



Guidelines on the Market Abuse Regulation-market soundings and delay of disclosure of inside information. October 2016.

ESMA published 13 July 2016 the Final Report with two sets of Guidelines which implement the **Market Abuse Regulation** (hereinafter, MAR): one addressed to **persons receiving market soundings** and the other, regarding **delay of disclosure of inside information**. The referred final report was, firstly, preceded by a *Discussion Paper* (November 2013), and later by a *Consultation Paper* (January 2016) on Draft Guidelines on the Market Abuse Regulation- both referred guidelines.

Guidelines on Market Soundings are issued in accordance with *Article 11.11* of MAR, which defines market soundings as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. These guidelines aim at reducing the overall risk of spreading of the inside information communicated in the course of the market sounding and at providing tools for the CA to effectively conduct investigations on suspected market abuse cases.

Likewise, **Guidelines on Delay of Disclosure of inside information** are set forth under *Article 17.11* of MAR. The objective is provide guidance by giving examples to assess the issuer in their decision to delay public disclosure of inside information

ESMA's published **Guidelines** which are addressed to **Persons Receiving Market Soundings** (hereinafter, MSRs), are as follows:

1. MSRs shall establish, implement and maintain **internal procedures** that are appropriate and proportionate to the scale, size and nature of their business activity, whilst, **ensuring appropriate staff training**. Furthermore, MSRs shall designate a **specific person or contact point** to receive market soundings, hence, duly reporting such information to the **Disclosing Market Participant** (hereinafter, DMP). In addition, the information received in the course of the market sounding is internally communicated only through pre-determined reporting channels and on a need-to-know basis, and will ensure that the individual(s) function or body entrusted to assess whether the MSR is in possession of inside information as a result of market sounding.
2. The MSRs shall **notify** the DMPs **whether they do not wish to receive market soundings** in relation to either all potential transactions or particular types of potential transactions.
3. The MSRs are required to **conduct their own assessment on whether they are in possession of inside information** as a result of the market sounding. Further to the DMP's notification that the information obtained in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information available to the individual(s), function or body within the MSR entrusted to conduct that assessment.
4. The MSRs shall **identify all issuers and financial instruments** to which they "believe" that inside

information relates.

5. The MSRs shall validate the content of the **written minutes or notes** of the DMPs unrecorded meetings, or unrecorded telephone conversations, or shall provide the DMP with their own version of the minutes or notes duly.

6. The MSRs shall keep **records** of: internal procedures, notifications, assessment which they perform, persons who have access to the information communicated in the course of the market sounding.

ESMA's published **Guidelines on delay of disclosure of inside information**, comprises:

1. An **indicative and non-exhaustive list of circumstances which immediate disclosure of inside information is likely to prejudice the legitimate interests of the issuers:**

- Issuers' ongoing negotiations where the outcome or normal pattern of those negotiations would likely be jeopardized affected by immediate public disclosure, as for example, mergers, acquisitions, splits and spin-offs, etc.
- In the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the financial recovery of the issuer.
- Where inside information refers to decisions taken or contracts made by the management body of an issuer which need, pursuant to its national regulation or organisation's bye-laws, the approval of another body of the issuer other than the shareholders meeting, in order to become effective, provided that immediate public disclosure of the information before such a definitive decision would jeopardise the correct assessment of the information by the public and the issuer arranged the steps to ensure that a final decision shall be adopted as soon as possible.
- The issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer.
- When an issuer decides to sell or acquire a major holding in another entity and the disclosure of such an information would likely jeopardise the implementation of such plan.
- Deal or transaction previously announced and subject to a public authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and, therefore, prevent the final success of the deal or transaction.

2. Examples of **situations where the delay in the disclosure of inside information is likely to mislead the public**, which at least, include the following:

- The inside information, whose disclosure the issuer intends to delay, is materially different from the previous public announcement of the issuer on the matter to which the inside information refers to.
- The inside information, whose disclosure the issuer intends to delay, regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced.

- The inside information, whose disclosure the issuer intends to delay, is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organized by the issuer or with its approval.

Useful links:

[Final Report regarding both Guidelines on the Market Abuse Regulation- market soundings and delay of disclosure of inside information.](#)

[ESMA Consultation Paper Draft Guidelines on the Market Abuse Regulation: both regulations that implement the MAR Regulation: guidelines for persons receiving Market soundings and guidelines on legitimate interests of issuers to delay disclosures of inside information and situations in which the delay of disclosure is likely to mislead the public.](#)

[Discussion Paper ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation.](#)