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ARTICLE

About the Accuracy of the Information Owed to the Market by French Listed Companies in Distress

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Last November, the Sanctions Commission of the French Financial Markets Authority, the *Autorité des Marchés Financiers*, or AME,[1] ruled that a company listed on Euronext Paris (the 'Company') and its managing director[2] (the 'MD') had failed to comply with their statutory duty not to disseminate false or misleading information to the market further to the sale of the Company's loss making ERP business. By way of sanction, the Sanctions Commission (the 'Commission') ordered them to respectively pay EUR 30,000 and EUR 10,000 in damages. These financial sanctions were mild considering the maximum possible penalty of EUR 100 million set out in the French Financial and Monetary Code (the 'FMC'). The author provides more insight as to the facts which led to the ruling[3] (the 'Ruling') and guidelines in order to strengthen immunity from, or lower such sanctions.

1. The facts and subsequent procedural steps which led to the Ruling

- On 8 September 2014, the Company disposed of its loss making ERP business for a nominal amount, paid on closing plus a deferred purchase price based on the business' goodwill over a subsequent period.
- As per the Company's first 2014 half year consolidated accounts, approved by the board on 16 September 2014, it achieved EUR 46 million of turnover by that date, a EUR 0.7 million operating profit, a net loss of EUR 8.1 million and a net profit of EUR 0.2 million for the business activities remaining in the Company after the sale of the ERP business.
- On 16 September 2014, the Company issued a press release on its website and announced the figures for its consolidated turnover, operating profit and net profit, as well as the sale of its ERP business, but omitted to mention that the announced net profit was for the business activities remaining in the Company, i.e after the disposal of the loss making ERP business.
- On 17 September 2014, the Company presented its mid-term consolidated accounts to the French Financial Analysts Society ('SFAF') and mentioned the EUR 8.1 million consolidated net loss, the EUR 8.3 million net loss of the disposed ERP business and the EUR 0.2 million consolidated net profit for the Company's remaining business after the sale.
- On the day following the presentation to the SFAF, a financial analyst published a note setting out the financial data provided to the SFAF.
- In a further press release, dated 19 September 2014, the Company republished its mid-term financial results and added specific language[4] in relation to the EUR 0.2 million consolidated net profit, so as to indicate that it was related to the Company's business activities remaining after the disposal of the ERP business. This second press release, however, was not presented as a corrective statement of the 16 September press release.[5]
- Two weeks later, the AMF questioned the Company about the difference between the net profit announced on 16 September and the restated net profit further to the disposal of the ERP business, referred to in the note issued by the financial analyst. The AMF also invited the Company, if required, to issue a corrective statement.

Notes

1 The French Financial Markets Authority.
2 Even though the ruling was published on the FMA's website, the names of the company and its MD were anonymised so as to avoid creating any serious and disproportionate damage to the latter.
3 Sanctions Commission, Decision 11 dated 2 November 2017 – can be viewed on the FMA's website.
4 The words used in that announcement were '*activités poursuivies*', i.e literally 'continued business activities', on the line mentioning the net profit
5 Page 6 of the Ruling

- On 10 October 2014, the Company issued a corrective statement setting out its mid-term consolidated net loss and the net loss of the disposed ERP business. The Company also added that 'the net loss of the disposed business includes a significant and exceptional depreciation of the accounting value of this business compared to its estimated sale value and that this adjustment has no effect on the group's cash position.[6]
- A month later the AMF decided to launch an investigation into the financial information provided by the Company. Based on the investigator's final report, the AMF's specialised Commission decided to notify a statement of grievances to the Company in June 2016.
- A public hearing before the AMF's Sanctions Committee eventually took place on 22 September 2017 and led to the Ruling.

2. The Ruling and statutory provisions which were breached

The AMF's specialised Commission[7] in its statement of grievances considered that two sets of key statutory provisions had been breached:

- Firstly, the Commission considered that the Company was in breach of section 223-1 of the General AMF Regulation[8] (the 'Regulation') and of sections 12.1(c) and 15 of the EU Market Abuse Regulation[9] ('MAR').
- Secondly, it took the view that sections 223-10-1 and 223-3 of the Regulation had also been breached.

  Section 223-1 of the Regulation provides that the 'information provided by the issuer must be true, precise and sincere'.[10] Section 12.1(c) of MAR, which has been in force since 3 July 2016, provides that prohibited market manipulation comprises the fact of 'disseminating information through the media ..., which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument ..., including the dissemination of rumours, where the person who made the dissemination knew or ought to have known, that the information was false or misleading'.

  Sections 223-10-1 and 223-3 of the Regulation respectively provide, in their versions applicable at the time of events, that:

  > 'Any issuer must ensure, in France, that the information which he or his advisors specifically make available to financial analysts, particularly on the occasion of financial transactions, is also equally given within the same time to sources and information channels', and
  >
  > 'when an issuer, or a person acting on his behalf, discloses inside information, he must provide it as per section 221-3 [i.e. on its website], either simultaneously in case of intentional disclosure, or swiftly in case of unintentional disclosure.'

Interestingly, the Sanctions Commission excluded the application of section 223-1 of the Regulation because MAR was deemed milder, in so far as MAR does not prohibit the dissemination of information which is simply inaccurate and also requires that the person disseminating the information knew or should have known that it was false or misleading, which is not a condition required under the aforementioned section 223-1.

The Commission, applying the principle of retroactive application of the more lenient legislation, therefore decided that MAR, rather than the Regulation, should be applied to the facts of the subject matter, which took place in 2014.

Based on the application of MAR and the facts, the Commission nevertheless concluded that the Company and its MD disseminated false or misleading information and knew or ought to have known that they did so. The Commission made that decision in consideration of some rather surprising statements made by the Company and MD at the hearing. For instance, the MD acknowledged that:

(a) he regularly and actively participated in the Company's financial communication, and

(b) the presentation of the financial information queried by the AMF was intentionally prepared so as to limit

  (i) the risks of termination by the customers of the disposed ERP business of their ongoing contracts transferred to the buyer, and also

  (ii) the risks of subsequent reduction of the deferred purchase price owed to the Company.

Regarding the application of sections 223-10-1 and 223-3 of the Regulation, the Commission decided that

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6 *'Le résultat net des activités destinées à la vente, négatif de 8,3 millions d'euros intègre une dépréciation significative et exceptionnelle de la valeur comptable des activités par rapport à la valeur estimée de la cession, cet ajustement étant sans effet sur la trésorerie du groupe.'*

7 La Commission Spécialisée No. 1 du Collège de l'AMF.

8 Règlement Général de l'AMF.

9 Regulation No. 596/2014 of 16 April 2014 on Market Abuse.

10 *'L'information donnée au public par l'émetteur doit être exacte, précise et sincère.'*

since both articles target the protection of investors and the proper functioning of the market and that the breach of section 223-10-1 was demonstrated and could also be imputed to the MD, there was no need to consider whether section 223-3 was applicable.

Considering section L 621-15 III of the FMC, in its applicable version at the time of events, which provides for different possible sanctions, including financial penalties not exceeding 100M€, or ten times the profit resulting from the breach, the Ruling is somewhat mild and nuanced.

This is no doubt due, inter alia, to:

(i) the facts and arguments presented at the hearing and explanations provided to the special investigator[11] during the preliminary hearings, which were highlighted in the Ruling:

- The Company and the MD took no advantage of the breaches ; and
- The Company's financial situation improved after the breaches were committed. The Company's 2016 consolidated turnover slightly exceeded EUR 113 million and generated a EUR 0.3 million loss and the Company's own turnover nearly reached EUR 19 million and generated a EUR 430,000 net profit. The Commission probably concluded that the market suffered no loss as a result of the dissemination in September 2014 of the misleading information ;

(ii) and probably also to the fact that:

- The Commission decided not to hit a small but growing company, in distress, with a sanction which could have worsened its balance sheet and soured its future. This is further evidenced by the Commission's decision not to reveal the identity of the Company and its MD in the Ruling, so as to avoid damaging their reputation, which is an option available to the Commission and which is applied on a case by case basis. As mentioned below, anonymisation of its decisions by the Commission is the exception rather than the rule.[12]

3. Recommendations

Each matter and investigation by the AMF has specificities of its own and the three recommendations that follow must therefore be of a general nature.

- The party under investigation should immediately take professional advice and consider, if technically required, issuing a corrective press release in a timely manner. This is a key point highlighted by the Commission in its Ruling. Indeed, the Commission made two noteworthy points in that regard:
  - (i) Firstly, it stated that the fact of amending the first press release and withdrawing the second press release from the Company's website did not alter the fact that a breach had been demonstrated.[13]
  - (ii) Secondly, the Commission expressly noted in the Ruling that three weeks had elapsed between the date when the financial analysts received the misleading information and the date when the corrective statement was issued.[14] The Commission obviously considered that this was far too long, inter alia because the AMF had queried the situation and invited the Company to issue a corrective statement, if required, on 30 September 2014.
- Analysing and measuring the quantum of the losses suffered by investors, further to the dissemination of the misleading information will be key to any defence strategy and arguments. Fortuitously, for the Company and the MD, the market suffered no loss because of the subsequent improvement in the Company's financial performance. This fact was no doubt emphasised by the Company's counsel to soften the Commission's decision.
- Requesting that the Commission delete the names of the Company and of its MD or not publish its ruling is an important damage limitation tool.

  In that regard, section L 621-15 V of the FMC restricts deletion of names to situations where publication may:
  - (i) Cause serious and disproportionate damage to the defendants, particularly where the ruling provides personal data in relation to the defendants, or

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11 The '*enquêteur*' appointed by the Secretary General of the FMA. His mission consists in analysing the facts, conducting preliminary hearings and drawing up a report, which is later submitted to the Secretary General of the FMA.

12 Certain decisions cannot be anonymised by the Commission. Said decisions are specifically those where the information obligations provided under Articles L 233-7 and L 233-8 of the Commercial Code as well as Article L. 451-1-2 of the FMC were breached.

13 Page 6 of the Ruling.

14 Page 11 of the Ruling.

(ii) Seriously affect the stability of the financial markets, or impact an ongoing investigation/audit/check.

- When finding a breach, the Commission usually takes a conservative approach as regards deletion of the defendants' names. In similar matters, which gave rise to sanctions in 2017, less than a third of them were anonymised and the Commission provided no justification in the rulings, other than referring to the provisions of article L 621-15, when accepting or refusing to delete the names of the defendants. This has been its consistent policy over the last few years.[15]
- At the end of 2017, the newly appointed head of the Commission added in an interview,[16] that the decision to anonymise rulings is motivated by the need to ensure proportionality between the impact of the sanctions, when made public, and the seriousness of the facts prosecuted.
- There will undoubtedly be increased discussion and room for creative argument over this concept of proportionality in the next few years, as some defendants may consider that the publicity of sanctions has a higher cost than the financial damage imposed on the prosecuted company.

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15 Bulletin Joly Bourse, July-August 2016, p. 343.

16 Bulletin Joly Bourse, November 2017: *'l'anonymisation est le résultat d'une analyse du caractère proportionné ou non des effets de la publicité de la sanction au regard de la gravités des faits réprimés ...'*