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We refer to the “Discussion Paper on ESMA’s policy orientations on possible implementing measures under the Market Abuse Regulation” 14. November 2013 (ESMA/2013/1649).

The Norwegian Securities Dealers Association takes the opportunity to give its view on some of the topics and questions raised in the Discussion Paper. We have limited our answers to those questions we see as most important in relation to the Norwegian market, also taking into account current market practice and how the relevant issues are dealt with by regulated markets and regulators as we see it.

The Consultation Paper addresses several issues related to the fact that instruments are traded on more than one market place/trading system (whether regulated or not). Apparently this may lead to a fragmentation of information, thus ESMA proposes to implement reporting obligations to i.e. “one single competent authority” or “most liquid”. There are apparently also problems related to who shall be subject to certain reporting obligations, i.e. the issuer, the stabilisator, the manager for an IPO etc.

Even though we acknowledge the theoretical problems that are addressed we are of the opinion that the consultation paper does not contain enough information or analysis that make it possible to draw conclusions as to whether these problems are of such a character that more detailed regulation is necessary, neither do we see that some of the suggested solutions are based on a real need for the market participants.

Further to this, we find it difficult to see what is needed from a regulator’s perspective, given the fact that extensive reporting obligations are already in place (TRS), and what is needed from a market perspective. In our view, it is imperative that the regulations do not impose additional reporting obligations where the information needed from a regulator’s perspective already exist, i.e. through the TRS system or EMIR reporting or through the markets. It is also of utmost importance to make a distinction between what is needed as a first report, i.e. regarding suspicious transactions, and information that can be collected at a later stage if a suspicion has been strengthened, ref the proposed requirements to the content of information that is not necessarily available, i.e. “birth surname”, “place of birth”, “work address” etc. Regarding the last point we do not see any analysis supporting the Consultation Papers presumptions of a need or a problem. It is important to strike the right balance between “need to have” and “nice to have” information and the institutions’ control functions ability to maintain their main duty – to monitor and advice the business and be operational effective.

We do in general support a standardization of reporting formats, but allow us to question the scale of the formats that are proposed.

With this as a background we will try to answer some of the questions that we see as the most important from our standpoint.

### **Buyback programs**

Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

We are of the opinion that aggregated figures, on a daily basis, are enough and we see no need for further disclosure of details. Disclosure in the market is enough thus we see no need for additional information on issuers' web-sites. Such reporting may be confusing and burdensome for the issuer without any significant effect on the market participants' possibility to see or receive the information.

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

Yes, we see no reason to change this and have not seen any arguments or requests for a change.

Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?

Yes

Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

In the event that the reception of such reports are motivated in the need for regulators to monitor or investigate, there should be further investigated who have the actual need, and to what extent already existing reporting through the "TRS-system" will be sufficient. As long as these reports contain information about the clients' identity (i.e. the issuer), the authorities may collect relevant information from existing reports.

Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?

We cannot see why one marketplace shall be seen as more "important" or "correct" than others shall and if such an approach is taken – how shall we then define the price in a multi-currency world?

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

We have not seen that trading in auctions is a problem, and we may also see a development towards more auction based trading, i.e. for less liquid instruments, which again may create new problems for buy backs in such shares.

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

We are not sure that there is a “problem” that need this kind of regulation, and miss a more thorough analysis of this. The question may also depend on the nature of the individual markets.

Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

See above, no more details needed.

Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

We are not sure that there is a need for being so detailed. Is this more a theoretical than real problem?

Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

Yes.

#### **Stabilisation measures**

Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

No specific opinion on this.

Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?

Yes.

Q14: Do you agree with these above mentioned details which have to be disclosed?

Yes.

Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?

It is the entity which is actually undertaking the stabilization that is closest to the activity, thus should have the responsibility. This is also the practical solution based on agreements with the issuer (probably general market practice).



Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilization?

Same as under Q 15.

Q17 Do you think that in the case of bi- or multinational stabilization measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?

Again one must make a distinction between which interests that this relates to, ref Q 5 above. If anything should be chosen it must be the market(s) where the issuer is listed.

Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitized debt convertible or exchangeable of shares/other securities equivalent to share?

Yes

Q20: Do you agree with these conditions for ancillary stabilization?

Yes

Q22: Do you agree that “block-trades” cannot be subject to the exemption provided by Article 3(1) of MAR?

Yes

### **Market soundings**

Focus under this section of the Consultation Paper is market soundings based on an interest from or an agreement with an issuer. We miss more focus on situations where institutions are acting without a mandate and more on an opportunistic basis which also may be or become market sensitive during the soundings. The same applies to i.e. block trades where an institution has been engaged by a buyer or is trying to collect interest from potential sellers where a potential buyer has been identified, but not yet approached etc. A more general approach to the market soundings could be advisable.

Q23: Do you agree with ESMA’s proposals for the standards that should apply prior to conducting a market sounding?

Yes, in general this is probably in line with market practice.

Q24: Do you have any view on the above?

It is imperative that soundings can be done through opening hours, and we have not experienced any severe problems that should lead to a ban.



Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

Option 1 – it is standard market practice and works well. It is the most simple and we have not seen inadvertent wall-crossing following this.

Option 2 is not recommendable. We can hardly believe that those of the buy-side that we need to approach will ever say that they in general never want to be wall crossed. Such firms/investors will normally be out of the question and we do not see any need for keeping lists etc. An unnecessary bureaucracy without any real effect.

Option 3. See above related to option 2.

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

In general scripts are a good thing, but we do not see the need for detailed regulation of this as such scripts must be developed individually depending on type of transaction, clients, issuers, markets etc.

Further the proposal addresses issues that need further analysis. We are of the general opinion that is risky for the disclosing party to indicate its assessments of the information and why it is considered to be inside information, thus open for a discussion with the recipient on the issue. To what extent information is inside information is not an “objective” issue as it may also depend on the recipients situation and to what extent the information he or she has in total will be inside information. This also addresses the problem with so called “cleansing statements”. It is almost impossible for a disclosing party to conclude when or to what extent a recipient is no longer in an inside position. What the disclosing party may state is that the information given, from his or her point of view, is no longer inside information. To what extent the recipient is still in an inside position is not for the disclosing party to assess.

Q27: Do you agree with these proposals regarding sounding lists?

Yes

Q29: Do you agree with these proposals regarding recorded lines?

Yes, normal practice.

Q30: Are you in favor of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

No, see also Q 26 above. Such a procedure may entail a risk of additional spreading of inside information or sensitive information and we see no need from a practical or monitoring angle.



Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

No, we see no need for additional written confirmation. In practice wall crossing takes place either through taped phone calls and the recipient should be well aware of this – they are mainly highly professionals, or through different types of confidentiality or non-disclosing agreements that also very often set restrictions on trading.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

Yes.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

It seems that the proposals and the approach taken are based on an assumption that there is a need for detailed information and agreements. In our opinion one must base the approach more on the fact that those on the buy-side that will be pre sounded are highly professionals with as good knowledge of the market and the regulations surrounding it, as the disclosing investment firms. We only see a need for greater care in the event that one does pre sounding with non-professionals, which is very unlikely.

We do also refer to what is said above regarding the difficulties in relation to the definition of inside information.

We believe that the suggested approach by ESMA will create additional burdens on the participants, a risk of inadvertent disclosure of inside information, without achieving the goal – better control of the handling of inside information.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

No, too detailed on how to act.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

No, ref above. Please also note that such an approach may also entail a risk of inadvertently disclosing inside information as it may be differences between the parties as to what information they may have (i.e. from other sources).

Q36: Do you agree with the proposal for the buy-side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

No, ref the answer to Q 35. This is an issue that may need to be further analyzed as many of the potential recipients may be or may not be under such reporting

obligations already. To put reporting obligations on non-regulated persons will probably require a better legal basis, i.e. by statutory law.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

OK

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

No

Q39: What are your views on these options?

Cleansing is a difficult issue since it relatively often will be impossible, due to a duty of confidentiality towards the client to issue cleansing information. In relation to block trades that are not completed it is impossible for an investment firm, due to confidentiality, to disclose to the market in general, that there has been an attempt to do a block. However, at the same time, those that are wall crossed will have knowledge of the attempt and the selling or purchasing interest – a knowledge that are not common. But they will not know whether this interest is still valid, and they may not be entailed to such information. On the other hand, everyone “knows” that i.e. shares “always” are for sale given the right price.

A practice where such transactions are done outside market hours with proper information to the market has been developed in the Norwegian market and this practice may to a large extent reduce the problem as everyone will know from the notices to the market that a transaction is contemplated and to what extent it succeeded. The “rest-problem” is then related to situations where the pre-sounding does not materialize in a transaction, but is it advisable to inform any one of this?

### **Suspicious Transaction and Order Reports**

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

If an order has been put into the trading systems and subsequently is withdrawn, we will probably have a situation with a reportable suspicious order. From an operational view a reporting obligation for this situation is manageable. A more delicate and difficult situation occur where i.e. a sales person either refuse to accept an order he consider to be “strange” or even “suspicious”, or the client following his discussion chooses not to put in an order. A reporting obligation for those in the front may be difficult to handle as it may require legal expertise to assess whether or not such activity falls under the reporting obligation. Thus we are of the opinion that these issues do need further analysis before we can have a definitive opinion.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?



We agree to the timing proposed as we see the need to ensure and make adequately reasoned reports. We question the need for extremely speedy reports. If a shorter than two weeks timing is imposed, one must carefully assess the content of the reports.

Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?

Yes, absolutely – there is no other alternative in practice.

Q63: Do you have any views on what those reasons could be?

We advise ESMA not to define such reasons or giving examples, there are too many reasons that may justify the one or other solution.

Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

Automated surveillance systems are expensive and need to be adjusted in its scenarios all the time, and should not be mandatory, at least for smaller firms. It is also an experience that manual surveillance conducted by skilled personnel can be just as effective as monitoring and analyzing reports from systems. The need for systems will be dependent on the size of the business.

Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.

We see no reason for not imposing such a duty. Trading venues and market places are probably much more able to detect suspicious trading activity as they will have a much more in depth knowledge of trading and trading patterns than individual broker/dealers.

Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

Training is important, but the ultimate reporting obligation should be put on the licensed firms and not on the individuals. Level of training must be assessed individually firm by firm.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

The proposed content is unnecessary extensive for an initial report given the information available to the reporting person/firm. One must also take into account that the competent authorities have a lot of information available from the "TRS-system" and EMIR reporting as well as public available information. The practice in Norway with short and basic information combined with the competent authority's own analysis of other information works well. Based on this, such authorities may come back and require additional information if needed. The scope



of the proposal from ESMA may be seen as a requirement for more detailed investigation on the firms' side, and that has never been the intention. In depth investigation and follow up is normally subject to strict procedures in criminal law etc.

A standard format could be a good idea, but not as extensive as proposed.

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

If adequate levels of security are achieved than an electronic reporting mechanism should be developed.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

Yes.

### **Insider list**

Q84: Do you agree with the information about the relevant person in the insider list?

No, not entirely. We really do not see the need for all the suggested information in these lists, and it may also be difficult to obtain all the information when drawing up the list. Some of the information, if relevant, may be collected by the competent authorities instead of the firms.

Birth surname is information that normally will not be collected by firms, and it is neither a requirement in relation to AML/KYC nor MiFID, and we see no immediate need for this information in relation to insider list. It may also be difficult to obtain as people may have good reasons for not giving such information (may also be restricted for personal protection). We can hardly see any need for date and place of birth in these lists, and it may be somewhat strange to ask several potential insiders during i.e. a pre-sounding. Further to this we cannot see the need for the individuals' working address. Today people may have a lot of different e-mail addresses and to collect all of them may pose some difficulties. We cannot see that ESMA has given any justification for this requirement thus the level of detail should be limited. There is a real need to know at the time and stage for completion of such lists.

Q85: Do you agree on the proposed harmonized format in Annex V?

It may be advisable to implement a common format given that it takes into consideration the reservation mentioned above. But ESMA should carefully assess also the fact that follow up and investigation of potential insider dealing will be a task for competent authorities and national prosecutors and that there might very well be a need for local adjustments.

Q86: Do you agree on the proposal on the language of the insider list?

Yes.

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields...)?

Yes, see above regarding Q 68 – same applies.

Q89: Do you agree on the procedure for updating insider lists?

Yes.

Q90: Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

No, we see no reason for treating SME companies traded on regulated or other relevant markets differently from other listed companies. The burdens imposed on firms when it comes to insider lists etc are not of a kind that may justify a simplified approach. On the contrary the risk of improper dealing, including insider dealing may be more apparent in such firms, low visibility, low public focus, limited liquidity combined with large spreads etc. Higher risk for both insider dealing and market manipulation?

### **Managers' transactions**

Q91: Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?

We are in doubt. The need for information of managers' transactions is justified in the need for other investors to see when such managers actively take a position or actively dispose of a position in the financial instruments issued by the firm where the manager is employed. Other kind of transactions, such as inheritance and gifts are more or less of no interest at all. Thus a reporting of such information is not necessary and may also be confusing. We must focus on what is really needed for the market and not on all information that may be nice to have. Unless we limit ourselves we may end up in extensive information spam where, at least smaller and retail investors will lose oversight and limit their possibility to see the "real" trading signals.

Q92: What are your views on the minimal weight that the issuer's financial instrument should have for the notification requirement to be applicable? What could be such a minimal weight?

Q93: For the avoidance of doubt, do you see additional types of transactions that should be mentioned to the non-exhaustive of examples of transactions that should be notified?

Given the approach in relation to Q 91 in relation to what is needed from a market perspective it is of lesser interest to see managers' exposure in derivatives in indexes or baskets. To be of any interest one should then have good knowledge of the composition of the index or basket and the weight of the individual instruments. In addition one must have an opinion on how to act/report when changes are made in the index or basket (shares taken in or out). The individual managers may not know of such indices/baskets, nor may he or she be aware of changes. Such information is of almost no interest, and a reporting obligation will only confuse the market and be extremely difficult to handle for those subject to the reporting obligation. Next question will then be - what about investments fund units (UCITS and AIFM)? These may be as well as interesting as exposure in indices and baskets.

Q94: What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?

As for the above answers one must consider what is most relevant for the market participants and at the same time avoid unnecessary information overload. The timeframe for notification/reporting is three business days after the transaction. It should be more or less obvious that reporting on an aggregated basis is the most convenient and informative way. A reporting on a transaction by transaction basis is irrelevant, and it is also important to take into account that it is the average price that will be of interest when it is reported on a day to day basis. An additional reporting on high or low will be of minimal value. If an aggregated reporting is not implemented, the market will probably see an increase in "all or nothing" orders where the investment firms/banks takes the risk and the reporting thus may be unnecessary delayed.

Thus a fourth alternative should be considered:

- All the transactions on a financial instrument carried out on the same day could be aggregated and reported at the average price or as agreed with the broker/dealer).

We will be more than happy to discuss these issues in more detail if ESMA so wishes.

Best regards

**The Norwegian Securities Dealers Association**



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