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ASSOCIAZIONE
ITALIANA
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FC/fc

ESMA
CS 60747
103 rue de Grenelle
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Re: ASSOSIM contribution to ESMA Consultation paper "Draft guidelines on the Market Abuse Regulation"

Preliminary remarks

Assosim[1] welcomes the opportunity to comment on the ESMA consultation document in subject and is pleased to provide the following observations.

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Guidelines for persons receiving the market soundings

As a general remark, Assosim would like to underline that ESMA should take in deeper consideration the nature of the relationship between the DMP and the MSR, which is firmly fiduciary. Therefore, the mutual trust and confidence existing between parties involved in market sounding activities should be adequately enhanced and valued in order to pursue an appropriate level of market protection. Moreover, ESMA should always bear in mind the ultimate *ratio* of the market soundings regime, which is to contrast insider dealing, and consequently adequate the extent of the guidelines in order not to go outside the scope of the mandate conferred by Article 11(11) of MAR, which constitutes their legal basis.

[1] ASSOSIM (*Associazione Italiana Intermediari Mobiliari*) is the Italian Association of Financial Intermediaries, which represents the majority of financial intermediaries acting in the Italian Markets. ASSOSIM has nearly 80 members represented by banks, investment firms, branches of foreign brokerage houses, active in the investment services industry, mostly in primary and secondary markets of equities, bonds and derivatives, for some 82% of the Italian total trading volume.

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

With reference to the prescription of an obligation of the MSR to conduct its own assessment of the nature of the information disclosed by the DMP (see guideline 3.1), Assosim deems it would be appropriate to distinguish between the case in which the relevant information is disclosed by the DMP as inside information and the different one in which it is presented to the MSR as non-inside. The implications of such scenarios are very different from one another, as ESMA itself recognizes in guideline 4. Indeed, ESMA intentionally addresses guideline 4, which requires the MSR to inform the DMP of its discrepancy of opinion about the nature of the information disclosed, only to the case where according to the DMP non-inside information is disclosed and MSR disagrees, but not the other way round (see CP, paragraph 3.1: "*Differently, ESMA is of the view that where the disagreement between DMP and MSR is due to the fact that according to the former inside information is disclosed but the latter disagrees, there is no need for requiring the MSR to inform the DMP of such discrepancy of opinion as there should be limited risk of spreading inside information to other MSRs without flagging it as such.*"). In fact, as the majority of respondents to the DP have already considered, it is unnecessary for the MSRs to carry out their own assessment of the nature of the disclosed information once they have been already wall-crossed. In other words, when the information is disclosed as inside by the DMP, if the MSR accepts such an assessment agreeing to receive the market sounding, the MSR itself inevitably adheres to the most conservative approach with reference to the information disclosed. Consequently, in such a scenario, there would be no need to impose the MSR the unnecessary burden to conduct and keep records of a further own assessment. Therefore, it would be appropriate to amend the guidelines, in order to clarify that in such a case the required MSR's assessment could consist in the mere MSR's acceptance of the DMP's inside assessment.

In support of the above, please consider that despite what is supposed by ESMA in paragraph 20 of the CP such a different treatment would not be in conflict with Article 11(7) of MAR if systematically and correctly interpreted. Indeed, considering the *ratio* of the market soundings regime, which is ultimately to protect markets against potential abuses, such as the misuse of inside information disclosed during a market sounding (*i.e.* insider dealing), it is clear that the *ratio* of Article 11(7) of MAR, while requiring MSRs to conduct their own assessment on whether they are in possession of inside information as a result of the market sounding, specifically addresses the risk of insider dealing hidden underneath the classification of the disclosed information as non-inside despite its actual inside nature. On the contrary, in light of such rationale, there would be no added value in requiring a supplementary assessment of the nature of the information where it is already flagged and treated as inside.

Such a conclusion is even more clearly grounded and confirmed if we pay close attention to the mandate of the guidelines itself, conferred to ESMA by Article 11(11) of MAR, which expressly states that the guidelines aim at providing MSRs with more detailed provisions in order to comply with Articles 8 and 10 of MAR, which regulate specifically insider dealing. In particular, under Article 11(11) of MAR: letter (a) expressly refers only to the factors to take into account in order to assess whether the information amounts to inside information (and not the factors to take into account to assess whether the information amounts to non-inside information); letter (b) addresses the topic of the adequate treatment of inside information if disclosed during the market sounding, in order to avoid insider dealing (without having regards to the treatment of non-inside information, giving rise to the assumption that there is no interest in providing for a specific treatment of non-inside information, thus defecting the only reason which would eventually justify the aforementioned MSR's own assessment despite the DMP's inside classification of the information, which the MSR would accept without any further own analysis if it was not for the obligation imposed by the guidelines); finally, letter (c) refers to the records that MSRs need to maintain in order to demonstrate that they have complied (not with Article 11 of MAR which regulates market soundings but once again) with Articles 8 and 10 of MAR which regulate insider dealing. Thus, it is evident that the whole market soundings regulation is specifically ancillary to the avoidance of insider dealing and in such a role (*i. e.* a mean towards an aim) it has to be read and interpreted, including Article 11(7) of MAR. Accordingly, the requirement of MSR's own assessment of the information disclosed, provided by Article 11(7) of MAR, should be interpreted as applicable only to that information disclosed as non-inside.

Moreover, the aforementioned Article 11(11)(c) of MAR is crucial also to show another misinterpretation of ESMA, under paragraph 22 of the CP, where it states that "*in order to comply with Article 11(11)(c) of MAR, in the guidelines ESMA proposes that, in order to ensure the enforceability of the relevant provisions, MSRs should keep records of their assessment*". Well, the relevant provisions to which ESMA refers hereto are always those related to insider dealing (Articles 8 and 10 of MAR recalled by Article 11(11)(c) of MAR). It is consequently clear that if the MSR accepts the DMP's inside classification of the information disclosed treating it as inside, despite the fact that the information is actually inside or not, the MSR is fully compliant with the relevant provision *ipso facto*. Therefore, in such a case, there would be no need to independently further assess the nature of the information neither to keep records of such an assessment, being sufficient in order to demonstrate the compliance with the relevant provisions to keep records of the internal procedures implemented to treat such information adequately as inside information.

Ultimately, allowing for the MSR's assessment to consist in the mere MSR's acceptance of the DMP's inside classification would recognize the appropriate value to the existing fiduciary relationship between the parties involved, which would at the same time enhance the mutual confidence promoting an even more correct assessment by the DMP and a more efficient market soundings market.

In sum, if ESMA accepts the proposed amendment, on one hand, the level of market abuse protection would grow (or in the worst case scenario it would remain the same), while, on the other hand, MSRs would be free of a useless burden which would otherwise strongly increase their compliance costs, in light of the high amount of market soundings conducted. Such an increase would force MSRs to refuse most of such soundings, with a consequent consistent negative impact on market integrity and efficiency.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

Assosim believes that it would be advisable that the MSR informs the DMP when it believes to have received inside information not flagged as such, although it should not be required to. Indeed, the free dialogue between the parties could facilitate mutual acknowledgement and comparison of underlying procedures which have driven different conclusions; this process might lead to a review of the analysis carried out either by the MSR or by the DMP. On the contrary, the obligation to inform the DMP of its discrepancy of opinion would be, on one hand, too burdensome for the MSR given the high amount of market soundings received and, on the other hand, not necessarily preventing the DMP from inadvertently spreading inside information to other MSRs without flagging it as such, given that such a communication would not ensure that the DMP will actually change its opinion. In conclusion, regarding the above, ESMA needs to bear in mind that ultimately each party must take responsibility for its own decisions and actions.

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

Assosim would like to underline that ESMA proposal regarding internal procedures under paragraph 5(1)(a) of the guidelines appears to go beyond the scope of the MAR mandate, because it requires to implement internal procedures with reference to any kind of information (inside or non-inside) received in the course of market sounding. On the contrary, given that such procedures aim at avoiding the spread and misuse of inside information (insider training), their scope should be limited only to inside information and, up to the maximum, to information disclosed as non- inside which hasn't been assessed yet by the MSR as actually non-inside. Accordingly, the relevant guideline should be reformulated adding the wording "if classified as inside information or if not until the assessment of its non-inside nature" after the word "sounding" in paragraph 5(1)(a) of the guidelines.

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

Assosim believes that such a requirement would represent a consistent burden for the MSRs, which have to deal with a high frequency of market soundings. Moreover, such a burden wouldn't add any value to the market sounding regime, given that all the market sounding activities (meetings, calls etc.) need already to be documented through either recording or written minutes or notes. Therefore, we suggest to delete paragraph 6 of the guidelines.
In the case where ESMA doesn't agree to such a deletion, we subordinately suggest at least to add the wording "if classified as inside information or if not until the assessment of its non-inside nature" at the end of paragraph 6 of the guidelines, for the same reasons expressed in the answer to Question No. 3 above.

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

Assosim agrees with such a more flexible approach. Although, with reference to the case of agreement of the MSR upon the content of the minutes drawn up by the DMP, we think it's necessary that ESMA clarifies that such an agreement could be expressed even through its non-disagreement, without the need to sign each minute or note. Indeed, it would be too costly for the MSR to revise each of them given the high amount of meetings, calls and communications involved in the market soundings. In addition, recognizing the MSR's non-disagreement as an acceptance of the DMP's notes would allow to preserve the strong trusting relationship existing between the parties involved, as already mentioned above.

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

Assosim agrees with the proposal regarding MSR's obligation to draw up its own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP.

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

Assosim doesn't have any specific further comment in addition to those already expressed in the answers to the questions above, to which we make reference hereto.

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Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public

As a general remark, in accordance with the *ratio* of the provision of a possible delay of disclosure of inside information under article 17(4) of MAR, clarified in light of Recital No. 50 of MAR itself, we deem that the list of legitimate interests as identified by the guidelines should be broadened as well as, on the contrary, the examples in which such a delay is likely to mislead the public should be tightened, in order to ensure that the legitimate interest protection is not completely neutralized by a too widely interpreted risk of misleading the public. Indeed, we would like to underline it is important to ensure that level 1 provisions are implemented correctly in level 3, which always need above all to respect level 1 scope. In our case, the clear aim of level 1 is to protect issuers, their stability and the integrity of markets, trying to reach a point of balance between, on one hand, the need to disclose inside information for the sake of market abuse prevention and, on the other hand, the situations in which such a disclosure would produce certain costs for the issuers overwhelming their eventual benefits for the markets. We seriously doubt that the level 3 proposals under discussion are in line with the above mentioned level 1 purpose, giving rise to several concerns especially from an issuer perspective. Therefore, Assosim deems that the guidelines should be reconsidered, in particular in light of Recital No. 50 of MAR, which has been partially disregarded insofar.

Q8: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

As just mentioned above in the introductory remarks, Assosim believes that the proposal regarding legitimate interests should be enlarged, taking into correct consideration the expressed content of Recital No. 50 of MAR. In particular, the wording of Paragraph 1, letter a), of the guidelines appears in clear contrast with letter a) of such Recital. Indeed, the latter includes in the circumstances that give rise to legitimate interests "*ongoing negotiation, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure*", while the former improperly restricts such example of legitimate interest to the case where "*the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardized by immediate public disclosure of that information*". It is of immediate evidence the different scope of (*i*) the terms "outcome" and "normal pattern" of a negotiation, on one hand, as well as the different implications of (*ii*) the verbs "jeopardize" and "affect", on the other one. Indeed, both the expressions "outcome" and "jeopardize" have a narrower scope than the terms "normal pattern" and "affect" with reference to the identification of circumstances able to impact an ongoing negotiation. In other words, recognizing a legitimate interest to delay disclosure of inside information only when such a disclosure would likely jeopardize the outcome of the negotiation means to significantly restrict the scope of such an interest, excluding from it all the circumstances in which the disclosure would simply affect the normal pattern of the negotiation without

jeopardizing the outcome (*e.g.* the conclusion of the deal is not prevented but negotiations lead to set a price or an another condition less convenient for the issuer). In sum, the above results in a significant and undue restriction at level 3 of the concept of legitimate interest as developed in level 1. Therefore, we propose to substitute the wording "*where the outcome of such negotiations would likely be jeopardized"* in Paragraph 1, letter a) of the guidelines, with the wording "*where the outcome or normal pattern of those negotiations would be likely to be affected*".

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

With reference to Paragraph 2, letter a), of the guidelines, Assosim agrees.
With reference to Paragraph 2, letter b), of the guidelines, Assosim deems that ESMA should specify that non audited financial statement (*e.g.* anomalous results of the subsidiaries communicated to the parent company subject to consolidated accounts, before such results are adequately audited) are not included in its scope, considering that continuous profit warnings may themselves be misleading if not accurate.
With reference to Paragraph 2, letter c), of the guidelines, we deem that the whole reference to market's expectations should be removed. Indeed, prohibiting delay of disclosure of inside information when it is in contrast with market's expectation appears too restrictive, given that it is the nature itself of inside information to be new to the market and thus price sensitive (*i.e.* against current market's expectations).

Q10: Do you see other elements to be considered for assessing market's expectations?

Without prejudice and subordinately to what stated above in the answer to Question No. 9, Assosim welcomes the revised approach regarding market's expectations, which are now linked to signals eventually previously set by the issuer itself. Although, we think it would be more appropriate, in order to achieve a higher level of certainty in the assessment of market's expectations, to base them on signals set by the issuer once aware of the inside information, during delay of disclosure of it, instead on those set before the inside information was even existing. Therefore, we propose to amend Paragraph 2, letter c), of the guidelines substituting the words "*has previously set*" with the following: "*is currently undoubtedly setting*".

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We remain at your disposal for any further information or clarification.

Yours faithfully,

Gianluigi Gugliotta
Secretary General