



European Securities and  
Markets Authority

# Final Report

**Guidelines on the Market Abuse Regulation - market soundings and  
delay of disclosure of inside information**





## Acronyms used

CP	Consultation Paper
DMP	Disclosing market participant
DP	Discussion Paper on policy orientations on possible implementing measures under the MAR, published on 14 November 2013
ECJ	European Court of Justice
ITS	Implementing technical standards
MAD	Directive 2003/6/EC of the European Parliament and the Council on insider dealing and market manipulation (Market Abuse Directive)
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Market Abuse Regulation)
MTF	Multilateral trading facility
MSR	Person receiving the market sounding
RTS	Regulatory technical standards

### **3 Guidelines on legitimate interests of issuers to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public**

#### **3.1 Background and mandate**

42. Article 17(1) of MAR sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. Article 17(2) of MAR sets forth a similar provision with reference to emission allowance market participants. Article 17(4) of MAR specifies that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:
- a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
  - b) delay of disclosure is not likely to mislead the public;
  - c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.
43. It should be stressed that for an issuer or emission allowance market participant to be able to delay the disclosure of inside information, all the above conditions have to be met.
44. Article 17(11) of MAR requires ESMA to issue guidelines to establish a non-exhaustive and indicative list of:
- a) legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information; and
  - b) situations in which delay of disclosure is likely to mislead the public.
45. These guidelines are aimed at meeting the mandate that ESMA has been given under Article 17(11) of MAR. They take into account the feed-back received from the public consultation of a DP issued on November 2013<sup>8</sup> and from a CP issued on January 2016.

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<sup>8</sup> Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649); [http://www.esma.europa.eu/system/files/2013-1649\\_discussion\\_paper\\_on\\_market\\_abuse\\_regulation\\_0.pdf](http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf)

### **3.2 Legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information**

46. ESMA's empowerment to issue guidelines refers only to issuers, as emission allowances market participants are not mentioned in Article 17(11) of MAR.
47. In drafting these guidelines ESMA has taken into account the cases of legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information mentioned in Recital 50 of MAR and the examples provided by CESR in its second set of Guidance (CESR/06-562b).
48. The examples of legitimate interests of the issuer to delay the disclosure of inside information provided in Recital 50 of MAR which mirror Article 3(1) of Directive 2003/124/EC are:
  - a) ongoing negotiations, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, 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 long-term financial recovery of the issuer;
  - b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between those bodies, provided that public disclosure of the information before such approval, together with the simultaneous announcement that this approval is still pending, would jeopardise the correct assessment of the information by the public.
49. The examples provided by CESR in its second set of Guidance (CESR/06-562b) are:
  - a) confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations;
  - b) product development, patents, inventions etc. where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible;
  - c) when an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure;

d) impending developments that could be jeopardised by premature disclosure.

50. In the guidelines ESMA decided not to include «*impending developments that could be jeopardised by premature disclosure*», as it was deemed to be a too generic provision.
51. The fact that the issuer has legitimate interests that are likely to be prejudiced by immediate disclosure of the inside information is not sufficient, *per se*, to delay the disclosure of inside information. In fact, for an issuer to be able to delay the disclosure of inside information, all the conditions set forth in Article 17(4) of MAR must be met.
52. It should be highlighted that such a list of legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of the inside information is not meant to be exhaustive and there may be other situations where issuers have legitimate interests. However, it should be borne in mind that the possibility to delay the disclosure of inside information as per Article 17(4) of MAR represents the exception to the general rule of disclosure to be made as soon as possible according to Article 17(1) of MAR, and therefore should be narrowly interpreted.
53. The list is also indicative. It should be for the issuers to explain that they are in a case where their legitimate interests are likely to be prejudiced by immediate disclosure of inside information, and each situation, including those listed in these guidelines, should be assessed on a case by case basis.

### **3.2.1 Ongoing negotiations and grave and imminent danger to the financial viability of the issuer**

54. These two cases, already mentioned in Recital 50 of MAR, are maintained in the guidelines and are separately listed as examples of situations where legitimate interests to delay the disclosure of inside information may exist.
55. A legitimate interest may exist where the issuer is conducting negotiations, the outcome of which would likely be jeopardised by immediate public disclosure of that information.
56. Further to the feedback received on the CP, ESMA decided to provide some examples, explicitly mentioning mergers, acquisitions, splits and spin-offs, purchases or disposals of major assets or branches of corporate activity, restructurings and reorganisations. The list of examples provided should not be considered exhaustive.
57. Another instance that may constitute a legitimate interest under Article 17(4)(a) of MAR could be where the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, by jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer.
58. No substantial changes are proposed with reference to this particular case. ESMA would like to highlight that, compared to the drafting in Recital 50 of MAR, no reference is made to the “long term” financial recovery of the issuer, as ESMA is of the view that also the

successful conclusion of negotiations aimed at ensuring the “short term” financial recovery of the issuer could constitute a legitimate interest to delay disclosure of inside information.

59. Note that this particular case does not refer to the possibility of delaying public disclosure of information related to the issuer’s temporary liquidity in order to preserve the stability of the financial system under Article 17(5) of MAR.
60. Finally, it should be reminded that Article 17(4) of MAR states that it should be for the issuer to explain to the national competent authority, in addition to how the other two conditions for delaying disclosure of inside information are met, how immediate public disclosure is likely to prejudice the issuer’s interests and jeopardise the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer.

### **3.2.2 Decisions taken or contracts entered into by the management body of an issuer which need the approval of another body of the issuer in order to become effective**

61. A legitimate interest of the issuer to delay disclosure of inside information, already mentioned in Recital 50 of MAR, may arise where the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer’s bylaws, the approval of another body of the issuer in order to become effective.
62. This is the case of two-tier issuer systems where certain types of decisions of the Management Board have to be approved by the Supervisory Board in order to have legal effects.
63. However, in order for that to be considered a legitimate interest to delay disclosure of inside information, in the draft guidelines proposed in the CP, ESMA stated that the following conditions had to be met:
  - a) an announcement explaining that the approval of another body of the issuer is still pending would jeopardise the correct assessment of the information by the public;
  - b) an announcement explaining that the approval of another body of the issuer is still pending would jeopardise the freedom of decision of the other body;
  - c) the issuer arranged for the decision of the body responsible for such approval to be made, possibly within the same day;
  - d) the decision of the body responsible for such approval is not expected to be in line with the decision of the management body, as for instance it would be where the two bodies are expression of the same shareholders represented in the management body or in cases where such body has consistently approved the management body’s decision on similar issues.

64. Taking into account the responses to the CP, ESMA acknowledged that the conditions proposed in the CP were too restrictive and very challenging to meet. Therefore, in the final guidelines ESMA provides only two conditions:
- a) immediate public disclosure of that information before such a definitive decision would jeopardise the correct assessment of the information by the public; and
  - b) the issuer arranged for the definitive decision to be taken as soon as possible.
65. Compared to the drafting proposed in the CP the final guidelines no longer make reference to the requirement that *“an announcement explaining that such approval is still pending would jeopardise the freedom of decision of the other body”*, nor that *“the decision of the body responsible for such approval is not expected to be in line with the decision of the management body, as for instance it would be where such body is the expression of the same shareholders represented in the management body or in cases where such body has consistently approved the management body’s decisions on similar issues”*.
66. An example relating to the first condition is related to the fact that, in practice, the public is aware that, most of the time, the Management Board will try to ensure that its decision will not be reverted and most decisions taken by the Supervisory Board are expected to be in line with the Management Board’s decision. Therefore, where the Management Board has doubts as to whether the decision of the Supervisory Board will be in line with its decision and sees a rejection or an amendment to their decision as a possible scenario, then the public could be misled by immediate public disclosure of the information, as they may see the decision of the Supervisory Board as granted while it is not.
67. In addition, no possibility of delay should be granted where the issuer does not arrange for the definitive decision to be taken as soon as possible.
68. The above conditions are aimed at ensuring that the simple fact that issuers have two different decisional bodies does not represent, per se, a legitimate interest to delay the disclosure of inside information until the second body’s definitive approval.
69. As a general rule, issuers are expected to disclose the inside information explaining that the definitive decision of the issuer’s second body is still pending. Only where the above conditions are met, the issuer would have a legitimate interest to delay the disclosure of the inside information.

### **3.2.3 Development of a product or an invention**

70. A legitimate interest for the issuer to delay disclosure of inside information, already mentioned in the CESR second set of Guidance, may be where 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.
71. In this particular case it will be the issuer’s interest to proceed to patent the product or the invention or otherwise protect its rights by other means as soon as possible.

72. Note the issuer should be able to explain to the national competent authority how immediate public disclosure is likely to prejudice the ability to patent the product or the invention or otherwise protect the issuer's rights.

### **3.2.4 The issuer is planning to buy or sell a major holding in another entity**

73. A case of legitimate interest for the issuer to delay disclosure of inside information may be where the issuer is planning to buy or sell a major holding in another entity and the implementation of such plan is likely to be jeopardised with immediate disclosure of that information.
74. This particular case differentiates from the case of ongoing negotiations as it involves situations where such a plan has been already decided but the negotiations have not started yet. ESMA would like to highlight that this particular case requires evidence of the decision taken in view of realising the plan.
75. Given that the list of legitimate interests is not meant to be exhaustive, there may be other examples of actions planned before the start of any negotiations that may constitute a legitimate interest of the issuer.
76. Note the issuer should be able to explain to the national competent authorities the reasons why the conclusion of the planned deal is likely to fail with immediate disclosure of that information.

### **3.2.5 Deal or transaction previously announced and subject to a public authority's approval**

77. A respondent to the DP suggested that the guidelines include in the list of legitimate interests the case where the issuer is discussing with a public authority (e.g. Antitrust) about possible conditions that such public authority might impose on the issuer for the transaction to be effective.
78. Taking into account the response to the DP, the guidelines proposed in the CP mentioned the legitimate interest that may exist in the situation where a deal or transaction previously announced is 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.
79. Given that non respondents commented on that, this point was confirmed in the final guidelines.
80. ESMA would like to highlight that, in case of take-overs or mergers and acquisitions the legitimate interest to delay the disclosure of inside information does not relate to the disclosure of the take-over nor the merger and acquisition announcements themselves. When these decisions are announced the issuers should provide the public with proper information about the public authorities' pending approval or authorization, including the



existence of possible conditions that could be imposed by such authorities. A legitimate interest to delay relates to the actual conditions that the public authorities may impose further to the announcement, in the course of the contacts with the issuer within the authorisation process. Such conditions may be the selling of part of a business in a determined geographical area (that could be imposed by a competition authority) or an increase in the capital of the issuer (that could be imposed by the prudential authority, where the issuer is also a regulated person).

81. Note that the delay is only admissible where the issuer can justify how immediate disclosure of the above conditions will likely affect the possibility for the issuer to meet such requirements.

### **3.3 Situations where the delay in the disclosure is likely to mislead the public**

82. In the final guidelines ESMA provides three examples of situations where the delay of disclosure of inside information is likely to mislead the public, namely where:
  - a) 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; or
  - b) 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; or
  - c) 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.
83. ESMA decided to provide in point c) some examples of signals that the issuer may have previously sent to the market, such as interviews released by the CEO of an issuer, or the information conveyed by the management of the issuer during a road-show.
84. The final guidelines keep the reference to market expectations. However, taking into account the responses to the public consultation, in order to provide more clarity to the concept of market's expectations such reference has been linked to the signals that the issuer has previously set. In assessing the market's expectations, the issuers should take into account the market sentiment, for instance considering the consensus among financial analysts.
85. Since in order to delay the disclosure of inside information all the conditions laid down in Article 17(4) of MAR should be met, the above situations are examples where immediate and appropriate disclosure is always necessary and mandatory. Nonetheless, it should be noted that the list is not meant to be exhaustive as there may be other situations where the delay in the disclosure is likely to mislead the public.



86. ESMA also considered to include in the list of situations in which delay of disclosure of inside information is likely to mislead the public the situation where issuers are delaying disclosure of inside information according to Article 17(4) of MAR and make public information that is inconsistent with the information under delay. However, ESMA is of the view that such situation is already covered by the prohibition of market manipulation and eventually decided not to explicitly mention such case in the guidelines.



# **ANNEX V – Guidelines on legitimate interests to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public**

## **1. Scope**

### **Who?**

87. These guidelines apply to Competent Authorities and issuers.

### **What?**

88. These guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and situations in which delay of disclosure is likely to mislead the public, according to Article 17(11) of Regulation (EU) No 596/2014 of the European Parliament and of the Council.

### **When?**

89. These guidelines apply from [2 months after publication of translations].

## **2. References, abbreviations and definitions**

MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

## **3. Purpose**

90. The purpose of these guidelines is to provide guidance by giving examples to assist the issuers in their decision to delay public disclosure of inside information under Article 17(4) of MAR.

## **4. Compliance and reporting obligations**

### **4.1 Status of the guidelines**

91. This document contains guidelines issued under Article 17(11) of MAR. Competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.

### **4.2 Reporting requirements**

92. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA to [[MARguidelinesGL3@esma.europa.eu](mailto:MARguidelinesGL3@esma.europa.eu)]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
93. Issuers are not required to report whether they comply with these guidelines.

## **5. Guidelines on legitimate interests of issuers to delay the disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public**

### **1. Legitimate interests of the issuer for delaying disclosure of inside information**

94. For the purposes of point (a) of Article 17(4) of MAR, the cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests could include but are not limited to the following circumstances:
- a. the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure. Examples of such negotiations may be those related to mergers, acquisitions, splits and spin-offs, purchases or disposals of major assets or branches of corporate activity, restructurings and reorganisations.
  - b. the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders by jeopardising the conclusion of the negotiations designed to ensure the financial recovery of the issuer;
  - c. the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's

bylaws, the approval of another body of the issuer, other than the shareholders' general assembly, in order to become effective, provided that:

- i. immediate public disclosure of that information before such a definitive decision would jeopardise the correct assessment of the information by the public; and
  - ii. the issuer arranged for the definitive decision to be taken as soon as possible.
- d. 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;
  - e. the issuer is planning to buy or sell a major holding in another entity and the disclosure of such an information would likely jeopardise the implementation of such plan;
  - f. a transaction previously announced is 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. Situations in which delay of disclosure of inside information is likely to mislead the public**

95. For the purposes of point (b) of Article 17(4) of MAR, the situations in which delay of disclosure of inside information is likely to mislead the public includes at least the following circumstances:
- a. 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; or
  - b. 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; or
  - c. 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.