Deutsche Bank

EU Transparency Register ID Number 271912611231-56

European Securities and Markets Authority
CS 60747 – 103 rue de Grenelle
75345 Paris Cedex 07
France

Deutsche Bank AG
Winchester House
1 Great Winchester Street
London EC2N 2DB
Tel +44 20 75458000
Direct Tel +44 20 75451903

2016-03-31

Draft guidelines on the Market Abuse Regulation

Dear Sir/ Madam,

Deutsche Bank welcomes the opportunity to comment on the above consultation paper. As an issuer, we have focused on the draft guidelines concerning delays to the disclosure of inside information, rather than on persons receiving market soundings.

Our key concern with the draft guidelines is that insufficient account would be taken of the interests of both issuers and market participants if there is a narrow interpretation of the legitimate right of issuers to delay disclosure of inside information. An approach, which states that delays should represent the exception to the general rule of disclosure to be made as soon as possible, would in our opinion be deeply problematic from several perspectives:

Inconsistent with MAR Level 1

- MAR clearly states that ongoing negotiations constitute legitimate interests allowing a delay to disclosure of inside information, where immediate disclosure is likely to prejudice the legitimate interests of the issuer. The draft guidelines are setting a far higher threshold than MAR itself by narrowing the scope to avail of this possibility by saying that transactions would need to be jeopardized by disclosure rather than just prejudiced.

Inconsistent with two-tier board structures

- In a two-tier board system, the ability of the supervisory body to exercise its function would be impeded if decisions by the management body were already made public before the supervisory body could take its own decision. In this regard, we would note that such an approach would also be inconsistent with the BaFin’s Issuer Guidelines which have proven to balance appropriately the issuer’s interests and the capital market's interest in transparency. Requiring the issuer to arrange for the supervisory body's decision within the same day is not realistic.

Insufficient account of the interests of issuers

Premature disclosure, as a result of the stringent approach proposed by the draft guidelines, would increase the risk of transaction failure. This is neither in the interest of the issuer, nor its stakeholders (such as employees, creditors, shareholders, suppliers and clients), the transaction counterparties and notably other market participants. The draft guidelines would effectively prevent issuers from striking a balance between public disclosure and maintaining its financial viability.

We hope you find these comments helpful and we would be happy to provide further information on any areas not sufficiently covered..

Your sincerely,

Daniel Trinder
Global Head of Regulatory Policy

I. Guidelines for persons receiving the market soundings

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?

No comment.

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

No comment.

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?

No comment.

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?

No comment.

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

No comment.

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?

No comment.

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

No comment.

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

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

Paragraph 69:

We disagree with the notion expressed by ESMA that the possibility to delay the disclosure of inside information represents the exception to the general rule that disclosure has to be made as soon as possible and therefore should be narrowly interpreted. Recent ECJ decisions in re.: "Geltl ./. Daimler" and "Lafonta" led issuers to assume that preliminary information, including intermediate steps in a protracted process, may constitute inside information at a very early stage and could therefore trigger the need for disclosure. Therefore, it is key for issuers that they are able to rely on the legal possibility to delay the disclosure of inside information in order to ensure that their interests are not prejudiced by premature disclosure. Further, the definition of inside information serves two different purposes and therefore requires a differentiated approach.

- First, where the definition of “inside information” is needed to specify the prohibition of insider dealing (Art. 8 MAR) or unlawful disclosure (Art. 10 MAR), it is understandable that it should have a wide scope to ensure the integrity of financial markets and investor confidence.
- Second, where it also determines the point in time when issuers have to make inside information public, which directly concerns themselves, a strict application of the definition – whilst it would enhance transparency – would not take into account that decision making in complex business situations like a proposed M&A transaction requires time because of the need to analyse the facts, negotiate terms and agree the internal decision making process within the issuer.

  Allowing sufficient time for these processes is indispensable in order to ensure that board members exercise their responsibilities with due care. A board member’s duties under corporate law, includes a responsibility to take entrepreneurial decisions only on the basis of reasonably adequate information (see, for example, sec. 93 par. 1 s. 2 German Stock Corporation Act, also based on the “business judgement rule” developed by the Delaware Supreme Court in its decision in re. Smith v. Van Gorkum (1985), now incorporated in Delaware General Corporation Law – 8 Del. C. § 141 (e)). If an issuer were required to disclose envisaged entrepreneurial decisions prematurely, it would create a public expectation, which would the risk the market being misled if the issuer decided otherwise at a later stage. Such premature disclosure would also prejudice the issuer’s decision making bodies. Premature publicity may compel the issuer to move ahead with a project despite the fact that the second body could not reasonably take a decision on the basis of sufficient information.

Hence, we strongly believe that a rule - which states that delaying the disclosure of inside information generally represents the exception to the general rule of disclosure to be made as soon as possible, and therefore should be narrowly interpreted - does not sufficiently take into account the interests of both the issuers and other market participants vis-à-vis.:

(i) entrepreneurial decision making not being affected by public pressure that might force board members to take premature decisions; and

(ii) the markets being misled by information that subsequently has to be reversed.

Rather, it is our view that that an overly narrow interpretation of the possibility to delay the disclosure of inside information would jeopardise the balanced concept established in MAR and would therefore not be in line with the intention of level 1. This view is, for example, consistent BaFin guidelines. They recognises that, given the requirement to disclose inside information already applies at a very early stage, the possibility to delay the disclosure is necessary as a corrective measure in order to avoid the potential of serious damage to the issuer due to premature disclosure (cf. BaFin Issuer Guideline, item IV.3.1, p. 61).

Paragraphs 72:

When stating that a legitimate interest may only exist where the issuer is conducting negotiations, the outcome of which would likely be "jeopardised" by immediate public disclosure of that information, the draft guidance takes a more restrictive approach then MAR itself and therefore is not in line with the framework set by the level 1 regulation. According to Recital 50 MAR ongoing negotiations constitute legitimate interests allowing a delay to the disclosure of inside information, where the outcome *or normal pattern* of those negotiations would be likely to be *affected* by public disclosure. Further the text of Article 17(4)(a) of the Regulation is phrased as follows: *"immediate disclosure is likely to prejudice the legitimate interests of the issuer.. ..."*

The draft Guidelines, however (set out in 3.4 of the Consultation Paper) use the word *jeopardise*. The verb *jeopardise* and *prejudice* are not synonyms however, nor are *jeopardise* and *affect*. To *jeopardise* means to put something at serious risk to the extent that its existence is dubious. To *prejudice* means to harm or to damage, but not necessarily to the extent that threatens existence.

Note also Recital 50 where in (a), when dealing with negotiations generally, the phrase "likely to be affected" is used; and then, in subsequent sentences, the verb *jeopardise* is used, clearly indicating that in some very specifically described situations a more demanding standard is expected in deciding what constitutes a legitimate interest.

In summary, MAR recognises the issuers' legitimate interest to negotiate transactions undisturbed by publicity without requiring that their outcome would otherwise be "*jeopardized*". Rather the issuer's interest in pursuing negotiations privately until a decision is reached should be sufficient to justify a delay of the publication of inside information if such publication could have an impact on the normal course of such negotiations, even if it cannot be predicted that the outcome of these negotiations would be at risk by such disclosure.

By using the verb *jeopardise*, the draft guidance is setting a far higher standard than MAR itself. ESMA says (for example in paragraph 88 of the CP) "The issuer should be able to explain...... the reasons why the conclusion of the deal is very likely to fail with immediate disclosure of that information." It should read in our view, and particularly in light of Recital 50 of MAR: "The issuer should be able to explain...... the reasons why the outcome or the normal pattern of the negotiation ~~conclusion~~ of the deal would be ~~is very~~ likely to be affected ~~fail~~, or why its terms and conditions are likely to be more onerous or less advantageous, with immediate disclosure of that information."

Paragraph 74:

Similarly, Recital 50 MAR provides that in the event that the financial viability of the issuer is in grave and imminent danger […], public disclosure of information may be delayed […] where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer. In our view, this is a lower threshold compared to the draft guidance which requires that "the conclusion of the negotiations" aimed at ensuring the financial recovery of the issuer would be jeopardised. For interpreting the word "undermining" we believe it is sufficient if such negotiations were negatively impacted and, hence, a successful conclusion becomes more difficult whereas if the draft guidance's approach were followed, the issuer would have to expect that public disclosure would result in the failure of the negotiations. Apart from the draft guideline's interpretation being a deviation from the level 1 regulation (and thus beyond the level 3 mandate) its strict view would also compel issuers to assign greater weight to public disclosure than maintaining its financial viability. Taking into account the interests of the issuer itself, but also its shareholders, creditors as well as its employees and business counterparties this is disproportionate and also damaging not only the interests of the issuer's stakeholder but potentially also the general public when the potential economic side effects of the issuer's failure becoming more likely is considered just because of the disclosure of its financial difficulties before they could be rectified.

Paragraph 78 to 82:

Given that Recital 50 MAR expressly mentions a situation where decisions taken or contracts made by the management body of an issuer require the approval of another body of the issuer in order to become effective since the organisation of such an issuer requires the separation between those bodies, we are concerned that under the draft guidelines, the conditions to be met to justify a delayed disclosure of inside information would result in such a delay becoming the exception rather than the rule.

In a two-tier board system, like for example in Germany or Austria, the supervisory body could hardly exercise its function if decisions by the management body were already made public before the supervisory body could take its own decision. Such disclosure, even if it were announced that the approval of the supervisory body remains pending, would jeopardise the correct assessment of the information by the public as it would lead to a fundamental misperception of the supervisory body's function.

Rather, to be able to properly accomplish the task of supervising the management board that is being allocated to the supervisory board by law and the importance of a free and independent exercise of this task, the delay of the disclosure should be possible as a general rule (cf. BaFin Issuer Guideline, item IV.3.1 p. 61)).

The cumulative requirement of the four criteria set out in paragraph 78, in our view, is an overly restrictive approach and, as a result, would make a delay hardly ever possible. In particular:

re a)

> The publication of a decision by the management board while the approval by the supervisory board is still pending would give the wrong impression that as a matter of fact the decision has already been made while it is not effective yet under corporate law. The public is expected to assume that, as a result of the publication and bearing in mind that in particular foreign investors might not be as familiar with the corporate governance principles and the decision making process in a two-tier board system, that the decision taken by the management board is final as a matter of fact and by doing so will incorrectly assess the decision making powers under corporate law.

re b)

The freedom of the supervisory body will necessarily be jeopardised as a refusal would almost certainly cause damage to the issuer and lead to unnecessary volatility in the issuer's share price as the market would receive contradictory signals. Therefore the supervisory body would in each such situation be forced to approve the management board's decision. Therefore this is an unnecessary requirement as it will be taken as a rule based on the very nature of a two tier board system rule (cf. BaFin Issuer Guideline, item IV.3.1 p. 61).

re c)

Requiring the issuer to arrange for the supervisory body's decision within the same day is not realistic. It will nearly be impossible as a matter of fact to invite members of the supervisory body at such short notice. These bodies usually have quite a diverse composition that reflects not only an issuer's often international shareholder structure but also employee representation (which is – at least in Germany required as a matter of law under the German co-determination principles). Apart therefrom, the decision making by the supervisory body requires its members to have sufficient time to analyse the facts underlying the requested approval. Effective supervision cannot be accomplished if decision making is expected within such a short period of time.

re d)

Requirement "d)" in our view is inappropriate as it requires the management body to speculate about the likely decision of the supervisory body. Further, limiting a possible delay to situations where the management body expects the supervisory body to object restricts the delay to an entirely unrealistic scenario. A responsible management body would not take a definitive decision where it expects such decision to be overturned. The examples given in the draft guidelines seem to indicate a fundamental misunderstanding of the complexity of corporate decision making. The pattern of prior decisions is hardly indicative for future decision making for a variety of reasons. First, the supervisory body's composition may change. Second, and most importantly, even if the kind of decision (such as capital increase, dividend payment, approval of an M&A transactions or the like may be similar) each such decision has to be made on the basis of its individual facts and therefore cannot be anticipated just based on prior decisions on similar matters that were, necessarily, adopted under different circumstances. Finally, the required decision of a supervisory body must by no means be misunderstood as a mere formality.

Moreover, the concerns expressed about paragraph 81 in the CP regarding the decision of the second body possibly being prejudiced by public pressure following preliminary disclosure, would become relevant if the decision of the management board on the same matter were disclosed prior to the second body's approval. Hence, it should generally constitute a legitimate interest of the issuer to delay disclosure. That is consistent with the current regulatory practice and has proven to balance appropriately the issuer's interests and the capital market's interest in transparency. (cf. BaFin Issuer Guideline, item IV.3.1 p. 61).

Paragraph 83:

While we appreciate the draft guidelines confirming that an issuer's interest in protecting a product or invention and its related IP rights, the requirement that the disclosure would otherwise "jeopardize" its IP rights is too stringent. So far, under the CESR level 3 guidance it has been sufficient that the issuer "needs to protect its rights" which is a lower standard than the avoidance of the risk of such rights being jeopardised (see CESR – Market Abuse Directive: second set of Level 3 guidance and information on the common operation of the Directive to the market Ref: CESR/06-562b, item 2.8).

Paragraph 86:

With regard to M&A transactions, the requirement that a legitimate interest is dependent on the condition that the "conclusion of the transaction is *very likely* to fail with immediate disclosure of the information" is too far reaching. From a practical point of view it is very difficult to predict the likelihood of such a failure. Rather, to protect an issuer's legitimate interest in pursuing its entrepreneurial strategy it should be sufficient to constitute a legitimate interest to delay disclosure if premature disclosure could, in the issuer's reasonable opinion, increase the risk that the proposed transaction could fail. Premature disclosure, which would be the result of more stringent requirements and the higher risk of transaction failure is neither in the interest of the issuer, nor its stakeholders (such as employees, creditors, shareholders, suppliers and clients), the transaction counterparties and notably the other market participants.

Moreover, an issuer's legitimate interests are not confined to avoiding a collapse in negotiations. The issuer also has a legitimate duty (prescribed by company law) to ensure that any transaction is done at a favourable price. Making an announcement at the outset puts the issuer at a severe disadvantage in any subsequent negotiation on price as the counterparty (the buyer or seller), knowing how difficult it will be for the issuer to withdraw from a publicly-stated position, will hold out until the issuer agrees to its demands on price.

Therefore, guideline 3.4.1(e) should read:

> "the issuer is planning to buy or sell a major holding in another entity and the disclosure of such information is likely to affect the normal pattern of negotiations or the conclusion of the transaction".

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

Paragraph 99:

Pursuant to lit. c under paragraph 99 of the CP the inside information is likely to mislead the public where the inside information the issuer intends to delay the disclosure of is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously set. We appreciate that the draft guidelines included the requirement that the issuer must have set active signals that contradict the inside information. However, in our view the generic reference to "previously set signals" is too far reaching as this may include any "implicit" signal set by the issuer at any time. It should be clarified that these signals have to be clear, explicit and closely related to the inside information also from a temporal perspective. Conversely, market expectations that are based on speculation beyond the issuer's official capital market communication by the issuer should therefore not lead to a delayed disclosure being regarded as misleading. Hence, it should still be permitted that issuers pursue a “no comment” policy if rumours arise in the market that cannot be traced back to a leak in the issuer’s domain.

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

While the market’s expectation may be based on the consensus among financial analysts or even the price development of the financial instrument or any announcements from third parties, it should only be relevant in the context of assessing whether a delayed disclosure is likely to mislead the public, if such market expectation is clearly based on the issuer’s capital markets communication.