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RESPONSE TO ESMA CONSULTATION PAPER ON GUIDELINES ON THE MARKET ABUSE REGULATION (ESMA/2016/162)

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INTRODUCTION

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

We also appreciate the efforts for the interpretation of MAR provided in the past and present Consultation Papers. Nevertheless, publication of a Feedback Statement, taking into account all the comments received by the industry, would help the market to adjust to new rules.

We welcome this opportunity to respond to this consultation paper published by ESMA relating to the draft guidelines (ESMA Guidelines) on MAR. These guidelines deal with two important topics: the procedure to put in place for the persons receiving market sounding and the delay of disclosure of inside information.

The part dealing with the legitimate interests of issuers to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public is of paramount importance for issuers. Firstly, because MAR recognized a single notion of inside information both for the market abuse and for the duty of disclosure to the public. This may lead to the communication of information not sufficiently mature and be manipulative in itself, as underlined by the ESME Report on 2007 amongst many others[1].

Secondly, 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. As a result, the delay of the communication of inside information is an important tool to avoid disclosure of information not sufficiently mature. We therefore agree with the SMSG stating that "the prerequisites for delay should not be interpreted narrowly" [2]. By contrast, ESMA proposes the opposite in stating that the option to delay is the exception rather than the rule and should be interpreted narrowly (paragraph 69.). This approach is reflected throughout the entire consultation paper. We are therefore concerned that ESMA Guidelines could erode the right for delay as granted in the Level 1-text.

We believe that ESMA should provide a framework where the conditions to meet for the delay of disclosure of inside information are very clear, and the conditions should be provided in a way that does not prevent issuers from using their right to delay the disclosure of inside information.

[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.

Issuers in some countries are requesting publication of a non-exhaustive list of inside information concerning indirectly and directly the issuer. This list could be inserted in Q&As or in additional guidelines which would ensure the common, uniform and consistent application of MAR. If such a list would not be produced at the EU level it could be useful to prompt National Competent Authorities to provide such a list or guidance at the national level to provide more legal certainty for issuers.

New Market Abuse Regulation will also cover smaller quoted companies on the growth markets like AIM (UK), AIM Italia, New Connect (Poland), First North (Scandinavian countries), MAB (Spain), etc. It should be ensured that issuers on the growth markets are able to take advantage of MAR's more proportionate rules regarding insider lists from the date MAR enters into force, without waiting for the entry into force of MiFID II.

SUMMARY OF KEY POINTS

- We feel that in some areas ESMA's proposal for guidelines provides for a framework more stringent than MAR level I or the rules currently in place. We urge ESMA not to go beyond the level I mandate.
- Publication of a non-exhaustive list of inside information, whether at EU or national level, could be helpful to issuers in a number of countries.
- Issuers on the growth markets should be able to take advantage of MAR's more proportionate rules regarding insider lists from the date MAR enters into force.
- M&A transactions should be explicitly included in the list of examples justifying the decision to delay the public disclosure of inside information.
- ESMA should recognize specificities of a two-tier system. Guidelines on situations where the approval of another body is needed should be amended. Otherwise, it would render delay of inside information in a number of situations that currently constitute "a legitimate interest" in a two-tier board system impossible.
- In case of CEO resignation, the imminence and likelihood of the successor's appointment should justify a postponement to allow simultaneous disclosure of the two events.
- We propose a number of adjustments to guidelines regarding situations where the delayed disclosure is likely to mislead the public in order to create a properly functioning disclosure regime.
- We also provide some comments on guidelines for persons receiving market soundings.

RESPONSE

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 MAR, "the person receiving the market sounding (MSR) 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 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 is 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.

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 we do not think 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 in 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?

We believe that 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 versions 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 prevail.

In this respect, we do not believe that detailed guidelines would 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 waive the signature burden); and
- DMP and MSR should have in place procedures to deal with disagreement cases.

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?

Although we welcome examples provided by ESMA of some important situations when a delay of inside information constitutes "a legitimate interest for delaying disclosure of inside information", we are very concerned with certain provisions in ESMA's Guidelines. We fear they could result in serious negative consequences for issuers and could result in practically withholding issuers' right to delay inside information in very important circumstances.

Our concerns relate to:

1. ongoing negotiations (chapter 3.2.1. / Proposal for guidelines 3.4 Art. 1, letter a) and M&A situations (chapter 3.2.4., Proposal for guidelines 3.4 Art. 1 letter e);
2. situations where the approval for another body is needed (chapter 3.2.2., Proposal for guidelines 3.4 letter c);
3. CEO's resignation (chapter 3.2 para 63);
4. Consistency of wording.

1. **Ongoing negotiations and M&A situations** (3.2.1 & 3.2.4/ Proposal for guidelines 3.4 Art. 1 letter a & e)

We appreciate ESMA's recognition that M&A transactions are generally to be considered as situations where legitimate interests to delay the disclosure of inside information may exist. Nevertheless, **in order to ensure legal certainty for issuers we would insist on explicitly including M&A transactions in the list of examples justifying the decision to delay the public disclosure of inside information**.

It could be useful to also include in the mentioned list any kind of structural transactions (segregation of activity, general assignment of all the assets and liabilities, the international transfer of the address, etc.).

Moreover, we believe that a legitimate interest should be recognised irrespective of whether the outcome of the ongoing negotiations would likely be "jeopardized" by immediate disclosure of inside information or whether the conclusion of the transaction "is very likely to fail" (see para. 86). Recital (50) of MAR, refers to a situation where a premature publication would affect the "normal pattern" of negotiations. We therefore suggest to adjust the current proposal. Otherwise, ESMA's guidelines would narrow the scope of the Level 1-text.

2. **Situations where the approval of another body is needed** (chapter 3.2.2., Proposal for guidelines 3.4 letter c)

Another serious concern relates to paragraph 78 (chapter 3.2.2) and Art. 1 c) of the Draft ESMA Guidelines, according to which ESMA specifies under which conditions an issuer will be allowed to delay the publication of inside information if a certain decision needs the approval of another body of the issuer other than the management board in order to become effective. This issue is particularly virulent in all two-tier-board systems where the supervisory board is separated from the management body and has the right (or even the duty) to approve certain decisions of the management board.

The legislator was fully aware of the problematic in two-tier-systems. Recital (50) of MAR explicitly mentions that pending approval of second body as a general rule constitutes "legitimate interest" on a non-exhaustive list (see paragraph 60 of the ESMA's proposal) in order to avoid organizational difficulties.

In its guidelines ESMA formulates four conditions which have to be met before the issuer is allowed to delay the disclosure of inside information in situations where typically another body is involved or have to approve a management decision. In addition, paragraph 82 requires the issuer to publish an inside information while still awaiting the approval, which should also be explained. In that respect ESMA's guidance is contradictory to guidance of certain supervisory authorities (including German and Polish for instance). Therefore, such requirements would put issuers from various countries in a difficult position and could destroy the way in which companies in two-tier systems operate or withhold the right to delay inside information in companies in a two-tier corporate governance structure. Moreover, we believe that if an approval is still pending such an announcement could possibly mislead the public.

In particular, we propose:

- To remove the condition a) in chapter 3.2.2 para 78. We believe it is unnecessary as such an announcement would always bear the risk that the information is not correctly assessed by the market.
- To remove the condition b) in chapter 3.2.2 para 78. We believe it is unnecessary as such an announcement would always undermine the freedom of decision of the supervisory body.
- To amend the wording of condition c) in chapter 3.2.2 para 78 in a following way:

"the issuer arranged for the decision of the body responsible for such approval to be made, ~~possibly within the same day"~~ ***as soon as reasonably possible, according to their internal procedures".***

The reason for the suggested change is that it would be extremely difficult or even impossible for the management board to arrange for the approval of the other body within the same day. In practice, the same-day-approval or next-day-approval would contradict the general objective to permit the issuer in a two-tier system to delay the disclosure of inside information. Moreover, such rule would be run counter good governance as the supervisory body may legitimately require more time to make an informed judgment. According to the corporate law, the OECD principles and codes of corporate governance, directors should receive appropriate information that is necessary to perform their duties with due care.

Also, in any case issuers are required by their internal procedures to arrange or call for the approval of the second body as soon as possible.

- We are also concerned with the condition d) in chapter 3.2.2 para 78 and we also request its removal. We believe that ESMA should generally allow the delay of publication if there is a second body involved that needs to approve a decision of the management board.

ESMA states that a delay is only possible if the decision of the body responsible for such approval is not expected to be in line with the decision of the management body.
This is problematic as it can never be known with certainty that a second body would approves or not. Therefore, a cautious issuer would rather make the inside information public in order to avoid the sanctions of the MAR. Also, another possible consequence is that the supervisory board would be regularly prejudiced and the pressure to approve would increase. As a result, the position of the supervisory board would be weakened which is contradictory to the political efforts to strengthen the corporate governance of listed companies.

On the other hand, if the supervisory board does not approve a decision already made public, another publication (correcting the previous publication) will be necessary confusing the market and negatively impacting the issuer's reputation.

Last, but not least, condition d) is describing a situation in which a delay is not necessary because a management board will most likely not present a decision to a second body if it expects that the supervisory body will not approve the decision. The possibility to delay is therefore not needed in situations which are described by condition d). Issuer do, however, need the option to delay in. situations where an approval of the supervisory body – although not certain – appears to be likely or possible. If condition d) is taken literally these kind of situations can never constitute a legitimate interest and, thus, no delay will be possible. This clearly contradicts MAR because the option to delay, even if granted in principle, could not be used in practice.

Therefore, **we strongly believe that ESMA's proposal is not in line with the intention of the legislator or in the interest of the market.** It would render delay of inside information in a number of situations that currently constitute "a legitimate interest" in two-tier board system impossible.

3. **CEO's resignation** (chapter 3.2 para 63)

In its draft guidance ESMA explains that it does not consider the CEO's resignation from their position 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.

4. **Consistency of wording**

As a general comment, we urge ESMA to revise the wording of the Guidelines and ensure that the terms used are consistent. As an example, the words "likely to be jeopardised", "would jeopardise" and "jeopardising" used in 1 a-e could lead to different interpretations and thus be misleading.

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

In order to create a properly functioning disclosure regime we believe that the following adjustments to ESMA's proposals are necessary:

1. Point a): "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 this wording would be clearer and less vague for issuers. The word "contradict" is in line with the advice by ESMA SMSG.

The introduction of the word "**recent"** serves to underline that the timeframe of the previous public announcement should be defined. Otherwise, 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 previous CEO, the condition of misleading the public is not met. We believe it is also important to elaborate on that in the explanatory memorandum.

In the point b) the guidelines should refer to "**issuer's profit forecasts**" instead of "issuer's financial objectives". Point **a)** already includes 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 guidelines would increase uncertainty and would not ensure a consistent implementation of the level 1 legislation.

Profit forecasts are defined by the Prospectus Regulation[3] : *"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".*

2. Point b) could therefore be redrafted 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."
3. Point c): We believe that **point c)** is redundant and should be **deleted** in order to avoid legal uncertainties **or at least be redrafted** in a 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".

It is our understanding that ESMA wants to avoid situations where the issuer actively sets signals in the course of its official financial communication that lead to a certain market expectation and may need to be changed afterwards when a new inside information arises. However, we believe that the cases a) and b) already cover all relevant situations. Moreover, point c) and the subsequent paragraphs are formulated in a very general way so that it is unclear what constitutes a relevant signal, what will happen if the market expectations are mainly driven by sentiment or analyst's research and whether even situations where the issuers has not followed an active communication strategy could be regarded as misleading.

Therefore, we suggest deleting **point c) to avoid legal uncertainties**. Otherwise, it should be at least narrowed in two respects:

- First of all, it should be made clear that the signals have to be closely related to the inside information and actively communicated as part of the official capital market communication. The term "actively" is also important, because otherwise it could be misinterpreted as a signal in the sense of the Guidelines if the issuer does not comment on or has not communicated on a certain issue.
- Secondly, it should be clear that ESMA refers to signals recently set by the issuer. 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 for clarify. 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. This concept should be also developed in the explanatory memorandum.
- Thirdly, regarding "market expectation" we disagree with ESMA's statement in paragraph 101 that issuers should also take into account the market sentiments and financial analysts' consensus. Also, we do not fully understand what that will change for evaluating situations referred to in point c). Issuers are not responsible for analysts' consensus. No publication of

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

inside information should therefore be only considered misleading when an issuer actively sets signals that contradict the inside information. Where market expectations are based on analysts' opinion, the company should not be held responsible for the lack of announcement. It should be clarified in paragraph 101 that the only signals that can be actively set by an issuer are public disclosures in the course of the official capital market communication.

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.

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