

IS A „PER SE“ AD HOC RELEASE FOR ANNUAL REPORTS WARRANTED AFTER PUBLICATION OF KEY FINANCIAL FIGURES?

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Also this year, most companies listed in Switzerland published financial information for the 2024 business year ahead of the publication of the full annual report for that year. In many cases, such early publication includes comprehensive financial information on full year results. Yet, the annual reports published usually around one to four weeks after such early earnings releases are deemed price-sensitive information by SIX Exchange Regulation and must be flagged as „ad hoc“ communication. This article explores the impact of such practice on the disclosure and insider trading policies of these companies and discusses whether a change of practice would be warranted.

By Thomas Reutter

1) Ad hoc relevance of financial reports and financial information

Issuers listed on SIX Swiss Exchange are subject to a duty to publish price-sensitive facts pursuant to Art. 53 al. 1 of the Listing Rules (LR) outside of trading hours and in a specified manner. Art. 53 al. 2bis LR also requires that ad hoc publications must be flagged as such. Price-sensitive information generally also constitutes inside information under Art. 142 and 154 of the Financial Market Infrastructure Act (FMIA). Thus, listed companies generally impose a „closed period“ for trading in their stock pending publication of the envisaged ad hoc announcement. However, as will be shown below, not all publications designated as „ad hoc“ warrant the qualification as inside information.

Annual and interim reports pursuant to Art. 49 and Art. 50 LR must always be published with an ad hoc announcement pursuant to Art. 53 LR (Art. 4 para. 2 of the Directive on Ad hoc Publicity (DAH)) under the „per se“ practice of SIX Exchange Regulation (SER). Apart from these information items, there are no other types of facts whose disclosure must always be classified as price-sensitive. However, „financial figures“ more broadly are deemed to be generally price-sensitive (see Guideline of SER on the Directive on Ad hoc Publicity of 1 October 2021 („DAH Guideline“), N 69). While annual and interim reports are deemed ad hoc relevant „per se,“ there is just a presumption (which should be amenable to rebuttal) that this is the case for financial figures more generally. According to the DAH Guideline, financial figures include annual and interim results, quarterly results and key financial figures in general (for example, revenues, profits, EBIT, EBITDA, cash flow, reporting by segment, etc.). Depending on the issuer's activities and the respective industry, different financial figures may be considered material.

2) Practice of Swiss listed companies

It is common practice for many Swiss listed companies to publish financial information on the preceding year's performance prior to the publication of the full annual report („Prior Publication“) in response to market demand for key performance indicators (KPIs) and other relevant financial information to be published as soon as possible. Some companies go as far as publishing almost the entire annual report, including the financial statements, while excluding certain sub-reports such as the compensation report. Others just publish financial headlines in a press release and a slide deck for analysts, journalists and investors. In either case, the auditor of the respective listed company typically signs off on the financial information to be published prior to its release. Hence, the financial information published is generally „final“ and not subject to change. Moreover, media, analyst and investor conference calls are typically held only at the time of the Prior Publication, and no such calls are held at the time of the annual report's publication.

Other listed companies have a practice of just publishing selected headline figures, such as turnover, prior to the publication of the annual report, which then includes the financial statements. Additionally, some companies provide an indication or estimate of performance figures (profit, EBITDA, etc.) after the year-end but before the publication of the final results in the annual report.

In addition to the foregoing, listed insurance group parent companies must also publish a „financial condition“ report, which includes, *inter alia*, information on regulatory capital and the applicable risk framework. This document typically does not contain any material new information not already included in the previously published annual report and, therefore, generally does not attract media or investor attention. However, due to SER's per se practice on financial statements, it is nevertheless published as ad hoc announcement by the respective issuers.

3) Practice of SER

SER's enforcement practice mainly revolves around the time gap between the (i) internal availability of financial statements, which have been approved by the board of directors and signed off by the auditors, and the (ii) actual publication of such financial statements. According to the practice of SER, there can only be a „reasonable period“ (*angemessene kurze Frist*) between these two events. In precedents, a time difference of 10 days (eight trading days) between the approval of a report and its publication has exceptionally been deemed to still qualify as a „reasonable period,“ mainly because the signed audit report was only available five days (three trading days) prior to publication (Decision of the Sanctions Commission dated 14 April 2015 [SaKo AhP/I/15], no. 11-15). Hence, in „normal“ cases where both the board approval and formal audit sign-off are available more or less concurrently, a time difference of 10 days may be considered too long.

This apparently reasonable and clear practice becomes more problematic in the case of a Prior Publication, which, as mentioned above, is a common practice for Swiss listed companies. In the decision Sako II / 2022, the Sanctions Commission of SER had to address this issue. An issuer had previously published financial information that did not include indicators such as EBIT and EBITDA, cash flow statements, a balance sheet (indicating the level of indebtedness) or the proposed dividend. Sako correctly concluded that these were potentially price-sensitive metrics that had not been previously disclosed and would therefore have to be considered as „ad hoc“ relevant. However, SaKo did not stop there but stated that „a certain price-sensitivity has to be ascribed to all information required by an accounting standard“ (*„... ist sämtlichen vom Rechnungslegungsstandard verlangten Angaben eine gewisse Kursrelevanz zuzusprechen“*). [SaKo even hinted that nonfinancial information, such as the corporate governance report, might be price-sensitive when it stated that this information was also missing in the previous publication of the issuer]. Furthermore, the DAH Guideline, No. 69, states that the advance publication of financial figures via an ad hoc announcement does not negate the price-sensitivity of an annual or interim report. This rather absolute view on the ad hoc relevance of financial statements (and possibly even other parts of the annual report) can cause problems, as will be set out below.

4) Assessment

As mentioned above, many listed companies publish a fulsome set of financial information ahead of the formal publication of the annual report. Communication with media and analysts takes place only at the time of the Prior Publication, and the subsequent publication of the annual report does not generate any media attention anymore. Closed periods prohibiting trading in shares for employees are often lifted at the time of the Prior Publication, which clearly shows the difference in perception between issuers and the market on the one side, and SER as the stock market regulator on the other side. Classifying information as „ad hoc“ generally creates a presumption that such information also constitutes „inside information“ under the respective administrative and penal provisions of the Swiss Financial Market Infrastructure Act. However, with SER’s practice, any lifting of closed periods can become potentially problematic pending the publication of financial information if one were to follow the widespread view that the relevant management members have inside information in case of a classification as ad hoc information.

SER’s per se practice on financial reports thus creates two main problems for Swiss listed companies:

- (1) The time gap between the Prior Publication and the publication of the annual report must be shortened to comply with ad hoc requirements. In the case of a comprehensive set of financial information (i.e., including information items singled out by SaKo in its decision referenced in section 3 above and after approval by the auditors and board of directors), issuers tend to view the publication of the annual report as no longer containing material information for investors. Hence, from a substantive point of view, such publication is not viewed as price-sensitive, and the time gap between the Prior Publication and the publication of the annual report becomes irrelevant under such premise. However, if the

annual report is to be considered „ad hoc“ in compliance with SER’s per se practice, the time gap between audit/board approval and publication of the annual report becomes relevant, as opposed to the time gap to the Prior Publication. Under these circumstances, SER’s practice, developed against the backdrop of cases where issuers did not do a comprehensive Prior Publication, tends to penalize companies that publish final and comprehensive financial figures, i.e., inside information, in the interest of the market early. They have to organize themselves in such a way that the other components of the annual report (management report (*Lagebericht*), compensation report, corporate governance report and usually also sustainability report) are available as well within the „reasonable period“ demanded by SER. By contrast, companies that directly publish their annual report without any Prior Publication have inside information for much longer and can set the board and approvals in a way that comfortably meets the „reasonable period“ requirement by SER. Thus, if SER continues to treat all issuers the same way, it sets incentives that contradict the goals of any ad hoc regime.

- (2) Issuers may face potential allegations of insider trading. If a listed company publishes a comprehensive set of financial information (i.e., including information items singled out by SaKo in its decision referenced in section 3), it would usually not consider the subsequent publication of the annual report as material nonpublic information in the sense of inside information anymore. It would therefore typically lift any closed periods restricting its management and other employees from trading in the company’s stock. However, SER’s practice considers the publication of the annual report as „per se“ ad hoc relevant. As „ad hoc“ information is usually deemed to also constitute „inside information“ (or at least create a presumption thereof), there is a theoretical risk that lifting any closed period might trigger a prosecution for insider trading if such trades occur prior to the publication of the annual report. However, from a substantive point of view, due to the Prior Publication, no material nonpublic (or „price-sensitive“) information is generally included in such a report anymore.

5) Conclusion

Rigorous approaches in the application of law often lead to inadequate results, and the SER’s „per se“ practice is no exception. As seen above, the current practice leads to uncertainty and inadequate results. With a comprehensive set of financial information having been published, the annual report of a listed company generally does not include information that is likely to be price-sensitive. Therefore, a more nuanced approach by SER is warranted.

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