



February 2016

## When can issuers delay disclosure of inside information?

**Last November, the Financial Conduct Authority ("FCA") proposed to amend its guidance on delaying disclosure of inside information. ESMA has now produced its own draft guidelines as to "legitimate interests" and when delaying disclosure may mislead the public.**

The FCA proposed in its [consultation](#) to amend its guidance to clarify that issuers may have legitimate interests which justify delaying disclosure beyond the example situations set out in the Disclosure and Transparency Rules ("**DTR**"). However, the FCA declined to provide further examples, as the European Securities and Markets Authority ("**ESMA**") is required by the Market Abuse Regulation ("**MAR**") to issue such guidance in the context of the new market abuse regime which will broadly apply from 3 July this year.

On 28 January 2016 ESMA published a [consultation paper](#) containing draft guidelines which set out a non-exhaustive list of circumstances in which disclosure of inside information may prejudice the issuer's legitimate interests. The guidelines also identify situations in which information may not be withheld, due to the likelihood of misleading the public.

### **DETAILS OF THE ESMA VIEW**

The proposed ESMA guidelines include a non-exhaustive list of six cases in which ESMA considers that immediate disclosure is likely to prejudice an issuer's legitimate interests:

- 1.** Where the issuer is participating in negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure of that information. ESMA notes that M&A transactions would generally be considered to fall within this case.
- 2.** 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, jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer.
- 3.** Where the inside information relates to 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, provided that certain conditions are met. This is aimed only at companies with a dual board structure (i.e. with supervisory and management boards).

4. Where the issuer has developed a product or an invention and the immediate public disclosure of such information is likely to jeopardise the intellectual property rights of the issuer.
5. Where the issuer is planning to buy or sell a major holding in another entity and the disclosure of such information would jeopardise the conclusion of the transaction.
6. Where a transaction previously announced is subject to a public authority's approval, and such approval is conditional upon additional requirements, if the immediate disclosure of those requirements will likely affect the ability of the issuer to meet them and therefore prevent the final success of the deal or transaction.

ESMA notes that, where an issuer delays disclosure of inside information, it should be able to explain to the FCA how immediate public disclosure of the inside information is likely to prejudice the relevant legitimate interest.

ESMA also outlines certain scenarios which in its view would **not** generally involve a legitimate interest, meaning the relevant inside information should therefore be disclosed as soon as possible:

1. Where a CEO resigns from his or her post and an issuer wishes to delay disclosure until a successor has been appointed.
2. Where a parent company wishes to delay disclosure in order to check subsidiaries' accounting information. ESMA's view is that once the information is precise enough to be considered inside information, it should be disclosed as soon as possible.

ESMA also comments that, where an unexpected and significant event occurs, the issuer should inform the public of any inside information as soon as possible. ESMA recognises that some time may be needed for the issuer to clarify the situation and ascertain any inside information, but has refrained from including this example in the list of legitimate interests, saying that it considers that this situation "may rather fall under the general provision...that an issuer shall inform the public of inside information *as soon as possible*."

Under the current regime and MAR, delaying disclosure of inside information is only permitted if confidentiality is preserved and the delay is not likely to mislead the public. ESMA sets out three situations where it considers that delay is likely to mislead the public, although it notes that the list is not exhaustive. These are:

1. Where the inside information is materially different from a previous public announcement of the issuer in relation to the same matter.
2. Where the inside information relates to the fact that the issuer's financial objectives are not likely to be met, where those financial objectives were previously publicly announced.
3. Where inside information is in contrast to the market's expectations and such expectations are based on signals that the issuer has previously set.

## COMMENT

The FCA stated, in its consultation on MAR, that it would revisit the text of DTR 2.5 following availability of further information on the ESMA guidelines on legitimate interests. Now that the draft guidelines are available, there are a number of areas where practitioners would welcome clarity as to the application of the guidelines to the UK markets. For example, the current UK rules allow issuers some flexibility to delay disclosure for a short time while facts relating to an unexpected event are ascertained. The position is less clear under the guidelines. The effect of ESMA's omission of a reference to "impending developments" is also unclear.

Given that 3 July is getting closer, there is a pressing need for guidance from the FCA as to the practical application of MAR. However, readers should note that while the previous market abuse regime was contained

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in an EU directive, giving the UK authorities greater freedom as to implementation, MAR is an EU regulation which has "direct effect" in the UK. This means that the FCA has less scope to set the parameters for UK issuers. This is likely to be a feature of European securities legislation as the EU moves towards a Capital Markets Union.

In the meantime, however, the draft guidelines set out useful guidance on what will constitute a "legitimate interest" and when the public is likely to be misled by a delay in disclosure.

It should be noted that MAR will apply to a broader range of issuers than the current market abuse regime, so that its provisions on inside information will apply to AIM companies.

## NEXT STEPS

ESMA will consider responses to its consultation paper received by 31 March 2016. If you would like to contribute to a consultation response, or if you have any questions in relation to the above developments, please speak to your usual Travers Smith contact.

The consultation paper also seeks views on ESMA's proposed guidelines on "market soundings". Please see our website for our upcoming briefing on this topic.

## FOR FURTHER INFORMATION, PLEASE CONTACT

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