Market Newsletter 1/2022

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Prohibitions on use and disclosure of inside information also apply to non-insiders

Over the past few years, the Financial Supervision Authority (FIN-FSA) has filed several requests for investigation to the Police on the abuse of inside information and unlawful disclosure of inside information. The cases are at different stages of processing by the Police and the prosecutor. The most recent final judgments on abuse of inside information, aggravated abuse of inside information and unlawful disclosure of inside information are from this year. The judgments given on four individuals were, at minimum, 75 day-fines and, at maximum, nine months conditional imprisonment. The proceeds of the crimes were ordered to be forfeited to the state.

Prohibitions on the abuse and unlawful disclosure of inside information apply to everyone

On its website, the FIN-FSA has published 10 trading guidelines for insiders of listed companies, aimed at steering insiders into a good code of conduct in their securities trading. With this article, the FIN-FSA also wishes to draw the attention of investors other than the company's insiders to the prohibitions related to inside information, which include prohibitions on the disclosure and use of inside information as well as on advice related to inside information.

The prohibitions are universal and apply to all those operating and trading in the securities market, regardless of their status or duties. It is also important for every trader to understand and take into account these prohibitions in their own operations and trading.

Trading is monitored comprehensively and effectively

A requirement for the functioning of the securities markets is that investors can have confidence in the markets and market participants. If a person trading on a securities market takes advantage of precise, significant and undisclosed information about a particular listed company, i.e. inside information, they will gain an unjustified advantage at the expense of other investors due to their advance knowledge. Abuse

of inside information undermines confidence in the impartiality of the market and the level playing field for investors and is therefore prohibited and punishable.

Monitoring of securities market trading is a broad entity involving several different parties. Surveillance systems, to a high degree automated, are comprehensively and effectively used in monitoring trading.

Market participants, such as investment service providers that receive and execute client orders, have an obligation to monitor their clients' trading and to report suspicious transactions and orders they observe to the FIN-FSA. The FIN-FSA receives approximately 150–200 of these notifications each year.

The FIN-FSA monitors trading and investigates suspicious trading transactions using its own trading surveillance system. The surveillance system generates reports of exceptional and suspicious trading transactions for further investigation. The FIN-FSA has at its disposal very comprehensive and detailed information on trading, including information on trading outside Finland. The FIN-FSA receives, for example, precise information on any trader's transactions and orders for shares listed on the Helsinki stock exchange, even if a foreign intermediary is used in the transaction and even if the transaction has been executed elsewhere than on the Helsinki stock exchange. Investigations into the abuse of inside information extensively review suspicious transactions and also take into account, for example, family relationships and other connections between different individuals. In addition, the FIN-FSA works closely with supervisors in other countries.

An investigation may result in the FIN-FSA filing a request for investigation with the Police. Abuse of inside information and unlawful disclosure of inside information are punishable under the Penal Code. The penalty for abuse of inside information or unlawful disclosure of inside information may be up to two years' imprisonment and in the case of aggravated abuse of inside information up to four years' imprisonment. Attempted abuse of inside information is also a punishable offence.

Insider information must not be disclosed without an acceptable reason

If you are in possession of inside information, you must not disclose it to another party without an acceptable reason. The purpose of the prohibition on the disclosure of inside information is to prevent the dissemination of inside information and the possible use of the information in securities trading. Disclosure of inside information is therefore, as a rule, prohibited. There are, however, situations in which disclosure of inside information is acceptable; this is the case if the exercise of the duties of the person disclosing the information requires the disclosure of the information. In that case, the disclosure must take place as part of the normal exercise of the job, profession or duties of the person disclosing the information. With regard to the prohibition on disclosure, it is therefore important to note that, for example in the context of discussions in the workplace, you should not disclose inside information obtained in the course of your work unless this is necessary for the exercise of your duties.

Disclosure of inside information is prohibited, regardless of how the inside information was obtained. Prohibition may therefore include, for example, a situation where you have accidentally heard a conversation in which inside information was expressed or you have seen documents revealing inside information. You must not further disclose such information to another party or, indeed, use this information yourself. However, in the case of persons who are not insiders or shareholders of a listed company, the application of the prohibition requires that the person knows or should know that the matter is inside information.

Inside information must not be used nor should others be advised to use inside information

If you have received inside information, you are prohibited from acquiring or disposing of a financial instrument, such as a share, to which the information relates, whether or not you are entered in the listed company's or an adviser's list of insiders. Please also note that the prohibition also applies to acquisitions or disposals on behalf of another party, such as a family member or an investment company. If you have inside information, you accordingly cannot purchase financial instruments on behalf of your children or spouse, for example. Cancellation or modification of an order that you have given before you received inside information is also prohibited, if you have the inside information at the time of cancelling or modifying the order.

If you have received inside information, you are also prohibited from advising another party in the acquisition and disposal of a financial instrument to which the information relates. The prohibition applies to both direct and indirect advice. Direct advice is a recommendation or instruction to acquire or dispose of financial instruments on the basis of inside information. Indirect advice is, for example, the provision of investment tips, if the provider of the investment tip has inside information concerning the financial instrument in question. A recommendation given on the basis of inside information to cancel or change an order is also prohibited. The punishability of advice does not require that the person disclose the inside information in their possession or that the advice they provide results in the acquisition or disposal of a financial instrument.

What kind of information can be inside information?

Inside information is defined in Article 7.1(a) of the Market Abuse Regulation[1]. According to the definition, inside information means information of a precise nature, which has not been made public, relating to an issuer or financial instrument, and which, if it were made public, would be likely to have a significant effect on the price of the financial instrument or the price of a related derivative financial instrument.

The issuer, i.e. the listed company, must keep a list of all people who have access to inside information or who otherwise perform tasks through which they have access to inside information. Advisers used by the issuer have a corresponding obligation.

It may sometimes be challenging for a person who is not on insider lists to assess whether the information they have is inside information. Most commonly, the insider information concerning listed companies relates to, for example, a significant order of a listed company, a significant investment decision, an acquisition, a takeover bid or changes in the financial performance of a listed company. It is important to note, however, that the definition of inside information is quite broad and it is not limited only to the information listed above, for example. It is also worth noting that even if no insider project has been set up for a matter in a listed company, insider information may still be involved. Whether information is inside information should be assessed via the criteria for inside information presented above, i.e. the unpublished nature, precision and significance of the information.

Unpublished nature, precision and significance of information

By the unpublished nature of information included in the definition of inside information is meant information that has not been made public by the issuer in a stock exchange release or information that has not otherwise been available to the market.

[1] *Market Abuse Regulation (EU) N:o 596/2014, acronym MAR.*

Information is considered to be of a precise nature,

- if it indicates a set of circumstances or events which exist or which may reasonably be expected to come into existence and
- if it is specific enough to enable a conclusion to be drawn on the basis of it as to the possible effect of the information on the value of a financial instrument.

The precise nature of the information does not require the occurrence of the event or set of circumstances to be certain or to have a high probability of occurring. In order for the precise nature of the information to be fulfilled, it is sufficient that there is a real possibility, objectively assessed, for the set of circumstances or event to occur. Furthermore, the precise nature of the information does not require that the direction of the possible price effect be foreseeable on the basis of the information.

Significant information means information that, if disclosed, would be likely to have a significant effect on the price of an issuer's financial instrument, and information that a reasonable investor would be likely to use as part of the basis for their investment decision.

More on this topic

- Inside information – FIN-FSA
- 10 trading guidelines for insiders
- Market Abuse Regulation (EU) No 596/2014

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Marketing of initial public offerings

In this article, the FIN-FSA responds to frequently asked questions from initial public offering (IPO) advisers about the marketing of IPOs and the distinction between IPO marketing and other communications.

General

In IPOs, marketing methods and channels have evolved and diversified, and questions have arisen about, among other things, what is permitted in marketing and what is not, what is IPO marketing and what is other advertising. There is no simple answer to these questions, and situations always have to be assessed on a case-by-case basis. The key factor, however, is that marketing must not be misleading. What is sought through marketing is also crucial; for example, if a podcast is planned with the aim of attracting investors to participate in an IPO, the podcast must take into account IPO marketing requirements.

The FIN-FSA considers that careful planning of an IPO's marketing messages and channels, and adherence to the plans, will minimise any possible interpretation problems concerning the IPO with regard to what is considered to be marketing of the IPO. It should also be agreed in advance who will market the IPO on behalf of the company and who, moreover, will not comment on it. The advisors of the listing company have an important role in guiding the company also in this regard. The FIN-FSA also considers

it good that the prevailing practice in Finland is to prepare publicity guidelines for the listing company at an early stage of the listing project. The guidelines help the company's management to be aware of what information about the company can be disclosed to the public and when.

When is IPO marketing involved?

The Regulation[2] defines advertising as a communication

- that relates to a specific offer of securities to the public or to an admission to trading on a regulated market and
- that is specifically aimed at promoting the potential subscription or acquisition of securities.

The FIN-FSA interprets the above definition of advertising broadly. In practice, this means that a communication can be considered as marketing of an IPO, even if it does not explicitly mention the IPO, if the communication is intended to arouse the interest of potential investors in the company and investing in its shares.

In practice, the aforementioned communication may be, for example, statements about the company's strengths, strategy, financial performance, future prospects, competitive situation and market growth. Such factors, which are typically presented in the marketing of IPOs, may be interpreted as marketing of the IPO regardless of where, how and in what way they are presented. On the other hand, marketing directed at the company's customers that aims to market the company's products or services, is not, as a rule, considered to be IPO marketing material.

What does the Regulation require from marketing?

Marketing material must be submitted to the FIN-FSA

The marketing material used in Finland related to all prospectuses must be submitted to the FIN-FSA at the latest when marketing begins. Marketing material related to IPO prospectuses, however, must be submitted to the FIN-FSA during prospectus inspection, as the FIN-FSA reviews the material in advance and substantively comments on it.

Marketing material must not be confusable with the prospectus

The Regulation[3] requires that advertising be clearly recognisable as such. Advertisements directed at retail investors should include, among other things, the word "advertisement" in a prominent manner as well as a recommendation that potential investors read the prospectus before making an investment decision in order to understand the potential risks and rewards associated with the decision to invest in the securities. Advertisements must also be sufficiently different in form and length from the prospectus so that no confusion with the prospectus is possible.

Marketing material must be based on the prospectus

The FIN-FSA emphasises, in particular, that advertising must be consistent with the prospectus and must not conflict with the information contained in the prospectus. In practice, this means that marketing

[2] *Regulation (EU) 2017/1129 of the European Parliament and of the Council, as amended (Prospectus Regulation).*
[3] *Prospectus Regulation and Commission Delegated Regulation (EU) 2019/979.*

messages must be based on the prospectus, and marketing cannot provide material information that is not in the prospectus. What is presented in marketing material should also be possible, in terms of its content, to be presented in the prospectus. This should be taken into consideration in connection with claims and slogans, for example.

The FIN-FSA's comments on marketing materials often relate to the presentation or highlighting of alternative performance measures (APMs). Marketing material should not include APMs, unless they are included in the prospectus. If APMs are presented, the corresponding figures of the applied accounting rules must also be presented in the same context in accordance with ESMA Guidelines.

It has sometimes been suggested to the FIN-FSA that preparing easy-to-understand marketing material based on the prospectus text might be challenging. The FIN-FSA therefore urges preparers of prospectuses to ensure that the information in prospectuses is also presented in a form that is easy to analyse, concise and comprehensible.

Prospectus supplement must also be taken into consideration in marketing material

If a prospectus is supplemented, advertisements directed at retail investors must also be amended if the matter supplemented renders the advertisement materially inaccurate or misleading. In such a situation, the amended advertisement must, among other things, include a clear description of the differences between the two versions of the advertisement.

Marketing material must refer to the prospectus

The advertisement must state where the prospectus is available so that the investor can fully acquaint themself with the information presented in the prospectus. In practice, advertisements must mention the website on which the prospectus has been or will be published. In some situations, it is not technically possible to include a reference to the prospectus in marketing materials. For example, a reference to the prospectus may not necessarily fit into the banner on a website. In that case, according to the interpretation of the FIN-FSA, the reference to the prospectus may be elsewhere on the same page or on a page that can be accessed by clicking on the advertisement.

Marketing must not be misleading

The information included in advertising must not be inaccurate or misleading. As in the prospectus, information or claims presented in marketing material must be based on facts and it must be possible to validate them to the FIN-FSA, if necessary. For example, the use of the term initial public offering might be misleading if a sale of shares is also involved, as the term *initial public offering* gives investors the impression that the funds being raised will be ultimately be at the disposal of the company. In such a situation, the term *initial public offering and sale* should be used. Similarly, the FIN-FSA has considered the use of the term *stock exchange listing* to be misleading if this does not involve a listing on a regulated market but on a multilateral trading facility, such as the First North list.

Positive and negative factors must be presented in a balanced way

Advertising must not pay less attention to negative aspects presented in the prospectus than to the positive aspects. In practice, this means that if marketing material describes, for example, the company's growth, strengths and the expected development of the market, the corresponding risks must also be highlighted in the same context. The FIN-FSA considers that the presentation of risk factors should be

considered on a case-by-case basis. In advertisements that contain, for example, only a brief reference to the company's IPO in a neutral manner, a description of risks is not required.

How does the FIN-FSA comment on marketing material?

In connection with the inspection of listing prospectuses, the FIN-FSA has drawn the attention of preparers of marketing materials to the fact that all marketing material must be based on the prospectus. Although the FIN-FSA also comments on marketing materials in connection with prospectus inspection, for scheduling reasons the FIN-FSA does not compare in detail the texts of the marketing materials with the texts of prospectuses. Insofar as the texts of the prospectus are used in marketing material, it is the responsibility of the preparers of the materials/the company to ensure the consistency of the texts.

The slogan of a marketing campaign should be submitted to the FIN-FSA for comment in good time. In practice, a slogan has been changed in several cases based on the FIN-FSA's comments. Comments have often concerned the fact that the slogan has given the impression that the company's success or investor returns are certain.

The FIN-FSA recommends that marketing materials be submitted to it at the earliest at the stage when the FIN-FSA has issued its first prospectus comments and they have been taken into account in the next version of the prospectus and in marketing material. In practice, this often means midway through the inspection period. Subsequent changes to the texts of the prospectus based on the FIN-FSA's comments must also be taken into account in all marketing material, where applicable. The FIN-FSA requires that the final versions of marketing material be submitted to it in collective form before marketing begins.

In IPOs, an announcement of the company's plans to list (intention to float announcement) is often published before the actual start of the offering. The FIN-FSA does not comment on companies' announcements in advance, and therefore does not comment on ITF announcements either.

FIN-FSA's findings

The FIN-FSA has not identified any particular problems with IPO marketing materials it has reviewed in advance. In some ambiguous situations, the FIN-FSA has discussed with advisers the nature of marketing material and marketing-related procedures. In general, the FIN-FSA and advisers have concurred on issues of interpretation related to marketing materials. However, the FIN-FSA draws the attention of preparers of marketing material particularly to the terms used about listing, the presentation of alternative performance measures, and the taking of prospectus comments into account in marketing material.

Marketing regulations and guidelines

- Securities Market Act (Chapter 1 sections 2 and 3 and Chapter 3 section 3)
- Prospectus Regulation (EU) 2017/1129 (Article 22) and Delegated Regulation (EU) 2019/979 (Chapter IV)
- Regulations and guidelines 15/2013 Marketing of financial services and products (in Finnish)

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ESMA's statement on transparency on implementation of IFRS 17 *Insurance Contracts*

On 13 May 2022, the European Securities and Markets Authority (ESMA) issued a public statement on the *Transparency on implementation of IFRS 17 Insurance Contracts*.

IFRS 17 *Insurance Contracts* has been in force since 13 December 2021 and it will be applicable on a mandatory basis for financial periods beginning on or after 1 January 2023. Comparative information must be provided for previous financial periods, with the transition date being 1 January 2022. IFRS 17 replaces the currently applicable IFRS 4 *Insurance Contracts*. The changes in the new standard compared with IFRS 4 with regard to valuation and the information to be disclosed in financial statements are very significant.

ESMA's statement emphasises the need for those applying the standard to provide sufficiently transparent and, as the application date approaches, more detailed information in their interim reports during 2022 and in the financial statement for 2022 about the transition and its impact, as required by IAS 8 *Accounting Policies, Changes in Accounting Estimates and Errors*. ESMA emphasises that information provided on the impact of application is expected to be both qualitative and quantitative. Based on the information provided, investors should be able to assess the impact of the application of the new standard on the financial position and performance of the entity.

IFRS 17 contains opportunities for interpretation and options on how an entity applies the standard. Financial statement supervisors expect entities to disclose their key decisions based on judgment.

Some entities will apply IFRS 9 *Financial Instruments* for the first time concurrently with IFRS 17. ESMA's statement from 2016 *Issues for consideration in implementing IFRS 9: Financial Instruments* remain valid for these entities. Companies should also consider disclosing information about the possible impacts of the application of IFRS 17 on figures according to solvency regulations.

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Listed companies are expected to provide in their half-yearly financial reports sufficient information on the impacts of Russia's invasion of Ukraine on their financial reporting – ESMA has issued a public statement

The FIN-FSA and ESMA are monitoring on an enhanced basis the operating environment related to the war in Ukraine, also from the standpoint of financial reporting. The importance of transparency in financial reporting increases as uncertainty grows.

ESMA expects companies to provide sufficient information in their future financial reporting on the actual and potential future impacts of the war in Ukraine on their operations, financial position and cash flows. The most significant risks and uncertainties to which the company is exposed should also be clearly identified and sufficient information about them disclosed.

On 13 May 2022, ESMA published a public statement on upcoming half-yearly reports. The FIN-FSA wishes to draw the attention of companies, their audit committees and auditors to the following key points as they prepare their upcoming half-yearly reports, prepared in accordance with IAS 34 *Interim Financial Reporting*.

Scope of half-yearly report and adequacy of disclosures should be assessed with particular care

For many companies, it is expected that the war in Ukraine and its impacts will constitute a significant event under paragraph 15 of IAS 34, which will require the information presented in the last annual financial statements to be updated with information concerning the war and its impacts. Therefore the special situation caused by the war in Ukraine might require more detailed and extensive disclosures in the half-yearly report. Even in cases where a company operates in sectors or geographical areas that are susceptible to the effects of the special situation caused by the war, but no material impact on financial reporting has arisen, it is appropriate to describe why this is the case.

Market uncertainty and the difficulty of forecasting increase the importance of management judgment and the information presented about it

Uncertainty about future development has increased significantly due to the impacts of the war in Ukraine, and this in turn will result in an increased level of management judgment in the preparation of interim reports. Due to changed circumstances, decisions that require management judgment might need to be reassessed and rejustified, such as the existence of control relationships in subsidiaries and the impairment of assets. In an uncertain market situation and with visibility being poor, the importance of scenario modelling is underlined in impairment testing. New uncertainties might also bring new financial statement items within the scope of management judgement.

The FIN-FSA expects comprehensive and sufficiently detailed information on the management judgment used in the preparation of half-yearly reports. Investors must be able to understand, on the basis of the information provided, which items have required management judgment and how management has exercised judgment in their decisions.

Audit committees are encouraged to engage in proactive and close dialogue with management and auditors

In addition to risk areas, it would be important for audit committees to pay special attention to the new judgments, estimates and forecasts used by management and to the adequacy of information disclosed about them. The FIN-FSA encourages audit committees to engage in proactive and close dialogue with management and auditors. Dialogue with the auditor may assist audit committees in their own oversight role, but it will also assist the auditors in their challenging assurance role in the prevailing uncertainty. The auditor must state in the audit report for the full financial year if, in the opinion of the auditor, the company's half-yearly report has not been prepared in accordance with the provisions thereon.

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Financial reporting enforcement results in Europe 2021

In March 2022, the European Securities and Markets Authority (ESMA) published the report *2021 Corporate Reporting Enforcement and Regulatory Activities*[4]. The report provides an overview of the ESMA-coordinated activities in 2021 of European national accounting enforcers. The report is more clearly divided into three parts than before: enforcement of financial reporting (including IFRS enforcement and enforcement of alternative performance measures), enforcement of non-financial information, and ESEF reporting. On these, ESMA provides recommendations to companies, their audit committees and auditors on how they can improve future financial reporting by assessing how they have complied with IFRS, non-financial information regulations and ESMA's Guidelines.

In 2021, ESMA and European financial reporting enforcers continued their regular IFRS enforcement measures. During the year, European enforcers undertook 711 examinations of listed companies' financial statements or interim reports. These led to enforcement actions against 250 companies, which represents 40% of the companies reviewed. As in previous years, enforcers identified most shortcomings in the same areas, namely in accounting for financial instruments, impairment of non-financial assets and presentation of financial statements. These highlighted the need for transparency and entity-specificity of information, which is particularly important in financial statements prepared in the uncertain market situation of the COVID-19 pandemic. In addition, a number of material departures continued to be identified with regard to issues related to revenue recognition, even though IFRS 15 *Revenue from Contracts with Customers* has already been applied for three years.

European enforcers also examined non-financial information disclosed by 711 companies. This represents around 36% of companies required to provide this information. Enforcement actions were taken in relation to 72 companies.

In addition, European enforcers examined 537 management reports to assess compliance with ESMA's APM Guidelines. Based on these, enforcement actions were taken in relation to 97 companies, constituting an action rate of 18%.

In 2021, ESMA also promoted the development of financial reporting through many actions. These actions included:

- ESMA's letter to the European Commission regarding the reform of the Transparency Directive following the 2020 Wirecard case[5]
- ESMA's report on the application of standards regarding consolidated financial statements (IFRS 10, IFRS 11 and IFRS 12)[6]
- ESMA's report on compliance with IFRS (IFRS 7 and IFRS 9) regarding banks ECL disclosures[7]
- ESEF XBRL taxonomy files for 2021[8].

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[4] ESMA32-63-1249 2021 Corporate Reporting Enforcement and Regulatory Report.
[5] ESMA32-51-818 Letter to the European Commission.
[6] ESMA32-67-716 Report on the application of IFRS 10-11-12
[7] ESMA32-339-169 Report on the application of the IFRS 7 and IFRS 9 requirements regarding banks expected credit losses
[8] ESMA32-60-727 Final report draft rts amending rts on esef 2021

Topical matters at ESMA

On 11 February 2022, ESMA published a Sustainable Finance Roadmap for 2022–2024.

On 17 March 2022, the European Supervisory Authorities (EBA, ESMA and EIOPA – the ESAs) issued a warning on the high risks of buying and/or holding crypto-assets.

ESAs' joint risk assessment report, highlighting the risks and vulnerabilities of the EU financial system, was published on 13 April 2022.

On 29 April 2022, ESMA submitted to the European Commission technical advice on investor protection issues. The advice was submitted as part of the Commission's retail investor strategy.

On 2 May 2022, ESMA issued its opinion on the European Commission's proposed amendments to the implementing technical standards on the insider lists of SMEs and to the regulatory technical standards on liquidity management.

Market newsletter now also published as online version

The market newsletter is now also published as an online version, starting with issue 1/2022. As each Market newsletter article has its own web page, the articles can be found using search engines and can be referenced directly with a link or shared on social media.

The newsletter will also continue to be published on our online service as a pdf file, which brings together all the articles in one issue. A publication link for both the online version and the pdf file will be distributed to Market newsletter subscribers via e-mail. Previously, only a pdf file of the Market newsletter was published on the online service. You can subscribe to the Market newsletter at the address finanssivalvonta.fi/en > Forms > Subscription to electronic publications.