assonime

MB/PS

European Securities and Markets Authority

RE: Consultation Paper - draft guidelines on the Market Abuse Regulation - ESMA/2016/162

Preliminary remarks

We welcome and appreciate all the huge work done by ESMA regarding the implementation of the Market Abuse Regulation (hereinafter "MAR").

We also appreciate the efforts for the interpretation of the MAR provided in the present Consultation Paper and in the past consultation papers too. The publication of a Feedback Statement, taking into account all the comments received by the industry, would help the market.

We would like to provide some preliminary and general remarks about the present Consultation Paper which deals with two important topics: the procedure to put in place for the person receiving market sounding and the delay of inside information.

The part dealing with the legitimate interests of issuer to delay inside information and situations in which the delay of disclosure is likely to mislead the public is of paramount importance for issuers. This is due to two facts: i) the MAR recognized a single notion of inside information both for the market abuse and for the duty of disclosure to the public. This coincidence of notion, as clearly underlined by (among many others[1]) the ESME Report on 2007 may lead to the communication of information not sufficiently mature and be manipulative in itself; ii) the MAR clearly states that an intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information.

The consequence of the above mentioned approach is that the delay of the communication of inside information is an important tool to avoid the communication of information not sufficiently mature; we therefore agree with the SMSG stating that "the prerequisites for delay should not be interpreted narrowly" [2]. We think that it should be important to ensure a framework where the conditions to meet for the delay of inside information are very clear and interpreted in a way that does not prevent issuers the possibility to use this right.

Moreover, as required by the SMSG and in line with the past[3], it would be useful to publish a non-exhaustive list of inside information concerning indirectly and directly the issuer; this list could be inserted in Q&A or in additional guidelines which would ensure the common, uniform and consistent application of the MAR.

We hereby provide our answers to the questions of the Consultation Paper.

Rome, 30th March 2016

[1] For some examples see J.L. Hansen, *A short criticism of the recent compromise proposal for a Market Abuse Regulation, Nordic and European Company Law Paper*, n. 10-35, 26th December 2012, C. Di Noia and M. Gargantini, *The Market Abuse directive disclosure regime in practice: some margins for future actions*, "Rivista delle società" 4/2009, available at SSRN.

[2] See SMSG, *Advice to ESMA, SMSG Position Paper regarding ESMA's work on MAR Level 3 measures*, 21 September 2015.

[3] See CESR/06-562b.

Annex

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

ESMA proposes a non-exhaustive list of legitimate interests which were already provided by CESR in the its second set of Guidance; the list includes the ongoing negotiations and decisions taken or contracts made by the management body of an issuer which need the approval of another body.

We agree with the examples proposed but we have some remarks regarding the decisions taken or contracts entered by management body which need the approval of another body; apparently ESMA seems to refer only to two-tier system only (par. 77).
It could be useful to clarify, at least in the explanatory memorandum, if, and in case how, this provision on the delay may apply in one-tier system too. Also in that system the CEO or executive directors can have the same powers of the management body in the two-tier system and can be empowered to take a decision or enter a contract (defining all the contents and without any further negotiation) but the decision/the contract need to be approved by the board.
No specific mention to two-tier system was included in the second set of CESR guidelines which stated that:" Cases within the scope of the second set of circumstances ('decisions taken which need the approval of another body') include those where there are complex decision-making processes involving multiple hierarchical layers in the issuer's organization (par. 2.9 CESR/06-562b).
Some more specific remarks concern the conditions provided in points (i) and (iii).
Regarding point (i) we think the condition is unnecessary; such an announcement would always bear the risk that the information is not correctly assessed by the public in every case in which the outcome is uncertain and the condition is any case already covered by point (iv).
Concerning point (iii) we cannot see how the management board could arrange for the approval to be made by the other body, within the same day. This is in contrast with rules of good corporate governance as the another body would be legitimate asking for more time to make its own and informed judgment on the said decision. According to corporate law, to the OECD principles and to codes of corporate governance, directors should receive appropriate information that are necessary to perform their duties with the due care. Issuers should in any case arrange or call for the approval of the second body as soon as possible, according to their internal procedures. In light of above we suggest to redraft point (iii) in the following way: "the issuer arranged for the decision of the body responsible for such approval to be made, ~~possibly within the same day" as~~ **as soon as possible, according to their internal procedures.**

We have also some concerns with the condition provided in point (iv); ESMA states that the decision of the body responsible for such approval is not expected to be in line with the decision of the management body and reports two examples: a) the two bodies are expression of the same shareholders represented in the management body and b) where such body has consistently approved the management body's decision on similar issues; we understand that the two examples reported in point iv) seem to represent the opposite case in which the approval of the second body is expected[4] (rather than it "is not expected"). Consequently it would be better to refer to situations which are not of "*routine*".

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

ESMA provides three non-exhaustive situations where the delay disclosure of inside information is likely to mislead the public. The situations are the following: i) the inside information the issuer intends to delay the disclosure of is materially different from a previous public announcement of the issuer on the matter to which the inside information relates to; ii) the inside information the issuer intends to delay the disclosure of regards the fact that the issuer's financial objectives are likely not to be met, where such objectives were

[4] As clarified in the comments at par. 80 of the Consultation Paper.

previously announced; iii) 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 the more flexible approach regarding situations where the delay disclosure is likely to mislead the public in comparison with the previous Consultation Document on 2013 which was too restrictive, with particular reference to the condition of contradiction of market expectations. Anyway we have some amendments to propose regarding points a) and c).

We think that point a) should be amended as it follows: "the inside information the issuer intends to delay the disclosure of is **in contradiction** ~~materially different~~ ~~from~~ **with** a previous **recent** public announcement of the issuer on the matter to which inside information relates to"; we think that the suggested formulation would be clearer and less vague for issuers. The word "**contradict**", in line with the suggestion of SMSG and the wording used by ESMA in paragraph 93 of the Consultation Paper, clarifies that the delay of publication would only be misleading where the issuer actively sets signals that contradict the insider information under delay. The reference to the previous "**recent"** announcement has been introduced in the drafting in order to limit the timeframe of the previous public announcement; to make an example, if the previous public announcement of the issuer on the matter to which inside information relates to has been made 2 years before by the old CEO the condition of misleading the public is not recurring at all. What is relevant is that the previous public announcement can be considered up-to-date. This concept could be also developed in the explanatory memorandum.

In light of above we also think that point c) is in some ways is already covered by point a) and for this reason it could be deleted or, in alternative, commented in the explanatory memorandum or redrafted in the following way: "the inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals **on the matter to which the inside information refers to** that the issuer has ~~previously~~ **recently** set"; the rationale behind this amendment is to circumscribe the situation which is likely to mislead the public to specific and recent signals actively provided by issuers. Again the reference to "**recent** "has been introduced in the drafting in order to underline the fact that the timeframe of the previous signals set by the issuer should be defined in order to clarify that, to make an example, if the previous signal of the issuer on the matter to which inside information relates to has been made 2 years before, the condition of misleading the public is not recurring at all.