Deutsche Bank

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Re: ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (2014/808)

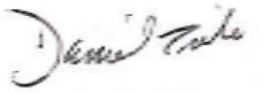
Dear Sir or Madam,

Deutsche Bank welcomes the opportunity to provide comments on the above consultation. Overall, we find ESMA's proposals balanced.

We do have some suggested amendments which we believe would increase the effectiveness of the framework. In particular, to increase legal certainty for market participants in relation to the proposed advice on indicators of market manipulation, it would be helpful to explicitly state that certain activities - such as acts in compliance with the rules of a (regulated and supervised) trading venue - would not constitute market manipulation.

We would be happy to discuss further the above point or any issues raised in our response. Please let us know if we can provide further information.

Yours sincerely,



Daniel Trinder
Global Head of Regulatory Policy

Draft technical advice on possible delegated acts concerning the Market Abuse Regulation - ESMA/2014/808

Specification of the indicators of market manipulation

Q1: Do you agree that the proposed examples of practices and the indicators relating to these practices clarify the indicators of manipulative behaviors listed in Annex I of MAR?

We agree with the proposed examples on the basis that they are not determinative but it would be helpful to explicitly state that certain activities would not constitute market manipulation. For example, we would recommend stating that in cases where a participant acts in compliance with the rules of a (regulated and supervised) trading venue, such acts would not constitute market manipulation. This would increase legal certainty for market participants. It would also be consistent with paragraph 6 of the draft technical advice which states that there are examples of practices that might actually be deemed licit if they are justified by legitimate reasons or are in compliance with laws and regulations (for example trading activity carried out in compliance with the rules of the relevant trading venue etc.).

In relation to 13(g) on page 20 of the draft technical advice, it is not clear why the situations described constitute an indicator of market manipulation, since the price impact described could result from any large order. The paragraph should be either reconsidered or at least clarified to state that a transaction that results in a price impact is not manipulative in itself, especially in the case of a large order.

Q2: Do you think that the non-exhaustive list of indicators of market manipulation proposed in the CP are appropriate considering the extended scope of MAR in terms of instruments covered? If not, could you suggest any specific indicator?

We believe the proposed list is sufficient.

Q3: **Do you consider that the practice known as "Phishing" should be included in the list of examples of practices set out in the draft technical advice? In this context, "phishing" should be understood as the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication.**

Phishing may be used in the course of market manipulation but it is not unique to financial markets. We do not therefore think that it would be a good example of a practice which constitutes market manipulation.

Q4: **Do you support the reference to OTC transactions in the context of cross product manipulation (i.e. where the same financial instrument is traded on a trading venue and OTC) and inter-trading venue manipulation (i.e. where a financial instrument traded on a trading venue is related to a different OTC financial instrument)?**

Yes.

Determination of the competent authority for notification of delays in public disclosure of inside information

Q7: **Do you agree with the proposals for determining the competent authority to whom issuers of financial instruments and emission allowances market participants should notify delays in disclosure of inside information?**

We agree with ESMA's proposals. We also support ESMA's intention to examine the potential establishment of a mechanism to inform the authority of the most relevant market in terms of liquidity - when it is different from the authority to which the notification is made - that a delay took place.

Q9: **Do you consider it would be appropriate to determine in a different manner the competent authority for the purpose of Article 17(5) of MAR, where the delay has the scope of preserving the stability of the financial system? If so, should the competent authority be determined according to mechanism set out in Article 19(2) of MAR or in another way?**

The competent authority should not be determined using the method in Article 19(2) of MAR as the procedure is not the most appropriate for acheiving the objective of preserving financial stability. For the objective persued, the banking supervisory authority is best placed to decide when sensitive inside information can be withheld form the public.

Managers' transactions

Q10: **Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?**

Where the transactions were not initiated at the direction of the person discharging managerial responsibilities (PDMR) we do not believe there is a duty to notify under Article 19(7) of MAR. Recitals 58 and 59 of MAR imply that these transactions must at least in theory be motivated by knowledge obtained in the PDMR's managerial function. Where the involvement of the PDMR in the actual investment decision can be ruled out, a requirement to disclose such a transaction does not serve the purpose of increasing transparency around managers' transactions. A notification requirement under such circumstances could actually mislead the market. We would therefore recommend deleting items 2 l) - n) of the draft technical advice.

Similarly, transactions in collective investment funds (such as UCITS and AIFs) should not be required to be reported, since the PDMR may not have access to the relevant information. The same rationale applies regarding financial instruments under an employees' share scheme as the PDMR does not make an investment decision. The exceptional treatment that is suggested for closed periods would not therefore be necessary. At a minimum, the requirements could be made more proportionate by applying weighing criterion, similar to the proposed approach for index funds.

Q11: **Under paragraph 3 of the draft technical advice, do you consider the use of a "weighting approach" in relation to indices and baskets appropriate or alternatively, should the use of such approach be discarded? Please provide an explanation.**

We agree with the weighting approach. It is reasonable as it will prevent disclosure when the issuer's shares represent only a small portion of the index or basket of instruments. Disclosure of transactions in all cases would result in information overload leading to the potential for confusion.

Q12: **Do you support the ESMA approach to circumstances under which trading during a closed period may be permitted by the issuer? If not, please provide an explanation.**

Overall, we support the approach. However, as explained in our answer to Q10 and Q11, transactions not based on an investment decision by the PDMR (e.g. award under an employee's share scheme, automatic conversion of a mandatory convertible bond) should be excluded from the notification requirements.

With respect to identifying the triggering event for the closed period, the publication of the preliminary financial data could be used as the initiation point as this information is more sensitive than the final financial numbers which usually just confirm or specify what has already been published on a preliminary basis.

Q13: **Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate, do you foresee any issue with the proposed approach regarding the disclosure of such transactions or the need to ensure that the closed period prohibition is respected?**

The proposed approach could create some challenges. As stated in the consultation paper, informing asset/portfolio managers of upcoming closed periods could actually encourage market abuse. The suggested approach will also restrict the normal trading activities of asset/portfolio managers. An alternative approach could be a prohibition on PDMRs having any discussions with asset/portfolio managers regarding closed periods. If such a prohibition were in place, then any transactions entered into by asset/portfolio managers on a wholly discretionary basis would not constitute market abuse. Asset/portfolio managers would simply be engaging in their usual trading activities with no knowledge of closed periods or other inside information. This avoids the risk of PDMRs trading during the closed period and the risk of asset/portfolio managers engaging in market abuse based on knowledge of closed periods.

Reporting of infringements

Q15: **Do you agree with the analyses and the procedures proposed in the draft technical advice? Which best practices from existing national, European or international legislation or guidance could be useful for the protection of the reporting persons under the market abuse regime?**

We agree with the main recommendations set out in the consultation document. We do believe however that the primary route for escalation should be within the Bank, rather

than an external body. There are several reasons for this, the most practical being that the Bank is more likely to be able to quickly and effectively remedy an issue the sooner it is made aware of it. Regulators should remain an additional escalation route for those who feel the issues raised have failed, or will fail, to receive proper action or consideration.

Q16: **Do you think there are other elements to be developed in relation to specific procedures for the receipt of reports of infringements under MAR and their follow-up, including the establishment of secure communication channels for such reports**

We agree with the proposals and do not believe there is any need to develop additional procedures for the receipt of reports of infringement under MAR.

Q19: **Are you aware of any particular provision, measure or procedure currently in place under national laws of Member States or best practices that could effectively complement the mechanism of the competent authorities and the waiver of liability for reporting proposed in the draft technical advice, in order to increase the protection of employees working under a contract of employment? If yes, please provide examples.**

German labour courts and general principles of German employment law regarding discrimination against whistleblowers for truthfully reporting infringements as illegal.