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Additional Information

Level 1 Regulation
Market Abuse Regulation (MAR) Regulation (EU) No 596/2014 - Market Intergrity

Topic
Market manipulation, including buy-back programmes and stabilisations

Subject Matter
Scope of the new Article 11(1a) of MAR

Question
Is the scope of Article 11(1a) of MAR limited to the communication of information to the potential investors who negotiate the terms and conditions to subscribe to the bonds or does it encompass the full process of private placement of bonds to qualified investors including the offering of the bonds to potential investors contacted after the terms and conditions have been determined?

ESMA Answer

23-06-2022

Original language

[ESMA70-145-111 MAR Q&A 9.2]

The scope of Article 11(1a) of Regulation (EU) No 596/2014 (MAR) is limited to the communication of information to the potential qualified investors who negotiate the terms and conditions to subscribe to the bonds only. Article 11(1a) sets forth an exception from the market soundings regime provided in Article 11(1), which has to be interpreted narrowly. The communication of information to potential investors contacted after the terms and conditions have been determined therefore falls in the scope of Article 11(1), as it takes place 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.

Recital 6 of Regulation (EU) 2019/2115[1] clarifies that the aim of the communication of information in that negotiation phase is to structure and complete the transaction as a whole, and not to gauge the interest of potential investors as regards a predefined transaction. This reasoning is based on the fact that the negotiation phase of the transaction essentially differs from the communication of information to gauge the interest of potential investors. Therefore, the exception provided in Article 11(1a) relates only to private placements being the result of negotiations between an issuer and a limited number of potential qualified investors, aiming to determine the contractual terms and conditions of the transaction.

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The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

[1] Regulation 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets (OJ L 320, 11.12.2019).