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SWISS CAPITAL MARKETS LAW

Ad Hoc Publicity – New Rules And Their Consequences For SIX Listed Issuers

Reference: CapLaw-2021-34

As of 1 July 2021, SIX Exchange Regulation Ltd (**SER**), the supervisory authority for issuers listed at SIX Swiss Exchange (**SIX**), revises the rules on ad hoc publicity in the Listing Rules (**LR**) and the Directive on Ad hoc Publicity (**DAH**). While the changes might not seem substantial at first, some details of the revised provisions are delicate, and issuers should carefully consider some practical consequences when releasing information in the future. The following article contains an overview of the changed provisions, including an initial assessment of their consequences.

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1) Flagging

In a game-changing approach, SER provides that media releases containing price-sensitive information must explicitly be qualified and labeled as "ad hoc". Issuers must flag such releases in a clearly recognizable manner as "*Ad hoc announcement pursuant to Art. 53 LR*" (art. 53 para. 2bis LR and art. 7 DAH). If a media release *obviously* contains no price-sensitive information, the announcement must not be flagged. Flagging is in line with the rules in many EU jurisdictions. For SIX primary listed issuers, however, the new approach requires a re-assessment of how to publicly releasing company information.

SER emphasizes in this context the discretion of issuers when qualifying the price sensitivity of its information (cf. Issuers Committee Circular No. 1 – Revised provisions in the area of ad hoc publicity and corporate governance of 10 March 2021, note 13 (**IC-CIR1**)). It, however, also clearly states that misuse of flagging can be sanctioned. As an example, SIX illustrates that qualifying a pure marketing press release as ad hoc is not permitted.

In practice, there exist two possibilities where issuers run the risk of being in violation with this new obligation:

First, "over-flagging", i.e. to flag a release, which may not necessarily contain price-sensitive information. Indeed, this should be not so much of an issue, given (i) the admittedly large discretion of the issuers (cf. paragraph above) (ii) the *ex ante*-view, (iii) the somewhat open definition of price-sensitivity as well as (iv) the lack of damage by too much information. Apart from blatant abuses or constant over-flagging by an issuer, market transparency and market participant's interests will hardly suffer from an "over-flagged" release. These are reasons SER should keep in mind whenever challenging the qualification of an issuer; otherwise the cautious might be punished.

Secondly and more delicate, if SER challenges an issuer's decision not to flag a release. As a precaution (and simple solution), issuers could be tempted to widely flag media releases as "ad hoc". However, flagging should be thought through carefully. First and most importantly, the flagging requires prior assessment by the issuer. With its communication practice the issuer will set a certain standard by which the issuer's assessment will be judged by the market (and SER) in similar situations in the future. If, for example, a certain deviation in a KPI is qualified as price-sensitive, the issuer will, *ceteris paribus*, be bound to assess a comparable deviation in a comparable KPI in the future in the same way. The issuers' discretion can thus be substantially limited through a low threshold when qualifying price-sensitivity. On top, a flagged release will draw more attention (e.g. a flagged outcome of a clinical trial). Market participants will interpret information differently with the implicit label "price-sensitive". To "flag" a release could thus even be price-sensitive information in of itself because the act of "flagging" is a direct statement of the issuer that the information contained in the release is relevant for the valuation of the market price. While this assessment was generally left to analysts or market participants under the current system, it is now – to some part at least – on the issuer under the new regime. Issuers will thus have greater responsibility for their media releases.

The assessment gets even more complicated for media releases that contain a mix of topics (e.g. bad news brightened up with good news, several changes in senior management positions on different levels, trading update combined with another topic) as it is common practice. Some of the information contained therein might be price-sensitive, some not. SER does not give indications in their explanations that a mixed topic release would not be allowed. From the considerations above, it follows that such a release must be flagged because it contains price-sensitive information at least in some parts. This, however, might result in the not price-sensitive information also contained in the release being considered in a different, maybe non-desirable light. Issuers might thus even consider publishing two media releases at once, one strictly limited to the price-sensitive fact and one with the rest of the news – like it is practiced by issuers in some EU jurisdictions.

Some issuers will have to answer these questions soon after the entry into force of the new rules. For the majority of issuers the half-year results trickle in during July and, provided that these half-year results deviate from the ones in 2020, the issuers have to answer the question whether they have to issue a profit hike/loss or profit warning prior to the release of the 2021 half-year report. Looking at the corporate communications of SIX listed issuers so far, the results for half-year 2021 might be substantially better than 2020 (maybe even back to the level of 2019). Very generally speaking, the deviations will, to some extent, be the economic consequence of the pandemic in 2020 as well as the economic rebound in 2021. This, however, should be a commonly known fact to a reasonable market participant and, hence, should not qualify as price-sensitive. It is unclear though whether SER shares this view. Thus, issuers – and in particular issuers who do not report quarterly and/or have not yet released information on their (expected) 2021 financial results – will have to carefully assess (i) whether or to what extent their 2021 results are the consequence of the pandemic and (ii) whether or to what extent this could have been expected by the reasonable market participant (see for the new term below, A.V). As is often the case, there is no general rule and a case-by-case analysis will be necessary.

Furthermore and as a side note only, where a sanction proceeding is initiated by SIX (e.g. for delayed release), the issuer's qualification as "ad hoc", must not lead to a reversion of the burden of proof. Whether or not a specific information is qualified price-sensitive *in a legal proceeding* will always be decided on the merits of the specific case and not based on a qualification made by the issuer in an ex ante-view.

Additionally, as of 1 July 2021, issuers have to re-organize their website and separate ad hoc announcements from other media releases (by a separate directory or by installing a filter function). According to SER, ad hoc announcements must be made available in chronological order in an easy-to-find directory that indicates the date of distribution and the classification as "ad hoc" (art. 9 para. 1 DAH). Releases issued prior to 1 July 2021 will not have to be classified ex post. The ad hoc announcements will have to be made available for a period of three years after publication (as opposed to two years under the current rules). As a consequence of the flagging, the number of ad hoc releases will likely diminish in the future compared to the number under the current system.

2) No "per se" facts except Financial Reports

In a welcome change, and conceding to the longstanding critics in legal literature, SER shifts and gives up its practice of the so-called "per se" facts, which have to be published by means of an ad hoc announcement regardless of the specific circumstances of the case (art. 4 para. 2 DAH). Financial reports pursuant to art. 49 and 50 LR, however, since they are of importance for the valuation of the company, are always qualified as price-sensitive.

This shift has its biggest impact when it comes to changes in the issuer's board of directors and executive committees. So far, issuers had no discretion, as such changes were considered price-sensitive per se. The practical consequences of the shift will be limited, though. With the assessment to flag or not to flag an executive change (or flag, for example, only for the CEO and Chairman), the issuer also here sets a certain standard that has to be maintained in following situations. Issuers will however have the discretion to develop their own communication practice.

In the aftermath of the Ordinance Against Excessive Remuneration (**OaEC**) many issuers have reduced the number of members in their executive committees to the main business functions – where a change might arguably be more important. Some issuers might thus simply continue the present practice and release every executive change by means of an ad hoc announcement, be it for practical reasons or for personal sensitivities.

3) Postponement of Disclosure

With the instrument of the postponement of disclosure, an issuer may hold back the release of a price-sensitive information, provided, *inter alia*, that the confidentiality of the information is guaranteed. SER has now somewhat strengthened the requirements for the prerequisite of confidentiality. New art. 54 para. 2 LR provides that issuers must guarantee *by means of adequate and transparent internal rules or processes* that confidentiality can be maintained throughout the duration of the postponement. The issuer must now *take additional organizational measures* to ensure that confidential facts are *only disclosed to persons who need them to perform the tasks assigned to them* (emphasizes by the author).

SER writes that issuers are in general free to choose the organizational methods and instruments for ensuring confidentiality, but have to consider "best practice" in this regard. SER further states that "best practice" may include: (i) limiting the number of people who know the information to the smallest possible number ("need-to-know" principle), (ii) limiting and safeguarding access to information, (iii) confidentiality declarations from all people who know the information, both internal and external, and (iv) maintaining a list of insiders (IC-CIR1, note 17). Some of these measures are already part of the statutory requirements to prevent insider trading according to art. 128 FMIO and it probably makes sense to align the ad hoc rules accordingly. Elsewhere, in the context of the issuers' discretion, SER again emphasizes the importance of proper internal rules and procedures (IC-CIR 1, note 7), i.e. with proper internal disclosure and insider trading policies. It is thus doable and also recommended that issuers implement (and stick) to the measures proposed by SER (even though they cannot be sanctioned if not).

4) Disclosure of Blackout periods

In an amendment not strictly related to ad hoc publicity, but that will be useful for market participants, the corporate governance sections of annual reports must now contain a generic description of the *general* quiet periods ("blackout periods"), e.g. deadlines, recipients, scope and exceptions (Annex 1, cif. 10 of the Directive on Information relating to Corporate Governance, DCG). As always, the principle of comply or explain is applicable. Whereas one-time quiet periods (e.g. during a postponement of disclosure) must not be disclosed in the hindsight. Blackout periods show the timeframes when assumedly insider information respectively price-sensitive information exists and, hence, not all available information is priced into the market price. To know about this timeframe can be a relevant information for a market participant's investment decision and increases market transparency.

Additionally, the knowledge about the specific blackout periods of an issuer most likely also facilitates the work of the supervisory authorities (SER, FINMA) when investigating insider-trading violations and, thus, in my view, the amendment also shows the increased interest in enforcing such crimes.

5) More language related Amendments

In addition, the revision sums up what is stated by SIX as being some more language related clarifications. Whether these changes really "do not result in any change in legal practice" (cf. IC-CIR1, note 5), remains to be seen, though.

– In art. 53 para. 1 LR the term "potentially" has been deleted such that only a "price-sensitive fact" remains the triggering event for an ad hoc disclosure. SER holds that the change from "potentially price-sensitive fact" is a clarification of a purely linguistic nature and does not lead to any substantial modification of the term or its legal meaning (IC-CIR 1, note 5). Regardless of the wording, as discussed above, the price-sensitivity is assessed from an *ex ante* perspective. The *ex ante*-view as well as the term sensitivity encompass the *potential* of such information to result in significant market price fluctuations. Moreover, according to its longstanding practice SER does not take into account the actual fluctuations of a market price when assessing price-sensitivity. Consequently, the deletion of "potentially" should really not result in a change in legal practice. In a somewhat unrelated (but important) excursus, SER further states that issuers make their decision using *their discretion, taking into account the company's internal division of responsibilities*. The company's internal division of responsibilities must be based on the company's legal documents, in particular the articles of association, rules of organization, schedule of powers and so forth (IC-CIR 1, note 7; emphasis by the author). If SER follows this, issuers should – to a big extent and subject to abuses – be protected in their discretionary decision, if they comply with their internal regulations provided that these are appropriate.

– As part of an alignment with international standards, the previous term of "average" market participant has been replaced with "reasonable" (art. 53 para. 1bis LR). SER describes a reasonable market participant as person who (i) is familiar with the activity of the issuer and the market of the financial instrument in which this person is making an investment and (ii) who knows the fundamentals of securities trading, corporate law and financial market practices, but does not need to have any special expertise (IC-CIR1, note 9). The description sounds like a strong alignment to the model person of international insider regulation with its "reasonable investor". The question arises whether the first part of the description ("familiar with the activity of the issuer and the financial instrument") results in a higher threshold than what was expected from the "average" market participant under the current rules.

– Thirdly, SER aligns the legal basis in the DAH and the LR in the sense that the principle according to which a fact is considered price-sensitive if its disclosure is capable of triggering a significant change in market prices is transferred from the DAH to art. 53 para. 1 LR. Again as an alignment to insider law (respectively the definition in the FMIA (at least in the German version)), the legal text was also re-worded: from "expected to trigger a price change that is considerably greater than the usual price fluctuations" to "capable of triggering a significant change in market prices".

6) Connexor Reporting

As of 1 October 2021 (not July), issuers of primary listed equities and equity related securities will have to submit their announcements to SIX via the online platform Connexor Reporting, the system so far used, *inter alia*, for regular reporting obligations. Issuers of derivatives, bonds, conversion rights and collective investment schemes can continue to submit ad hoc announcements to SER by e-mail. Connexor will not replace the proper distribution by the issuer according to art. 7 DAH. Some more practical questions of the revision are not yet clear (e.g. time frame for upload, four eyes-requirement). SIX will follow-up with a revised art. 12a DAH and new provisions in the Directive on the Use of the Electronic Reporting Platform to Fulfil Reporting Obligations Under Art. 9 of the Directive on Regular Reporting Obligations (**DRPRO**). Also the Commentary on the Directive on Ad hoc Publicity will likely be revised by the end of 2021.

7) Conclusion

In summary, the new provisions show, first, that SER as the supervisory body for SIX is determined to align its rules and procedures to European standards (see also discussions on stock exchange equivalence) as well as to the provisions of insider trading law. It remains to be seen whether some of the alignments that SER describes as linguistic clarifications will result in a change of practice for ad hoc publicity rules.

For issuers, however, the instantly biggest impact of the new rules will be to *ex ante* qualify the released information as price-sensitive or not and flag such announcements, respectively. In particular, when it comes to financial information, like trading-updates, or other repeating news, issuers have to consider if and if so what communication standard is set with their qualification. In order to defend the qualification, it is key for issuers to have proper internal ad hoc rules and precise procedures already in place.

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