



DUFAS¹ Position Paper

Draft guidelines on the Market Abuse Regulation

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?

Designated point of contact

ESMA proposes that disclosing market participants (DMPs) should be able to identify any nominated contacts a firm may have, either be it designated persons or a single point of contact in the form of a function or department. Where a firm has nominated designed persons, all pre-sounding contacts should be made to those individuals.

We believe it would in general not be practical for persons receiving market soundings (MSRs) to designate a single point of contact – be it a person or a department or function – within the organisation for the purpose of receiving market soundings. To a certain extent, depending on size and complexity of an organisation, we feel no single point of contact is able to assess market soundings and related information in the proper context by itself.

In particular, in case of large scale investors, where such investors operate across a wide range of asset classes and strategies, a single point of contact is not capable at all of passing judgment on all market soundings – and information acquired in that process – without the involvement of other departments (primarily the commercial departments of the investor). One individual can simply not be expected to possess a level of knowledge that extends across multiple asset classes. Involvement of others within the organisation is almost unavoidable.

Therefore we would favour a different approach, where market soundings can be received by multiple areas/individuals/departments/functions within the organisation. However, all market soundings are subsequently routed to a designated co-ordinating (independent) department/function or individual staff member. The course of action is then determined in co-ordination with the department which initially received the market sounding. Proper logging of events, decisions and affected employees is done at the level of the co-ordinating department. Although we understand the designation of a single point of contact to be a voluntary consideration, we feel it is beneficial to share our views and explain how this is likely to be done in many cases.

Communicating the wish not to receive market soundings

We approve of the approach that ESMA has taken in relation to communicating the wish not to receive market soundings. However, we believe a 5 year record retention period is uncalled for, particularly because the DMP itself will have to log such notifications as well.

¹ DUFAS, the Dutch Fund and Asset Management Association, is the industry association of asset managers in the Netherlands. Our members are independent asset managers, asset managers from the banking sector, the insurance sector, the real estate sector, and the pensions sector, as well as custodians.



Assessment as to whether a MSR is 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

We approve of the approach as proposed by ESMA. Market soundings can be received at multiple areas within the organisation. However, any information received in the course of a market sounding will always be assessed in co-ordination with a designated department, specifically intended for managing (inside) information in a centralised manner. Separately this designated department will also be able to assess independently how the information received through the market sounding compares to other information which the organisation possesses.

In light of article 11(7) of MAR, we understand and agree that a MSR has a responsibility to make its own assessment after a DMP's notification that information disclosed in the course of a sounding has ceased to be inside information. However, this should not create considerable extra work for MSRs checking for accuracy all elements of the DMP's opinion in order to identify any potential misjudgement or error. To keep things appropriate, DMPs should to a certain level of granularity be allowed to rely on the DMP's opinion.

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

We can approve of the approach proposed by ESMA, although this is perceived as somewhat of a theoretical situation. It is particularly hard to imagine a situation where a DMP has earmarked a market sounding as containing inside information and the MSR disagrees and would take the risk of disregarding the DMP's assessment.

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?

The draft guidelines prescribe that a MSR should establish, implement and maintain internal procedures to:

a) *ensure that the information received in the course of the market sounding is internally communicated only through pre-determined reporting lines and on a need-to-know basis.*

We do believe that all market soundings and related information should end up at the same place/department/function, with as little interference as possible between the point of entry and the function/department in charge of following up on a market sounding.

b) *ensure that the 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 composed of staff properly trained to that purpose.*

As indicated in relation to the assessment of inside information, we believe no single function or department is able to singlehandedly assess the information received. Rather this assessment is achieved in co-ordination with the relevant (commercial) department where the market sounding first arrived.



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?

Maintaining a central list of staff involved is merited, provided that this can be achieved at a department level, rather than at the level of each individual member of staff. Depending on their size and nature, some firms will be able to ring-fence individuals, but many other firms will deem an entire team to be insiders following receipt of inside information by one team member. For instance, when a market sounding is received for a particular department (e.g. equity), we would then assume that all related staff of that department has been able to take note of that information.

Assessment of related financial instruments

The draft guidelines propose that a MSR itself should determine what financial instruments can be considered related instruments. In addition a MSR should be able to demonstrate this designation with a full audit trail of that analysis. We believe this to be too cumbersome. An institutional investor cannot be expected to be able to determine all related instruments in scope, especially given the fact that this could encompass a tremendous amount of instruments with a very limited frame of reference (how is a MSR to know whether it has covered all possible instruments?). Depending on the issuer and interpretation, the number of related instruments can grow tremendously (potentially up to a few hundred instruments). MSR's will not be in possession of sufficient resources in order to make that determination. As such we believe the DMP is in a much better position (and has a clear responsibility) to provide a default list of related instruments when communicating inside information.

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

We agree with the revised approach regarding the recording of the telephone calls, where this is no longer required for MSRs.

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?

We agree the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreements with the content of those drafted by the DMP.

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

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