



**ASSOGESTIONI**

associazione del risparmio gestito

Rome, 31<sup>st</sup> March 2016

**ESMA – European Securities and Markets Authority**  
103 Rue de Grenelle  
75007 Paris  
France

Our ref: 135/16  
Your ref: ESMA/2016/162

**Assogestioni's Draft Reply to ESMA's Consultation Paper on Draft Guidelines on the Market Abuse Regulation (ESMA/2016/162)**

Assogestioni<sup>1</sup>, the Italian Investment Management Association, welcomes the opportunity to respond to ESMA's Consultation Paper concerning Draft Guidelines on the Market Abuse Regulation (ESMA/2016/162).

In general, we appreciate the attempt made by ESMA to take into account – for the purpose of this Consultation Paper – some requests tabled by different market participants in the course of the previous consultation. In this sense, we share the approach that tries to strike a balance between the necessity to ensure fairness in the performance of market participants' duties and the need not to impose disproportionate requirements on their organization and internal procedures.<sup>2</sup>

Nevertheless, we find that some requirements still risk to create unnecessary burdens on MSRs, without providing any concrete added benefit/advantage for the functioning of the market. Indeed, we believe that some provisions still carry the risk of creating undue and unbalanced prescriptions on MSRs

In particular, we do not agree with the provisions establishing: (i) the need for the MSR to notify the DMP when it does not agree with his valuation of an information as not being an inside information - or when it ceases to be an inside information - (guideline n. 4): this provision risks to shift the responsibility of a wrong assessment from the DMP to the MSR; and (ii) the assessment made by the MSR on financial instruments and issuers related to the inside information disclosed in the course of

---

<sup>1</sup> Assogestioni represents the interests of the Italian fund and asset management industry. Its members manage funds and discretionary mandates around EUR 1.822 billion (as per February 2016).

<sup>2</sup> We refer to the "*Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation*" (ESMA/2013/1649).



the market sounding (guideline n. 7): this is indeed a requirement which would rather fall more within the remit of the DMP.

In addition, we would like to express a few considerations around the current proposal on MSR's staff training requirement (guideline n. 5, *sub b*). In our view, this proposal does not duly consider the development made in relation to the final RTS on the DMP's obligations<sup>3</sup>, submitted by ESMA for adoption to the Commission. Acknowledging the need to balance the breadth of the requirements, in that context, ESMA has not deemed it necessary (anymore) to require the DMP's staff involved in the market soundings to be properly trained (see paragraph 103 of the "Final Report - Draft technical standards on the Market Abuse Regulation"). However, ESMA comes back on this in the Consultation Paper at hand and foresees the same requirement for MSR's staff: We believe this is not proportionate in the light of the final RTS.

Moreover, in some cases, we still see the risk of duplication of requirements. As rightly indicated by ESMA<sup>4</sup>, it is her intent to avoid undue duplications. However, as drafted, a risk of duplication still exists in the proposed guidelines when compared to the Draft technical Standards, in particular, in the provision on the record keeping. More specifically, we refer to: (i) the notification of the wish not to receive market sounding required for both MSRs (guideline. 2 and 9 of the Consultation Paper) and DMPs (paragraph 85 of the "Final Report - Draft technical standards on the Market Abuse Regulation"); and (ii) the recording of the affirmative valuation of the information disclosed as an inside information to be made both by the DMP and the MSR (guideline n. 3 and 9 *sub b*) for the MSR and paragraph 79 of the Final Report for the DMP).

We would also like to share a final, very important, consideration around the requirement on the identification of the contact point (guideline 1). We believe that such a requirement is of extreme importance for the effectiveness of the entire (new) discipline on market sounding and we therefore highly recommend ESMA to specify the purpose of such a provision in light of the considerations that follow.

We are of the strong view that the contact point is functional to ensure the prompt recognition of the person(s) receiving inside information in the course of the market sounding. Hence, the compliance by the company with such a requirement on a strict "need to know" basis (to avoid unnecessary dissemination of inside information) is also functional to grant the presumption that the company's employees (i.e. also traders not consulted upon by the contact point) **not part of such a "market sounding" list do not possess the inside information**. Such a system should grant sufficient restriction and should allow employees (e.g. managers making trading decisions not consulted by the contact point) **not** in the list to perform their professional activities (and, thus, make investment/trading decisions) on the basis of such a presumption. In other words, the list needs to work on an exemption basis for those not part in the list. The fact of not being part in the list and the obligation on those on the list not to spread the information ensure that the other employees are exempted from the obligation not to use the inside information as, in fact, they do not possess it.

---

<sup>3</sup> Final Report - Draft technical standards on the Market Abuse Regulation (ESMA/2015/1455).

<sup>4</sup> See paragraph 7 of the Consultation Paper.



We urge ESMA to make this point clearer and to consider the “market sounding” list to operate as a “safe harbor” (i.e. a presumption of absence of knowledge) for all those which have not been consulted for the purpose of the sounding, including traders who have not been involved in it.

**Q1: Do you agree with the 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?**

We believe that the proposal is in line with the requirements stemming from art. 11 MAR.

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

We do not agree with the set of provisions proposed by ESMA in case of discrepancies of opinions between DMPs and MSRs, in particular with the points sub 4(1)(b) and 4(2)(b). We believe that the requirements are commercially difficult and risk to give disclosure to even more inside information between the two parties.

We also strongly disagree with ESMA when it states that this discussion between DMP and MSR in the case of discrepancy is aimed to avoid that the information is disclosed to other MSRs. In our opinion, this event does not fall within the responsibilities of the MSR and consequently this specific duty should not be on the MSR as it risks to make the MSR accountable for the wrong valuation given by the DMP.

We therefore propose to delete the entire provision.

**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?**

Yes, we agree with ESMA when it recognizes that “*the flexibility to determine their internal organization, deciding whether [a] function or body should also be responsible for receiving the market sounding or whether existing functions (e.g. the compliance or legal department) should be involved in the process*” (paragraph 14 of the CP). We also appreciate the confirmation that all the internal procedures required should be applied on a proportionate basis, taking into account the size and the activity performed by the entity.

In addition, we would also recommend ESMA to consider our comments made in the preliminary part of this response, when we highlight the unbalance between MSRs and DMPs requirements on staff training stemming in the light of the final RTS submitted to the Commission.

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



Yes, we agree with ESMA's proposal and we recognize that the list of the staff in possession of the information communicated in the course of the market sounding is useful for the MSR too, in order to provide for all the set of internal procedures required.

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

Yes, we agree with the revised approach related to the provisions on telephone calls recording proposed by ESMA. The provision requiring DMPs to record telephone calls is coherent with the overall objective the requirement aims to achieve. In our view, the identification of the recipient of the obligation with the person promoting the market sounding rightly poses the duty on the entity that – as the “promoter” – should have the *onus* to record the activity linked to such an action. We therefore believe that it is commendable for the DMP to activate a recording system of telephone calls when contacting MSRs.

**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?**

Yes, we agree with the proposal.

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

It is undoubted that the new discipline on market soundings will likely increase compliance costs. In particular, as previously stated, MSRs will face increased costs due to the provision of guideline n. 7 concerning the assessment of all the financial instruments and issuers to which the inside information, communicated in the course of the market sounding, relates.

Fabio Galli  
Director General

A handwritten signature in black ink, appearing to read 'F. Galli', with a long horizontal stroke extending to the right.