AFEP RESPONSE TO ESMA CONSULTATION PAPER
Draft guidelines on the Market Abuse Regulation (ESMA/2016/162)

About Afep

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Since 1982, Afep, the French Association of Large Companies, is the association which brings together large companies operating in France. The Association is based in Paris and Brussels. Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Afep has over 100 members. More than 8 million people are employed by Afep companies. Their annual combined turnover amounts to €2,000 billion.

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Guidelines for persons receiving 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?

We acknowledge that pursuant to article 11.7 of the Market Abuse Regulation[1] (MAR), "the person receiving the market sounding shall assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information". However we don't see in practice how this would work especially when the Market Sounding Recipients (MSRs) are notified by the Disclosing Market Participants (DMPs) that they will receive inside information and how, in that particular case, MSRs could question the nature of the information received and come up with a different assessment. In this case, there is no need for ESMA to issue further guidance.

On the contrary, when MSRs are notified that the information received are not inside information, they should comply with article 11.7 and make their own assessment taking into account all information available to them, including those from other sources. The same process should apply when the MSRs are assessing whether they are still in possession of inside information. **We consider that ESMA's guidelines should only address these two specific cases.**

More generally speaking, we consider that the guidelines should aim at keeping arrangements and procedures regarding market soundings as simple as possible and avoid introducing unnecessary complexity and legal uncertainty and risks.

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

Communication between DMPs and MSRs should be restricted to information necessary and appropriate to disclose in the context of a market sounding. Therefore undue discussion should be avoided. Thus we agree with the comments made to the 2013 public consultation by respondents who were not supportive of ESMA's proposal.
More generally speaking, we consider that the guidelines should aim at keeping arrangements and procedures regarding market soundings as simple as possible and avoid introducing unnecessary complexity and legal uncertainty and risks.

[1] Regulation (EU) n°596/2014 of the European Parliament and of the Council of 16 April 2014

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?

We support ESMA's proposal but do not consider that more detailed guidelines are necessary. **The implementation of internal procedures and staff training programs should be left to the sole consideration of each MSR in order to be adapted to their specific needs and organisation.**

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?

We support ESMA's proposal. However ESMA should state explicitly **that drawing up a list of persons in possession of information communicated in the course of market soundings is not necessary when such persons are already included on an insiders' list** pursuant to article 18 of MAR.

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

We support ESMA's approach to no longer require MSRs to record telephone calls.

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?

ESMA's proposal, in particular the five days deadline for the MSR to provide the DMP with its own version of minutes, could prove difficult to implement. Moreover we don't see the point in having two diverging version of minutes and how, in the context of a control or an investigation carried out by a Competent Authority, this would help the Authority nor how the said Authority would decide which version should prevailed.

In this matter, we do not believe that detailed guidelines will be helpful. Therefore **we strongly advocate ESMA to limit its guidelines to general principles** stating that:

- an agreement between DMPs and MSRs should be reached and materialized by all means (this would also waived the signature burden); and
- DMPs and MSRs should have in place procedures to deal with disagreement cases.

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

Not addressed.

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?

Generally speaking, we are concerned that ESMA's guidelines could have serious negative consequences for issuers and could *de facto*, if narrowly interpreted, restrict the right to delay the disclosure of inside information in very important circumstances. Our concern relates to ongoing negotiations, M&A transactions and situations where the approval of another body is needed.

With regard to letter a) and e), **M&A transactions should be explicitly included in the list of examples justifying the decision to delay the public disclosure of inside information**. Moreover such transaction as well as ongoing negotiations should constitute legitimate interests to delay disclosure irrespective of the fact whether the outcome of the negotiations is *de facto* "jeopardized" or the conclusion is "likely to fail". The fact that a premature publication could affect the "normal pattern" of negotiations, as mentioned in recital (50) of the MAR, should suffice. **The proposed draft guidelines should therefore be amended, otherwise ESMA's interpretation would be narrower than the Level 1 Regulation.**

Regarding point c): inside information regarding decisions taken by the management body which have to be approved by another body. More specifically, **we are concerned with the condition provided in (iii).** As a matter of fact, we cannot see how the management board could arrange the approval by the other body to be made within the same day. This even seems to contradict the general objective to permit the issuer to delay the disclosure of inside information in case of a dual system, which induces a more complicated approval process. In addition, this would be detrimental to good governance as the supervisory body would be legitimate asking for more time to make its own judgment on the said decision.

Finally, in its draft guidance ESMA explains that it does not consider a resignation of a company's CEO as a legitimate interest to delay the disclosure of inside information. **We believe that in certain cases the CEO's resignation may justify a delay in disclosure** until a successor is appointed and that it should be listed amongst the examples provided. Where the successor's appointment is not imminent, and the company may be without a CEO for some time, delaying disclosure may not be justified. However, in instances where the successor's appointment is imminent the disclosure of the CEO's resignation may need to be announced in conjunction with this designation. Otherwise, the former's announcement

could undermine the latter's appointment. Therefore we believe that the imminence and likelihood of the successor's appointment should justify a postponement to allow simultaneous disclosure of the two events.

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

We have two major concerns:

1. **Point b): the guidelines should refer to "issuer's profit forecasts" instead of "issuer's financial objectives".** As a matter of fact, point a) is drafted in a very general way that would already include the case where an issuer has made public financial objectives that are no more valid. There is therefore no need to address this specific case. Moreover, "financial objectives" are not defined by any piece of legislation at EU level. Introducing an undefined concept in ESMA's guidelines will increase uncertainty and not ensure a consistent implementation of level 1 legislation. However if ESMA deems necessary to aim at specific issues, the Authority could address the situation where an issuer has made public profit forecasts that are likely not to be met.
   Profit forecasts are defined by the Prospectus Regulation[2] : *"a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure* is *mentioned".*

   Point b) could therefore be drafted as follows : "the inside information whose disclosure the issuer intends to delay regards the fact that the issuer's **profit forecasts** are likely not to be met, where such **profit forecasts** were previously publicly announced;"

2. **Point c): we do not agree with ESMA's proposal that delaying the publication of inside information is misleading when it contradicts "market's current expectations".** First of all markets expectations are not defined and as mentioned above, introducing an undefined concept in guidelines raises uncertainty. Secondly, we totally disagree with ESMA's statement in paragraph 101 of the consultation paper and referring to the fact that issuers should take into account the market sentiments and financial analysts' consensus. Issuers are not responsible for analysts' consensus.

   The omission to publish inside information should be considered misleading only if an issuer actively sets signals that contradict the inside information whose publication is delayed. Where market expectations are based only on analysts' opinion alone or

[2] Article 2 of Commission Regulation (EC) n°809/2004 of 29 April 2004 implementing Directive 2003/71/EC.

rumours, the company should not be held responsible for the lack of announcement. Since this part of the guidelines is related to the disclosure of inside information, the only signals that can be actively set by an issuer are public disclosures. **Point c) is therefore also covered by point a) and we are requesting ESMA to delete this item.**

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

No. Please refer to our request expressed above to delete point 2. c) of the draft guidelines regarding situations in which delay of disclosure of inside information is likely to mislead the public.