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European Securities and Markets Authority

RE: Discussion Paper - ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

General remarks

We welcome the excellent ESMA's Discussion Paper which provides some policy orientations on possible implementing measures under the Market Abuse Regulation (hereinafter "MAR"): the paper is detailed, well grounded and can remain a reference paper also for future interpretation. Given that some parts of the paper are not linked to implementing measures to be drafted by ESMA and/or the EU Commission, (as an example par. 247, which is outside the mandate), it would be of great use for the market that ESMA, following this discussion paper, will publish a detailed feedback statement updating the current document rather than only the draft implementing measures.

In general, we evaluate very positively this way of consultation by ESMA, well in advance of the draft implementing measures

We appreciate and share the content of the Discussion Paper which sometimes adopts the current solutions of the implementing measures of the directive 2003/6/EC; this is the case, for example, of buy-back and stabilisation measures in which ESMA refers directly to Regulation n. 2273/2003.

We draw your attention on some specific issues of the Discussion Paper and hereby provide some answers to the questionnaire and some comments, focussing on issuers obligations: market soundings, accepted market practices, disclosure obligations, insiders' list and managers' transactions.

I. Market soundings

A general comment on market soundings deals with the notion of information and is related to level 1 (art. 7c of MAR).

While MAR (art. 7c, par. 1) describes market soundings as communication of "information", from par. 2 the concept used is always the disclosure of "inside information": apparently, disclosure of inside information is a "special kind" of market sounding, and only in this "specific" case the other paragraphs of art. 7c, and the implementing measures by ESMA, should apply. This would also imply that "special" market sounding, with disclosure of inside information, can only happen in two cases:

1) when issuer is delaying inside information;

2) when inside information is not produced in the sphere of the issuer but, rather, is a so-called market information (i.e. the selling of a big stake of the issuer by one of its shareholders).

The two cases are somewhat overlapping in the discussion paper: for example, it is not clear why ESMA proposes in par. 84 a procedure for the case of "non-wall-crossed sounding scripts" because it is not clear if this is a proper market sounding; furthermore, the issuer (as a "disclosed market participants") should always be overburdened by keeping records of any communication of information: par. 84 should be deleted as it imposes to set up a prescriptive procedure, similar to an insider list, whenever the issuer is sounding the market with non inside information.

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

We welcome ESMA proposals which aim to enhance clarity and procedural certainty as well as standardisation to market participants in conducting market soundings. However, the proposals seem too prescriptive and could impose undue administrative burdens on issuers, advisors and investors alike. Market soundings may involve initial and secondary offers and so stiffening market soundings could be detrimental for raising new capital, especially as regards SMEs. We believe that requiring market participants to maintain written records about each consideration in the assessment process (including the conclusions and the reasons behind each conclusion), is unduly excessive and will result in administrative burdens especially for the smaller market participants[1].

IV. Accepted Market Practices (AMPs)

As far AMPs, being a matter of national discretion, ESMA is aware of the pivotal role that it will play in terms of assessing the compatibility of a proposed market practice with the legislative framework. In this regard, it will be therefore important to adopt the best solution in order to ensure a cross-border approach.

Moreover, in par. 155 of the Discussion Paper, ESMA states that, as MAR extended the scope of market abuse, consequently, and in accordance with art. 2.1, AMPs "may cover any financial instrument covered by MAR", including financial instruments admitted to trading on a MTF/OTF: we wonder if ESMA could allow an automatic extension or if it is necessary to proceed with the request of extension and how. Just to make an example, as in Italy the existing AMPs do not cover financial instruments admitted on a MTF, it would be useful to clarify if the extension will be automatic once the MAR will entry into force or if the Competent Authority, upon a specific request of the interested parties, may extend the existing amps also to financial instruments admitted to trading on a MTF/OTF.

VI. Public disclosure of inside information and delays

Q70: Do you agree with this general approach? If not, please provide an explanation.

We agree with this general approach.

Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

With regard to the requirements applicable to issuers on MTF/OTF, we think that a

[1] See par. 92.

proportional approach should be followed. In par. 242 of the Discussion Paper regarding the channels for appropriate public disclosure of inside information, ESMA considers that similar requirements to those applicable to issuers listed on regulated market should apply also to issuers on MTF/OTF. This would mean that the requirements of dissemination, storage and filing set forth by the Transparency Directive (hereinafter "TD") will be applicable also to issuers on MTF/OTF even if the above mentioned directive concerns only issuers on regulated market. This approach would not be coherent with the legislative framework set forth by the TD which has been revised recently. Moreover the solution envisaged here is also different from the one adopted for the channels of public disclosure that must be ensured for buy-back programmes in which ESMA considers that in case of shares only traded on trading venues different from regulated markets, a comparable mechanism (but not the same we would add) to dissemination, filing and storage should be used[2].

Q72: Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.

In par. 247 ESMA reminds the current provision set forth by art. 2.3 of directive 2003/124/EC which states that "any significant changes in already publicly disclosed inside information should also be publicly disclosed as soon as possible after the change occurs". ESMA considers that such a requirement should be maintained in the MAR implementing Level 2 measures.

We have some reservations on this. First of all, there seems to be no explicit mandate in MAR for regulating this aspects, even if we acknowledge that it may well be a future level 3 guideline. Secondly, if the "significant change" foreseen by ESMA is so relevant that constitutes a new inside information in itself (to be published according to art. 12), issuer must inform the public as soon as possible and for this reason the provision is useless; if, on the contrary, the significant change does not constitute a new inside information (to be published according to art. 12), the provision could lead to misleading disclosure to the public of uncertain information which may result in market manipulation. Therefore, in any case, the above mentioned provision, for which there is not a specific mandate in art. 12 of MAR, should not be maintained. We think that par. 247 of the Discussion Paper is misleading and can create confusion and therefore it should be eliminated

Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?

We agree.

Q74: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?

We support the Prospectus Directive based approach which gives clarity and certainty.

Q76: Do you agree with the approach to the ex post notification of general delays and the ways to transmit the required information? If not, please explain.

Information about the existence of the delay should be transmitted in written form using electronic means of transmission.

For the explanations, MAR states that national law may alternatively provide that a record of such explanation may be submitted only upon request of the competent authority. This waiver should become the rule, because:

[2] See par. I.2.2.2 of the Discussion Paper.

(i) it is really burdensome for the issuer to give each time the reasons for delaying public disclosure of inside information (large issuers are disclosing hundreds of statements a year);

(ii) national authorities will receive so many notifications that it will be impossible to exercise any control on its contents. National authorities will react only when there is a drop or an increase in the stock prices.

Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.

Issuers may put in place appropriate procedures and arrangements depending on their own organisation, provided that these procedures are sufficiently flexible and draw a general framework instead of centralised and prescriptive rules. In particular, it is very difficult to determine ex ante, within the issuer, a single person responsible for deciding about the delay, and in any case he should not necessarily be a "managing board member", as indicated in the unique example by ESMA in par. 271: other examples could be added like the general counsel, a non executive member of the board, the chairman, the director general outside the board.

Q78: Do you agree with the proposed content of the notification that will be sent to the competent authority to inform and explain a delay in disclosure of inside information? If not, please explain.

We agree with the proposed content.

Q79: Would you consider additional content for these notifications?

No. The proposed content is already complete.

Q80: Do you consider necessary that common template for notifications of delays be designed?

Not necessarily. Issuers should be free in how they comply with the MAR duties with respect to the notification of delays. If ESMA created a common template, its use should be an option for issuers but not a binding obligation.

Q81: Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?

ESMA should clarify that while the decision making of the competent authority is pending the issuer is allowed to delay disclosure. Otherwise, that form of delay would not work.

Q82: Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information? Do you consider that CESR examples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

We agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information. It should be clarified that other situations and circumstances may arise as legitimate interest as well.

Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

MAR clarifies that an issuer can delay the disclosure of inside information if, among other circumstances, it does not mislead the public. MAR request ESMA to issue guidelines: we welcome the effort done by ESMA to allow issuers to understand when, according to MAR, a delay is always misleading, so that, on the other side, issuers may safely delay without misleading the public.

The proposed approach could be improved in order to be in line with the spirit of MAR.

ESMA proposes as a general rule that delay is always misleading when it "contradicts the market's current expectation": the proposal risks to be too restrictive because it is the nature of inside information to be "new" to the market be price sensitive, i.e. against market current expectation.

A more flexible concept could be used. The first-best solution is to use as a general rule the wording of par. 308: "delay is always misleading only if it contradicts previous public announcement of the issuer".

We propose also other suggestions in case market expectations are kept. The omission to publish inside information should only be misleading if an issuer actively sets signals that strongly contradict the inside information under delay. A materiality concept could be added (i.e. "significantly" contradicts market expectations). Eventually a concept of market "long term" expectations could be considered. The word "current" could be deleted.

In any case, the example in par. 307 should be reverted: rather that stating "embarking on an acquisition strategy", which is a too wide concept, the sentence should refer to "a strategic acquisition". Another example could be inserted: a delay is always misleading if it refers to a major acquisition in a new sector of activity never announced by the issuer.

With reference to the second part of par. 308, ESMA considers that the disclosure will be always required when the issuer, preparing its annual financial statement, understands that "the actual results, even though not fully finalised, substantially differ from the anticipated results as previously publicly announced by the issuer, the issuer would be expected to issue a profit warning without delay until the finalisation of the concerned financial statement". It would be better to delete this part of the paragraph which risks to give rise to more uncertainty than what is solves. In listed companies, organized with directly and indirectly controlled companies, operating in different jurisdictions, it may well happen, when preparing consolidated accounts, to received anomalous final results (material and price sensitive) from subsidiaries, that after a time-consuming thorough double-check may end up in erroneous numbers: if the issuer should announce them immediately, without any check, it would mislead the market, rather than the opposite. That is why even the transparency directive prohibits the disclosure of non audited statements. Moreover there should be the risk of continuous profit warnings that may themselves be misleading. For all the reasons above mentioned the second part of par. 308 should be deleted.

VII. Insider list (Article 13 of MAR)

Insiders list are lists of all persons who have access to inside information. Apart from the case of permanent insiders (for example the CEO of a company), a person in inserted into the list when an inside information arise.

As a general remark, the new MAR framework, with a stricter definition of the issuer disclosure obligation, implies that insiders list will be existing only when the issuer is delaying the disclosure of inside information; otherwise either an information is not yet inside or it is already public.

Another consideration concerns art. 13, par. 1a on the possibility for persons acting on behalf of the issuer to keep "the" insider list". In our opinion, this covers two cases: i) the first case relates to the

insider list kept by a person acting on behalf of the issuer, typically the consultant who has a mandate to keep the list of insiders within the issuer); ii) the second case relates to the "secondary" insider list within the consultant, typically the advisor or investment bank or a law firm who is involved in the preparation of a strategic operation for the issuer. It is up to both type of consultants to keep a list of the persons, who have access to inside information of the issuer but ESMA should nevertheless clarify that in the second case the responsibility of the maintenance of this list should lay on the consultant.

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

It should be necessary to verify if all the details proposed by ESMA do not go against any law of data protection. It could be enough to include in the list, in case of a physical person, the details of the name of this physical person, and in case of a legal person, the name of a relevant (physical) person within the organisation of the legal person. In alternative, as we think that there should be a clear link between the information required and the purpose of the list, we propose to delete some information considered useless like home, work and mobile telephone numbers as well as personal and work email address. In any case, all the information proposed by ESMA could be provided by issuers upon a request of the Competent Authority in case of an investigation.

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

We agree that a template could be useful but leaving flexibility on the detailed information as indicated above.

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?

Yes

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...)?

We welcome the use of standard tables proposed by ESMA. We also think that ESMA should not go too far providing a technical format for the insider list "including the necessary details about the information provided (e.g. standards to use, length of the information fields)", as envisaged in Q88; as the requirements of the insider list set forth by MAR are substantially similar to those established by the implementing measures of the directive 2003/6/EC, there is no reason to modify the actual structure of the insider list requiring such specific details as this could increase costs. For this reason the necessary details about the information provided (e.g. standards to use, length of the information fields) should be left to the discretion of the issuer.

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?

Par. 333 should clarify that, according to MAR, the SMEs should create an insider list according to Level 1 and not with the detailed characteristics set up at Level 2. Otherwise there is not any concrete reduction of administrative burdens, as suggested by MAR and, more in general, by the Commission Communication on "A Small Business Act for Europe".

VIII. Managers' transactions (Article 14 of MAR)

A general remark about managers' transactions concerns the role of the issuer according to art. 14 of MAR: it should be clarified that issuers receive information about the transactions conducted by person discharging managerial responsibilities ("PDMRs") and person closely associated and disclose a subset of them without any re-elaboration of the data.

Secondly, MAR lack an explicit obligation for a PDMR to disclose to the issuer who are the person closely associated to him. Given that the issuer should receive and disclose to the public not only all transactions transmitted by PDMRs but also by all persons closely associated to them, the issuer need to know their precise and updated list in order to disclose only true negotians by effective persons closely associated.

A preliminary clarification that ESMA should provide deals with thresholds: while only transactions over the 5000€ threshold should be disclosed to the public concerns, it is not clear if those under the 5000€ threshold should be in any case disclosed only to the competent authority as this is not clear reading cross-references in art. 14, parr. 1, 1a and 3 of MAR.

Another further useful clarification regards how a person closely associated to PDMRs transmits information on the transaction to the issuers and especially to the Competent Authority because nothing is said in Level 1: should they use appointed mechanism? Is the competent authorities providing specific email address or formats?

It should also be clarified in Level 2 measures that the timing for notification should start only when there is effective knowledge of the transaction by the PDMR (i.e. in case of transaction made by life insurance firm for a life insurance policy of a PDMR).

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

In par. 347 ESMA states that transactions referred to art. 14.2 (b) include transactions executed for the account of the PDMRs within the framework of a fully discretionary asset management contract (meaning that there is no instruction whatsoever from the PDMR) as regards the investment policy of the contract; it is not clear from MAR wording if notification should also include operations by asset managers when there is no discretion by the PDMR.

In par. 351 ESMA does not make a difference with regard to how the respective financial instrument has been acquired by the PDMR. From our point of view, an acquisition of a financial instrument may only create signals for the market if there is an active investment decision by the reporting person. This is also the core legislative and economic rationale behind the duty to publish PDMRs' transactions: other market participants may extract from the reported transaction what are the PDMR's current expectations with regard to listed company. Market participants would therefore rather be misled if the duty to report also covered transactions that resulted in situations where the PDMR has no discretion and/or is completely passive.

Consequently, gifts, inheritances and donations should be out of scope, because they have in common that they cannot be influenced by the person in question. Also due to the low threshold, market would be otherwise flooded by many transactions without any signalling value.

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*****?**

ESMA proposes to include in the notifications also transactions executed in derivative or indices or baskets if the financial instrument of the concerned issuer carries a certain weight; it is questionable to include in the notifications also these transactions: PDMRs and persons closely associated to them should have a certain degree of specific knowledge of the financial instrument (and of their underlying asset). ESMA wishes to include some sophisticated financial instruments while it is worth to limit the notification of derivative financial instruments based on shares of the concerned issuer. In any case, if ESMA decides to include the transactions proposed, reference could be made to a "significant" weight (at least 50%).

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?

No

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

We would favour the first or the third option.

Q95: What are your views on the suggested approach in relation to exceptional circumstances under which an issuer may allow a PDMR to trade during a trading window?

The effort done by ESMA in evaluating the exceptional circumstances that should be taken into consideration to allow managers' transactions is very welcome; ESMA puts in evidence the relevance, not only of the feature of exceptional circumstances, but also of the urgent, unforeseen and compelling cause which is external to the person discharging managerial responsibilities. Some useful examples are provided in the Discussion Paper.

Q96: What are you views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

We consider these criteria as very useful.

Roma, January 27th, 2014