016, in an effort to provide greater legal certainty to both issuers and to supervisory authorities, as follows:

1. If immediate disclosure is likely to prejudice the legitimate interests of the issuer

These are cases in which the interests of the issuer are considered to prevail over the interest of the market in being appropriately informed, referring in general to information which, if disclosed prematurely, could be detrimental to or jeopardise the transaction in question. The key examples provided by ESMA are:

a) Negotiations whose outcome could be compromised by an immediate disclosure (mergers, acquisitions, asset sales and purchases, etc.);

b) Negotiations designed to ensure the recovery of issuers whose financial viability is in grave and imminent danger;

c) The development of products or inventions, when immediate disclosure could harm the issuer's intellectual or industrial property rights;

d) Plans or final decisions (not negotiations) to sell or purchase a major holding in another company.

2. If a delay of disclosure is not likely to mislead the public

This second condition essentially requires that the inside information whose disclosure the issuer intends to delay does not contradict the information available in the market, in those cases where this can be attributed to the issuer itself. It is considered that the disclosure of the information cannot be delayed in cases such as:

a) When the information whose disclosure the issuer intends to delay is materially different from that previously announced by the issuer itself;

b) When the issuer will not meet financial objectives previously announced to the market (profit warnings);

c) When the information whose disclosure the issuer intends to delay is in contrast with the "market's expectations", where such expectations are based in turn on "signals" the issuer has previously sent to the market (such as interviews, presentations, roadshows etc.).

3. If the issuer is able to ensure the confidentiality of the information

This condition corresponds to a large extent to the current provisions of Article 230 LMV. Thus, if there were rumours or news in the market regarding the inside information whose disclosure has been delayed and the degree of accuracy of such rumours or news allowed it to be understood that they can be attributed to information that has been leaked, the issuer would be obliged to disclose it as soon as possible (in which case a silent or "no comment" policy is therefore not admissible).

Duty to notify supervisory authorities

Whereas the LMV, in accordance with the former MAD, requires " immediately" informing the CNMV of the decision to delay disclosure (Art.228.4), which is a system that has proven to be inoperative, the new MAR has established a system of notifying after the fact, in an attempt to enable supervisory authorities to assess the use made by issuers of this faculty and to be able to react in the case of any undue delays.

But the MAR acknowledges an alternative for EU Member States, in one of the few options given to national legislations in this context:

a) that issuers who delay the disclosure of inside information must inform the competent authorities once they make it public, providing a written explanation on how they have met the conditions imposed; or

b) that this explanation be given by the issuers, not in all cases but only "upon the request of the competent authority".

Thus it is the issuer who must decide whether or not to delay the disclosure of inside information "on its own responsibility", in terms of exempting itself from the duty to disclose when it considers the conditions established in the MAR to be met. But once it discloses the inside information, it must inform the supervisory authority (in any event, or only when the latter so requests, as each Member State chooses), explaining the reasons which justify the delay and the manner in which the other conditions were fulfilled.

Spain's legislator has not yet chosen one or the other option, since it has not adopted the necessary provisions to adapt the system under the LMV to that of the MAR for those issues on which the MAR allows the intervention of national law. Nevertheless, it seems clear that the CNMV should consider itself now fully empowered to at least require issuers to explain the reasons why they decided to delay the disclosure of inside information and how they met the conditions imposed, even if using their general supervisory powers and considering that the material or substantive rules are fully in force.

Obligations of issuers who delay disclosure

The MAR and its implementing rules impose a large set of obligations upon issuers that make use of the faculty to delay the disclosure of inside information, in order to ensure effective compliance with the conditions required for it and the supervisory authorities' capacity to monitor and oversee the use that is made of such faculty. The issuers' main obligations in this regard are as follows:

1. Keeping a disclosure record

Commission Implementing (or "second level") Regulation (EU) 2016/1055 of 29 June 2016 requires those issuers who decide to delay the announcement of inside information to record and document in writing a long list of information, including –amongst many other facts and figures–: the time and date when such information came to exist, when the decision was taken to delay its disclosure, the identity of the persons who adopted the decision and are responsible for constantly monitoring the conditions of the delay, and the manner in which the prerequisite conditions for such delay were met.

They are generally known as 'disclosure records', and these requirements have led many European issuers to revise, and in many cases update, their own internal procedures in relation to the use and management of inside information following the entry into force of the MAR.

2. Informing supervisory authorities

As stated above, issuers are required to inform the supervisory authorities as soon as they make public inside information whose disclosure had been delayed, in any case or –depending on the option chosen by each Member State– when so required by the supervisory authority.

Regulation 2016/1055 also concerns the content of this written notice. The details which must be provided in the notice largely coincide with those in the disclosure record issuers must keep.

3. Setting up mechanisms for the immediate disclosure of the information

As also stated above, one of the conditions for delaying the disclosure of inside information is that the issuer be able to ensure its confidentiality and, should there be rumours or news attributable to a possible leak, to make such information public as soon as possible.

For this reason, said Implementing Regulation (EU) 2016/1055 requires that the disclosure record which issuers must keep include "proof" of the mechanisms in place to disclose the information once its confidentiality is no longer guaranteed. In principle, these mechanisms should include preparing a draft announcement or notification of a relevant event to deal with possible information leaks.

This is a manifestation of another general obligation imposed upon issuers, consisting of the need to constantly verify and ensure that the conditions for delaying disclosure continue to be met.

4. Drawing up an insider list

Issuers who delay disclosure are also required to draw up an insider list, which must include all persons who have access to inside information and who are working for them (Art.18.1 MAR).

As for counterparties, issuers must sign the corresponding confidentiality agreements, but they cannot impose this obligation to keep an insider list upon their counterparties. Although it is still the practice of some issuers in the Spanish market to do otherwise, the MAR only requires that those persons working for the issuers themselves be included in insider lists.

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