

AMF Position-Recommendation n° 2003-01
Transmission of inside information prior to the sale of significant shareholdings in companies listed on a regulated market (“data room” procedures)

Reference texts: articles 622-1 and 622-2 of the AMF General Regulation

Listed companies can now implement data room procedures in numerous situations, such as asset disposals and mergers. Without prejudice to Article L 465-1 of the Monetary and Financial Code relating to insider trading, such procedures are covered by Books II and VI of the General Regulation of the Autorité des Marchés Financiers.

However, data rooms organised by a company with a view to the disposal of a holding by one of its shareholders raises special issues. Indeed, one or more potential buyers are given access to a sometimes large body of documentation containing all kinds of information about the issuer. Some of this information is protected by confidentiality rules, notably trade secrecy (patents) and commercial secrecy (customers), while other data (such as unpublished financial statements, projected financial results, business plans, on-going negotiations) may be sensitive, that is, they may influence the company's share price. Because of the confidential nature of the information disclosed by the company solely for a transaction between third parties, and because of the privileged access to this data, this particular type of data room procedure must be justified in light of its corporate interest.

This document clarifies the ways in which the procedure can be made more secure so as to safeguard shareholders' interests and comply with the fundamental principles of equal investor access to information and non-use of inside information.

I - Conditions for implementing the "data room" procedure

I-1 A procedure that must be restricted to the disposal of significant shareholdings...

Position:

The AMF restricts use of the procedure to transactions intended for the reallocation of significant shareholdings. The significance of a holding will be assessed on the basis of its size and its links with the company's strategic decision-making processes (e.g. presence of one or more directors on the board, industrial or commercial partnerships, etc.), particularly in cases where the disposal is not followed by a tender offer.

I-2 secured by nondisclosure agreements.....

Position:

The AMF requires nondisclosure agreements to be set up in order to prevent any risk of disclosure and use of inside information.

Persons using the data room thus acknowledge that the information sent to them is confidential and non-public, and that it cannot be used or communicated other than for the planned transaction.

While the data room is open, interested parties must refrain from trading in the securities of the company in question and from divulging inside information to third parties. (See Section III for cases in which this obligation is maintained after the data room closes.)

I-3 ... and restricted to persons showing a serious intent to buy

Position:

Access to the data room must be restricted to persons who have signed a letter of intent showing that they are seriously interested in the acquisition and, in particular, that they are able to finance it.

The information disclosed through a data room procedure must enable potential buyers to confirm or withdraw their intention and to define precisely the terms on which they are willing to proceed with the transaction. Consequently, such information is not the key determinant of the intent to purchase.

II – Public disclosure

II-1 In cases of a sale of a significant shareholding followed by a public tender

- *Mandatory offer*

When the ratio of shares acquired constitutes a majority holding or results in a change of control, the market is normally protected by the filing of a tender offer, the acceptability of which is assessed under the conditions provided by the AMF General Regulation. The pricing criteria are then published and duly justified.

- *Voluntary offer*

Without acquiring a controlling interest in the company, a buyer may nevertheless wish to pursue his acquisition policy by filing a voluntary offer, the acceptability of which is also assessed by the Autorité des Marchés Financiers.

- *Competing offer*

If, in this particular case, the principle of fair competition so requires, the company will arrange for all competing bidders to have access to the requisite information in the data room.

At all events, the prospectus must ensure that investors have equal access to all the important facts, communicated via the data room, required for their decision.

II-2 In cases of a sale of a significant shareholding not followed by a public tender

Position:

As soon as the transaction that justified the data room procedure is complete, and if the buyer does not intend to file a voluntary offer, the issuer shall inform the market of the price and the terms communicated by the parties. It shall also specify that a data room was put in place for the purposes of the transaction.

The issuer shall make public any important and potentially price-sensitive facts that it had undertaken not to disclose, in the interest of the company, when such facts were made available in the data room.

Recommendation:

When several potential buyers expressed an interest, and the board of directors or the supervisory board was involved in the selection process, the AMF recommends that the issuer discloses to the market the information regarding the prices of the competing bids, their terms and conditions, and the reasons for which they were rejected.

III – Maintaining the trading prohibition for data room participants

If no transaction takes place after the data room has closed, the participants may not divulge or use the inside information they received through the data room procedure until such time as the information is made public or becomes immaterial.

Recommendation:

In this respect, in order to allow the parties to determine how long the information retains inside status, the Autorité des Marchés Financiers recommends that the parties mutually specify the time period during which the information remains relevant. This period must be appropriate to the diversity of information in question (e.g. forecasts, draft financial statements, contracts, trademark licences, customer lists, etc.).

Position:

In order to restore the principle of equal access to information during a financial transaction, the AMF requires that all confidential and sensitive information communicated via a data room between future investor(s) and the company be mentioned in the prospectus.¹

Once the information is no longer considered inside information, or if it has already been disseminated in connection with a tender offer, the trading prohibition is lifted and the interested parties may, for example, tender any shares they hold to an offer or file a competing offer.

¹ AMF 2003 Annual Report – Chapter 3 page 67-68