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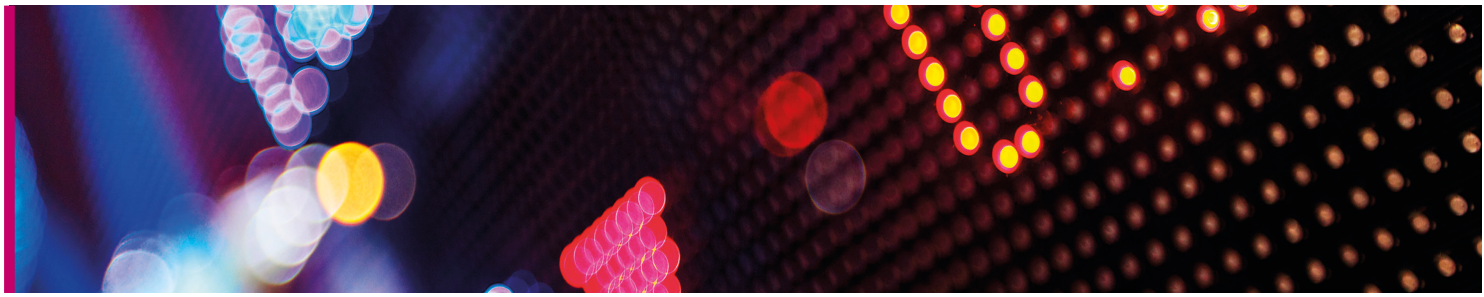
MAR one year on: time for listed companies to reflect?
June 2017



A year after the new EU Market Abuse Regulation took effect, companies still face uncertainties as to how to comply with their obligations. Here we look at how the market is dealing with the main challenges of MAR. We also suggest actions listed companies can take now, to ensure they continue to follow best practice.

Extra hours spent on identification of inside information

MAR kept the old concepts that inside information should be announced as soon as possible, but that delay is permitted if certain conditions are met. It brought in new record-keeping and reporting requirements where disclosure of inside information is delayed. The new requirements may have seemed purely procedural, but they have been far from straightforward to implement, as listed companies have discovered during the course of the last year.

Many extra hours have been spent around the board table or on the phone to brokers and lawyers agonising over whether a particular scenario is inside information or trying to pinpoint exactly when it will become inside information. This is because of the need to specify the exact time and date when inside information first arises and to identify inside information as such when it is announced.

Identifying inside information is not an exact science; views may differ or be judged wrong in hindsight. The key is that companies take a considered and consistent approach. Many companies have formalised their disclosure committees and their matter escalation procedures to ensure this is done (see "Inside information decision tree" below).

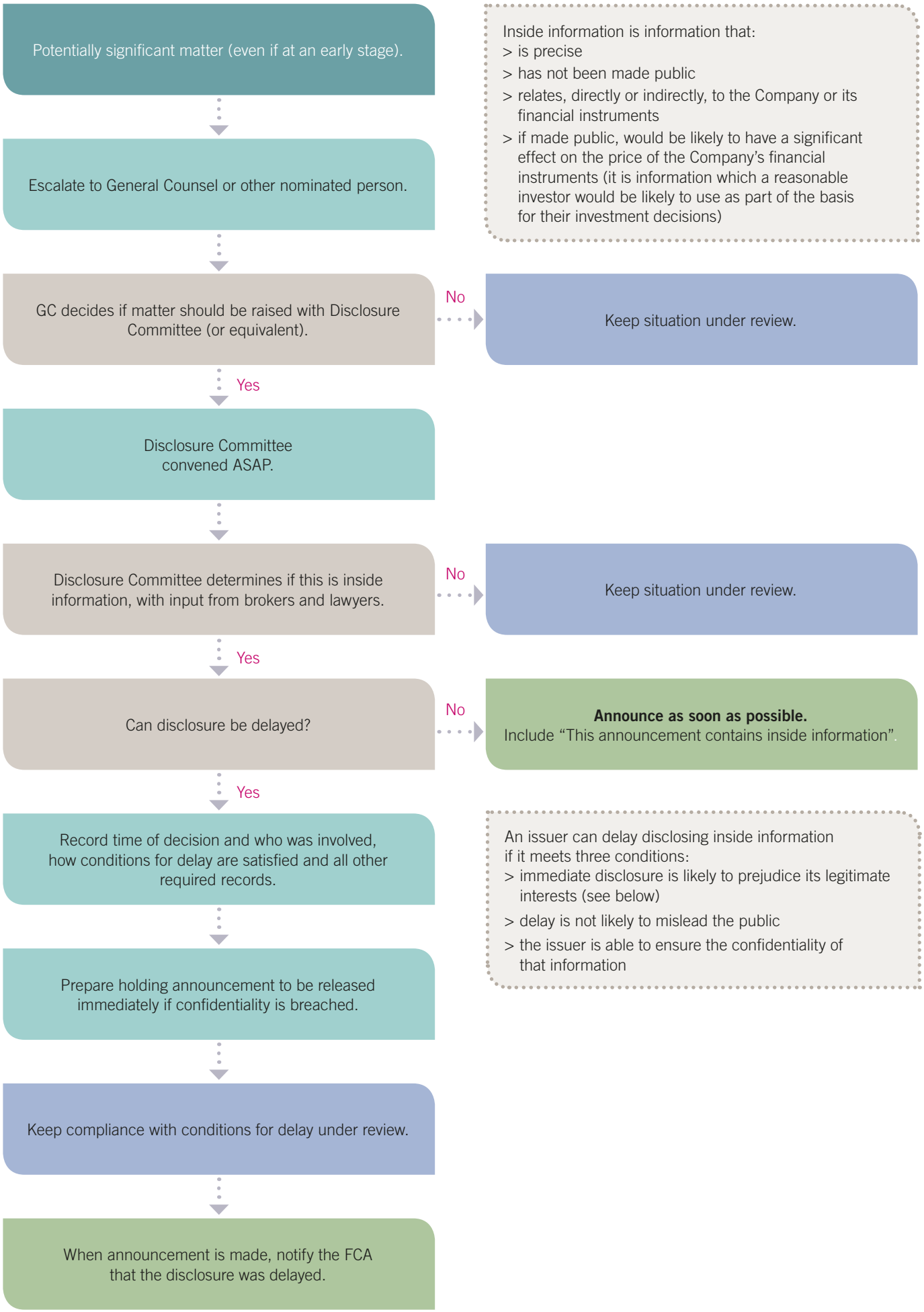
Treating information as if it is inside information, even when it is not, can be the prudent thing to do – for example, imposing confidentiality obligations and dealing restrictions for a broader category of sensitive information may be a good idea. But this does not extend to using the "this contains inside information" rubric in announcements as a default. Companies should be wary of setting themselves too low a bar in determining what is inside information, as this could set an unhelpful precedent for the future.

Badging an announcement as containing inside information will also mean that companies will have to be able to demonstrate that it was announced as soon as possible or that there was a legitimate interest reason for delaying (see "Legitimate reasons for delaying disclosure of inside information" below). In the latter case, they should ensure:

> an insider list was kept
> the FCA is notified of the delay in disclosure
> the requisite records are kept of when the inside information first arose

In our experience it has become increasingly common for the FCA to launch inquiries after significant announcements. Companies should be prepared for the FCA to ask questions if the correct procedures have not been followed, or if an announcement has not been badged as inside information but triggers a price movement. From October 2017, changes to DTR 6 mean that companies will also have to classify announcements according to the legal obligations under which they are made. If an announcement is considered to contain inside information it should be classified as being made under Article 17 MAR.

Inside information decision tree



Legitimate reasons for delaying disclosure of inside information

ESMA guidance on the legitimate reasons a listed company might have to delay disclosure, and when delay would mislead the public, was finalised shortly after MAR took effect. More recently, the FCA adopted this guidance in full and confirmed that it will treat it as an indicative, non-exhaustive list. This is a departure from the pre-MAR position, where in practice delay was only allowed where ongoing negotiations would be likely to be prejudiced by early disclosure. Companies now have more scope to argue that there are other situations in which they have a legitimate interest in delaying disclosure, although ESMA has stressed that the ability to delay is the "exception to the rule" so should be narrowly interpreted. When relying on a reason which is not reflected in the ESMA guidance companies will be taking the risk that the FCA will not agree that they had a legitimate interest in delaying. For that reason, we have not seen, and are unlikely to see, a significant shift in market practice on delaying disclosure.

Financial results in line with market expectation

It has long been accepted market practice for issuers to announce their financial results on a pre-determined date. Normally it is only if the results are out of line with market expectations that companies will publish a trading update earlier. However, this practice has come under the spotlight because it does not fit neatly within the new regime. There are two schools of thought on this issue. One is that, while results that are not out of line with expectations do comprise inside information, the need to preserve an orderly reporting framework gives a legitimate interest to delay for a short period, even though this is not mentioned in the ESMA guidance on legitimate interests. The other is that, while results in line with expectations are **not** inside information, it may nevertheless be prudent to put in place controls and restrictions in relation to that information, in the same way as you would if it were inside information. This appears to be the more commonly held view, based on the number of results announcements which have included the "this contains inside information" rubric. Either way the end result is the same – announcement on a scheduled date. The difference is in the records that are kept, the rubric on the announcement and whether the FCA is notified of a delay in disclosure.

What does "as soon as possible" mean?

If delay is not permitted, inside information must be announced "as soon as possible". This is not new. However, the need to record the time and date when inside information first arises puts any gap between that time and the announcement under scrutiny. What does "as soon as possible" mean in practice? FCA guidance says that a short delay is permissible to verify the facts, but in most cases issuers should be making an announcement within hours, if not minutes.

What about if something becomes inside information out of market hours? On the one hand, announcement at 7am the next working day when the market opens ensures that all market participants get the same information at the same time and makes for an orderly market. Is this as soon as possible though, if the deal in question is agreed on Sunday evening? FCA rules used to say that an issuer must make an out of hours announcement via two newspapers and two newswire services and that the fact that an RIS is not open for business is not in itself grounds for delaying disclosure. This was changed last year, with the rules becoming guidance and the "must" being relaxed to "may". Yet if anything the trend seems to be in the direction of announcing sooner rather than later – the "may" still means "must" in effect. There is not yet a settled understanding on when an out of hours announcement will be expected or required. Indeed, some companies have been criticised in the press for attempting to "bury bad news" by announcing material developments on a Sunday night.

This is certainly an area where there are inconsistencies in market practice and across Europe. Until regulators clarify one way or another, all issuers can do is consider the timing of announcements on a case by case basis, with input from their advisers. Those with another listing in another time zone may be more likely to announce out of hours, as they need to juggle two sets of disclosure rules and keep two bodies of investors informed.

Impact of Brexit

Many found it surreal preparing for the implementation of MAR in the wake of the referendum result last Summer. From what we know at this stage about the Great Repeal Bill, MAR will continue to apply to UK listed companies when the UK leaves the EU.

Notifications following a share buyback

To qualify for the safe harbour for share buyback programmes, extensive information has to be announced to the market, reported to the FCA and put on the company's website for five years. This includes a detailed breakdown, trade by trade: something that not all companies appear to be including in their post trade announcements. When implementing a share buyback programme, companies should be clear at the outset what has to be announced and who will be responsible for providing the data necessary (ie the broker or the company). If the buyback programme is being operated by a broker acting as principal, as is commonly the case, details of the broker's trades in the market may also need to be announced as well as the trade between the broker and the company.

Legitimate reasons for delay

Under the ESMA guidance, legitimate interests could include decisions approved by a management body that need approval from a supervisory body (i.e. in companies with dual board structures) and situations where immediate disclosure would jeopardise:

- the outcome of ongoing negotiations
- the implementation of the issuer's plans to buy or sell a major holding in another entity
- the issuer's ability to meet requirements that might be imposed by a public authority where a previously announced transaction is subject to that authority's approval
- the interests of shareholders and conclusion of negotiations when the financial viability of the issuer is in grave and imminent danger
- the intellectual property rights of the issuer when it has developed a product or invention

Checklist

- ☐ Are your procedures for identification and handling of inside information up to scratch or could they be improved? How have they been working in practice? Can you, at all times, make a decision quickly? See the "Inside information decision tree" above for a suggested approach.
- ☐ Have all PDMRs been trained on MAR and do they understand their obligations in practice? Is a refresher, or a review of how the new procedures have operated to date, in order?
- ☐ Do all insiders or potential insiders understand their obligations? Unless you are reminding insiders of their obligations and restrictions every time they are added to an insider list, is now a good time to ask them to acknowledge again what it means to be an insider?
- ☐ Are you keeping your list of closely associated persons up to date? Is now a good time to send each PDMR the list you currently have and ask them to confirm that it has not changed, or provide details of any new CAPs (who must be sent written notification of their duties)?
- ☐ Is the information on your insider list up to date? Remind insiders to inform you of any change of address, phone number etc. and make sure those responsible for the insider list are notified once any change in relevant personal details is provided to HR.
- ☐ Are announcements of inside information and any announcements made in relation to share buybacks going on to your website and will they be kept there for five years? If you are planning a share buyback programme, make sure you agree announcement contents with your broker before the programme begins.
- ☐ Does your new joiner programme include training on inside information and your internal dealing policy?

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