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Additional Information

Level 1 Regulation

Market Abuse Regulation (MAR) Regulation (EU) No 596/2014 - Market Integrity

Topic

Insider dealing and legitimate behaviour, including market soundings

Subject Matter

Financial instruments in scope of the market sounding regime

Question

Does the scope of Article 11 of MAR cover all communications of information to one or more potential investors prior to the announcement of a transaction, in order to gauge their interest in a possible transaction and the conditions relating to it?

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Original language

[ESMA70-145-111MAR Q&A 9.1]

Under the market sounding regime outlined in Article 11 of MAR, the communication of information by an issuer, a secondary offeror, an emission allowances market participant or third party acting on their behalf or account (the Disclosing Market Participant – DMP) should be deemed to be made in the normal course of the employment, duties or profession of such a person where all the conditions contained in Article 11 of MAR are met, and therefore not constitute unlawful disclosure of inside information.

Article 11(1) of MAR concerns market soundings that gauge the interest of potential investors in a possible transaction in a financial instrument and the conditions relating to it such as its potential size or pricing. Those financial instruments have to be financial instruments covered by the MAR scope as specified in Article 2(1) of MAR:

1. financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
2. financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
3. financial instruments traded on an OTF;
4. financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

Where the financial instrument subject to the possible transaction is already admitted to trading (or a request for admission to trading has been made) or is traded on a trading venue, as for example when the new transaction relates to an increase of an existing issuance, then

that transaction will fall within scope of Article 11.

Where the financial instrument subject to the possible transaction is not admitted to trading (nor a request for admission to trading has been made) nor traded on a trading venue, that financial instrument would not fall under Article 2(1)(a)-(c) of MAR. That financial instrument would fall under Article 2(1)(d) of MAR if its price or value depends on or has an effect on the price or value of another existing financial instrument in scope of MAR.

In such a case, to determine if Article 2(1)(d) applies, the DMP must assess on a case by case basis whether there is any relationship between the price or value of the financial instrument that is the subject of the sounding and any other existing financial instrument falling under Article 2(1)(a)-(c) of MAR such as, for instance, other financial instruments of the issuer in question or of a parent company. DMPs are expected to be able to document their assessment.

Where the DMP assessed that such relationship exists, then the financial instrument will be in scope of MAR and the related possible transaction will be in scope of the MAR market sounding regime.

If there is uncertainty as to whether there is a price or value relationship, such as where there are no data available regarding a new financial instrument, in order to receive the protection under Article 11, should it be subsequently shown that there was a relationship, an appropriate approach would be for the DMP to apply the provisions of Article 11 of MAR and the relevant delegated and implementing regulations.

Where a recommendation refers to several financial instruments independently, such as part of sectorial research, the requirements would apply to each financial instrument that is the subject of the recommendation.