



The Market Abuse Regulation and the Duty to Disclose Inside Information

*Questions and Answers on the Application of the
Market Abuse Regulation ('MAR') 596/2014 3 July 2016*

Table of Contents

1 Introduction.....	1
1.1 Regulations	1
2 Questions & Answers.....	2
2.1 What changes does MAR impose on issuers' disclosure practices?	2
2.2 How does MAR affect Nasdaq Nordic's Rulebooks for Issuers and the First North Nordic Rulebook?	2
2.3 Is there any need to differentiate between the concepts of 'price-sensitive information' and 'inside information'?.....	2
2.4 Does the concept of inside information change what information must be disclosed?	2
2.5 What types of information could be categorized as inside information?.....	3
2.6 Does a fact or course of events have to materialize before information could be considered as inside information?	3
2.7 At what point in time should inside information be disclosed, and does MAR dictate any changes to previous regulation?	4
2.8 What does the requirement that inside information should be disclosed 'as soon as possible' mean in practice?	4
2.9 Can issuers wait to disclose inside information until the next trading day if the markets have closed at the time of the event?.....	5
2.10 Can issuers postpone the disclosure of inside information until the issuer's board has reviewed and approved the disclosure?	5
2.11 What kind of information relating to an event or circumstance (considered inside information) should be disclosed?	5
2.12 Can an agreement overrule the issuers' duty of disclosure of inside information to the markets?	6

2.13 Does MAR allow for delayed disclosures of inside information?.....	6
2.14 What conditions must be met to delay a disclosure of inside information?	6
2.15 What constitutes a legitimate interest in relation to delayed disclosures of inside information?	7
2.16 What does it mean that a delayed disclosure of inside information must not mislead the public?.....	7
2.17 What actions must be taken in the wake of a decision to delay a disclosure of inside information?	8
2.18 What should issuers have in mind when disclosing inside information that have been previously delayed?.....	8
2.19 Does the local FSA have the authority to demand more information related to a delayed disclosure of inside information?	8
2.20 Must Nasdaq be informed of a delayed disclosure of inside information?	8
2.21 How should issuers act when actual financial performance deviates from what the market should reasonably expect based upon information previously disclosed?.....	9
2.22 Does MAR contain any requirements as to how disclosed inside information should be organized online on the issuer’s website?	10

1 | Introduction

MAR entered into force on 3 July 2016 and primarily addresses market abuse activities as well as the duty to disclose inside information. Almost all of these provisions became directly applicable to EU Member States on the effective date of the regulation. Consequently, all issuers at Nasdaq Nordic¹ Exchanges and Nasdaq First North must be aware of the content and proper legal meaning of MAR's provisions as well as Nasdaq's regulatory framework for issuers.

The Q&A below seeks to facilitate the reader's understanding of how and whether MAR affects issuers' disclosure obligations. Notwithstanding the answers to the questions below, the overall conclusion is that MAR does not in practice imply any major changes to the duty of disclosure. MAR mainly imposes stricter requirements on issuers to expand and formalize the documentation of their disclosures of inside information, particularly in relation to delayed disclosures of inside information.

1.1 Regulations

The same day MAR entered into force, Nasdaq's revised rulebooks were incorporated into Nasdaq's regulatory framework for issuers. These two rulebooks, applicable to Nasdaq Nordic's regulated markets and Nasdaq First North Nordic markets, now contain identical rules regarding the disclosure of inside information.

[Market Abuse Regulation \('MAR'\) \(English\)](#)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>

[Nasdaq Nordic Rulebooks](#)

<http://business.nasdaq.com/list/Rules-and-Regulations/European-rules/index.html>

[European Securities and Markets Authority's Library on Market Abuse](#)

https://www.esma.europa.eu/databases-library/esma-library?f%5B0%5D=im_esma_sections%3A22

[The Swedish Financial Supervisory Authority on the Market Abuse Regime \(in Swedish\):](#)

<http://finansinspektionen.se/Regler/Marknadsmissbruk-Mar/Offentliggorande-av-insiderinformation-/>

[The Finnish Financial Supervisory Authority on the Market Abuse Regime \(in Finnish\):](#)

<http://www.finanssivalvonta.fi/fi/Saantely/Saantelyhankkeet/mar/Pages/Default.aspx>

[The Danish Financial Supervisory Authority on the Market Abuse Regime \(in Danish\):](#)

<https://finanstilsynet.dk/Lovgivning/Information-om-udvalgte-tilsynsomraader/MAR>

¹ Nasdaq Nordic represents the common offering by Nasdaq Copenhagen A/S, Nasdaq Helsinki Ltd., Nasdaq Iceland hf. and Nasdaq Stockholm AB.

2 | Questions & Answers

2.1 What changes does MAR impose on issuers' disclosure practices?

MAR expands the application of certain inside information disclosure rules to include issuers of financial instruments traded on Multilateral Trading Facilities (MTFs). It also increases requirements for issuers' administration and documentation with regard to disclosures of inside information. However, the new requirements are not likely to significantly increase the frequency or the contents of disclosures.

2.2 How does MAR affect Nasdaq Nordic's Rulebooks for Issuers and the First North Nordic Rulebook?

Due to the implementation of MAR, Nasdaq has reviewed Nasdaq Nordic's Rulebooks for Issuers and the First North Nordic Rulebook in order to ensure that they are aligned with the rules enacted by MAR. The changes made pursuant to this review are more lexical than material in that they modify the rulebooks' legal definitions of inside information and the time of disclosure. And in practice, these changes will likely have a limited effect on issuers' disclosures of inside information.

It should be stressed that Nasdaq has strived to achieve a situation in which issuers are not subject to new duties unless such impositions are necessary in the light of MAR. The rulebooks for Nasdaq Nordic and First North Nordic now contain identical rules related to issuers' duty to disclose inside information. This is because MAR expands the scope of the market abuse regime to encompass not just Regulated Markets but also Multilateral Trading Facilities.² Consequently, MAR must be applied by issuers at both Nasdaq Nordic's regulated markets and Nasdaq First North.

2.3 Is there any need to differentiate between the concepts of 'price-sensitive information' and 'inside information'?

No. When MAR entered into force, the concept of *price-sensitive information* was completely and uniformly replaced by the concept of *inside information*.

The term inside information is defined in MAR article 7.

2.4 Does the concept of inside information change what information must be disclosed?












² In Finland similar requirement was already in place prior to MAR.

Currently there is no indication that this is the case. Nasdaq's overall conclusion is that MAR does not in practice imply any major changes to the duty of disclosure. MAR mainly imposes stricter requirements on issuers to expand and formalize the documentation of their disclosures of inside information, particularly in relation to delayed disclosures of inside information. Nasdaq's guidance to the General provision in Nasdaq Nordic's Rule book for Issuers is also in principle similar compared to pre-MAR.

2.5 What types of information could be categorized as inside information?

All information that in some way relates to an issuer has the potential to be classified as inside information. This issue is determined on a case-by-case basis and depends on the nature of the information and the financial instrument, the business and financial history of the issuer, and all other relevant circumstances.

The previous rulebooks of Nasdaq Nordic did specify what kinds of information could be regarded as inside information. These lists of examples remain in the current rulebooks and thus continue to serve as indicators of what information can constitute inside information. Examples include:

-  Acquisitions or divestitures.
-  Commencement or settlement of, or decision rendered in, legal disputes.
-  Decisions taken by authorities.
-  Research results, development of a new product or important invention.
-  Significant deviation in financial results ("Profit warning").
-  Financial information revealing the issuer's financial difficulties.
-  Information regarding subsidiaries and affiliated companies.
-  Shareholders' agreements known to the Issuer which may affect the use of voting rights or transferability of the financial instruments.
-  Credit and or customer losses.
-  Information linked to new joint ventures.
-  Price or exchange rate changes.

Please see the guidance text to the general provision on disclosure of inside information in Nasdaq Nordic's Rulebooks for Issuers respectively Nasdaq First North's Rulebook.

2.6 Does a fact or course of events have to materialize before information could be considered as inside information?

No. Information regarding an event that is yet to occur can be regarded as inside information. This means that an agreement does not have to be finalized or signed to be considered inside information. The assessment is dependent on two factors:

How concrete the information is,

and how likely it is that the event will actually materialize.

The information must be assessed on its own merits and on the basis of all relevant circumstances. Not much advice has been provided by the legislator as to when information crosses the boundary and must be categorized as inside information. The European Court (EC) has, however, declared that the information must stem from an event that could be reasonably expected to materialize. This means that the information must achieve a certain level of “quality”. Article 7 (4) in MAR states that inside information is information that “a reasonable investor would be likely to use as part of the basis of his or her investment decisions.”

In summary, MAR does not differentiate between the different stages of an event. All information that qualifies as inside information must be disclosed. This means that an issuer may need to make several disclosures referring to the same event.

2.7 At what point in time should inside information be disclosed, and does MAR dictate any changes to previous regulation?

According to MAR an issuer shall inform the public as soon as possible of inside information which directly concerns that issuer. That in itself is not a change to previous regulation. Since inside information can also include events that are under preparation or not finalized, the obligation to disclose could arise earlier than before. However, the timing of the actual disclosure may not necessarily differ from the previous practice if the conditions for delayed disclosure are met in accordance with MAR and the issuer decides to delay the disclosure.

2.8 What does the requirement that inside information should be disclosed ‘as soon as possible’ mean in practice?

The requirement that the disclosure should be undertaken as soon as possible rather than immediately indicates that there is some tolerance for the fact that the disclosure could take some time to prepare. Issuers are therefore generally allowed to prepare and take the necessary actions to make sure that the disclosure is published in the regular communication channels used.

In cases where the issuer knows beforehand that a particular event will materialize, the acceptable time to perform the disclosure is shorter given that the issuer has had time to prepare a disclosure.

Whether or not the preparation time is acceptable depends on a case-by-case assessment of the information’s nature, administrative procedures required and significance to the issuer. If the information is highly significant, the issuer may need to bypass procedures otherwise applied, in order to enable the immediate disclosure of the inside information.

In summary, MAR does not differentiate between the different stages of an event. All information that qualifies as inside information must be disclosed. This means that an issuer may need to make several disclosures referring to the same event.

Nasdaq's Surveillance department may be contacted if the issuer is in doubt as to how the situation should be properly managed.

2.9 Can issuers wait to disclose inside information until the next trading day if the markets have closed at the time of the event?

No, the main rule is that inside information should be disclosed as soon as possible.

Market practice in some jurisdictions has previously been to accept that disclosure of inside information has been made the following trading day as long as the disclosure has been made well before the markets open and the information had been kept confidential. MAR does not address whether such practice will be considered permissible under the new market abuse regime. Nasdaq therefore believes that all issuers should be extremely careful in assuming that old market practices continue to hold. Issuers have, under all circumstances, a duty to ensure that inside information remains confidential until the information is disclosed.

2.10 Can issuers postpone the disclosure of inside information until the issuer's board has reviewed and approved the disclosure?

Issuers must maintain internal rules of procedure that specify which individuals are authorized to make decisions regarding the disclosure of inside information. A disclosure decision is therefore considered as a part of the day-to-day administration of the business rather than a matter for the board. A board meeting at which the contents of a disclosure will be debated and decided upon is therefore not a legitimate reason for postponing the disclosure of an event that has already occurred.

2.11 What kind of information relating to an event or circumstance (considered inside information) should be disclosed?

Issuers have a duty to disclose such information that would allow a typical, reasonable investor to make a well-founded investment decision. This means that the disclosure must be detailed enough for the investor to assess the event's effect on the issuer and on the issuer's financial instrument. It is important for issuers to recognize that abstaining from disclosure as well as disclosure of incorrect or unclear information can be considered improper and misleading under MAR.

In conjunction with a deal or transaction, it is generally required that issuers disclose both the identity of the counterparty and the total value of the transaction or deal. However, in some cases it may be possible to omit those details while still enabling the public to comprehend the economic implications the event will have on the issuer's business and financial position.

It should be noted that issuers cannot avoid the duty to disclose by entering into a confidentiality agreement or any other agreement with a third-party. The duty to disclose inside information to the market thus takes precedence over contractual clauses. Confidentiality based on law or other regulation may, however, in certain cases be a valid reason not to disclose.

2.12 Can an agreement overrule the issuers' duty of disclosure of inside information to the markets?

Issuers cannot avoid the duty to disclose by entering into a confidentiality agreement or any other agreement with a third-party. The duty to disclose inside information to the market thus takes precedence over contractual clauses. Confidentiality based on law or other regulation may, however, in certain cases be a valid reason not to disclose.

2.13 Does MAR allow for delayed disclosures of inside information?

According to MAR Article 17 (4) issuers can, at their own risk, delay the disclosure of inside information if all conditions specified in MAR are fulfilled. MAR requires the issuer to, in a more systematic and formal way, document delays.

Local Financial Supervisory Authority must be informed when the issuer eventually discloses the delayed information to the market. At the authority's request, the issuer must also produce a written statement explaining why it believes that the MAR requirements for delayed disclosure were fulfilled.





2.14 What conditions must be met to delay a disclosure of inside information?

MAR Article 17 (4) requires *all* of the following conditions to be met for a delay to be considered lawful:

- (1) Immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- (2) delay of disclosure is not likely to mislead the public;
- (3) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

2.15 What constitutes a legitimate interest in relation to delayed disclosures of inside information?

Below are some examples of what *could* constitute legitimate interests. A comprehensive account of conceivable legitimate interests and the special requirements associated with each of these interests can be found in a guideline issued by ESMA (a link to this guideline is provided below).

-  Ongoing negotiations that are likely to be undermined by a disclosure; for example, negotiations linked to acquisitions.
-  Decisions or agreements that have been approved by one corporate body but must be approved by a supreme corporate body in order to be final. A critical precondition to delaying disclosure is that the delay must not jeopardize the public's ability to assess and evaluate the issuer's financial instrument.
-  Events related to product development, inventions or patents. However, if such events will eventually affect one of the issuer's larger investments in product development, they should be disclosed as soon as possible. For example, failed clinical trials.
-  Ongoing attempts to resolve financial hardships that seriously threaten current and future shareholders' interests and which are pursued to allow the business to recover. The magnitude of the financial problems in question cannot, however, be so large so as to render the business insolvent under the applicable companies act.

ESMA guidelines on MAR – delay in the disclosure of inside information:

https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf

2.16 What does it mean that a delayed disclosure of inside information must not mislead the public?

The requirement that a delayed disclosure must not be likely to mislead the public is applicable on situations where the issuer, through its public communication, has lead the market to draw certain conclusions and that the information yet to be disclosed would contradict such conclusions. The communication that must be considered in this context is not only disclosures of inside information but also information disseminated in other manners, such as during media interviews or in CEO presentations at road shows.

Please see ESMA guidelines on MAR – delay in the disclosure of inside information:

https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf

2.17 What actions must be taken in the wake of a decision to delay a disclosure of inside information?

When a decision is taken to delay a disclosure, such decision must be documented. The documentation should include the decision maker and why, at the time of the decision and thereafter, the issuer considered that it fulfilled all the conditions listed in MAR Article 17 (4). Issuers must therefore make sure they have clear internal rules and procedures governing delayed disclosures.

2.18 What should issuers have in mind when disclosing inside information that have been previously delayed?

Issuers must notify the local FSA when disclosing information which has been delayed.

Please consult the website of the local FSA for further information.

2.19 Does the local FSA have the authority to demand more information related to a delayed disclosure of inside information?

Yes. The local FSA can request information about the delayed disclosure and the decision-making process preceding the decision to delay disclosure. In that way the FSA can satisfy itself that the conditions to delay a disclosure under MAR have been fulfilled. It is therefore extremely important that the issuer clearly document why, at the time of the decision and thereafter, it considered that it fulfilled all the conditions listed in MAR Article 17 (4).

Please consult the website of the local FSA for further information.

2.20 Must Nasdaq be informed of a delayed disclosure of inside information?

No, to put it briefly. Issuers are not obliged to report to Nasdaq when a decision to delay disclosure is made or when a delayed disclosure is finally made.

However, issuers do have a duty to notify Nasdaq *before* disclosures of information which is assumed to be of extraordinarily importance to the issuer and its financial instruments (please see further in the Nasdaq Nordic Rulebooks for issuers). Such extraordinary events generally involve situations in which the exchange must consider relevant actions in relation to the issuer's financial instrument in order to maintain sound and orderly trading with a functioning price formation.

The issuer is also obliged to, upon request, supply Nasdaq with such information that is required to properly monitor the issuer's compliance with the Nasdaq Nordic Rulebooks for issuers.

2.21 How should issuers act when actual financial performance deviates from what the market should reasonably expect based upon information previously disclosed?

If the deviation constitutes inside information and the conditions for delaying disclosure are not fulfilled, the issuer should disclose the information as soon as possible (“profit warning”).

An assessment first has to be made whether the information about the deviation is inside information. If the issuer’s financial results or standing, based on previous information disclosed, significantly deviates from what could be reasonably expected, the information relating to the deviation is inside information that must be disclosed. If the information in the report is reasonably within the limits of what the issuer has communicated earlier, and other known circumstances, there is normally no need to disclose a profit warning.

In addition, it is important that the issuer actively decides whether individual circumstances relating to the financial report are inside information. A single, individual circumstance included in a financial report that is considered to be inside information should naturally be disclosed as soon as possible. In many cases, however, it is the full report that is considered to be potential inside information.

If a deviation is inside information and if the issuer should wish to delay disclosure of such information, a careful assessment must be made of whether the relevant conditions are fulfilled. All conditions must be fulfilled but the most important one to consider will often be that the delay is not likely to mislead the public. ESMA has provided guidance on what shall be considered in such context:

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.³

³ Please see ESMA guidelines on MAR – delay in the disclosure of inside information: https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf

The situations in which disclosure of inside information that relates to financial performance can be delayed without being likely to mislead the public are in other words very limited. When a deviation in financial performance is encountered and such deviation is significant enough to constitute inside information there will most often be a requirement to disclose such information as soon as possible (“profit warning”).

2.22 Does MAR contain any requirements as to how disclosed inside information should be organized online on the issuer’s website?

According to Article 3 in the Commission’s Implementing Regulation (EU) 2016/1055 of 29 June 2016, inside information should be accessible on an easily identifiable part of the issuer’s website. The website should be designed in such a way that the user can easily differentiate between the different types of press releases available on the website.

Information related to the marketing of the business and issuer should not be mixed together with information that the company is obliged to disclose under MAR. If the issuer provides different types of press releases on its website, it must make sure that users can differentiate between them. This could be achieved through a feature allowing users to single out press releases that have been labeled as containing inside information, by separating sections containing the different releases through headlines, or by clearly identifying the press releases that contain inside information in some other way.