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Response to ESMA's consultation paper – draft guidelines on the Market Abuse Regulation

ESMA initiated 28 January 2016 a consultation on draft guidelines on the Market Abuse Regulation.

The draft guidelines have been discussed and analysed by the the Securities Markets Expert Group of the Association of Danish Law Firms.

The Association of Danish Law Firms (ADLF) offers the following comments:

1. General comments

ADLF welcomes ESMA's initiative to provide further guidance to the market participants, issuers and advisers with regard to key aspects of the Market Abuse Regulation (MAR). This is paramount in order to ensure a coherent and fair implementation of MAR in the member states. The fact that issuers and other market participants may face serious criminal, administrative and civil law sanctions, including on a personal level, in case of non-compliance makes it even more important to establish clear guidelines from the side of the regulators. In this connection, ADLF notes that the concept of "inside information" as defined in MAR could and should be more precisely defined in subsequent guidelines, both with regard to as and when a specific piece of information is sufficiently precise and with regard to the requirement that such information has significant price impact. Likewise, ADLF urges ESMA to provide further guidelines on the requirement that inside information is disclosed as soon as possible.

In this context, ADLF recommends that ESMA takes into account the need for the issuers to safeguard legitimate interests and that any communication made by issuers to the markets enables the market participants to assess the impact of the said information. Thus, a practise whereby focus is placed only on ensuring the fastest possible communication to the markets without regard to the reliability of such communication would not be in the best interests of the market participants. We refer in this connection inter alia to the SMSG Position Paper of 21 September 2015 (ESMA/2015/SMGS/025), which ADLF generally believe sets out valuable and considered advise to be taken into account.

From a Danish perspective, the need to establish clear guidelines is underpinned by the fact that as of today, Danish issuers are not obliged to disclose inside information until if and when such inside information becomes a reality. ADLF would welcome an interpretation of MAR from ESMA's side where such practise could be upheld, i.e. the obligation of the issuer to disclose inside information is not triggered merely on account of the fact that inside information is deemed to exist. If ESMA cannot support such an interpretation of MAR, ADLF asks ESMA to consider how to address the concerns stated above by other means.

2. Comments regarding 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?*	**Article 54 in the guidelines** In article 54 ESMA refers to Article 17 (1) of Regulation (EU) No 596/2014 (MAR) which sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. However, ESMA provides no further guidance in relation to when the disclosure obligation occurs. It is of utmost importance for the issuer to have as specific guidance as possible on this issue and it is a prerequisite for assessing whether the issuer can delay the disclosure of inside information. Therefore, ADLF suggests that ESMA should – as an introduction – note that Article 17(1) requires issuers of a financial instrument to publicly disclose as soon as possible inside information in a manner which enables fast access and complete, correct and timely assessment of the information by the public. ESMA should note that these criteria are the ones set out in Directive 2003/124/EC implementing MAD and thus a continuation of the applicable law. In order to properly use the guidelines there is a need for further guidance in determining when an issuer is in a position to delay public disclosure. ADLF especially sees merit in ESMA commenting on and taking into account in the guidelines the concept of the two fold notion of inside information, where it is generally accepted that inside information can be used for insider trading before an issuer has an obligation to disclose this information following article 17, e.g. when the inside information may not be sufficiently precise. Without guidance from ESMA in this regard ADLF sees the risk of alleged insider trading being challenged with an argument, that an issuer had not decided to delay this information, therefore there is no inside information and no violation of the prohibition on insider trading. ADLF therefore sees it

		as clearly within the ESMA mandate to further define when an obligation to disclose sets in under article 17 (1) in order to provide proper guidance towards the use of the delay possibility. Further, ADLF finds it important that further guidance is provided with regard to situations where inside information concerns a process which occurs in stages and that each stage of a process as well as the overall process could constitute inside information. Finally, ADLF finds it important in the guidelines to specify even further that it is a case by case assessment whether the issuer has a disclosure obligation or not. **Articles 59-62 in the guidelines** ADLF agrees that the examples listed are relevant. However, with regard to article 60(b), ADLF does not find that ESMA's comments take into appropriate account the various governance structures existing in different member states. In particular, under Danish law, the board of directors is the supreme organ that must take decisions on all strategic or otherwise important matters relating to the company. Thus, even if the executive management has rendered its decision, it is from a Danish point of view often needed that the board of directors decides on the matter to be disclosed. Thus, it is in the view of ADLF always appropriate for Danish issuers to await the decision of the board of directors prior to making any disclosure to the market. ADLF recommends that the guidelines are amended so as to take into account the different governance structures existing in the members states. **Article 63 in the guidelines** According to Article 17(4) an issuer may, on its own responsibility, delay disclosure to the public of inside information if different conditions are met. We agree with ESMA´s view in relation to Article 17(4)(a) that a resignation of CEO doesn't represent an example of legitimate interest to delay disclosure of inside information, until CEO´s successor has been appointed. **Article 64 in the guidelines** ADLF recommends that ESMA makes clear what it more specifically means with saying that the disclosure should be made *as soon as possible* in order to avoid that national authorities take different or too restrictive approaches to this concept. It should be made clear that *as soon as possible*

		means the time needed for the company to assess the impact of the inside information and on that basis prepare a correct description hereof in a company announcement. **Articles 65 - 67 in the guidelines** As mentioned above, ADLF supports the comments made by SMSG and asks ESMA to reconsider its position. **Article 69 in the guidelines** As referred to in Clause 65, the SMSG commented that "the right to delay should not be interpreted narrowly". ADLF strongly supports this view and encourages ESMA to refrain from applying the argument as quoted in Clause 69 that "exceptions to a general rule should be interpreted narrowly". This argument is too general and imprecise to provide any real guidance in this context and it may lead to overly restrictive interpretations by national authorities. **Articles 76 - 82 in the guidelines** As mentioned above, the guidelines do not on this point reflect properly the Danish governance structure with a board of directors working independently of the executive management and with separate authority under law. It should be made clear that delay of disclosure is considered to fulfil the requirement for *legitimate interest* until the supreme governing body of the company has rendered its decision. Similarly, ADLF proposes that it be made clear that in cases where – as a matter of law –the corporate authority to pass a specific resolution is vested with the board of directors, then a resolution by the executive management to propose to the board of directors to use that authority to pass a specific resolution should not trigger an obligation to disclose (or that in such event, the issuer has a legitimate interest in delaying disclosure). The examples of resolutions mentioned to in Clause 80 (dividends and share capital increases) would in a Danish corporate law context always be the prerogative of the board of directors/or the general meeting, and any internal proposals made in this regard by the executive management should not result in a requirement for immediate disclosure (without possibility for delay). **Article 86-88 in the guidelines** ADLF shares the view that the example would constitute legitimate interests but sees no reason that the guidelines suggests that it be qualified to situations where failure is "very" likely. As for the

		example in Article 60(a), it should be sufficient that failure or adverse impact is "likely" to occur in the event of immediate disclosure. Further, the principle should apply not only to plans to "buy or sell a major holding in another entity" but also to plans to "buy or sell major activities or operations" as the same legitimate interests of the issuer would apply in such case.
Q9	*Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?*	**Article 99 in the guidelines** ADLF shares the vision that the examples in a) and b) of point 99 are clear examples of when the delay of disclosure is likely to mislead the public. However, the illustration in c) may in some situations be too vague and ought to be considered further. In order for the company to take responsibility for "market expectations", it must be required that such expectations are directly attributable to statements made by duly authorized representatives of the issuer. Further, the assessment made by market participants on account of the statements so made is not the responsibility of the issuer and cannot render a delay of disclosure "misleading". For instance, if analysts interpret statements made by a CEO to have certain implications for future developments in the share price, the fact that the issuer holds information that points to another assessment cannot force the issuer to being obligated to make an announcement to the market.
Q10	*Do you see other elements to be considered for assessing market's expectations?*	N/A

Yours sincerely,

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