esma European Securities and Markets Authority

Final Report

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

13 July 2016 | ESMA/2016/1130

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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

1 Executive Summary

Reasons for publication

Article 11(11) of Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (MAR)[1] provides that ESMA shall issue guidelines addressed to persons receiving market soundings. Article 17(11) of MAR provides that ESMA shall issue 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. This final report follows the Consultation Paper[2] (CP) issued on January 2016 and the Discussion Paper (DP) issued in November 2013[3].

Contents

Section 2 relates to the guidelines for persons receiving market soundings, while Section 3 presents the guidelines on legitimate interests and omissions likely to mislead the public. Both Section 2 and Section 3 provide an introduction on the background together with an analysis of the provisions included in the text of the guidelines taking into account the feed-back received from the public consultation and the opinion of the SMSG.

Annex I sets out a summary of the questions contained in this paper, Annex II provides a description of the legislative mandate to ESMA to develop guidelines and Annex III includes a cost-benefit analysis, Annex IV and V provide the opinion of the Securities and Markets Stakeholder Group and the feedback on the CP, Annex VI includes the guidelines for persons receiving market soundings and Annex VII includes the guidelines on legitimate interests to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public.

Next Steps

Within 2 months of the issuance of the guidelines, each national competent authority will have to confirm whether it complies or intends to comply with those guidelines. In the event that a national competent authority does not comply or does not intend to comply, it will have to inform ESMA, stating its reasons. ESMA will publish the fact that a national competent authority does not comply or does not intend to comply with those guidelines.

[1] 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; (OJ L 173, 12.6.2014, p. 1)

[2] Consultation Paper on draft Guidelines on the Market Abuse Regulation (ESMA/2016/162); https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf.

[3] 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

2 Guidelines for persons receiving market soundings

2.1 Background and mandate

1. Article 11(1) of MAR describes a "market sounding" 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. Further descriptions are provided in Recitals 32 and 33 of MAR. Article 11(4) of MAR states that, when a DMP discloses inside information to a MSR in the course of a market sounding in accordance with the conditions in Article 11(3) and (5) of MAR, this should be deemed to have been made in the normal course of the exercise of a person's employment, profession or duty, and therefore not to constitute market abuse.

2. As required under Article 11(9) and Article 11(10) of MAR, ESMA has developed draft regulatory and implementing technical standards (RTS and ITS) respectively to determine appropriate arrangements, procedures and record keeping requirements and to specify the systems and notification templates to be used by DMPs when conducting market soundings. These RTS and ITS were submitted to the European Commission on 28 September 2015[4]. The RTS and the ITS were published in the Official Journal of the European Union on 17 June 2016[5].

3. Article 11(11) of MAR requires ESMA to issue guidelines addressed to MSRs, regarding:

    a) the **factors** that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;

    b) the **steps** that such persons are to take if inside information has been disclosed to them in order to comply with Articles 8 and 10 of MAR; and

    c) the **records** that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of MAR.

4. The guidelines are aimed at meeting the mandate that ESMA has been given under Article 11(11) of MAR. They take into account the feedback received from the public consultation on a DP issued in November 2013[6] and on a CP issued in January 2016[7]. The guidelines are

[4] Final report on draft technical standards on the Market Abuse Regulation (ESMA/2015/1455; http://www.esma.europa.eu/system/files/2015-esma-1455_-_final_report_mar_ts.pdf

[5] COMMISSION DELEGATED REGULATION (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings. COMMISSION IMPLEMENTING REGULATION (EU) 2016/959 of 17 May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council.

[6] 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

[7] Consultation Paper on draft guidelines on the Market Abuse Regulation (ESMA/2016/162); https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf

also taking into account the provisions contained in the draft RTS and ITS on market soundings that were submitted by ESMA on 28 September 2015 to the European Commission for adoption and published in the Official Journal of the European Union on 17 June 2016.

2.2 General remarks

5. Note that for an advisor to a transaction it is a common market practice to conduct a market sounding for a number of clients and brokers. Often, those brokers will in-turn sound their clients. However, it should be borne in mind that the protection afforded by the market sounding regime of MAR is only available to DMPs - as listed in Article 11(1)(a) to (d) of MAR. A third party must be acting on behalf of an issuer to be considered a DMP, and hence brokers who receive inside information from an advisor in the course of a market sounding, and then in turn sound their clients, would not be captured by the market sounding regime and therefore not afforded the protection against an allegation of unlawful disclosure of inside information.

6. The MAR regime is intended to regulate the way market soundings are conducted, including the transmission of inside information in the course of such soundings. However, in practical terms, not all market soundings involve the disclosure of inside information.

7. When elaborating the guidelines on the records to be kept by the MSR, ESMA has considered the record keeping requirements imposed on DMPs through the MAR and the related technical standards, in order to avoid unnecessary duplication of recording of the same information. In addition, the retention period of at least five years set out in the guidelines for the records to be kept by MSR is aligned with the period specified in Article 11(8) of MAR with reference to the DMPs' record keeping obligations.

2.3 Internal procedures and staff training

8. The guidelines address the MSR's internal procedures and staff training. Although this aspect was not included in the DP, it was consulted upon in the CP.

9. In relation to the market soundings, the guidelines require MSRs to establish, implement and maintain internal procedures that are appropriate and proportionate to the scale, size and nature of their business activity. The proportionality principle has been introduced in the guidelines further to the feedback received to the CP. In fact, ESMA recognises that the internal procedure cannot overlook the key characteristics of the MSR, potentially ranging from a physical person or a small entity to a large regulated entity.

10. The above internal procedure should ensure that, where the MSR designates a specific person or a contact point to receive market soundings, that information is made available to the DMP. The MSR should ensure that this is appropriately publicised to the DMP, e.g. through sell side relationship management, on data vendor contacts, or on their website. As a good practice it is recommended that MSRs keep evidence of their decision to designate a specific person or a contact point to receive the market sounding and the way that information is made available to the DMPs.

11. In addition, the internal procedure should ensure that 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. This is aimed at ensuring that the information received in the course of the market sounding is treated confidentially and does not freely spread within the MSR.

12. Moreover, the internal procedures should ensure that the MSRs clearly identify the individual(s), function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding, and that they are properly trained in that respect. The purpose of this requirement is to have clearly identified within the MSR who is responsible for the above mentioned assessment. Considering the potentially wide variety of persons that can receive market soundings, ESMA is of the view that MSRs should have the flexibility to determine their internal organisation, deciding whether such individual(s), function or body may coincide with other existing roles or functions (e.g. the compliance or the legal department) or be expressly set up for that purpose. Similarly, ESMA is of the view that MSRs should have the possibility to choose whether or not the above individual(s), function or body may have a broader role, encompassing also the reception of market soundings.

13. The internal procedures should also allow the MSR to manage and control the flow of inside information arising from the market sounding within the MSR and the application of the prohibitions to the MSR and its staff, under Articles 8 and 10 of MAR, arising from being in possession of inside information as a result of the market sounding.

14. ESMA is of the view that, in order to ensure the enforceability of the relevant provisions, MSRs should keep records for a period of at least five years of the above internal procedures.

15. The guidelines also set forth that all the MSR's staff that are entrusted to receive and process the information received in the course of the market sounding are properly trained on the relevant internal procedures and on the prohibitions arising from being in possession of inside information. Similar to the internal procedures, ESMA considers it necessary that a proportionality principle is introduced in the guidelines further to the feedback received to the CP.

2.4 Communicating the wish not to receive market soundings

16. Establishing a process that minimises inadvertent and unintentional disclosure of inside information includes as a necessary preliminary step the determination of the scope wherein such information can circulate. For this reason, ESMA proposed in the CP that persons receiving MSRs should notify the DMPs whether they wish not to receive market soundings.

17. In the draft guidelines proposed in the CP ESMA specified that MSRs may express their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions and notify the DMP accordingly.

18. In the final guidelines ESMA kept the same approach, specifying that the recommendation to inform the DMP of their wish not to receive market soundings should be triggered by the MSR being addressed by the DMP.

19. ESMA maintains that, in the final guidelines, MSRs should keep records for a period of at least five years of the notification of their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions.

2.5 MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information

20. According to Article 11(7) of MAR, 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. In conducting such analysis MSRs cannot limit to assess the information they received from the DMP, but should also consider other related information they might be in possession of. Such requirement stems from Article 11(7) of MAR, which provides that the MSR «*shall assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information*». In practical terms, MSRs may be in possession of inside information as a result of being officially wall-crossed or as a result of non-inside information received from one or more other sources that, when combined with that received from the DMP, may amount to inside information.

21. Therefore, in the guidelines ESMA proposes that the factors MSRs should take into account in order to assess whether they are in possession of inside information as a result of the market sounding are the DMP's assessment and all the information available to the individual(s), function or body within the MSR entrusted to conduct that assessment, including the information obtained from other sources than the DMP. Similarly, 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, including the information obtained from other sources than the DMP.

22. In the final guidelines ESMA specifies that, in conducting those assessments, the individual(s), function or body should not be required to access information behind any information barrier established within the MSR.

23. In order to comply with Article 11(11)(c) of MAR, in the guidelines ESMA proposes that, to ensure the enforceability of the relevant provisions, MSRs should keep records of their assessment and the reasons therefor for a period of at least five years.

2.6 Discrepancies of opinion between DMP and MSR

24. In the CP, ESMA proposed that in the case of market soundings where according to the DMP no inside information is disclosed, where the MSR assesses it is in possession of inside information, if the different assessment is due to the fact that the MSR is in possession of further information than that received from the DMP, then the MSR should refrain from informing the DMP of such discrepancy of opinion. Differently, if the different assessment is

based exclusively upon the information that the MSR received from the DMP, then the MSR should inform the DMP of such a discrepancy of opinion.

25. Similarly, where the MSR receives the DMP's notification informing that the information communicated in the course of the market sounding ceased to be inside information and the MSR disagrees with the DMP's conclusion, if the different assessment is due to the fact that the MSR is in possession of further information than that received from the DMP, then the MSR should refrain from informing the DMP of such discrepancy of opinion. Differently, the MSR should inform the DMP of such discrepancy of opinion, if the opinion is based solely on the information disclosed by the DMP.

26. Further to the feedback received to the CP, ESMA has reviewed its approach with reference to the discrepancies of opinion between DMP and MSR, and in the final guidelines the relevant part has been deleted. The reasons for that are related to the fact that further dialogue between DMP and MSR could involve the risk of additional information inadvertently being disclosed and the liaison requirement was not strictly included in the mandate.

27. In all cases it should be reminded that, irrespective of the DMP's assessment, where the MSR assesses it is in possession of inside information, it should therefore comply with the prohibition arising from being in possession of inside information. Differently, where the MSR assesses it is not in possession of inside information it will be always in the position to disregard the DMP's contrary assessment and the prohibitions arising from being in possession of inside information. However, MSRs should bear in mind that, should their assessment be wrong, they may in fact be in possession of inside information and therefore be pursued by the relevant competent authority for breaching the provisions on insider dealing and unlawful disclosure of inside information.

2.7 No obligation for MSR to report to competent authorities

28. ESMA proposed in the DP that, in instances where MSR suspects improper disclosure of inside information, they should be encouraged to notify the relevant competent authority of this potential violation.

29. Taking into account the responses to the DP, in the CP ESMA expressed its view that introducing an obligation for MSRs to report to the competent authority may be counter-productive for the market sounding regime and be too burdensome, particularly with reference to non-regulated persons. For these reasons any reference to such an MSR's obligation has been deleted from the guidelines text. ESMA has kept that approach in the final guidelines.

30. Would MSRs or staff with MSRs wish to report a suspicion of improper disclosure of inside information in relation to market soundings, they can always rely on the provisions of Article 32 of MAR relating to the reporting of actual or potential infringements.

2.8 Assessment of related financial instruments

31. ESMA proposed in the DP that the MSR should demonstrate its own determination on whether securities are related securities, by maintaining a full audit trail of its analysis. The approach

was maintained in the draft guidelines included in the CP. Taking into account the feedback received in the CP and notably the SMSG opinion, in the final guidelines ESMA recommends that where the MSR has assessed it is in possession of inside information as a result of a market sounding, for the purposes of complying with Article 8 of MAR it should identify all the issuers and financial instruments to which they believe that inside information relates.

32. Taking into account the responses received to the CP and acknowledging the high number of derivatives instruments, the final guidelines now include a reference to a best effort principle, where they mention issuers and financial instruments to which they «*believe*» that inside information relates.

33. Moreover, making explicit reference to the purposes of the requirement, namely complying with the MAR provision on insider dealing (Article 8 of MAR), the guidelines clarify that the level of detail of the assessment of related financial instruments should be linked to the complexity of the MSR's trading activity.

34. The MSR should keep record of their assessment of related financial instruments for a period of at least five years.

2.9 Written minutes or notes and recording of telephone calls

35. Taking into account the responses to the DP, in the draft guidelines proposed in the CP, ESMA no longer imposed on MSRs any requirement for the recording of telephone calls, as such obligations fall on the DMPs under the RTS on market soundings. That approach has been kept in the final guidelines.

36. In the final guidelines, ESMA specifies the behaviour required from the MSR where the market sounding has taken place during unrecorded meetings or unrecorded telephone conversations. Taking into account the RTS on market soundings which in such instances require the DMP to draft written minutes or notes to record the communication of the information, the final guidelines require the MSR to sign these minutes or notes drawn up by the DMP within five working days, where the MSR agrees upon their content. Where the MSR does not agree with the DMP upon the content of the minutes or notes drawn up by the DMP, the MSR should provide the DMP with their own version of the minutes or notes duly signed within five working days. Noting the requests for clarification in the responses to the CP, ESMA further specifies in the final guidelines that the five working day period should be consider from the receipt of the minutes or notes drawn up by the DMP.

37. ESMA also notes that the guidelines will not prevent the MSR to record the telephone calls on their own initiative, notably for commercial purposes, provided that the DMP has given in advance its consent to the recording.

2.10 Record keeping

38. In the final guidelines ESMA provides that MSRs should keep records in a durable medium that ensures accessibility and readability for a period of at least five years of:

a) the internal procedures;

b) the notifications to the DMP of the whish not to receive future market soundings;

c) the assessments as to whether they are in possession of inside information as a result of the market sounding and the reasons therefor;

d) the assessment of related instruments;

e) the persons working for them under a contract of employment or otherwise performing tasks through which they have access to the information communicated in the course of the market soundings, listed in a chronological order for each market sounding.

39. With reference to the last point, in the draft guidelines proposed in the CP, ESMA already recommended that, for each market sounding, MSRs should draw up a list of the persons working for the MSR that are in possession of the information communicated in the course of the market soundings. This aspect is linked with the provisions on internal procedures.

40. The aims of this requirement are to: (i) improve the internal management of the flow of information resulting from market soundings, (ii) allow MSRs to demonstrate compliance with the inside information prohibition, and, (iii) foster the competent authorities' ability to reconstruct the information flow in the course of a possible investigation. With reference to possible overlapping between this guideline and the content of Article 18 of MAR, it should be borne in mind that the two provisions do not share the same scope. In the context of a market sounding, MSRs, as potential investors, may not be the issuer to which the market sounding relates and or persons acting on the issuer's behalf or account. Therefore, MSRs will not be subject to the insider list provisions.

41. Taking into account the feedback received to the CP, in the final guidelines the scope of this requirement has been further specified, making now reference to «*persons working for*» the MSR «*under a contract of employment or otherwise performing tasks through which they have access to the information communicated in the course of the market soundings*».

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[8] and from a CP issued on January 2016.

[8] 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

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 I – Legislative mandate to draft guidelines

1. Article 11(11) of MAR provides that «*ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to persons receiving market soundings, regarding:*

   a) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;

   b) the steps that such persons are to take if inside information has been disclosed to them in order to comply with Articles 8 and 10 of this Regulation; and

   c) *the records that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of this Regulation*».

2. 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(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.

3. Article 17(11) of MAR provides that «*ESMA shall issue guidelines to establish a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in point (a) of paragraph 4, and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in point (b) of paragraph 4*».

ANNEX II - Cost-benefit analysis

Guidelines for persons receiving market soundings

A market sounding is «*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*». The regulatory and implementing technical standards (RTS and ITS) on market soundings that were submitted by ESMA to the European Commission on 28 September 2015 and published on the Official Journal of the European Union on 17 June 2016 outline appropriate arrangements, systems and procedures and notification templates for DMPs when conducting market soundings.

The final guidelines for persons receiving market soundings outline: i) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information, ii) the steps that such persons are to take if inside information has been disclosed to them in order to comply with Articles 8 and 10 of MAR and iii) the records that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of MAR.

	Description
Benefits	The guidelines are aimed at providing clarity and legal certainty by defining a common set of rules for the persons receiving the market soundings across the European Union, consistent with the rules set forth by the TS with reference to DMPs. The guidelines, outlining the MSR's obligation, should reduce the risk of spreading of inside information as a result of the market sounding and consequently reduce the risk of abuses. The guidelines regulate the buy-side consistently with the provisions set forth in the TS on market soundings and are aimed at facilitating the supervisory and investigative activities of the competent authorities. Overall, the main benefit arising from the rules contained in the guidelines would be enhanced market integrity.
Compliance costs *- One-off* *- On-going*	Most of the responsibility for compliance with the market sounding regime falls on the DMPs. However, also MSRs will bear some costs arising from the requirements outlined in the guidelines. It should be noted that buy-side firms will be impacted by the requirements in a different manner. For instance, should the MSRs deem that the requirements outlined in the guidelines are too burdensome, they may choose to be sounded less frequently, in particular when inside information is disclosed in the course of the market sounding. In order to mitigate the compliance costs for smaller entities, the final guidelines explicitly provide that the internal

	procedures should be appropriate and proportionate to the scale, size and nature of the MSRs' business activity. As a result of the guidelines requirements, MSRs will need to have in place internal procedures in order to: i) ensure that, where the MSR designates a specific person or a contact point to receive market soundings, that information is made available to the DMP; ii) ensure that 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; iii) ensure that the individual(s), function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and properly trained to that purpose; iv) manage and control the flow of inside information arising from the market sounding within the MSR and its staff, in order for the MSR and its staff to comply with Articles 8 and 10 of MAR. This would be a significant one-off cost for the MSRs in relation to establishing and implementing the procedures, but also an ongoing cost in relation to the resources to be assigned to the task of assessing whether the MSR is in possession of inside information as a result of the market sounding. MSRs will also have to train their staff entrusted to process the information received as a result of the market sounding. This will involve differentiated training for the staff involved in receiving the market sounding approaches and for the staff being part of the function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding. The final guidelines highlight that also the training should be appropriate and proportionate to the scale, size and nature of MSR's business activity. The internal training would be primarily a small one-off cost for the MSRs. The guidelines will also require the MSRs to list the staff that are in possession of the information communicated in the course of the market soundings and identify all the issuers and financial instruments to which that inside information relates. This would be an ongoing cost

	for the MSRs, since the requirement will have to be fulfilled for each market sounding received. The final guidelines also require the MSR to keep records of: i) the internal procedures regarding the market soundings; ii) their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions; iii) the assessment as to whether the MSR is in possession of inside information as a result of the market sounding; iv) the assessment of all the issuers and related instruments; v) the persons working for them who have access to the information communicated in the course of the market soundings, listed in a chronological order for each market sounding. Record keeping requirements would contain one-off elements for the internal procedures and the wish to receive market soundings in relation to either all potential transactions or particular types of potential transactions, and ongoing elements for the other records that MSRs will have to keep upon reception of each new market sounding. Lastly, where the DMP has drawn up written minutes or notes of the unrecorded meetings or unrecorded telephone conversation the MSRs should, within five working days after receipt: i) sign those minutes or notes, where they agree upon their content or ii) provide the DMP with their own version of those minutes or notes, where the MSR does not agree upon their content. This should be a minor cost for MSRs, as the outlined regime envisages it in residual cases, in the absence of any recording and in case of disagreement between DMP and MSR.

Legitimate interests of the issuer for delaying public disclosure of inside information and situations in which delay of disclosure is likely to mislead the public.

Article 17(1) of Regulation (EU) No 596/2014 (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 of inside information to the public provided that: 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.

Article 17(11) of MAR requires ESMA to issue guidelines to establish a non-exhaustive indicative list of: i) legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information and ii) situations in which delay of disclosure is likely to mislead the public.

	Description
Benefits	The guidelines are aimed at providing clarity and enhancing legal certainty by defining a list of legitimate interests of issuers for delaying public disclosure of inside information and situations in which delay of disclosure is likely to mislead the public. Although such lists should not be considered exhaustive and are meant to be indicative, they should assist the issuers in conducting their assessment as to whether they meet the conditions to delay inside information according to MAR. This should contribute to reduce the number of controversial cases of delay in the disclosure of inside information. Overall, the main benefit arising from the guidelines would be a clearer and more uniform application of the provisions on delay of disclosure of inside information in the European Union and therefore enhanced market integrity.
Compliance costs *- One-off* *- On-going*	It should be noted that the costs for issuers arising from the public disclosure regime arise from the level 1 and level 2 provisions. The guidelines will not burden the issuers with any additional costs, as they do not set forth any additional requirement for the issuers.

ANNEX III – Opinion of the Securities and Markets Stakeholder Group

Response to ESMA's Consultation Paper on Draft Guidelines on the Market Abuse Regulation.

I. Executive summary

The objective of this paper is provide advice to ESMA on the Consultation Paper on Draft Guidelines on the Market Abuse Regulation.

The SMSG commends ESMA for its ongoing commitment to establishing the single rulebook on market abuse (which is of particular importance given the Capital Markets Union agenda) and welcomes the consistent harmonisation of requirements applying to market soundings under the Market Abuse Regulation as this is a new element of the market abuse regime and its scope is uncertain. In this respect, the SMSGs agrees with most of the proposed guidelines and only recommends to clarify some aspects of the new regime.

The SMSG also uses the opportunity to comment on the indicative list of legitimate interests of issuers which are likely to be prejudiced by immediate disclosure of inside information.

The SMSG welcomes ESMA's understanding of the indicative list being non-exhaustive and considers various examples of possible legitimate interests, including the legitimate interests of issuers with a two-tiered board structure as provided for under draft guideline 1c.

However, the SMSG asks ESMA to review the wording of the conditions specified in guideline 1c (decisions taken or contracts entered into by an issuer with a two-tiered board structure) and points to relevant fundamental principles of company law in Member States whose issuers have a two-tiered board structure.

II. Background

1. On 2 July 2014, the EU Regulation on Market Abuse (MAR) entered into force. The MAR requires ESMA to issue guidelines addressed to persons receiving market soundings, on the legitimate interests of issuers which can justify a delay in the publication of inside information and on the situations in which the delay of disclosure is likely to mislead the public.

2. On 28 January 2016, ESMA published its Consultation Paper on draft guidelines on the Market Abuse Regulation (ESMA/2016/162 – "CP on Guidelines"). The CP is the follow-up of ESMA's Discussion Paper on ESMA's policy orientations and initial proposals for MAR implementing measures published on 14 November 2013 ("DP on MAR").

3. On 21 April 2014, the SMSG responded to ESMA's DP on the MAR (ESMA/2014/SMSG011). Furthermore, the SMSG provided advice to ESMA on 21

September 2015 regarding ESMA's future work on MAR Level 3-Measure (ESMA/2015/SMSG/025 – "PP on Level 3").

4. After having published its CPs, ESMA requested the SMSG's opinion on the proposed guidelines. The SMSG herewith gives advice to ESMA. In addition, the SMSG reiterates its opinion on the importance of having an easy access to the single rulebook on market abuse.

III. Comments

1. General comments on the importance to build a single rulebook on market abuse

5. The MAR establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation. The purpose of the MAR is to promote the integrity of financial markets in the Union and enhance investor protection and confidence in those markets, while ensuring uniform rules and clarifying key concepts. In order to ensure uniform conditions, the Commission (COM) is empowered to adopt implementing acts and ESMA is required to elaborate on the standards to be adopted by the COM. Furthermore, ESMA is required to issue guidelines regarding the interpretation of relevant aspects of the MAR. The MAR, the accompanying level 2-regualtions and level 3-measures will build a single rule book on market abuse in Europe.

6. The future single rulebook on market abuse will form a complex regime. This is mainly due to the fact that the MAR will be accompanied by a number of additional level 2-regulations. ESMA has proposed 11 RTS/ITS (which will likely be adopted by the COM as regulations) and provided technical advice to the COM regarding 5 topics (which will probably also be dealt with by separate regulations). The MAR and most of the level 2-instruments will contain a number of highly detailed provisions. Some topics, such as market soundings, disclosure of inside information and manager transactions, will be subject to different acts at level 2 and measures at level 3. It will therefore be challenging for market participants to apply the law, especially because many of them are not familiar with the process of capital market legislature in Europe.

7. The SMSG has already encouraged ESMA to establish an interactive single rulebook on its website (SMSG PP on Level 3 para. 6-8). It takes this opportunity to reiterate its recommendation that a comprehensive compendium of the level 1-text (MAR), COM's delegated acts and the corresponding RTS/ITS, as well as the related ESMA Guidelines and Q&As be provided. It would also be useful if the compendium included references to the increasingly important body of CJEU case law on the EU market abuse regime. The SMSG is convinced that such an online tool – similar in design to EBA's online 'single rulebook' - will be of great help for market participants who will be able to easily access the new level 1- and corresponding level 2-provisions and level 3-measures. As already stated in the SMSGs' Position Paper, ESMA should, however, also make clear that the single rulebook on market abuse does not encompass the powers of the NCAs and sanctions provided by administrative and criminal law which continue to be subject to national laws.

2. Market soundings

8. Market soundings are interactions between a seller of financial instruments and one or more potential investors prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring (Art. 11 (1) MAR). The MAR acknowledges that market soundings are important for the proper functioning of financial markets and should not in themselves be regarded as market abuse. Provided that a 'disclosing market participant' (DMP) complies with the requirements laid down in the MAR, disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties and so in compliance with the MAR (Art. 11 (4) MAR).

9. In order to ensure consistent harmonisation, ESMA is to develop draft RTS/ITS to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in the MAR (Art. 11 (9) MAR). The draft RTS/ITS mainly deal with the requirements applying to disclosing market participants (DMP). In addition, ESMA must issue guidelines addressed to 'persons receiving the market sounding' (MSR) regarding certain aspects of the communication with a DMP (Art. 11 (11) MAR). ESMA's proposals for guidelines take into account the rules contained in the draft RTS/ITS on market soundings.

2.1. General remarks

10. ESMA has explained in depth the new market sounding regime in its Final Report on draft RTS/ITS (ESMA/2015/1455) and clarified a number of interpretational questions which arose in the course of the consultation process. The SMSG commends and welcomes this approach and wishes to highlight the importance of providing guidance to the market in this responsive way. ESMA's CP on draft guidelines takes this approach a step further and clarifies that the protection afforded by the market sounding regime of MAR is only available to DMPs as listed in Art. 11 (1) (a)-(d) MAR. Thus, brokers who receive inside information from an advisor during the course of a market sounding (and then, in turn, 'sound' their clients) will not be captured by the market sounding regime. The SMSG agrees with ESMA's view; however, it wishes to clarify that, in those cases in which Art. 11 MAR is not applicable, the disclosure of inside information might be made in the normal exercise of an employment, a profession or duties, as laid down in Art. 10 (1) MAR, and so in compliance with the MAR. ESMA could, accordingly, reinforce this point in its guidelines. Another important issue ESMA could deal with is whether a fund manager (MSR) may disclose inside information received by a DMP in the course of a market sounding to his investor.

2.2. Specific remarks

11. The SMSG agrees with most of the proposed guidelines and only recommends that some aspects be clarified.

2.2.1 Guideline 3 (MSR's assessment as to whether they are in possession of inside information)

12. The proposed guideline 3 No. 2 states: "While taking into account the DMP's notification that the information disclosed 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 them …"

13. The SMSG agrees with the proposed guideline. The MSR needs to make an independent assessment whenever the DMP comes to the conclusion that the information disclosed is no longer inside information. This follows from Art. 11 (6) MAR. To make an independent assessment, it will be important for the MSR to learn from the DMP why the information ceases to be inside information according to the DMP's assessment.

2.2.2 Guideline 4 (Discrepancies of opinion between DMP and MSR)

14. The proposed guideline deals with the situation where, on one hand, the DMP takes the view that no inside information is disclosed, whereas the MSR, on the other hand, is of the opinion that the information received does constitute inside information. The SMSG asks ESMA to consider the reverse situation where the DMP reaches an assessment that the information has to be considered as inside information, whilst the MSR disagrees with this interpretation.

15. The draft guideline 4 stipulates certain obligations for a MSR, provided that the MSR receives the DMP's notification informing it that the information communicated in the course of the market sounding ceased to be inside information and the MSR disagrees with the DMP's conclusion. The SMSG wishes to clarify that this only applies if the information ceases to be inside information according to the DMP's assessment.

2.2.3 Guideline 6 (list of MSR's staff that are in possession of the information)

16. According to ESMA's draft guideline 6, MSRs should draw up a list of the persons working for them that are in possession of the information communicated in the course of the market soundings.

17. The SMSG observes there could be some ambiguity as to how "persons working for them" is to be interpreted and therefore seeks further clarification. Would only own employees, i.e. staff, and possibly directors, be covered or also advisors, consultants etc. that are contracted and thus 'working for' the MSR (and who have access to this information) and hence come within the MSR's information storage and reporting responsibility? Annex II (page 33) only mentions "staff", so some additional clarification may be needed so that whoever is in possession of such information (employed or not) and who has received it by way of working for the MSR should be covered.

2.2.4 Guideline 7 (assessment of related financial instruments)

18. Guideline 7 provides that where the MSR has assessed they are in possession of inside information as a result of a market sounding, the MSR should identify all the issuers and financial instruments to which that inside information relates.

19. The SMSG takes the view that the scope of the guideline is unclear. Should the MSR only assess instruments it is involved with?

2.2.5 Guideline 8 (written minutes or notes)

20. The SMSG asks whether the own version of the minutes may be signed electronically.

3. Disclosure of inside information

21. Article 17(4) MAR provides an exemption from the obligation to disclose inside information immediately, stating that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that certain conditions are met:

    (a) immediate disclosure of the information is likely to prejudice the legitimate interests of the issuer or the emission allowance market participant;

    (b) the delay of disclosure is not likely to mislead the public; and

    (c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

    An issuer is required to satisfy all three requirements before being able to rely on the exemption contained in Article 17(4) MAR.

22. In the CP on draft guidelines, ESMA established a non-exhaustive and indicative list of legitimate interests of the issuers which are likely to be prejudiced by immediate disclosure of inside information, as well as situations in which delay of disclosure is likely to mislead the public. In doing so, ESMA has sought to meet its mandate under Article 17(11) MAR. ESMA has taken into account the comments received in the course of a public consultation conducted as part of the DP published in November 2013. Furthermore, ESMA has considered the recommendations the SMSG has submitted to ESMA in its Position Paper on the future level 3-regime.

3.1 General remarks

23. The SMSG agrees generally with ESMA's approach specifying legitimate interests of the issuer as a requirement for the delay of the disclosure of inside information. In particular, the SMSG welcomes ESMA's understanding of the indicative list of legitimate interests as being non exhaustive (CP draft guidelines para. 66 and 69). This reflects the legislature's intention (cf. recital 50: "following non-exhaustive circumstances").

24. ESMA is of the opinion that the possibility to delay the disclosure of inside information "represents the exception to the general rule" and "therefore should be narrowly interpreted (CP on draft guidelines para. 69). However, to understand the importance of the right to delay it is important to take into account the legislative history and the context in which the definition of "inside information" has been developed. The CJEU has defined the term "inside information" for the purposes of insider trading law rather than market efficiency. Particular emphasis therefore has been placed by the ECJ on the regulatory aims and purposes of the insider trading law prohibitions, rather than considerations of market efficiency. As a consequence, the CJEU has stated that an "intermediate step" in a protracted process can be considered inside information (see *Geltl* case). Article 7(3) MAR codifies the CJEU's approach and adopts a definition of "inside information" which reflects the Court's opinion in the *Geltl* case. Under this approach, the concept of "inside information" is a very broad concept, which in the view of the SMSG is justified when considered from the perspective of prohibiting insider trading law. However, applying this concept – in the same form – in the disclosure context is difficult, since the concept was not designed for the regulatory purpose of ensuring that issuers comply with their disclosure obligations. In consequence, the possibility to delay disclosure of inside information has played a key role in practice since the *Geltl* case. Moreover, a general consensus has emerged that the right to delay disclosure of inside information is no longer to be interpreted in a narrow way (which is acknowledged by the NCAs, courts and also in literature).

25. The provisions of the MAR about the disclosure of inside information reflect this understanding. According to Art. 17(4) MAR, in the case of a protracted process that occurs in stages an issuer may delay the public disclosure of inside information relating to this process (provided that the requirements for a delay are met). This new paragraph on "intermediate steps" recognises that delay is of particular importance where the inside information is still only an intermediate step in an ongoing process. It also explains why the right to delay is "no longer" seen as narrow (because it has been expanded to include situations where the inside information is only an intermediate step and not yet final).

3.2. Legitimate interests of the issuer for a delay of the disclosure

3.2.1 Guideline 1 a) (issuer is conducting negotiations)

26. According to ESMA's CP, the following circumstances could constitute a legitimate interest: "the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardized by immediate public disclosure of that information".

27. This circumstance is already mentioned in recital 50 MAR. The SMSG therefore agrees to include it in the indicative list of legitimate interests. However, we are concerned that ESMA prefers a different wording. According to recital 50 MAR, such circumstances may be "ongoing negotiations, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure." The SMSG recommends to adopt the example of a possible legitimate interest one-to-one. It is concerned that ESMA's guideline could be understood as limiting the right to delay of

the disclosure against the legislature's intention and contrary to the current approach to delay and market needs considered in section 3.1 above.

3.2.2 Guideline 1 b) (issuer is in grave and imminent danger)

28. According to ESMA's CP, the following circumstances could also constitute a legitimate interest: "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, jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer".

29. Again, this circumstance is already mentioned in recital 50 MAR. ESMA's drafted guidelines slightly differ from the wording in recital 50 MAR. The SMSG agrees with ESMA's proposal which may be somewhat more generic but reflects the intention of the level 1-legislator. However, given the sensitivity of this issue, it might be wiser to stick to the wording in the recital.

3.2.3 Guideline 1 c) (decisions taken or contracts entered into by an issuer with a two-tiered board structure)

30. A further example of a possible legitimate interest refers to issuers with a two-tiered board structure. ESMA describes the situation in which a delay might be justified as follows: "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, other than the shareholders' general assembly, of the issuer in order to become effective."

31. According to ESMA's draft guidelines, a delay is permissible provided that all of the following conditions are met:

    (i) immediate public disclosure of that information before such a definitive approval would jeopardise the correct assessment of the information by the public;

    (ii) an announcement explaining that such approval is still pending would jeopardise the freedom of decision of the other body;

    (iii) the issuer arranged for the decision of the body responsible for such approval to be made, possibly, within the same day; and

    (iv) 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."

32. There are two reasons why the SMSG asks ESMA to reconsider this guideline. First, the SMSG is concerned that the proposed guideline might not reflect the legislators' intention. The requirements for a delay due to this reason are described in recital 50 as follows: "provided that public disclosure of the information before such approval, together

with the simultaneous announcement that the approval remains pending, would jeopardise the correct assessment of the information by the public." Thus, the legislators apply only one condition for delay: that an announcement made before approval has been obtained would jeopardise the correct assessment. Further conditions for a delay are not mentioned in recital 50. Thus, the SMSG takes the view that ESMA does not have the competence to limit the issuers' right to delay.

33. Second, the third and fourth condition do not reflect fundamental principles of company law in Member States whose issuers have a two-tiered board structure. The supervisory body in a two-tiered issuer is a legally independent body, which operates separately from the management board. The supervisory body reflects the interests of various shareholders and stakeholders (in particular in companies which are subject to co-determination). However, neither shareholders nor stakeholders (employees or trade unions) have the right to give instructions to the members of the supervisory body. These are obliged to act in the best interests of the company. It is not possible to draw conclusions about a supervisory body's approach based on past conduct and prior instances of approval (as currently presumed under the fourth criterion above), as the supervisory body is mandated under national company law to consider each decision (even those decisions giving rise to similar issues or circumstances) anew and in light of the wider, constituent interests –including non-shareholder interests – the supervisory body represents. We therefore believe that the fourth criterion ought to be abolished.

34. With respect to the third prerequisite, there are several difficulties with applying this prerequisite in practice. The condition, as presently worded, does not take into account the fact that disclosure obligations may arise daily in a protracted process and thus the question arises whether the issuer may delay disclosure or not. The condition is thus difficult to implement, as the supervisory board cannot be consulted on an every-day basis each time there is an "intermediate step" which constitutes inside information.

35. The SMSG agrees with ESMA that no possibility of delay should be granted where the issuer does not arrange for a decision to be adopted by the supervisory board. However, there are strong reasons not to prescribe a certain time period within which the issuer has to arrange for the decision of the supervisory body. ESMA should confine its guidelines to the first two conditions and additionally make clear that the delay be as short as possible.

3.2.4 Guideline 1 d) (issuer has developed a product/invention)

36. A further case where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests is described as follows: "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."

37. This example was already mentioned in the CESR second set of Guidance. The SMSG agrees with the inclusion in the indicative list of legitimate reasons. However, for the sake of consistency, the SMSG recommends to formulate the guideline in the same way as guideline 1.a) and 1.e) ("would likely be jeopardised" instead of "is likely to jeopardise").

The SMSG further suggests to include services as they are also economic commodities and the issuer may have the need to protect its rights when developing a new service.

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

38. In its Position Paper, the SMSG recommended to interpret the requirement "not misleading the public" in accordance with former CESR guidance (Level 3 – second set of CESR guidance, CESR/06-562b) and current guidance by NCAs. ESMA has taken this into account and proposed draft guidelines which provide three situations where the delay of disclosure of inside information is likely to mislead the public.

39. The SMSG welcomes ESMA's new approach. However, further clarification might be necessary as the concept of "market expectation" is rather vague. The SMSG recommends a two-step test: ESMA's guidelines should require that (i) the issuer has made statements that go contrary to the new inside information, and (ii) this prior information from the issuer is deemed to have affected the market's expectations and impacted on price formation, i.e. has been noticed or is otherwise of a character that reasonable investors would pay attention to. Thus, not any and all 'statements/indications' from the issuer would necessarily be seen as relevant as an obstacle to delay, e.g. if they were made to a small constituency or were very vague.

The advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

ANNEX IV – Feedback on the CP

Guidelines for persons receiving market soundings

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

1. ESMA received thirty-one responses to this question. There were mixed interpretations about whether the assessment in question is an assessment by the MSR specifically of the information disclosed by the DMP, or an assessment by the MSR of whether it is possession of inside information after the sounding (i.e. combining the information received with other information available). Six respondents answered with the understanding that the assessment is focused specifically on the information communicated by the DMP whereas twelve respondents agree with the proposals; half of them caveat their agreement with a suggestion/request for clarification.

2. Six respondents are of the view that it is only beneficial for the MSR to conduct an assessment when the DMP has classified the information as not inside. They argue that accepting a DMP's assessment of "inside information" would by default result in conservative treatment of the information and therefore, there is no added benefit of conducting another assessment (and no risk of inside information not being controlled). Instead, they are of the view that there is a risk that the MSR wrongly re-classifies inside information as not inside information. On the other hand, there is clear benefit to the MSR conducting an assessment where the DMP has categorised the information as not inside, as this reflects that the MSR may have additional information that when combined equals inside information. In this case an assessment mitigates the risk that inside information may not be controlled properly.

3. Five respondents think that the DMP is in a better position than the MSR to assess the nature of information.

4. Two respondents believe it would be more proportionate for the MSR to be able to state that they agree with the DMP's assessment.

5. Four others think that an assessment should only be required when the MSR disagrees with the DMP's categorisation.

6. Five respondents requested clarification regarding the information available to the MSR:

    a) suggesting that this should reference information available to the employees tasked with receiving soundings;

    b) asking to clarify whether MSRs should be required to consider information sitting behind a "Chinese Wall";

c) asking to clarify the meaning of “available” as there may be information in the public domain which could be available but is not in the MSR’s possession.

ESMA’s response:

7. ESMA would like to stress that the obligation for the MSR to assess for itself whether or not it is in possession of inside information (or when it ceases to be in possession of inside information) as a result of the market soundings stems from Article 11(7) of MAR. Therefore, any proposed approach whereby the MSR could skip its active assessment passively relying on the DMP’s assessment should not be considered compliant with the MAR requirements.

8. With regard to the subject of the assessment, ESMA has been mandated to issue guidelines on the factors that MSRs are to take into account when information is disclosed to them as part of a market sounding, «*in order for them to assess whether the information amounts to inside information*». In the guidelines, ESMA highlighted as factors to be considered by the MSR the DMP’s assessment and all the information available to the individual(s), function or body entrusted within the MSR to conduct that assessment, including information obtained from sources other than the DMP.

9. This approach, which derives directly from Article 11 of MAR, takes into account the possibility that in the course of the sounding the MSR obtain non-inside information, and that information may amount to inside information once combined with some other pieces of non-inside information the MSR may be already in possession of.

10. Further to the responses to the CP, in the final guidelines ESMA included the recommendation that the individual(s), function or body entrusted within the MSR to conduct that assessment should consider all the information available to them, but should not be required to access information sitting behind a “Information barrier” established within the MSR’s organisation.

11. Given that one of the main purposes of the market sounding regime is to ensure that the inside information is treated as such, a thorough consideration of all the information available to the individual(s), function or body entrusted within the MSR to conduct that assessment is far more important where the information disclosed by the DMP is not inside information *per se*. On the contrary, where it is inside information *per se*, the MSR will have to consider it as such irrespective of the other possible pieces of inside information it may well be already in possession of.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

12. ESMA received thirty responses to this question. Twenty disagreed with the proposal, on the following grounds:

a) the process is too complex and burdensome, with too many potential scenarios resulting in either action or inaction for the MSR.

b) each party should take responsibility for their own assessment pointing to the fact that they have independent obligations under Article 11 of MAR.

c) a notification to the DMP of a discrepancy of opinion will have no consequence in practice as there is no follow up requirement for the DMP to take it on board, while another noted that changing the assessment of the DMP is not the responsibility of the MSR. Another also noted that there would be no requirement for the DMP to inform other MSRs who had already been sounded of the change in status of the information.

d) there would be a risk of inadvertent disclosure as further discussion could result in greater information exchange. Such conversations should not be encouraged.

e) the MSR should follow the DMP's categorisation of the information. Where the DMP classifies the information as not inside information and the MSR disagrees, "*the position is probably grey as we are assuming both parties are doing their job with professionalism. Therefore, no opinion should prevail and the communication of discrepancy does not help anyone – it just creates potential legal liability and lots of practical issues*".

13. Nine respondents agree with ESMA's proposal, with one considering though that the situation is theoretical as MSRs would not risk disregarding the DMP. One agreed on the premise that it is simply a notification of disagreement and no requirement to provide further analysis or explanation. Another agreed in principle but thought a standalone requirement for the MSR to notify the DMP was onerous and that this should be incorporated in the record of the MSR's assessment.

14. The SMSG responded that the guidelines should also consider the situation where the DMP reaches an assessment that the information has to be considered as inside information whilst the MSR disagrees with this interpretation.

ESMA's response:

15. Taking into account the feedback on the CP and considering also the specific scope of the mandate under Article 17(11) of MAR, ESMA decided to no longer include in the guidelines any "liaison obligation" for the MSR in case of discrepancies of opinions with the assessment conducted by the DMP. Therefore, former point 4) in the draft guidelines proposed in the CP has been deleted.

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

16. ESMA received twenty-nine responses to this question. One respondent agreed with no further comment whereas fourteen respondents agreed on the basis that allowing flexibility regarding the procedures is important and on the condition that no more detail is added.

17. Six respondents commented on the language "*function or body*" in relation to training as follows:

- for smaller firms it will not always be possible to identify a single function or body (as below);
- no single function or department is able to single–handedly assess the information and this would be in coordination with the relevant (commercial) department where the sounding first arrived;
- the requirement to train should apply in relation to the employees within the function or body who are responsible for assessing the information and not to the entire department;
- the language used in the guidelines implies that a dedicated unit needs to be established and therefore there will not be enough flexibility for other organisational set-ups.

18. It was also suggested combining 5)1)a) and 5)1)c) as they are very similar – both requiring the firm to control the flow of the inside information arising from the sounding.

19. One respondent put forward that for infrequent MSRs (e.g. a private equity investor) it would be very difficult to have meaningful pre-determined reporting lines. It would also be hard to identify the "function or body" as individuals involved will vary depending on the subject of the sounding (e.g. different deal teams for different markets/investments and corresponding lawyers.

20. Two respondents argued that the proposals are beyond scope of the mandate and that the requirements should only apply in relation to the receipt of inside information. One of these suggested also applying the requirements in relation to information classified as non-inside information which is pending confirmation through the MSR's assessment to be non-inside.

21. One respondent argues that training is no longer a requirement in the published RTS for DMPs and it is unbalanced and disproportionate to instead require training for MSRs

22. Two respondents noted that some MSRs will be unregulated entities who receive soundings infrequently and are of the view that the requirements would be too burdensome for such entities to comply with.

ESMA's response:

23. Taking into account the feedback on the CP, ESMA decided to introduce in the guidelines an explicit reference to a proportionality principle to both the internal procedures and the staff training. In fact, the final guidelines provide that both the internal procedures and the staff training should be appropriate and proportionate to the scale, size and nature of the MSR's business activity, therefore allowing some flexibility for smaller firms that most likely will not have the same level of organisational complexity of bigger firms.

24. Moreover, ESMA decided to add a reference to "individual(s)" entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding, no longer providing that only a "function or a body" may be entrusted with such task within the MSR. This is a consequence of the proportionality approach, and will involve that smaller firms can entrust one or more physical persons among their staff to conduct the assessment as to whether they are in possession of inside information as a result of the market sounding.

25. In the final guidelines, the reference to the recommendation to ensure that, where the MSR designates a specific person or a contact point to receive market soundings, that information is made available to the DMP, was moved into the internal procedure and staff training section.

26. With reference to the training on the internal procedures and on the prohibitions under Articles 8 and 10 of MAR, ESMA is of the view that this is part of the mandate as included in the "steps" that MSRs are to take if inside information has been disclosed to them in order to comply with the provisions contained in the two above articles (Article 11(11)(b) of MAR). Ensuring that proper training is effectively conducted will avoid the risk of having procedures only on paper, with limited or none practical application.

27. ESMA is of the view that all the MSR's staff receiving and processing the information obtained in the course of the market sounding should be involved in the training. Said that, the proportionality principle will allow for MSRs to organise training that is appropriate and proportionate to the scale, size and nature of their business activity.

28. Finally, even if the guidelines do not get into details as to allow some flexibility in the implementation, it is likely that the training of the individual(s), function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding will be different from the training of staff receiving and processing the information received by the DMP.

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

29. Out of the fifteen respondents disagreeing with the proposal, six are of the view that the proposed guidelines are beyond ESMA's mandate and four that the requirement should apply only to staff who are in possession of inside information as a result of soundings.

30. A couple of other respondents challenged the effectiveness of such a list. They argue that because there would be no contravention of Article 8 or 10 of MAR if such a list was not completely accurate/up to date, the lists would be open to error and NCAs could therefore not rely on them.

31. Other arguments against the proposal were that the requirement is unnecessary because:

    a) paragraph 5 of the guidelines (CP versions) already requires internal procedures to control the information. By meeting the requirements contained in paragraph 5, a MSR should always be able to reconstruct the flow of information and a list may indeed form part of some firms' internal controls but should not be prescribed to all.

    b) the MSR is required to characterize the information and then, if it is inside information, not to use or unlawfully disclose it; the internal procedures on how to comply with the MAR prohibitions should be left to the MSR to decide, depending on its size, nature and organisation.

32. Another respondent is of the view that the requirement would be too burdensome/is too prescriptive for MSR's that are non-regulated entities.

33. Most of the respondents who agreed with the proposal requested clarification on:

    a) what "*in possession of*" means in practice;

    b) the meaning of "*working for*"; one respondent being of the view that this should only capture employees of the MSR rather than advisors etc;

    c) the need to draw up a list if the individuals are already recorded on an insider list pursuant to Article 18 of MAR. On this matter, a respondent agreed with the proposal on the basis that the purpose is for record keeping only and not an extension of Article 18 of MAR.

34. Finally, one respondent agreed and requested that a record of the MSR's decision to designate a specific person or contact point to receive market soundings is made available to DMPs.

ESMA's response:

35. ESMA remains of the view that a list of the persons working for the MSRs that had access to the information communicated in the course of the market soundings is essential for competent authorities to conduct investigations on possible market abuse cases. The fact that the guidelines require a list which is not limited to inside information, but covers all the information communicated in the course of the market sounding, is also related to the fact that the list will have to be drafted as soon as the MSR accepts to receive the market sounding, possibly before the MSR has conducted its own assessment under Article 11(7) of MAR.

36. Moreover, with reference to possible overlapping between this guideline and the content of Article 18 of MAR, it should be borne in mind that the two provisions do not share the same scope. In the context of a market sounding, MSRs, as potential investors, may not be the issuer to which the market sounding relates and or persons acting on the issuer's behalf or account. Therefore, MSRs will not be subject to the insider list provisions.

37. If on the one hand for small entities it may be somehow burdensome to draw up the required list, on the other hand it will allow MSRs to demonstrate compliance with the prohibitions on inside information and fostering the competent authorities' ability to reconstruct the information flow in the course of a possible investigation.

38. In the final guidelines this requirement was moved to the record keeping section.

39. Taking into account the feedback received to the CP, in the final guidelines ESMA has further specified the scope of this requirement and added that a time reference is needed.

40. The final guidelines make now reference to a record keeping obligation, for a period of at least five years of the «*persons working for*» the MSR «*under a contract of employment or otherwise performing tasks through which they have access to the information communicated in the course of the market soundings, listed in a chronological order for each market sounding*».

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

41. ESMA received thirty-three responses to this question. Most of the respondents welcome the revised approach of removing the requirement indicated in paragraph 115 of the DP ("*The buy side should ensure that any follow-up calls to the sell side following a sounding approach which didn't result in a wall-crossing should be conducted on company recorded mobile and land lines*") and, more generally, of not imposing on MSRs any requirement for the recording of telephone calls.

42. Among the reasons therefor, the fact that the DMP is already subject to recording obligations under the RTS on market soundings, and that the MSR will always have the possibility of recording the call, whenever the DMP agrees.

43. Some respondents asked to introduce further recording requirements for the DMP. It was suggested that "*any communications with the DMP should be made to a telephone line that is subject to recording by the DMP, and that the DMP should make this telephone number available to the MSR*". Another rather similar suggestion was to specify that the MSR should, however, only be able to communicate on a recorded telephone line with the DMP if he wishes to do so, and was complemented with the proposal to clarify in the technical standards on market soundings that "*the DMP, when establishing procedures for conducting market soundings by telephone (see Art. 2 para. 2 of the draft RTS), is obliged to make the number for the recorded telephone line available to each MSR"*.

44. Finally, one respondent emphasised that no call can take place if the MSR does not consent.

45. On the opposite side, just one respondent challenges the revised approach as, while recording technology is very reliable, it is not perfect. It highlights that requiring two parties to record a conversation ensures that at least one recording of the market sounding will exist. In addition, the respondent proposes to introduce requirements on the quality of the recording (it should be audible) and the requirement of transcribing conversations, even through electronic means, allowing to electronically find transcriptions by a search function.

ESMA's response:

46. ESMA acknowledges a broad support to the revised approach and therefore the final guidelines keep the approach of no longer imposing on MSRs any requirement for the recording of telephone calls, as such obligations already fall on the DMPs under the RTS on market sounding.

47. ESMA would like to highlight that the guidelines are not preventing the MSR to record the telephone calls on their own initiative, notably for commercial purposes, provided that the DMP has given in advance its consent to the recording.

48. With reference to the suggestions to impose additional obligations to the DMPs, ESMA would like to remind that it was mandated to address in these guidelines MSRs only.

49. Finally, ESMA confirms that even if not specified in the guidelines, according to what provided for in the RTS on market soundings, the DMP may record the telephone call only once the MSR has given their explicit consent.

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

50. ESMA received twenty-eight responses to this question. Eleven respondents (but only six in full) agreed with ESMA and welcomed the relevance given to the own assessment made by the MSR, as opposed to that of the DMP.

51. On the other hand, the seventeen respondents who disagreed and the five who partially agreed pointed out that ESMA's proposal lacks a rationale, is unduly burdensome, difficult to implement, not proportional, and intrinsically related to problems already shown in responding to Question 2.

52. They pointed out that DMPs and MSRs are typically prepared to solve possible disputes between themselves. Therefore, ESMA should limit its guidelines to general principles requiring that: a) an agreement between DMPs and MSRs should be reached and materialized by all means; and b) DMPs and MSRs should have in place procedures to deal with disagreement cases.

53. Some respondents warned ESMA about the lack of empowerment to impose record keeping requirements to MSRs.

54. Other respondents questioned the need of signing the minutes, especially in the event of agreement. Some respondents say that a formal signature would prove complicated and propose that (e)mail in return could be acceptable as a signature. One suggests adding in point 8 of the guidelines (CP drafting) a new point c) "passively accept the version of the meeting as recorded by the DMP by not responding to the minutes or note that they provide, within five working days".

55. A few respondents questioned the rationale of the requirement of drawing up own versions, since NCAs do not benefit from having two different versions.

56. Several respondents suggested alternative proposals according to which it should be sufficient that:

    a) the MSR keeps its own record that, in the event of investigation, could be provided for consideration;

    b) the MSR adds in the margins of the DMP's minutes, or in an annex, those parts where the MSR disagrees and the DMP signs below if it agrees on the amendments proposed by the MSR;

    c) the MSR sends as soon as possible an email to the DMP;

    d) the MSR has procedures to deal with disagreement.

57. SMSG asked whether the MSR's own version of the minutes may be signed electronically.

58. One respondent questioned the five-day deadline while another noticed that Article 6(3) of the RTS on market soundings establishes that DMP and MSR have five working days to reach an agreement but the guidelines provides no time limit by which the DMP must provide its version to the MSR. If the MSR does not receive the DMPs version until the fifth working day after the sounding, and does not agree with it, the MSR may find that it cannot comply with this obligation.

ESMA's response:

59. ESMA is of the view that, in practice, most market soundings will be conducted through recorded telephone lines. However, in the remaining cases, it is of the utmost importance for the competent authorities to have legal certainty as to the content of the information conveyed in the course of the sounding. In order to achieve that goal and in the absence of a recording, the best solution is represented by written minutes or notes signed by both the DMP and the MSR. However, where the DMP and the MSR disagree on the content of the information conveyed during the sounding, the only approach that will guarantee the competent authority the possibility to investigate a possible market abuse case will be that where the DMP has to keep record of both his own and the MSR's version on the minutes or notes.

60. In order to achieve that purpose, the RTS on market soundings focuses on the DMP's obligations, the guidelines on the MSR's.

61. ESMA is of the view that a written signature is the most effective means to legally prove agreement between two parties. However, nothing prevents the MSR from signing the DMP's minutes or notes and sending it to the DMP in an electronic format. ESMA acknowledges that also an electronic signature would serve the purpose in that respect.

62. With reference to the timing for the MSR to provide the DMP with its own version of the written minutes or notes, taking into account the feedback received ESMA amended the relevant paragraph of the final guidelines to make it workable. Where the MSR disagrees with the DMP as to the content of the written minutes or notes, the final guidelines require the MSR to provide the DMP with their own version duly signed «*within five working days after receipt of the minutes or notes drawn up by the DMP*».

63. Similarly, where the MSR agrees on the content of the minutes or notes drawn up by the DMP, it should sign those minutes or notes and return them to the DMP.

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

64. In general, many respondents stressed the difficulty of providing elements of compliance costs. Some considered that the on-going costs are far more significant than the initial implementation costs. Others spotted the following general cost drivers:

a) IT development, implementation, operation and maintenance of systems to handle soundings; ongoing monitoring and assessment;

b) establishing a new organizational function to handle soundings;

c) resources to monitor and document the sounding activity;

d) establishing internal procedures and staff training;

e) record keeping; the requirement to keep records according to point 9 of the guidelines (CP version) will trigger storage costs and costs for setting up specific internal processes;

f) recording systems for telephone calls; search engines for the recorded data.

65. A few quantitative estimates have been provided by few respondents:

- "the cost estimated for the telephone call recording is of 1,2MM€ for the first year, considering only the software for fixed telephones regarding employees who could be able to deal with market soundings and without taking into account the additional search engines that will be needed".

- many providers of telephony technology provide their services for very reasonable costs. Depending on what functions a client desires, our experience suggests that the services offered range from $50/user/month to $200/user/month".

- "if insider lists are to be maintained for all staff in relation to market soundings on an accurate and timely basis, this will require the implementation of significant new systems infrastructure which could, on a rough estimate, cost some €375,000".

66. Some qualitative comments were specifically related to point 5 (internal procedures and staff training), point 7 (assessment of related financial instruments) and point 8 (written minutes) of the guidelines proposed in the CP.

a) On point 5 of the guidelines one respondent warned on the cost of introducing a separate function or body, independent of the fund managers and analysts, responsible for assessing whether the firm might be in possession of, or in receipt of inside information, taking into consideration all the related information available to the firm.

b) On point 7 of the guidelines, another respondent highlighted the costs due to the assessment of all the financial instruments and issuers to which the inside information relates and suggests that it would result more efficient if the assessment is provided by the DMP.

c) On point 8 of the guidelines one respondent said that it would require MSRs to spend considerable time and internal staff resources as well as incur significant additional costs to engage external legal counsel in order to obtain comfort that their position is correct and thereby seek to avoid liability.

67. Finally, several respondents emphasised the risk that the market sounding regime will be abandoned by the industry due to the high compliance costs. In particular, one respondent notices that asset management firms do not directly benefit from taking part in the market sounding process.

68. SMSG did not respond to this question.

ESMA's response:

69. ESMA welcomes all the contributions to determine any possible elements of compliance cost arising from these guidelines, and took the suggestions into account in the final version of the guidelines.

70. In a view of regulating the market sounding regime limiting at the same time the compliance costs for MSRs, ESMA has introduced in the guidelines an explicit reference to a proportionality principle. In fact, ESMA recognises that the internal procedures referred to in the guidelines should be appropriate and proportionate to the scale, size and nature of their business activity, and added to the guidelines a reference in that respect

71. The compliance cost for MSRs arising from the obligation proposed in the DP to record the telephone calls with the DMPs was one of the drivers that led ESMA to drop that point in the final guidelines.

Guidelines on legitimate interests of the issuer for delaying public disclosure of inside information and situations in which delay of disclosure is likely to mislead the public.

Q8: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

72. ESMA received thirty-one responses to this question. Ten of these agree with the proposal that the guidelines should be a non-exhaustive indicative list whereby if the issuer finds itself in one of the situations in the list, this does not automatically entail there is a legitimate interest to delay disclosure.

73. Six of these respondents added that firms should justify on every occasion why the examples apply to them given that inside information always contradicts market expectations.

74. Some of these respondents said that ESMA should, as an introduction, note that Article 17(1) of MAR requires issuers of a financial instrument to publicly disclose as soon as possible inside information in a manner which enables fast access and complete, correct and timely assessment of the information by the public.

75. The guidelines need to specify even further that it is a case by case assessment of whether delayed disclosure can take place.

76. Only one respondent considers the list should be exhaustive. They are concerned with any proposal that facilitate the delay in disclosure of inside information. From their perspective, it is conceivable that delaying disclosure may endanger uncertainty and create instability.

77. Several respondents also expressed concerns that the proposal could have serious negative consequences for issuers and could, if it is narrowly interpreted, restrict the right to delay the disclosure of inside information. They disagree with the possibility that delaying disclosure represents the exception to the general rule where disclosure has to be made as soon as possible.

78. Two of these respondents indicated that recent ECJ decisions on “Geltl./.Daimler” and “Lafonta” led issuers to assume that preliminary information, including intermediate steps in a protracted process, may constitute inside information at a very early stage and could therefore trigger the need for disclosure. Therefore, it is key for issuers that they are able to rely on the legal possibility to delay the disclosure of inside information in order to ensure that their interests are not prejudiced by premature disclosure.

79. Five separate respondents said it is important that further guidance is provided for situations where inside information concerns a process which occurs in stages and that each stage of a process as well as the overall process could constitute inside information.

80. Several of these respondents considered the restrictive wording of the guidelines is not in line with the elements set out in Recital 50 of MAR, which narrows the right to delay disclosure if the proposal is taken literally.

81. Two respondents also recommended ESMA to review the wording and ensure the terms used are consistent such as “likely to be jeopardised”, “would jeopardise” and “jeopardising” which would otherwise lead to different interpretations and thus be misleading.

Conducting negotiations - Point 1(a)

82. A few respondents to this example consider mergers and acquisitions should be explicitly included. Some suggested that ongoing negotiations should also be included irrespective of the fact that the outcome of the negotiations are “jeopardised” or the conclusion is “likely to fail”. They consider that the use of the word jeopardise is too restrictive and is setting a higher standard than MAR. The wording should be drafted in light of Recital 50 of MAR where the fact that premature publication could affect the “normal pattern” of negotiations is sufficient.

Financial viability of the issuer – Point 1(b)

83. Five responses to this example support ESMA by suggesting an example of this would be the liquidity supply or short funding of the issuer is in grave and imminent danger.

84. Other respondents however consider Recital 50 of MAR provides a lower threshold than the proposed guidelines and consider ESMA is acting beyond its mandate. In their view, it is sufficient that such negotiations were negatively impacted and hence, a successful conclusion becomes more difficult whereas in the draft guidelines, the issuer would have to expect that public disclosure would result in failure of the discussions.

85. The proposed guidelines would also compel issuers to give greater weight to public disclosure than maintaining its financial viability. Taking into account the interests of the issuer itself, but also its shareholders, creditors as well as its employees and business counterparties, this is disproportionate and also damaging not only the interests of the issuer's stakeholder but potentially also the general public when the potential economic side effects of the issuer's failure becoming more likely is considered just because of the disclosure of its financial difficulties before they could be rectified.

86. One respondent suggests replacing "jeopardising" with "by adversely affecting".

Two-tier companies – Point 1(c)

87. All the respondents to this example raised concerns with the proposed drafting.

88. Meeting all the four conditions would be excessive, and respondents are concerned it would not make the delay of disclosure possible resulting in the delay becoming an exception rather than a rule. They consider the proposal undermines the two-tier corporate governance system composed of a management board and a supervisory body. The ability to postpone the immediate disclosure of inside information should be regarded as a necessary corrective designed for the boards to accomplish their tasks effectively and to protect the legitimate interests of the issuer. A narrow interpretation would fail to offer the issuer an adequate level of protection.

89. From the German respondents' perspective, maintaining the current approach currently in place in Germany is consistent with BaFin Issuer Guidelines and the well-proven practice approach should be maintained to avoid potentially misleading communication in cases an approval is still pending.

90. The legislator was fully aware of the problem in two-tier-systems which is reflected in Recital 50 of MAR which explicitly mentions that pending approval of the second body as a general rule constitutes "legitimate interest" on a non-exhaustive list in order to avoid organizational difficulties.

91. Several respondents proposed drafting changes and below is the summary of the points raised by respondents for each example:

i. four respondents said that the publication of a decision by the management body while the approval of the supervisory body is still pending would give the wrong impression that the decision has been already taken while it is not yet effective under corporate law. Another respondent said following the current drafting may create expectations which are subsequently not met as a result of a later decision (by the supervisory body). They also see a "danger" as such a requirement to disclose information prematurely may restrict the ability of the issuer's decision makers to properly conclude their decision making process. One respondent suggests removing this condition;

ii. three respondents said the proposal would hinder the freedom of the supervisory body would almost be jeopardised, as a refusal would almost certainly cause damage to the issuer and lead to unnecessary volatility in the issuer's share price as the market would receive contradictory signals;

iii. seven respondents consider the drafting is too restrictive and would be impractical. Five respondents cannot see how the other body could approve on the same day the decision and they consider such requirement would seem to contradict the general objective to permit delayed disclosure and would not be realistic. Three respondents said it will nearly be impossible to invite members of the supervisory body at such short notice. These bodies usually have quite a diverse composition that reflects not only an issuer's often international shareholder structure but also employee representation (which is – at least in Germany required as a matter of law under the German co-determination principles). The same respondents, still referring to German practices, added that such rule would run counter good governance as the supervisory body may legitimately require more time to make an informed judgment effective supervision cannot be accomplished if decision making is expected within such a short period of time. Two of these respondents added that according to the corporate law, the OECD principles and codes of corporate governance, directors should receive appropriate information that is necessary to perform their duties with due care.

One respondent said that in the case of prolonged negotiations (for example a bid or merger), a number of small decisions may need to be taken during the course of the negotiations and it may not be possible to ensure that the ultimately responsible body is instantly informed by the lower body.

Another respondent raised another consequence of the current drafting would result in an incentive to delegate the relevant decision to a committee which could decide more quickly.

Several respondents therefore suggested changing "within the same day" either with "as soon as possible", "as soon as legally and practically possible" or "within three days";

iv. all the respondents who provided comments on these criteria are against them. The supervisory body is an independent corporate body whose decisions should be unaffected by earlier announcements. Two respondents consider the proposal contradicts the most basic rule of governance as there is no way to know before the meeting what will be the decision of the supervisory body. One of these respondents in

addition to another respondent indicate the drafting is too narrow and having two announcements, once by the management body and another one by the supervisory body, would lead to market "turbulence" as there could be contradictions between the announcements.

Another respondent said the expectation concerning the decision of the second body is not a suitable criterion as the management board will never pass a decision it knows will not meet the supervisory body's approval and cannot be an indication of future decision making.

One respondent said that due to the inability to predict future decisions of the supervisory body, this assumption with the current drafting places an unreasonable burden of proof on the issuer.

Another respondent said this condition effectively eliminates the possibility to delay the publication of inside information as it can only be complied with in situations where the management body will not present the decision to the supervisory board, but not in the normal day-to-day situations of protracted decision making processes.

Another respondent indicated this condition should instead refer to situations which are not "routine" rather than situations "which are not expected".

The above respondents therefore suggest changing the drafting to "a legitimate interest […] would exist, if the decision of the body responsible […] for such approval is reliably expected to be in line with the decision of the management body".

Finally, one respondent suggested clarifying whether and how this provision on the delay may apply to one-tier system too. The same respondent highlighted that also in one-tier system the CEO or executive directors can have the same powers the management body has in the two-tier system, i.e. taking a decision or defining all the detail of a contract, with the final decision to be taken by the board.

Development of a product or an invention – Point 1(d)

92. The responses highlighted that the word "jeopardise" is too stringent and goes against the term used in the existing CESR standards, therefore suggesting reverting to the terms used in CESR/06-562b section 2.8, i.e. "needs to protect its rights".

The issuer is planning to buy or sell a major holding in another entity – Point 1(e)

93. Several respondents indicate that from reading paragraph 86 of the explanatory text, the delay is only possible if the transaction is very likely to fail. Respondents said it is very difficult to predict the likelihood of the failure of the conclusion of a transaction.

94. The fact that the deal is very likely to fail in case of disclosure should not be considered as a final interpretation and a "mere probability" is sufficient criterion.

95. Another respondent writes they do not consider this example to be a legitimate interest. This should be instead a more general ability to delay disclosure of the planning stages of other kinds of transactions/corporate developments where negotiations may not have started. The same respondent also thinks the word “would jeopardise” is too strict and suggest using similar wording to 1(d) as an issuer will have to make judgement as to whether disclosure of information is likely to jeopardise the conclusion of a transaction without knowing what the reaction of other parties involved would be.

96. Other suggestions were using a wording similar to Recital 50 of MAR, i.e. “would be likely to be affected” instead of “likely to be jeopardised”.

A previously announced transaction is subject to a public authority’s approval – Point 1(f)

97. No respondents commented on the example.

Other issues: CEO’s resignation - Paragraph 63 of the explanatory text

98. Although not part of the non-exhaustive list, six respondents provided comments in relation to paragraph 63 of the explanatory text on the CEO’s resignation.

99. Four of these respondents consider that in certain cases CEO’s resignation may justify a delay in disclosure until a successor is appointed and such example should be included in the list. Three of these respondents said it would be legitimate to delay disclosure if the announcement of the appointment is imminent where the announcement of the successor can be made at the same time as the resignation. In their view this would however not apply if the company is without a CEO for some time. The other respondents suggest it would be legitimate to delay disclosure where, for example, the resignation is not with immediate effect to allow time to find a suitable replacement.

100. Six other respondents however agree with ESMA that a resignation of a CEO does not represent an example of legitimate interest to delay disclosure of inside information until the CEO´s successor has been appointed.

Other issues: verifying accounts / preparation of results - Paragraph 64 of the explanatory text

101. One respondent considers there might be circumstances where a short delay may be acceptable to clarify the situation of the accounts of a subsidiary.

102. Two respondents welcome the clarification that verification of accounts does not amount to legitimate interest to delay disclosure under Article 17(4) of MAR.

103. Another respondent however considered that further clarity is needed for the process of preparing results as this does not trigger the requirement to disclose inside information before the planned date of the publication of the results. The respondent considers it is important that the practice of issuers to publish results in accordance with a planned (and usually disclosed) timetable (except for when a profit warning is

required) and would like ESMA to clarify how it believes issuers should analyse the issue.

Other issues: **relationship between Article 17(4) and (5) of MAR**

104. Some respondents seek clarification on the timeframe to obtain clarification.

105. One respondent suggests the guidelines should contain a clarification in the application of Article 17(4) of MAR to credit institutions, in order to provide legal certainty as to what can be considered a "legitimate interest" for such firms. The respondent provides drafting and indicates the clarification is necessary because Article 17(5) of MAR serves a different purpose than Article 17(4) of MAR (see also Recitals 49 and 52 of MAR). The provisions should apply cumulatively and not alternatively.

OTHER ISSUES

106. One respondent said that it could be useful to include in the list also any kind of structural transactions (segregation of activity, general assignment of all the assets and liabilities, the international transfer of the address, etc.).

107. Another respondent would like the examples to be more detailed and other situations should be added (e.g. covenant breach, restructuring before an issue of the issuer's debt). Business plans should also be considered.

108. A respondent commented that the example on "*impending developments that could jeopardise premature disclosure*" (paragraph 69 of the CP) should be reinstated, at the very least as a statement of principle as its removal could cause issuers to assume that impending developments are incapable of constituting a legitimate interest justifying delayed disclosure.

109. The same respondent notes the commentary at paragraph 61(a) and agrees that this is effectively a sub-set of the proposed guideline 1(a) and considers it should be retained because it represents a helpful example of a situation which falls within that guideline.

110. The existing CESR Guidance contains a statement (in paragraph 2.7) that reads "*Issuers should consider the particular circumstances of their case when deciding whether they can delay disclosure*". The respondent believes that this guideline is helpful in that it emphasises the need to avoid a "*one size fits all*" approach. Its deletion would appear to discourage issuers and their advisers from making informed judgement calls on a case by case basis.

111. Finally, ESMA received a proposal to add to the list of legitimate interests the case where the issuer is a financial institution and the inside information relates to measures taken by a prudential supervisor, where the immediate public disclosure of the inside information is likely to prejudice the final implementation of such measures.

ESMA's response:

112. ESMA would like to remind that the regime for public disclosure of inside information is outlined in Article 17 of MAR. Article 17(11) of MAR requires ESMA only to establish a non-exhaustive indicative list of legitimate interests of the issuer to delay disclosure of inside information.

113. This means that there may be other cases where immediate disclosure of the information may be detrimental to the issuer. At the same time, it should be noted that the list is 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.

114. In drafting these guidelines ESMA took into account the examples contained in Recital 50 of MAR and in the CESR guidance. However, ESMA would like to remind that in fulfilling its mandate it found appropriate to go beyond the examples provided in Recital 50 of MAR and not to be bound by the wording therein used. ESMA is stressing that that in all cases the examples provided are indicative and there may be other cases of legitimate interest than the ones included in the guidelines.

115. With reference to the legitimate interest relating to ongoing negotiations and taking into account the feedback on the CP, ESMA decided to add some examples of negotiations in the guidelines text to include mergers, acquisitions, splits and spin-offs, purchases or disposals of major assets or branches of corporate activity, restructurings and reorganisations.

116. With reference to the cases where the financial viability of the issuer is in grave and imminent danger some respondents suggested that an example of this would be where the liquidity supply or short funding of the issuer is in grave and imminent danger. In this respect ESMA would like to highlight that the decision of not including a reference to the "long-term" financial recovery of the issuer (present in the examples given in Recital 50 of MAR) was indeed driven by the fact that also the "short-term" financial recovery of the issuer could be a possible legitimate interest.

117. With reference to two-tier system companies many respondents warned that it will be almost impossible for an issuer to meet all the four conditions at the same time. With particular reference to the condition included in point 1(c)(iv) of the drafting proposed in the CP, some respondents criticised that the management boards tend to pass decisions that they know will usually obtain the supervisory body's approval.

118. Taking into account the feedback received ESMA decided to delete the conditions laid down in points 1(c)(ii) and 1(c)(iv) of the drafting proposed in the CP.

119. In relation to the condition laid down in point 1(c)(i), ESMA is of the view that still remains a valid point to qualify a legitimate interest in relation to two-tier companies. In fact, where the correct assessment of the information by the public would not be jeopardised by a statement explaining that the management board has approved a deal

but the supervisory board's decision is still pending, then there should be no legitimate interest of the issuer to delay disclosure of such information. ESMA is of the view that an example of situation where the correct assessment of the information by the public would be jeopardised by immediate public disclosure may be the case where the management body has doubts as to whether the decision of the other body will be in line with its decision.

120. In relation to the condition laid down in points 1(c)(iii) of the guidelines proposed in the CP, taking into account the responses received, ESMA has decided to remove the reference to "*the same day*", now providing that the issuer should arrange for the decision of the body responsible for the definitive approval to be made "*as soon as possible*".

121. Finally, ESMA is of the view that it is not appropriate to extend the example relating to two-tier companies to one-tier companies. The two systems present substantial differences in the decisional process, one being characterised by two separated bodies required to take independent decisions, the other presenting a single body that may voluntarily delegate part of their decisional powers to another person.

122. With reference to the issuer planning to buy or sell a major holding in another entity, ESMA highlights that 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 a view of implementing the plan.

123. It should be reminded that, given that the list of legitimate interests is not meant to be exhaustive, there may be other examples of plans before the start of any negotiations that may constitute a legitimate interest of the issuer.

124. Taking into consideration some responses to the CP, in the final version of the guidelines ESMA decided to include the cases where the risk to the successful implementation of the plan is not proven but only likely.

125. It should be noted that the issuer should always be able to explain to the national competent authorities the reasons why the implementation of the plan is likely to fail with immediate disclosure of that information.

126. With reference to the case of the CEO's resignation from their post as an example of legitimate interest to delay the disclosure of inside information until their successor has been appointed, ESMA reiterates its view that this does not represent a case of legitimate interest to delay disclosure of inside information and therefore that information should be disclosed as soon as possible.

127. In relation to the possible legitimate interest where a delay would be needed in order for a parent company to check the accounting information received by the subsidiaries, ESMA is of the view that if the information as such is not precise (e.g. because the missing information from the subsidiary is significant) then there is no inside information at that point. Differently, if the information is precise enough to be considered inside

information, the time needed for the parent company to check the accounting information received by a subsidiary should not qualify as a legitimate reason to delay disclosure under Article 17(4) of MAR. The issuer will remain subject to the obligation laid down in Article 17(1) of MAR, where it is provided that issuers should inform the public «as soon as possible».

128. In relation to «*impending developments that could be jeopardised by premature disclosure*», ESMA kept its approach and did not include them in the list of legitimate interests, as it was deemed to be a too generic provision.

129. In relation to the proposal to add to the list of legitimate interests the case where the issuer is a financial institution and the inside information relates to measures taken by a prudential supervisor, where the immediate public disclosure of the inside information is likely to prejudice the final implementation of such measures, ESMA decided not to include such situations in the list of legitimate interest. Such situation may fall into one of the other listed case of legitimate interests and, where the relevant conditions are met, may fall into the scope of Article 17(5) of MAR. Differently, the ordinary regime of disclosure as soon as possible should apply.

130. With reference to the request for clarification in the application of Article 17(4) and (5) of MAR, ESMA considers the issue to be beyond the mandate received and therefore the point was not treated in the guidelines.

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

131. ESMA received 26 responses to this question.

132. In relation to point 2(a) of the guidelines, ten respondents agreed with the proposal. Three respondents suggested that the use of “materially different” is unclear. Some suggested the use of “in contradiction” instead. Two respondents suggested to make reference to a recent public announcement.

133. In relation to point 2(b) of the guidelines, nine respondents agreed with the proposal. Two respondents pointed out that “financial objectives” are not a defined concept and that ESMA should make reference to “profit forecasts” instead, as they are defined in Article 2 of Commission Regulation (EC) n°809/2004 (Prospectus Regulation). One respondent suggested specifying that non audited financial statements should be excluded from the scope of this point.

134. Another respondent envisaged not to rule out the possibility to delay the disclosure of inside information even where that information regards the fact that the issuer’s financial objectives, previously announced, are likely not to be met.

135. In relation to point 2(c) of the guidelines, four respondents agreed with the proposal. Some suggested introducing a differentiation between inside information that

contradicts market's expectations and inside information that simply confirms or reinforces market's expectations.

136. Eight respondents, including the SMSG, pointed out that "markets expectations" are an undefined, vague concept and that inside information is always in contrast with market's expectations, suggesting that that reference should be removed. Some of them stressed that issuers should not be obliged to take into account the market sentiments and financial analysts' consensus, as they are not responsible for analysts' consensus.

137. Eight respondents disagreed with the drafting proposal, deemed to be not clear and too vague. Some suggested deletion as the case should be already covered in the two previous points.

138. Three respondents suggested that the reference to signals that the issuer has previously set is too far reaching, some suggesting framing the time reference using the wording "has recently set".

139. Three respondents pointed out that the reference to signals is unclear. Some stressed that it should be clear that signals do not include any implicit signals. Some respondents envisaged that issuers could pursue a "no comment" policy if rumour arises in the market that cannot be traced back to a leak in the issuer's domain.

ESMA's response:

140. With reference to the feedback received on point 2(a) of the guidelines, ESMA is of the view that the wording "*materially different*" used in the guidelines has a broader meaning compared to the proposed wording "*in contrast*". In fact, some information may be materially different from other information without necessarily being in contrast with it. Therefore, in the final guidelines the wording proposed in the CP was maintained.

141. To better define the timeframe between previous public announcements and the inside information whose disclosure the issuer intends to delay, in the final guidelines the reference to "*a previous public announcement*" was changed into "*the previous public announcement*". This highlights that the issuer, in assessing whether it is in a situation where the public could be misled by delayed disclosure, should consider only the most recent announcement relating to that information.

142. In relation to point 2(b) of the guidelines, ESMA is of the view that a more general reference to "*financial objectives*" is preferable to the suggested one to "*profit forecasts*", and did not change the drafting in the final guidelines. However, ESMA would like to highlight that "*profit forecasts*" should be captured by the reference to financial objectives publicly announced.

143. ESMA disagrees with the proposal not to rule out the possibility to delay the disclosure of inside information even where that information regards the fact that the issuer's

financial objectives are likely not to be met, as delaying such inside information would certainly represent a situation where the public is likely to be misled.

144. In relation to point 2(c), the final guidelines keep the reference to market's 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 sent to the market.

145. In addition, ESMA decided to provide 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.

Q10: Do you see other elements to be considered for assessing market's expectations?

146. ESMA received nineteen responses to this question.

147. Four respondents agreed with the reference to market's expectations and appreciate the suggestion made in the explanatory text to take into account the market sentiment, for instance considering the consensus among financial analysts.

148. One respondent disagreed with the suggestion to take into account the market sentiment, for instance considering the consensus among financial analysts, in assessing market's expectations.

149. One respondent envisaged a differentiation from expectations which have resulted from statements issued or confirmed by the issuer as opposed to statements made by third parties such as the financial or trade press.

150. Six respondents reiterate that the reference to "market's expectation" is a rather vague and unclear concept, one of them reiterate the suggestion of removing the reference to "market's expectation".

151. One respondent appreciated the link between market's expectations and signals that the issuer has previously set, but consider it too far reaching, some suggesting framing the time reference using the wording "has recently set".

152. One recipient pointed out that market's expectations should be based only on signals set by the issuer, excluding though implicit communication.

153. The SMSG recommended «*a two-step test: ESMA's guidelines should require that (i) the issuer has made statements that go contrary to the new inside information, and (ii) this prior information from the issuer is deemed to have affected the market's expectations and impacted on price formation, i.e. has been noticed or is otherwise of a character that reasonable investors would pay attention to. Thus, not any and all*

'statements/indications' from the issuer would necessarily be seen as relevant as an obstacle to delay, e.g. if they were made to a small constituency or were very vague».

ESMA's response:

154. ESMA appreciated the feedback received on this question. In order to provide more clarity to the concept of market's expectations, in the guidelines they have been directly linked to the signals that the issuer has previously sent to the market.

155. In addition, ESMA decided to provide some examples of signals that the issuer may have previously sent to the market, explicitly mentioning interviews released by the CEO of an issuer, the information conveyed by the management of the issuer during a road-show or any other type of communication organized by the issuer or with its approval.

ANNEX IV – Guidelines for persons receiving market soundings

1. Scope

Who?

1. These guidelines apply to Competent Authorities and persons receiving market soundings.

What?

2. These guidelines apply in relation to the factors, the steps and the records that the persons receiving the market soundings will have to consider and implement according to Article 11(11) of Regulation (EU) No 596/2014 of the European Parliament and of the Council.

When?

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

2. References, abbreviations and definitions

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
MSR	Person receiving the market sounding
DMP	Disclosing market participant
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
RTS on market soundings	Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings

3. Purpose

4. Article 11(11) of MAR provides that ESMA shall issue guidelines addressed to persons receiving market soundings (MSR) regarding:

   d) the **factors** that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;

   e) the **steps** that such persons are to take if inside information has been disclosed to them in order to comply with Articles 8 and 10 of MAR; and

   f) the **records** that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of MAR.

5. The purpose of these guidelines is to ensure common, uniform and consistent approach in relation to the requirements that MSRs are subject to. 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 Competent Authorities to effectively conduct investigations on suspected market abuse cases.

4. Compliance and reporting obligations

4.1 Status of the guidelines

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

4.2 Reporting requirements

7. 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 [MARguidelinesGL2@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.

8. The persons receiving market soundings are not required to report whether they comply with these guidelines.

5. Guidelines for persons receiving market soundings

1. Internal procedures and staff training

9. The MSR should establish, implement and maintain internal procedures that are appropriate and proportionate to the scale, size and nature of their business activity, to:

    a. ensure that, where the MSR designates a specific person or a contact point to receive market soundings, that information is made available to the DMP;

    b. ensure that 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;

    c. ensure that the individual(s), function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and properly trained to that purpose;

    d. manage and control the flow of inside information arising from the market sounding within the MSR and its staff, in order for the MSR and its staff to comply with Articles 8 and 10 of MAR.

10. The MSR should ensure that the staff receiving and processing the information obtained in the course of the market sounding are properly trained on the relevant internal procedures and on the prohibitions, under Articles 8 and 10 of MAR, arising from being in possession of inside information. The training should be appropriate and proportionate to the scale, size and nature of MSR's business activity.

2. Communicating the wish not to receive market soundings

11. After being addressed by a DMP, the MSR should notify it whether they wish not to receive future market soundings in relation to either all potential transactions or particular types of potential transactions.

3. MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information

12. MSRs should independently assess whether they are in possession of inside information as a result of the market sounding taking into consideration as relevant factors the DMP's assessment and all the information available to the individual(s), function or body entrusted within the MSR to conduct that assessment, including information obtained from sources other than the DMP. In conducting that assessment, the individual(s), function or body should not be required to access information behind any information barrier established within the MSR.

13. Further to the DMP's notification that the information disclosed 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 the DMP's assessment and all the information available to the individual(s), function or body entrusted within the MSR to conduct that assessment, including information obtained from other sources than the DMP. In conducting that assessment, the individual(s), function or body should not be required to access information behind any information barrier established within the MSR.

4. Assessment of related financial instruments

14. Where the MSR has assessed they are in possession of inside information as a result of a market sounding, for the purposes of complying with Article 8 of MAR the MSR should identify all the issuers and financial instruments to which they believe that inside information relates.

5. Written minutes or notes

15. Where in accordance with point (d) of Article 6(2) of the RTS on market soundings the DMP has drawn up written minutes or notes of the unrecorded meetings or unrecorded telephone conversation, the MSRs should, within five working days after receipt:

    a. sign those minutes or notes, where they agree upon their content; or

    b. provide the DMP with their own version of those minutes or notes duly signed, where they do not agree upon their content.

6. Record keeping

16. MSRs should keep records in a durable medium that ensures accessibility and readability for a period of at least five years of:

    a. the internal procedures referred to in paragraph 1;

    b. the notifications referred to in paragraph 2;

    c. the assessments referred to in paragraph 3 and the reasons therefor;

    d. the assessment of related instruments referred to in paragraph 4;

    e. the persons working for them under a contract of employment or otherwise performing tasks through which they have access to the information communicated in the course of the market soundings, listed in a chronological order for each market sounding.

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]. 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.