

COVID-19: forward looking statements

It is reasonable to assume that the spread of the Covid-19 epidemic and the enactment to date or in future of special legislative measures, which have been and may be subsequently adopted in the context of the medical emergency, will have a significant impact on the business and operations of a vast number of companies for a period of time which cannot be predicted.

In this context, one of the issues to which listed Italian companies will certainly need to devote significant attention is the impact which the current economic landscape may have on their forward looking statements.

FORWARD-LOOKING STATEMENTS: FRAMEWORK

In general terms, listed companies are not subject to specific limitations or obligations on communicating to the market estimates of their expected future results (*forward-looking statements or guidance*).

However, it should be noted that – if disclosed to the market – *forward-looking statements* must be considered in the light of the existing rules on transparency in the treatment of inside information, principally provided for in Regulation (EU) N. 596/2014 of the European Parliament and the Council of 16 April 2014 (**MAR**), which governs, *inter alia*, the prevention of market abuses and provides for specific obligations of disclosure on the part of listed companies.¹

Art. 17 of MAR provides that "An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer"².

In that context, it is helpful to refer to the "Linee guida sulla Gestione delle Informazioni Privilegiate"³, published in October 2017 by Consob⁴, which contain a non-exhaustive list of the types of information which may be qualified as inside information under the terms of MAR⁵: these expressly include variations in the expected results (profit warnings and earnings surprises) of the relevant company.

Issuers which have published forward looking statements must, therefore, undertake in a timely manner the verification required to establish if and in what measure their forecasts may be altered as a result of the current market circumstances and, where that alteration is to be considered as material⁶, treat that information as inside information and proceeding without delay to inform the market⁷.

Given the extremely specific nature of the COVID-19 emergency and the current inability to predict its length and any relevant regulatory developments, it seems likely that many issuers may, at some (early) stage, conclude that a material deviation exists between their outstanding forward-looking statements and their revised expectations on the future performance, although they are unable - at such an early stage - to assess the magnitude of this deviation (and therefore to prepare and publish immediately a new, reliable, guidance).

In that event, it would appear prudent and appropriate for the relevant issuer to follow a two-step approach and, therefore, to communicate promptly to the market that investors should no longer rely on the outstanding guidance, reserving then to a subsequent press release (to be issued as soon as the relevant data are available) the announcement of revised and updated data. The first announcement may possibly create a degree of uncertainty on the market, but would at the same time permit all the investors to be duly and timely informed of the circumstance (qualifiable as an inside information) that forward looking statements previously published by the issuer can no longer be taken as a proper reference.

ESMA RECENT RECOMMENDATIONS

The above principles and framework have been confirmed by a recent [recommendation made by ESMA](#) (the European Securities and Markets Authority) on the action to be taken by listed companies in relation to the impact of Covid-19.

In that document, ESMA recommended issuers - among other things - to:

- i. disclose as soon as possible any significant, relevant information concerning the impact of Covid-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under MAR;
- ii. provide transparency on the actual and potential impacts of Covid-19 in their 2019 year-end financial report or in their interim financial reporting disclosures.

The handling of the Covid-19 emergency and its consequences on forward-looking statements is always (and by definition) company-specific and needs to be identified on a case-by-case basis. Issuers should therefore carefully and timely consider their situation, in order to establish actions to be performed, also in terms of disclosure to the public.

[1] See also Article 114 of the Italian Consolidated Financial Act (Italian Legislative Decree no. 98 of 1998, as amended and integrated).

[2] MAR replaced the provisions of Article 68 of the Consob Regulation no. 1197 of 19 March 1999, which provided for, *inter alia*, specific rules concerning forward-looking statements and the duty of issuers to promptly update the market in relation to any relevant deviation between existing forward-looking statements and actual performance.

[3] Guidelines for the management of inside information.

[4] The Italian stock market supervisory Authority.

[5] See paragraph 3.1.2 of the "Linee guida sulla Gestione delle Informazioni Privilegiate", available [here](#) in Italian language only. "Changes in expected earnings or losses" are included also in the non-exhaustive and indicative list of events which might constitute inside information included in the "Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market" dated July 2007, issued by CESR (the Committee of European Securities Regulators) and available [here](#). (see paragraph 1.15).

[6] In this regard, please see paragraph 4.6.7.5 of the "Linee guida sulla Gestione delle Informazioni Privilegiate".

[7] It is worth remembering that it is not possible to delay the disclosure of an inside information pursuant to Article 17, paragraph 4, of MAR, if the delay is likely to mislead the public. In this regard, ESMA clarified that situations in which delay of disclosure of inside information is likely to mislead the public includes the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced (cfr. ESMA document named "MAR Guidelines - Delay in the disclosure of inside information", paragraph 5.2, pg. 5, available [here](#)).

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