Deutsche Bank

EU Transparency Register ID Number 271912611231-56

27 January 2014

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Re: ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

Dear Sir or Madam,

Deutsche Bank welcomes the opportunity to provide comments on the above consultation.

We agree with the majority of the ESMA proposals. However, we have suggested some changes which we believe would increase the effectiveness of the framework. We trust you find these suggestions helpful.

Please let us know if we can provide further information.

Yours sincerely,

Andrew Procter
Global Head of Compliance, Government and Regulatory Affairs

I. *Buyback programmes and stabilisation (Article 3 of MAR)*

I.1 Buyback programmes

Regulation 2273/2003[1] has worked well and the market has become familiar with the principles set forth therein. Its approach and principles should be retained and its content reflected in the new Regulatory Technical Standards subject to some clarifications and amendments. The scope of applicability of the safe harbour should be extended to securities listed or to be listed on an MTF or OTF only.

Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

We agree with this approach.

Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

Disclosure of aggregated figures on a daily basis is sufficient. Disclosure on the issuer's website would also be useful.

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

The deadline should be kept as it is. As ESMA rightly points out the market seems satisfied with the existing disclosure deadline. Therefore, we do not expect a shorter timeframe to be sufficiently valuable to outweigh the administrative burden for issuers.

Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?

We agree with this approach as it reduces the complexity of the internal processes for issuers.

Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

There should be one single competent authority, who could also work as a point of contact for authorities in other Member States where the shares are also traded. It appears preferable in terms of consistency if that is the competent authority of the issuer's home Member State. This would also reflect the approach used in related contexts (such as the market making exemption or short position reporting within the EU Short Selling Regulation) where there is one point of reference, i.e. the home state regulator of the financial institution. If this option is not selected by ESMA, the next preferable alternative would be the option linked to the venue where the shares were first admitted to trading. The option linked to liquidity could be difficult to assess in practice as liquidity may change between different markets over time.

[1] http://eur-lex.europa.eu/Result.do?arg0=2273%2F2003&arg1=&arg2=&titre=titre&chlang=en&RechType=RECH_mot&Submit=Search

Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?

It could be challenging to determine what the most liquid market would be given potential differences over time and in view of currency fluctuations. Rather, we recommend retaining the approach of MAD I and either limiting the execution of trades under the buy-back programme to a Regulated Market and prohibiting the purchase at a price higher than the last traded price or last current bid on the Regulated Market where the purchase is carried out. Alternatively an execution of the trades on Regulated Markets or MTF's should be allowed if the market participants have technical systems in place to prove that no purchase was made at a price higher than the last traded price or last current bid on the Regulated Market or MTF where the respective purchase has been executed.

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

For the avoidance of doubt and market impact or distortion, execution throughout the whole auction period should not be allowed. Manipulation during an auction (especially during the last third of an auction) could be easier than during normal trading. During an auction, price is determined according to the most-execution-principle where exchange prices are determined such that the highest possible volume of shares change hands. This makes it difficult to monitor if an increase in price has occurred as it is more difficult to determine what is driving the price.

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

In principle we agree with the cumulative criteria approach but further explanation with relevant examples would be welcome to understand how this would work in practice. We do not consider that market capitalisation is a good indication for the level of liquidity and should be removed from the criteria.

Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

Three different categories may result in unnecessary complexity. Only in cases where further venues could be taken into consideration, thereby allowing a consolidated view across venues (see Q10), do we think that a further differentiation might be useful and worth the extra complexity.

Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

We note that a clear way of calculating volumes across all venues is often difficult and this will be burdensome for issuers. A reference to the Regulated Market or MTF where the respective purchase has been executed would be preferable.

Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

We agree.

I.2 Stabilisation measures

Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

The described categories as they have been established under Regulation 2273/2003 have generally worked well and should be maintained. That said, ESMA could take this opportunity to make some adjustments where the current regime has caused some uncertainties, in particular:

- It is not entirely clear from the wording what a “secondary” offer means, more specifically whether the offer of new shares from a capital increase of a listed issuer constitutes an “initial” or “secondary” offer. In accordance with market practice it should be clarified that a distinction should be made with regards to the offered class of shares, i.e. if the offered class has not been traded yet, it is an “initial offer”; if the offered class is already being traded, it is a “secondary offer” ? ;
- In certain offerings there is no “allotment”, for example in the case of a rights offering, there may only be a limited number of shares left that have not been taken up in the rights offer itself. Such “rump shares” would usually not be placed (i.e. allotted) but rather, they would be sold via the stock exchange. For the purpose of calculating the end of the stabilisation period, we suggest that a period of thirty days after the end of the offer could be used. Careful consideration should be given however to the case of rights issues (where there is no allotment period) to ensure they are not disadvantaged by the referenced period;
- It should be clarified whether “adequate public disclosure" of the terms of the offer under Art 8(4) of Regulation 2273/2003 requires publication of a pre-stabilisation notice either at allocation or at pricing. We are aware that market practice varies between sending one pre-stabilisation notice at the opening of books or publishing two pre-stabilisation notices at allocation and pricing. Regulatory guidance has been inconsistent across jurisdictions. Only one pre-stabilisation notice should be necessary, which should be made before the opening of the offer period as it is required according to Art. 9(1) of Regulation 2273/2003.

Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?

For the pre-stabilisation disclosure, the disclosure provided for under the Prospectus Directive is sufficient, as is currently required by Regulation 2273/2003.

It would be useful to have more guidance as to what means of publications are deemed sufficient. For example, there should be clarity on which Regulatory Information Services (RIS) can be relied upon to file stabilisation reports across various jurisdictions. The Discussion Paper states that “methods used for adequate public disclosure of such information should be efficient" without going into specifics. In some EU jurisdictions, regulators have not given clear guidance on suitable RIS providers.

Beyond stabilisation, the question of where to file regulated information across jurisdictions relates to a wider scope of issues and also concerns buybacks, adequate public disclosure, stabilisation notices, inside information, Person Discharging Managerial Responsibility notifications etc. Ideally, national regulators should specify particular RIS and also include those providers that will be picked up by the nationally specified RIS, such as London Stock Exchange’s RNS for example.

Q14: Do you agree with these above mentioned details which have to be disclosed?

We agree.

Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?

It appears most appropriate to make the entity, which is actually undertaking the stabilisation, exclusively responsible for transparency requirements relating to the stabilisation safe harbour because this entity:

- has the original data to be disclosed, as they result from transactions conducted by that entity;
- should be familiar with the transparency requirements as it deals with stabilisation in the ordinary course of its (investment banking) business, whereas, for an issuer or offeror this is likely to be an exceptional event; and
- has an own interest to ensure that the transparency requirements are being complied with as it may otherwise risk losing the protection of the safe harbour.

Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?

Responsibility should rest with the entity actually undertaking stabilisation, for the same reasons set out above.

Q17 Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?

The reporting regime should be harmonised across the EU. In the case of multiple trading venues there should be one single competent authority that is also the point of contact for authorities in other Member States where the shares are traded. It appears preferable in terms of consistency if it is the competent authority of the home member state of the issuer. As regards the alternatives, the reference to liquidity appears to be more difficult to assess and could be uncertain as the liquidity might change between different markets over time. If the shares are not admitted in their home member state, the trading venue where the shares were first admitted to trading or, traded, should be used. This regime should be consistent with the reporting regime for share buybacks, see the response to Q5.

Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?

We agree.

Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?

Capping prices should not be part of the conditions because changes in interest rates or credit spreads can affect prices.

Q20: Do you agree with these conditions for ancillary stabilisation?

We agree. However, ESMA could take the opportunity to clarify that overallotment should be made concurrently with the allotment of the base deal immediately after the end of the subscription period and not "during the subscription period", as the allotment is generally made after the end of the subscription period. The wording in paragraph 50 of the Discussion Paper mirrors the terminology in Regulation 2273/2003, which, however, is already being interpreted as including an allotment immediately after the end of the subscription period.

Q21: Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?

While sell-side trading is indeed not covered by the existing definition of "stabilisation" in Regulation 2273/2003, CESR's level 3 guidance on that topic has led to uncertainty as to the treatment of "refreshing the greenshoe", more specifically the impact of sales to refresh the greenshoe on the availability of the safe harbour for subsequent stabilisation transactions and/or the exercise of the greenshoe option.

Provided that the possibility to "refresh" the greenshoe is properly disclosed together with the standard pre-stabilisation disclosures, it should be possible to:

- Sell shares during the stabilisation period that were acquired in the course of stabilisation transactions as long as this is effected in a market sensitive manner. Despite not being covered by the safe harbour, such sales should not constitute market manipulation;
- Make the safe harbour available for further stabilisation transactions effected after such a sale to "refresh the shoe", as long as the requirements of the safe harbour rules (as they currently exist under Regulation 2273/2003) are complied with; and
- Allow the exercise of the greenshoe option in its entirety in accordance with the current requirements of Regulation 2273/2003, irrespective of a previous sale to "refresh the shoe".

The foregoing had been the generally accepted view in legal literature (in Germany for example) before CESR published its third set of level 3 guidance and is still strongly supported by market participants. We cannot see any downside in returning to that interpretation. The sales used to "refresh" the greenshoe support the stabilisation manager in carrying out additional stabilisation transactions in a volatile market environment where the share price takes another hit during the stabilisation period, after it had initially recovered following the original stabilisation activity.

Q22: Do you agree that "block-trades" cannot be subject to the exemption provided by Article 3(1) of MAR?

The term "block trade" is not defined in the draft MAR nor in Regulation 2273/2003. However recital 14 of Regulation 2273/2003 states "*In relation to stabilisation, block trades shall not be considered as a significant distribution of relevant securities as they are strictly private transactions*". On that basis, market practice is drawing the distinction between "private" block trades that are not protected by the stabilisation safe harbour and publicly announced placements that can constitute "significant distributions" under Regulation 2273/2003 for which the stabilisation safe harbour is available. There is a definition of significant distribution in Article 5 paragraph 5 (a) "*as an initial or secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed".* We would welcome clarity that anything that is not a significant distribution is a block trade and that publicly announced placements that constitute "significant distributions" under Regulation 2273/2003 are within the scope of the safe harbour provided by Article 3(2) of MAR.

II. Market soundings (Article 7c of MAR

Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

We agree. However, there should be more guidance as to the criteria for the determination of the type and number of investors the disclosing market participant intends to question, particularly given the sanction if disclosure is, in hindsight, deemed "improper". Taking into consideration the interpretation of permitted disclosure by the ECJ in the decision of 22 November 2005 in case C-384/02 (Grøngaard) it would be helpful if ESMA could confirm that, provided the procedure described in MAR is being complied with, market sounding constitutes permitted disclosure if the disclosing party concludes in its reasonable professional discretion that it is necessary to wall-cross a certain number of investors to achieve a realistic assessment of the feasibility of a transaction and/or of its potential conditions.

We would welcome paragraph 62 of the Discussion Paper stating that investor relation communications also consist of non-deal road-shows provided that a) no contemplated placement is mentioned and b) no inside information is disclosed.

Q24: Do you have any view on the above?

The hours in which market sounding takes place should not be restricted. Different kinds of investors might have different requirements. For example, strategic investors might require longer to consider their potential involvement in a placement. Depending on the size and the nature of a transaction, it may be crucial to be able to approach these kinds of investors. Therefore, there should not be a strict limitation on the time span that market soundings may take.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

Our preference would be to determine the buy-side client's wishes on a case by case basis. As a general rule, Option 1 should apply in order to reduce unnecessary administrative burdens. That should not preclude Option 2 if an investor has affirmatively expressed that they do not want to be wall-crossed.

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

In principle we agree with the proposals for scripts. However, the disclosing market participant should reach its own conclusion of what is inside information. The receiver of the information should be put on notice that they may be receiving inside information, but they should be responsible for making their own determination of exactly what the inside information is. If the disclosing party has to explicitly state that inside information is X, it should be qualified with "including but not limited to....."

Q27: Do you agree with these proposals regarding sounding lists?

We agree.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

We agree.

Q29: Do you agree with these proposals regarding recorded lines?

We agree.

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

Yes, we would be in favour provided that e-mail communication should be sufficient and appropriate to ensure that communication is effected in a timely manner.

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

We agree.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

We agree.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

We support the proposals.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

We agree, but the drafting could be clarified to ensure that a dialogue between the parties is first necessary to resolve simple misunderstandings.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

Yes, it should inform the disclosing market participant of the consequences described in the response to Q34.

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

It should be compulsory only after the buy-side has alerted the disclosing party of its view and the disclosing party continues with the process on a non-wall-crossing basis despite the buy-side's alert. This has the benefit of allowing the disclosing party to respond to the alert and refute and explain the suggestion, adjust the procedure or to stop the process before the buy-side is compelled to go to the competent authority.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

We support the proposals.

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

No.

Q39: What are your views on these options?

Neither of the two options are likely to work in practice. A systematic cleansing strategy appears unlikely to work in each and every case. A discussion of, or agreement on, the cleansing strategy on a case-by-case basis is not realistic because:

- transactions with prior wall-crossing are generally time-critical so that there is limited room for discussions on that procedural point; and
- if more than just one investor is approached, there is a high risk that different buy-side contacts will prefer different strategies that are difficult to combine and therefore hard if not impossible to implement.

It would be preferable and more reasonable to agree on the cleansing strategy with the sell-side client instead as such strategy will also have to depend on the sell-side client's own policy to comply with its confidentiality and disclosure obligations. The disclosing market participant could then present a cleansing strategy to the buy-side contact before the buy-side contact is asked for its consent to be wall-crossed. Thus the buy-side contact will be in a position to decide whether they want to be wall-crossed or not on the basis of the procedure proposed by the disclosing market participant. Procedurally, this approach may be more pragmatic. It is essential that the ESMA standards emphasise that there must be cooperation between sell-side clients and disclosing participants.

III. Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

Q40: Which practices do you think are more related to manipulation of benchmarks?

MAR Article 8(1)(a) refers to market manipulation as giving false or misleading signals regarding price, supply or demand while MAR Article 8(1)(d) refers to transmitting false or misleading information/input which manipulates the calculation of a benchmark.

A broad range of practices could therefore be considered as being related to the manipulation of benchmarks, which is helpful to ensure competent authorities across the EU can investigate and initiate enforcement action as appropriate and necessary.

We also note that the MAR/MAD definition of benchmarks is broadly aligned with that used in IOSCO and EBA-ESMA principles for benchmark-setting and in the proposed EU Regulation on benchmarks. Both IOSCO and EBA-ESMA emphasise the importance of applying these principles in a way that is proportionate to the nature and importance of the benchmark in question. We support this risk-based approach to focus on benchmarks widely used by market participants and / or whose methodology or governance pose greater potential conflicts of interest or scope for manipulation. We therefore agree that ESMA's approach to benchmarks provisions in MAR should be proportionate to potential market impact.

Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

The list in Annex III lacks sufficient contextualisation. Many of the examples could potentially be considered normal market activity where trading takes place in firm, deal-able sizes. For example, point B risks capturing genuine price discovery while point O could theoretically catch all derivatives trading. While the annex incorporates previous guidance provided by CESR, we would recommend further elaborating the contextual factors that should be taken into account when making a determination.

Q42: In your view, what other ways exist to measure order cancellations?

We are not convinced that measuring order cancellations alone is the right approach to identifying indicators/signals of market manipulation. A high level of order cancellations is a very simplistic way to identify signals of market manipulation. It would not take account of specific circumstances and the potential legitimate reasons for cancellation. The correlation breaks down where there are multiple and related orders.

Q43: What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?

The presence of a number of the indicators set out in Annex I of MAR. We would recommend that ESMA provides further interpretation on the points set out in the Annex and include all factors that should be taken into account to determine whether legitimate circumstances exist that could result in the practice being identified as not manipulative.

Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

Please see our response to Q41-43.

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.

The scenarios included could all potentially encompass normal and acceptable business activity under certain circumstances and depending on the context. For example, if a firm acts as a market maker in a security which has limited liquidity then the behaviours demonstrating a concentration or repetition of activity are likely to occur regularly as part of normal market making activity. As set out in response to Q41, we would recommend further elaborating the contextual factors that should be taken into account when making a determination.

Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?

This will depend on the circumstances of each individual case. There is also an implication in the phrasing of this question that the analysis is more of a real-time control or circuit breaker in trading. It is often only possible to detect such manipulative behaviour in retrospect taking a wider view of behavioural/activity patterns. That is why compliance surveillance of trading generally takes place on T+1 basis or later.

Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

Rather than focusing on tools, it would be better to focus on the availability of data/information within tools. Successful monitoring of trading requires good quality data relating to market activity as a comparative reference by which the firm's own trading can be measured. In view of this, it is arguable that monitoring is best undertaken by regulators as they have access to the widest range of market data, including the transaction report data submitted by firms which allows a regulator to identify the underlying clients where applicable. However, if monitoring is to be a responsibility of firms then regulation should provide for greater access to market data for those firms, for example, by implementing a requirement that exchanges and other trading venues or reporting repositories make data available to firms at a reasonable cost for use in monitoring. Obviously certain data, such as firm and client identifiers may need to be redacted.

IV. Accepted Market Practices (Article 8a(5) of MAR)

Q48: Do you agree with the approach suggested in relation to OTC trading

We agree.

Q49: Do you agree with ESMA's approach in relation to entity which can perform or execute an AMP?

We agree.

Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?

N/A

Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?

N/A

Q52: Do you agree that the factors listed seek to ensure a high degree of safeguards and proper interplay of forces of supply and demand?

We agree.

Q53: Do you agree with the fact that AMPs may in some instances protect specific market participants (retail clients)?

N/A

Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should this principle be adapted?

Provided that the market practice is observed, independence should not be mandatory.

Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?

We agree.

Q56: Should an ex ante list of situations when the AMP should be temporarily suspended or restricted be established (e.g. takeover bids)?

This should depend on the respective AMP and may be part of the definition and scope of the AMP.

Q57: Do you agree with the above mentioned principles that seek to ensure that AMPs do not create risks for the integrity of related markets and would you consider adding others?

Some of the principles are disproportionate. For example, requiring submission of the underlying contract between the interested parties to the competent authority risks creating a burden for the competent authority and market participants for no significant benefit.

As regards the "Chinese walls" point raised in the Discussion Paper, the general conflicts of interests' requirements under MiFID should be sufficient.

Q58: What kind of records of orders, transactions etc. should a person that performs an AMP have?

Generally, it should be evidenced and auditable and kept for at least 5 years.

Q59: Do you agree with the above mentioned principles that take into account the retail investors' participation in the relevant market? Would you consider adding others?

N/A

V. Suspicious Transaction and Order Reports (Article 11 of MAR)

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

We agree with this analysis. Given that the task of judging whether someone was attempting to do something is quite difficult, the risk of over-reporting exists. ESMA will need to take account of how potential over reporting and genuine mistakes are managed. Over-reporting may exist for example, where a client unknowingly suggests a trading strategy that contravenes MAR and when challenged, willingly withdraws the suggestion. In many cases it would be unreasonable to be obliged to report such situations. The ESMA text should make this clear.

It is important to have in place a principle that anyone filing a report may not be held liable (unless the report is intentionally or untrue by reason of gross negligence). Under German law such a rule currently exists and we would recommend maintaining that principle.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

Yes, we agree with the approach. The need to notify transactions and orders which become suspicious retrospectively (paragraph 200 of the Discussion Paper) might require additional monitoring. There might be a need to further define the aspects that would typically fall under the term subsequent events or information.

Often suspicion builds over time through the observation of a pattern of activity, rather than from a single event. The first event in the pattern may not, by itself, trigger suspicion and it is possible that the pattern will not become apparent until the activity has repeated over a period of days or weeks. Given the description that a firm may be held to account for not reporting the original event within two weeks we would recommend taking account of the above explanation of how patterns can slowly emerge.

Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?
Q63: Do you have any views on what those reasons could be?

We agree that a firm's reporting should be based on facts and not on presumptions, particularly not unreasonable presumptions. The word presumption should be changed to assumption. As under the currently applicable German law, an obligation to report suspicious transactions should only apply if there are concrete facts indicating that market abuse has been committed or attempted.

Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.

If firms are going to be required to implement automated surveillance then it is critical that the rules oblige other parties to provide the market data which is vital to the success of such monitoring.

Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

In this field it is of particular importance that training is up-to-date and takes into account latest examples of manipulative behaviour in the market. Regular training sessions should be complemented by ad-hoc alerts, etc.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

A template such as in paragraph 215 of the Discussion Paper would be useful, provided that it is sufficiently flexible.

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

We have had positive experience with the BaFin template. We would agree with a common electronic template if it is not overly rigid. There must be flexibility to describe every situation which may require reporting. In this regard the use of free text boxes should be considered.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

We agree to the five year record keeping requirement. Recording of "near misses" is, however, problematic. The difficulty is understanding what is meant by "potentially suspicious transactions which have been examined". As noted elsewhere, it is difficult to define the activities which constitute market manipulation as the context is critical and therefore it is difficult to define specific indicators within automated monitoring processes. As a result, such monitoring generates a significant proportion of "false positive" alerts, in other words, alerts on activities which fit the pre-defined criteria but given the context of the activity are not suspicious. The issue is defining the point at which reviewing the activity in the alerts moves to being an "examination" of that activity. There is therefore a tension between implementing coverage which is sufficiently broad to capture potentially suspicious activity and forcing overly burdensome recording of all judgements taken in reviewing such activity (including the majority of false positive items).

VI. *Public disclosure of inside information and delays (Article 12 of MAR)*

Q70: Do you agree with this general approach? If not, please provide an explanation.

We agree. This is an example where specific RIS determined by Regulators across jurisdictions would be helpful.

Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

We agree.

Q72: Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.

We would agree if such a change in itself qualifies as inside information. We note that significant changes to a set of publicly disclosed information create new inside information which should be disclosed following the normal procedure.

Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?

We agree.

Q74: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?

The Transparency Directive based approach is the most appropriate option. Under this procedure, the competent authority receiving the notification will remain the same. Adopting the Prospectus Directive approach would in most cases lead to similar results as the Transparency Directive approach. However, the Transparency Directive approach would have the benefit of centralising the supervision of ongoing disclosure (regular and ad hoc).

Conversely, the MiFID approach of determining the relevant competent authority with reference to the most relevant market in terms of liquidity appears likely to result in unnecessary complexity.

- Firstly, that market is not specified in the European Commission's draft of MiFIR; rather, according to Art. 23 para. 8 lit. (b) , the Commission's draft of MiFiR states that the identification of that market will depend on criteria for defining a relevant market yet to be developed by ESMA.
- Given the fact that liquidity might fluctuate between markets and trading platforms, the reference will necessitate the need for permanent monitoring by the issuer. There would also be a risk that the competent authority may occasionally change as a result.
- Further, the MiFID approach would require complex procedural rules such as criteria and reference periods for the measurement of liquidity and review periods

(as market participants would be unlikely to want to see the competent authority change) as well as transparency rules to clarify to all market participants who the competent authority is at a particular point in time.

In view of the above, the MiFID approach appears overly complex and is likely to generate costs without delivering real benefits.

Q75: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by emission allowances market participants?

This should also be the competent authority in the Member State where the market participant has its registered office, as suggested in paragraph 264 of the Discussion Paper.

Q76: Do you agree with the approach to the ex post notification of general delays and the ways to transmit the required information? If not, please explain.

We agree.

Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.

We agree. In particular, as set out in paragraph 271 of the Discussion Paper, issuers should have discretion as to how exactly they organise themselves to ensure compliance with the requirements for a delay. That means, in particular, that the issuer’s (management) board should be able to delegate a decision on the delay to a “disclosure committee” without a board member necessarily having to participate in the decision making. That would also help issuers to ensure that they can take decisions without undue delay as required by MAR.

The treatment of rumours should recognise that according to Art.12 (4)(a) MAR, confidentiality is no longer ensured if a rumour explicitly relates to a piece of inside information which has not been disclosed (...) or when it is sufficiently accurate to indicate that the confidentiality (...) is no longer ensured". Conversely, if the rumours are such that they do not give the impression that there has been a leak within the issuer's sphere (including, in the case of a proposed Merger & Acquisition transaction, the transaction team, also with representatives of other parties) the issuer should still be allowed to delay disclosure.

The possibility of delaying disclosure is important for issuers, e.g. for the reasons set out in Recitals 24 et seq. of MAR. Taking an overly restrictive approach would jeopardise the balanced concept established in MAR. In particular, forcing issuers to disclose prematurely may lead to the failure of proposed Merger & Acquisition transactions or capital raisings and cause serious damage to the issuer.

Q78: Do you agree with the proposed content of the notification that will be sent to the competent authority to inform and explain a delay in disclosure of inside information? If not, please explain.

We agree.

Q79: Would you consider additional content for these notifications? Please explain.

No.

Q80: Do you consider necessary that common template for notifications of delays be designed?

We do not believe that this is essential, but it may be useful.

Q81: Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?

It is important for ESMA to clarify whether in the event of a capital raising, a delay in the publication of inside information is warranted to preserve financial stability in the public interest.

ESMA should also clarify that while the decision making of the competent authority is pending the issuer is allowed to delay disclosure. Otherwise, that form of delay would not work.

Q82: Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information? Do you consider that CESR examples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

We agree.

Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

There is a genuine risk that this principle, if applied too strictly, would effectively remove the right to delay any disclosure of inside information. We would therefore favour ESMA producing a short list of potential situations where omitted disclosure is likely to mislead the public.

More generally, we are concerned that the approach taken in paragraph 307 of the Discussion Paper overly restricts issuers as it is typical for many circumstances that constitute inside information to contradict market expectation (and are price sensitive for that very reason). Hence, as is noted in the BaFin Issuer Guideline (item IV. 3.2), an imbalance of information exists throughout the period in which the issuer has knowledge of inside information but does not disclose it. This imbalance of information is not "misleading" per se. However, issuers must not, while they are delaying disclosure of inside information, actively provide any indications that are in contradiction to the undisclosed inside information. Also, we note that a "no comment policy" as misleading in this context.

VII. *Insider list (Article 13 of MAR)*

Q84: Do you agree with the information about the relevant person in the insider list?

Requiring private home and mobile numbers as well as a private e-mail address is not required for the purposes set out in Art. 13 MAR. Insider lists are required to identify insiders and to enable the competent authorities to contact them for further inquiries. The aforementioned data is not necessary for either of those purposes. Requiring that data is disproportionate with regard to the relevant person's privacy and could raise data protection concerns. The contact details should be limited to such person's business address.

Q85: Do you agree on the proposed harmonised format in Annex V?

Apart from the private contact details (see Q84 response), we agree.

Q86: Do you agree on the proposal on the language of the insider list?

We agree.

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

We agree.

Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields…)?

We support such an approach.

Q89: Do you agree on the procedure for updating insider lists?

We agree.

Q90: Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

We agree. It is questionable whether the implementation of such a system is more efficient for an SME compared to maintaining an insider list. It should not matter whether insider dealing occurs with regards to the securities of a small or a large company.

VIII. Managers' transactions (Article 14 of MAR)

Q91: Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?

The characteristics are sufficiently clear.

Q92: What are your views on the minimal weight that the issuer's financial instrument should have for the notification requirement to be applicable? What could be such a minimal weight?

A weight of 50% is the threshold applied in Germany (see the BaFin's issuer guide, item V.2.1, page 76). This is sufficient.

Q93: For the avoidance of doubt, do you see additional types of transactions that should be mentioned to the non-exhaustive of examples of transactions that should be notified?

No.

Q94: What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?

Alternative 3 appears to be the most appropriate; individual orders or transactions are not relevant to inform the market that a Person Discharging Managerial Responsibilities (PDMR) has been active in trading the securities of the issuer. Rather the information set out in alternative 3 should be sufficient. More detail does not provide any further information to the market but rather swamps investors with details that are not relevant.

Q95: What are your views on the suggested approach in relation to exceptional circumstances under which an issuer may allow a PDMR to trade during a trading window?

The suggested approach fails to give an exception where a dealing in a manager's shares takes place by operation of law e.g. where a scheme of arrangement automatically causes the manager to exchange his existing shares for another share. We would request that ESMA considers this matter and proposes appropriate wording.

Q96: What are you views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

The terminology is not sufficiently clear. The time during which a PDMR shall not conduct any trading in financial instruments relating to the issuer should generally be called "closed period" as in Article 14(4)(a) of MAR. Conversely, the term "trading window" (which does not appear in Art. 14 (4)(a)) should rather be used for the time when a PDMR actually can trade (which would in our view also be more consistent with the use of such a term in colloquial language). There should be another clear term for that time (e.g. "permitted period"). However, using different terms for the same issue should be avoided.

Generally, the terminology used in this section should be reviewed as it also appears inconsistent in other respects. For example, in paragraph 376 of the Discussion Paper the term "closing window " is used (apparently instead of "closed period").

In paragraph 376 of the Discussion Paper it is not clear why the PDMR should be required to notify the issuer of its choice to exercise an option at least 4 months before the expiration day. It is unclear where the 4 month period comes from and why it was chosen. Irrespective of the time left until expiration, the requirement should simply be that the option is exercised outside a closed period.

The awarding of the issuer's financial instruments to a PDMR based on an employees' scheme as set out in paragraph 377 of the Discussion Paper appears to us a non-issue as if the financial instruments are automatically awarded based on the conditions of the scheme. If there is any kind of discretion involved on the issuer's side, the financial instruments should simply be awarded during a permitted period (i.e. not during a closed period) only.

Furthermore, the criteria for allowing particular dealings is not sufficiently clear. However, we agree that transactions that were irrevocably decided upon outside a closed period or that do not result in a change of the owner without any price impact, should be permitted.

IX. *Investment recommendations (Article 15 of MAR)*

Q97: Do you have suggestions on how to determine when an investment recommendation is "intended for distribution channels or for the public"?

The distribution intended by the producer of the investment recommendation should be decisive.

Q98: Do you think that there should be a threshold for what constitute "large number of persons" for the purpose of determining that an investment recommendation is intended for the public?

A threshold would be useful for the sake of clarity. We note that US rules[2] state that a research report is not one which is distributed to less than 15 recipients.

Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?

We agree.

Q100: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?

We agree.

Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

We agree.

Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

We agree.

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

The current threshold of 5% is appropriate. Disclosure of any holdings would lead to monitoring difficulties with little policy benefit. Alternatively, a general disclosure could suffice where it states that the legal person responsible for the production of the recommendation may hold shares in the respective issuer.

[2] FINRA Rule 2711. Definition 9 (Research Reports) part B (ii)

Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?

Yes, this should be in line with the disclosures to be made in accordance with Regulation 236/2012 (EU Short Selling Regulation).

Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?

We agree. However, any rule should clarify that the disclosure relating to debt positions impacts all class of investment recommendation, in order to capture wider conflicts.

When determining the appropriate thresholds it is important to consider that debt instruments have different categorisations within the capital structure of an issuer. While it may be sensible to set the threshold in line with the threshold for equity instruments, ownership of 5% or more in one bond may exert more influence on an issuer than a 15% holding in another. Also, ownership and control clauses in bond documentation/term sheets can be opaque when considering control/conflicts of interest issues.

Q106: Do you think that additional specific thresholds should be specified with respect to other 'non-equities' financial instruments?

This should be clarified. We assume that it is referring to bonds/derivatives.

Q107: Do you think that further disclosure on previous recommendations should be given?

Q108: If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?

Yes, this is done already in many cases. We would suggest a list of recommendations on that financial instrument for the last 3 years.

An analysis of the gap between market price and price target should not be required. This is self-explanatory. However, a general explanation of the envisaged timeframe for the price target may be used. The US rules on disclosures[3] concerning the meaning and distribution of ratings along with the price chart and price targets are useful.

Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

We do not see any disadvantage in a general disclaimer in addition to the specific disclosure that is legally required. The general disclaimer, as contained in the example in paragraph 410 of the Discussion Paper, results from the fact that the specific disclosure necessarily can only reflect the situation at the time of first publication of a report, but positions may change as a result of ongoing trading.

Q110: Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?

It would be useful to clarify that a reference can be made to a website with the relevant disclosure.

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[3] 2711 section (h) on disclosures, parts 4, 5, 6 and 7 all give guidance on historic ratings, target prices and price charts http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3675

Q111: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

The rules on recommendations produced by third parties should be tightened in some situations other than where intermediaries of financial analysts carry out the dissemination. In particular, we note that research magazines often obtain broker reports and extract information from them and reproduce the investment advice without providing the full justification that they were based on. As with the approach of Regulation 1060/2009 on Credit Rating Agencies, parties that disseminate advice upon which investors make decisions should have to provide justification or take responsibility for the extracted advice that they circulate.

X. Reporting of violations (Article 29 of MAR)

Q112: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?

The procedures are sensible. However, the data of legal persons on behalf of whom reporting may be made, should also be protected.

Q113: Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?

We agree that there should be specific rules to protect whistleblowers from being sanctioned for reporting breaches or facts indicating breaches. However, protection mechanisms to avoid libel and slander should be established as well.