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Q&A of 18 March 2021 on selective disclosure towards shareholders and the controlling shareholder in particular, as well as on the publication of inside information relating to business plans

1. Introduction

1.1. Since 2017, Consob has carried out some in-depth analyses in relation to the possibility for listed companies to establish with shareholders and, in particular with the subjects who control them - in law or in fact, individually or jointly, also through shareholders' agreements - information flows concerning company information that may take on a privileged nature, pursuant to the regulations on market abuse.

The management of information flows between listed companies and shareholders - regardless of considerations related to the treatment to which the information could be subject for reasons of personal, commercial or industrial confidentiality – concerns two different legal and regulatory areas. On the one hand, where the information transmitted is privileged, the rules on selective disclosure, aimed at specific recipients and not at investors, are relevant. On the other hand, information flows take on importance in relation to the corporate governance of a public limited company and the relationship between directors and shareholders and are the subject, in some respects, of ad hoc provisions on the establishment and use of information channels that are functional to exercising corporate governance in listed companies. The flow of information that the majority shareholder must receive from the subsidiary companies for the purpose of preparing the financial statements is also important.

Upon the conclusion of the above-mentioned analyses and taking into account the relevant profiles of the topic in question, which emerge in the context of discussions with listed companies in the conduct of supervisory activities, also in the form of specific requests, Consob thus considers it necessary to provide the market, through specific Q&As, with guidelines on the conditions that may justify establishing information flows, relating to inside information, by companies with listed shares towards their shareholders and, in particular, their majority shareholder.

1.2. A Q&A specification is also published on inside information that could be contained in business plans. The topic in question has also been the subject of further study following the repeal[1] of article 68 of Consob Regulation no. 11971 of 14 May 1999 ("**Issuers' Regulation**"), which governed the communication to the public of forecast data and quantitative objectives concerning management performance, also when contained in business plans, based on the previous regulatory context. The business plan is not covered by specific disclosure obligations, notwithstanding the obligations of disclosure and management of the inside information contained therein. In the event of a breach of confidentiality or of rumors about inside information contained in business plans, the publication of such information allows the public to correctly assess the issuer's disclosure environment, ensures information symmetry and correct expectations to be formed by investors. This has been clarified in a specific Q&A.

[1] Taking place with resolution no. 19925 of 22 March 2017. See on this point, the explanatory report on the results of the consultation of 6 April 2017.

2. *Questions & Answers*

Q1: What are the cases where selective information towards the controlling shareholder can be considered legitimate?

Q1.1 Is it possible for the controlling shareholder of a listed company to selectively receive inside information relating to company management and/or business strategies?

A: The *controlling shareholder may selectively receive inside information from the subsidiary company only: (i) in some cases expressly provided for by law or (ii) in the presence of a specific "justifying report" (iii) where appropriate measures are taken to preserve the confidentiality of the information.*

The system of applicable rules appears to be aimed at preserving and protecting the fundamental principle of equality and information symmetry, aimed at making the same information framework available at the same time to all current and potential investors.

In addition to the need to protect the integrity of the market - from a subjective point of view of price formation based on the information made available to the public of investors - the law recognises the need to ensure, also from a subjective point of view of corporate governance, the protection of all categories of shareholders, including minority shareholders, through the principle of equal treatment referred to in article 92 of Legislative Decree no. 58/1998 ("**Consolidated Law on Finance - TUF**"). The right to corporate disclosure is recognised by law as a fundamental element to monitor shareholders on the work of directors and for the correct performance of the market, provided, however, that this is done in a manner that ensures equal treatment between all shareholders. Therefore, an individual right of the majority shareholder to corporate disclosure in a "selective" form is not recognised, notwithstanding the provisions of specific legislation[2].

[2] In this regard, the express provisions of information flows to individual shareholders are found in our legal system only in the presence of a controlling relationship. Reference is made, within the framework of the legislation of issuers subject to the MAR:

- to the obligation of the subsidiary to provide information to the parent company for the purpose of preparing the consolidated financial statements (article 43 of Legislative Decree no. 127/1991) and related special industry rules;
- to the information that must be stated in the management report (article 2428 of the Italian Civil Code) on the "*situation of the company and the performance and profit/loss of operations, as a whole and in the various sectors in which it has operated, including through subsidiaries*" and the related right of the controlling party to receive from the subsidiaries an information flow that is functional to preparing the management report;
- to the information on the most significant transactions carried out by subsidiaries that the delegated bodies of the parent company must provide to the board of directors and the board of statutory auditors (article 2381 of the Italian Civil Code);
- to the obligation for listed issuers to communicate "*to the public, as soon as possible, the inside information that directly concerns said issuer*" (article 17, paragraph 1, of Regulation (EU) 596/2014) and the related right of the controlling party to receive the information that is functional to this implementation, as indicated by the second paragraph of article 114 of the TUF, which reads: "*Listed issuers give the necessary provisions so that the subsidiaries provide all the necessary information to fulfill the disclosure obligations provided by law and by Regulation (EU) no. 596/2014. Subsidiaries shall promptly submit the requests for news*";
- to the information that the directors of a listed company must report "*promptly, in accordance with the procedures established by the by-laws and at least quarterly, to the board of statutory auditors on the activities carried out and on the transactions of major economic, financial and equity importance, carried out by the company or subsidiaries*" (article 150, paragraph 1, of the TUF);
- to the power of the board of statutory auditors to exchange information with the corresponding bodies of

Therefore the position of controlling shareholder does not constitute the automatic prerequisite for the legitimate selective transmission of corporate disclosure, except where expressly provided for by law and: (i) for the sole purpose of allowing the controlling shareholder to comply, in turn, with legal obligations and (ii) to a limited extent only with the information expressly indicated by the legislator or with the information strictly necessary to implement the aforementioned obligations.

Apart from the aforementioned hypotheses, it is permissible for the controlling shareholder to receive inside information selectively from the subsidiary only if there is a "justifying report" of such selective disclosure and if measures have been taken to preserve the confidentiality of the information transmitted.

In this regard, the selective disclosure regulation finds its systematic place in Regulation (EU) 596/2014 ("**MAR**"), according to which "*When an issuer* [...] *communicates inside information to third parties, in the normal exercise of an occupation, profession or function, pursuant to article 10, paragraph 1, it is obliged to give full and effective communication of such information to the public, simultaneously in case of intentional communication and promptly in case of unintentional communication. This paragraph does not apply if the person receiving the information is bound by an obligation of confidentiality, regardless of whether that obligation is of a legislative, regulatory, statutory or contractual nature* " (article 17, paragraph 8).

The aforementioned rule requires, as conditions of legitimacy for the disclosure to third parties of inside information: (i) the existence of a "justifying report" of the communication (the "*normal exercise of an occupation, profession or function*")[3] and (ii) the existence of an obligation of confidentiality on the part of the recipient of the information. In addition, the MAR and its implementing legislation require (iii) the necessary adoption of appropriate organisational measures to protect inside information, in order to avoid its improper circulation, both inside and outside the company[4].

The rationale for regulating the disclosure of inside information to the public lies in the need to ensure equal access to information for investors, whether these are current or potential shareholders. In this sense, information symmetry becomes the main instrument to protect the trust and integrity of the capital market. Consequently, the legislator considered it necessary to confine within a specific

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subsidiaries on the management and control systems and the general performance of corporate activities (article *2403- bis* of the Italian Civil Code);

- to the powers of the members of the controlling body of a listed company to "*ask the directors for information, also with reference to subsidiaries, on the progress of corporate operations or on certain transactions, or to address the same requests for information directly to the administrative and control bodies of the subsidiaries*" (article 151, paragraph 1, of the TUF and articles 151-*bis* and *151- ter* of the TUF);

- to the obligation of listed issuers to provide the public and Consob with information concerning transactions carried out by the same issuers and subsidiaries in their financial instruments.

[3] The restriction on the free transmission of inside information is provided firstly by article 10, paragraph 1, of the MAR, which includes the prohibition of communication to third parties of inside information *"except when the communication takes place during the normal exercise of an occupation, profession or function*". The judgment of normality provided to exclude abuse is the same as that required by article 17, paragraph 8 of the MAR.

[4] See also paragraph 6.5.6 of the Consob Guidelines on the management of inside information no. 1/2017, October 2017. Among the subjects identified as possible recipients of selective information, Consob has indicated, by way of example: consultants and other subjects involved in the examination of the matters subject to advice, the subjects with whom negotiations are underway on commercial or financial transactions, public sector supervisory authorities, banks in the context of lending activities, rating agencies, stock exchange companies where financial instruments are listed.

area of legitimacy the circumstances that constitute an exception to this principle, identifying them in those situations in which the communication is supported by work, professional or functional reasons and takes place after adopting measures to preserve the confidentiality of the information.

That said, an individual prerogative of the majority shareholder to receive inside information - concerning, for example, strategic decisions, specific transactions and related meetings of corporate bodies - is not reflected in the current provisions. In particular, the possibility for the controlling shareholder to request and obtain a preferential information flow from the issuer concerning inside information cannot be considered to exist in the legal system, outside the aforementioned hypotheses as better specified below (pursuant to specific legal provisions, for example on accounting reporting see Q1.3, or in the presence of a "justifying report", see Q1.2 and Q1.4).

Q1.2 Is it possible to recognise the legitimacy of a selective disclosure when the controlling shareholder exercises management and coordination activities over the subsidiary?

A: *A case in which the legal system would seem to allow the establishment of a specific flow of information to the controlling party can be found when the latter exercises management and coordination activities over the company pursuant to article 2497 of the Italian Civil Code. This information flow can only regard information that is functional to an effective management of the group, notwithstanding the need to assess the existence of the other conditions of legitimacy of* selective disclosure *(obligation of confidentiality of information and adoption of the related organisational measures aimed at protecting information).*

In the presence of management and coordination activities exercised by the controlling party, according to doctrine it seems possible to admit that the latter receives information from the subsidiaries not only when expressly permitted by law, but also when this is functional to an effective management of the group as a whole, allowing in the latter case to extend the area ofinformation that can legitimately be transferred to the parent company.

The management and coordination activity is actually an expression of *a quid pluris* compared to the mere exercise of control, indicating the presence of an influence on the decisions of the subsidiaries, such as to constitute a single economic entity, organised in the form of the group of companies. This power of management and coordination can be expressed in a constant flow of instructions, provided by the parent company and received by the subsidiary's bodies, which concern significant moments in the life of the company such as, for example, choices on the scope of the business, finding financial means, budgetary policies and concluding important contracts.

In this regard, it can be said that intra-group information flows are, together with others, one of the characteristic elements of management and coordination activities. The same indications of the existence of direction and coordination activities, identified and used by doctrine and case law for the purposes of applying the relevant framework (consider, among others, the parent company preparing and approving business and strategic plans, the centralisation of the treasury or other financial assistance functions of the parent company, issuing directives and instructions on important business choices, releasing authorisations for investment initiatives or specific corporate operations, group regulations, approving the organisational charts of subsidiaries with reference to the main corporate functions) assume that there are specific information flows from the subsidiary to the controlling party, aimed at concretely carrying out the management and coordination activities, which can take many forms and with varying degrees of effectiveness.

In this regard, it seems worth specifying that, in any case, the sharing of inside information with the

controlling shareholder cannot, in itself, be considered indicative of management and coordination activities being exercised, the existence of which must instead be verified based on the most consolidated indications provided by doctrine and case law that require a broader and more complete factual analysis[5].

In practice, it is noted that these information flows can also be regulated within group protocols, which identify the scope of the information shared, the purposes of selective communication, the timing and methods of such sharing, as well as the licensed parties to manage the information.

It is understood, in any case, that: (i) the information flow that may be established between the subsidiary and the parent company must only concern the information that is functional to effectively managing the group;
(ii) in communicating to the controlling party information of the company subject to management and coordination, the directors of the latter must in any case take into account the interest of the company they administer; (iii) it is necessary for the issuer to ensure the existence of the other conditions of legitimacy of selective disclosure (obligation of confidentiality of information and adoption of the related organisational measures aimed at protecting information).

Q1.3 Is it possible to allow the establishment of information flows that are functional to preparing the financial statements by the controlling shareholder?

A: *For the purpose of the majority shareholder preparing the financial statements, the current system provides for a specific obligation for the subsidiary companies to transmit the information that is functional to their preparation.*

The information flows needed for the shareholder holding controlling interests in listed companies to prepare the periodic financial statements can be identified both in statutory regulations and in IAS/IFRS international accounting standards.

With reference to statutory regulations, in the event that the shareholder holds the control of the subsidiary and is required to prepare consolidated financial statements, article 43 of Legislative Decree no. 127/1991 requires that "*subsidiaries are obliged to promptly transmit to the parent company the information requested by it for the purpose of preparing the consolidated financial statements*". Special rules provide for specific information flows for preparing the consolidated financial statements of entities operating in certain sectors.

For companies that use international accounting standards, the preparation of the consolidated financial statements is governed by IFRS 10 "*Consolidated financial statements*".

The preparation of consolidated financial statements requires aggregating the balance sheet and income statement of the subsidiaries, based on accounting principles and uniform valuation criteria. Therefore, the parent company must have all the information necessary for preparing the consolidated financial statements. This includes information relating to the estimation of future cash flows, based on the most recent budgets or multi-annual plans approved by the subsidiaries, needed

[5] With specific reference to State-controlled companies, it should also be noted that article 19, paragraph 6 of Legislative Decree 78/2009 (so-called anti-crisis decree) converted with amendments by Law no. 102 of 3 August 2009 excluded, with an interpretative rule, the State as a subject that can exercise direction and coordination, requesting that "*Article 2497, first paragraph, of the Italian Civil Code, is interpreted as meaning collective legal entities, other than the State, that hold the equity interest in the context of their business activity or for purposes of an economic or financial nature*".

for the controlling shareholder to determine the recoverable value of assets included in the scope of consolidation, the so-called impairment test required by IAS 36 *"Impairment of assets"*.

Therefore current legislation imposes on the subsidiary the obligation to promptly transmit to the parent company the information needed to prepare the consolidated financial statements by the latter.

Q1.4 In what other cases is it possible to find a "justifying report" of the selective disclosure towards shareholders and the controlling shareholder in particular?

A: *Is the listed company deemed to be responsible for assessing, from time to time, the existence of a "justifying report" that is suitable to allow the transmission of inside information to the controlling shareholder, regardless of whether the control is in law or in fact, solitary or joint. This assessment requires an investigation into the existence of a company interest in conveying the information.*

Apart from the cases expressly provided for by law or other cases that constitute a justification for selective disclosure (for example to the extent that this disclosure is functional to the controlling shareholder exercising the management and coordination activities, or to comply with the accounting reporting obligations), it is also considered that establishing information flows of a privileged nature towards the majority shareholder can only take place in the presence of a "justifying report" based on the corporate interest of the issuer and that the latter is responsible for assessing the existence of such a condition from time to time.

A "justifying report" of the selective disclosure can be identified, for example, in a contractual relationship established between the company and the controlling shareholder. In this regard, in practice, contracts for the provision of services, including outsourcing, or consultancy, concluded in the interest of the issuer and which may require the transmission of certain information strictly necessary to execute the contracts in question have been found to be agreements based on selective information flows.

These contractual relationships may represent a "justifying report" that is suitable for allowing selective disclosure assuming that: (i) the contract is concluded in the interest of the subsidiary (ii) the information to be transmitted is limited to that strictly essential to execute the contract and (iii) compliance with confidentiality provisions is guaranteed also by the counterparty to whom the information is sent.

In this regard, the provision should also be read, contained in scheme 2 of Annex 3A of the Issuers' Regulations, which requires issuers to indicate in the explanatory report "*the shareholders who have indicated their willingness to subscribe, in proportion to the share held, newly issued shares and/or convertible bonds, as well as any option rights not exercised*", thus expressly providing for the possibility of establishing a dialogue with the shareholders prior to announcing a capital transaction on the market. Also in this case, in fact, the transmission to shareholders of information on a specific transaction appears to be
contemplated, in order to satisfy the company's interest to probe the feasibility of the transaction itself.

A further hypothesis that may justify information flows being established towards the majority shareholder could arise in the event that the shareholder needs information to fulfil regulatory obligations related to the granting of authorisations to execute extraordinary transactions of interest to the company (for example, under rules on State aid, crisis resolution or bail-out, admission to bankruptcy proceedings). Even in such cases, in fact, sharing inside information of the issuer with

some shareholders is functional to performing some essential phases of the procedural process provided for by law to carry out transactions of interest to the company.

In conclusion, it is considered to be the task of the listed company to assess, from time to time, the existence of a "justifying report" that is suitable for allowing the transmission of inside information to the controlling shareholder. This assessment requires an investigation into the existence of an interest of the company to convey the information requested by the controlling shareholder, verifying whether the conditions of a legitimate transmission of information to the aforementioned shareholder are met, notwithstanding the obligation of confidentiality for the recipient of the information and the procedural safeguards aimed at ensuring the protection of the confidentiality of the information itself (see below Q2). The valuation of the listed company must be carried out in compliance with the duty of diligence and care of the corporate interest of the directors.

Q1.5 Is it possible to identify a shareholders' agreement as a "justifying report" of selective disclosure as part of a possible company procedure implementing the aforementioned agreement that contemplates the transmission of company information?

A: *A shareholders' agreement for the concerted management of equity interests in itself is not considered to prove the existence of a "justifying report" of selective disclosure for the benefit of shareholders adhering to the agreement as part of a possible company procedure implementing the aforementioned agreement that contemplates the transmission of company information.*

It is not considered possible to recognise the existence of a "justifying report" for the transmission of inside information - by the listed company towards signatories - in the presence of mere shareholders' agreements stipulated between shareholders, aimed at the concerted management of equity interests. This also in the presence of any company procedures adopted by the listed company in implementation of the aforementioned shareholders' agreements that contemplate the transmission of company information. Even in such circumstances, the corporate interest in disclosure must be verified in practice.

In this regard, the shareholders' agreement must be considered as an agreement concluded between third parties with respect to the company, which therefore does not have the necessary conditions to form a "justifying report" in itself that allows a selective transmission of information.

Similarly, procedures adopted by the listed company for the sole purpose of allowing the implementation of the shareholders' agreement, and which provide for transmitting business information of various kinds, cannot in themselves contain a justification to transmit inside information.

Q2: In the event that a justification for the selective disclosure is deemed to exist, what conditions must be met and what procedural safeguards must be adopted by the listed company?

A: *In the presence of a justification for* selective disclosure, *this can be performed on condition that the recipients of the information are bound by an obligation of confidentiality and that appropriate organisational measures are taken to protect the inside information.*

The law does not provide for specific rules on procedures to manage inside information flows between a listed company and its controlling shareholder.

However, the reader can be guided by referring to cases that have greater similarities - in terms of exceptions to the principle of equal access to information - than the one under consideration and, in particular, to the case of delaying the disclosure of inside information to the public.

In the event of a delay, there is an actual typical information asymmetry: there is inside information, but the company believes that the necessary conditions are met to not inform (yet) the public[6]; the company also believes that it is able to maintain the confidentiality of the delayed information by adopting a series of organisational safeguards provided for by law even when the circulation of information is merely within the company. For example, from a procedural point of view, Implementing Regulation (EU) 2016/1055 includes the obligation to identify the persons responsible for the decision on the delay, for the continuous monitoring of the conditions that justify it and for its termination. It is also required to register[7], from time to time, the conditions of legitimacy of the delay and any modification thereof, as well as to create "*protective barriers to information, erected both internally and externally to prevent access to inside information by other people beyond those who*, [...], *must access it in the normal exercise of their professional activity or function*"[8].

For the purposes of establishing an appropriate procedure, a selective flow of inside information may be deemed to occur in case of a delay in providing information to the public. Consequently, a minimum procedural set should be that referred to by the delay regulation, as per the MAR and Implementing Regulation (EU) 2016/1055.

A further operational starting point could be drawn from the regulation of market soundings, provided for by article 11 of the MAR as an exception, provided for by law, to the prohibition of selective disclosure of inside information. When conducting a market survey, in fact, numerous procedural rules are applied to ensure a careful management of information flows and to monitor over time the contents of the information transmitted, even regardless of their privileged nature. Particular attention is paid to the recipients of the information, required to respect the obligations of confidentiality and abstention from operation[9].

In fact, it should be remembered that the subject (natural or legal person) who receives inside information is qualified as insider and that from this attribute derives the necessary adoption of every safeguard aimed at avoiding an unjustified communication of the information itself[10].

However, against this background, the general consideration remains that, since the "justifying report" is in the issuer's interest, any transfer of information must be based on a prior assessment by

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6 These conditions are the existence of legitimate interests of the issuer, the exclusion of the misleading nature of the postponement of information and the maintenance of its confidentiality.

7 Registration is intended as an indication and storage on a durable medium of the data relating to each delay decision, also with a view to any future investigation activity by the Authority.

8 See article 4, paragraph 1, letter c), i) of Implementing Regulation (EU) 2016/1055.

9 The measures are aimed at both those who transmit information and those who receive it; see MAR, article 11, paragraphs 3 and 5, Delegated Regulation (EU) 2016/960 of 17 May 2016 and the *MAR Guidelines - Persons receiving market soundings* of 10 November 2016 (ESMA/2016/1477).

10 In particular, it should be noted that the prohibition of unlawful disclosure of inside information established by article 10 of the MAR *"applies to any natural or legal person in the situations or circumstances referred to in article 8, paragraph 4"* or, *inter alia, "to any person who possesses inside information on the grounds that [...] has a stake in the capital of the issuer"*.

the issuer. It will be primarily up to the company to adopt organisational and procedural measures to assess the price sensitive importance of the information transmitted and the existence of an appropriate justification for its transmission. This analysis appears particularly delicate and necessary, taking into account the position of the controlling shareholder compared to the issuer. For the controlling shareholder, the dividing line between inside information and relevant information is tenuous, together with the others already held, precisely by virtue of the close position with respect to the source of the information. Moreover, in the event that the support of a shareholder can be decisive to carry out a certain operation, it may be problematic to identify the exact dividing line, including temporal, between relevant information and information that becomes privileged due to the contribution that the shareholder itself can make to the occurrence of the event (as happens, for example, in the case of recapitalisation).

To confirm the centrality of the role of the listed company in correctly managing information flows, the risk underlying an unlawful disclosure of inside information by the latter is underlined. If the disclosure of inside information were to take place in the absence of an appropriate justification, there could be a hypothesis of market abuse in the case of unlawful disclosure of inside information.

Q3: Under what circumstances must the information in a business plan be made public?

A: *Inside information contained in business plans must be disclosed to the public as soon as possible or, alternatively, delayed pursuant to the MAR. In case of delay, publishing inside information relating to business plans is in any case necessary due to the loss of confidentiality or the occurrence of indiscretions about such inside information.*

An issuer who publishes a business plan or press release containing inside information is required to update the public if changes are made to the plan's content, to ensure, over time, the accuracy of the information provided.

The issuer, also in relation to prolonged processes of defining business plans possibly linked to the occurrence of particular events and circumstances, may delay disclosing inside information to the public, having assessed under its own responsibility the existence of the conditions provided for by article 17, paragraph 4, of the aforementioned Regulation.