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EUROPEANISSUERS RESPONSE TO ESMA CONSULTATION ON DRAFT TECHNICAL ADVICE ON POSSIBLE DELEGATE ACTS & DRAFT TECHNICAL STANDARDS ON MARKET ABUSE REGULATION

15 October 2014

INTRODUCTION

We welcome the work done by ESMA insofar regarding the implementation of Market Abuse Regulation (hereinafter "MAR"). We also appreciate the efforts for the interpretation of the MAR provided in the present Consultation Papers and in the Discussion Paper of 2013. However, the content of the consultation is very technical and therefore it is difficult for issuers (especially smaller ones) to understand the implications of the proposals.

In our position we do voice strong reservations against some of the proposals regarding issuers' duties. In particular, we are concerned about the level and amount of details regarding insider lists which will lead to a dramatic rise in compliance costs and legal risks for issuers. We also comment on managers' transactions, market soundings, AMPs and technical means for delaying disclosure of inside information.

We believe that ESMA has exceeded its mandate at Level 1 in the following areas:

- in market soundings by prescribing record keeping requirements to all market soundings, notwithstanding whether they contain inside information or not;

- in case of insider lists where the amount of data required by ESMA is disproportionate and against the spirit of level I regulation which intended to decrease administrative burdens on issuers; also by requiring issuers on SME Growth Markets to provide an insider list containing all the information specified in a template by ESMA (Table 2), level I regulation exempts SME growth markets from drawing up insider lists;

- in terms of the means for appropriate disclosure of inside information, by proposing to require issuers on MTFs and OTFs to the use the same dissemination channels as applicable to the regulated markets under the Transparency Directive.

We are also concerned about:

- the prohibition of trading imposed on third parties with a discretionary portfolio during the closed period;

- the proposal on managers' transactions could result in flooding the market with non- relevant information and misleading signals;

We would also welcome publication of a Feedback Statement taking into account all the comments received by the industry.

IV. DETERMINATION OF THE COMPETENT AUTHORITY FOR NOTIFICATION OF DELAYS AND PUBLIC DISCLOSURE OF INFORMATION

ESMA has identified different options to determine the authority for the purpose of notification of delays and public disclosure of inside information. It suggests a three-fold approach which principally refers to the competent authority of the Member State where the issuer's registered office is located. The proposed approach seems efficient and supportive of market monitoring.

V. MANAGERS' TRANSACTIONS

We would like to draw your attention to two general remarks we put in our answer to the 2013 Discussion Paper[1] as we did not find any comment on that in the current Consultation Paper.

The first one concerns the role of the issuer according to art. 19 of MAR: it should be clarified that issuers are recipients of the information about the transactions conducted by a person discharging managerial responsibilities ("PDMRs") and a person closely associated, and therefore disclose a subset of them without changing the data.

Secondly, MAR lacks an explicit obligation for a PDMR to disclose to the issuer, who are persons closely associated to him/her. 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, we would like to underline the dependence of the issuers on the goodwill of PDMR and on the correctness of the information that they provide. In addition, we believe that less stringent provisions should apply for persons under age: no requirement to provide the name and other personal details, but information on the person who notifies and fills out the form.

Q10: Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?

We fear that inclusion of transactions in which the PDMT does not play an active role, like receiving gifts, inheritances and donations, among those triggering the duty to notify, may result in flooding the market with not relevant information and misleading signals. The low threshold set forth by the MAR, combined with the obligation to notify every single transaction once € 5 000 is reached, will already significantly increase the number of notifications in the market.

In these circumstances, recognising which transactions are worth shareholders' attention will be hampered, while creating additional compliance problems for issuers. This is why some regulators, like in France, Italy and Germany, decided to exclude "passive transactions" from the notification requirement under MAD.

The same should apply to pre-arranged components of variable remuneration plans, e.g. stock options where the PDMT has no discretion (no choice over the type of transaction nor on when it should be executed). Also here, the transaction is not creating any signal for the market participants on what are the current expectations of the PDMR regarding the course of business of the respective listed company.

[1] http://www.europeanissuers.eu/_mdb/position/270_20140127_EI_ESMA_MAR_final_response.pdf

Q11: Under paragraph 3 of the draft technical advice, do you consider the use of a "weighting approach" in relation to indices and baskets appropriate or alternatively, should the use of such approach be discarded? Please provide an explanation.

A weighting approach around 20% as suggested by ESMA will be appropriate (the threshold should not be lower).

Q12: Do you support the ESMA approach to circumstances under which trading during a closed period may be permitted by the issuer? If not, please provide an explanation.

Yes, we support this.

Q13: Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate, do you foresee any issue with the proposed approach regarding the disclosure of such transactions or the need to ensure that the closed period prohibition is respected?

We do not agree with ESMA's proposal to impose on asset managers with a discretionary portfolio a prohibition on investing in financial instruments linked to the relevant issuer's shares during the closed period. We believe that these proposals go too far as in many cases, the PDMR will not have the necessary degree of control over the fund manager.

We do not understand how a manager can abuse information, when he does not have any influence on the respective transaction executed by an asset manager managing a portfolio on a discretionary basis. Therefore, when you can prove that a discretionary mandate has been given to the asset managers, the prohibition of trading during the closed period should not be applicable. We would like to underline that this is recognised by some regulators (Belgian, French, etc.). For instance, the French regulator AMF states in its recommendation concerning prevention of insider dealing that the contract with a portfolio manager (which implies that the manager has a strict duty not to interfere in any transaction) may continue even during closed periods defined by the company unless the later decides otherwise.

We would recommend further investigation with fund managers as to how this would work in practice. We are concerned, as recognised by ESMA in paragraph 115, that notifications from (possibly) a number of PDMRs, who may be from different issuers, to "discretionary" fund managers of closed periods (which may relate to specific transactional activity as well as routine results announcements) could significantly affect the ability of certain "discretionary" fund managers to conduct their normal day to day trading activities. This would be especially problematic in case of collective funds.

Otherwise, investing into collective funds which include a holding in the listed company where the PDMR is employed could no longer be feasible for PDMR. For instance, if the PDMR of a German blue-chip were to invest in an investment fund specialised in European equities, where this German blue-chip were included among the assets of this fund, the PDMR would need to notify the asset manager about the prohibition of trading during the closed period. As a result, the respective fund managers would face trading bans from PDMRs from different companies, during different periods of time, which would no longer be manageable. We do not believe that this was intended.

Q14: Do you consider the transactions included in the non-exhaustive list of transactions appropriate to justify the permission for trading during a closed period under Article 19(12)(b)?

We support ESMA's non-exhaustive list.

III. MARKET SOUNDINGS

Generally speaking, all the processes envisaged in the Consultation Document are very complex and too detailed and we fear that this will discourage market soundings.

Our major comment on market soundings is that only those market soundings that do involve inside information (which according to art. 11 par. 3 of MAR is to be assessed on case by case basis by a disclosing market participant), should be subject to the record-keeping requirements. It is clear from article 11 par. 4 to 6 of MAR that **the record keeping requirements** regarding all information given to the person receiving the market sounding, **should apply only in case of market soundings involving disclosure of inside information**. (Please note that article 11 par. 5 refers explicitly to par. 4 of the same article, which deals with market soundings when disclosure of inside information takes place.)

We question whether ESMA is not exceeding its mandate by prescribing record keeping requirements to all market soundings, notwithstanding whether they contain inside information or not (see par. 90 of ESMA draft technical standards).

As we understand Level 1 MAR describes market soundings as communication of "information" (art. 11 par. 1). Only a special kind (a subset) of market soundings involves the disclosure of inside information (as is also clear from recital 34 ("conducting market soundings may require disclosure ... of inside information) which means that only in this "specific" case, the other paragraphs of art. 11, including in particular all the record-keeping requirements, and the implementing measures by ESMA, should apply.

We also would underline that ESMA has no implementing powers on par.1 but only on 4-5-6-8.

This also implies that "special" market sounding, with disclosure of inside information, can only happen in two cases:

1) when the issuer is delaying inside information;
2) when the inside information is not produced by the issuer itself but, rather, is market information (i.e. the selling of a big stake of the issuer by one of its shareholders).

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

See above.

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

See above.

Q5: Do you agree with these proposals regarding sounding lists?

Yes, we agree.

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

Yes, we agree.

Q7: Do you agree with these proposals regarding recorded communications?

We take note of ESMA's proposals on recorded communications. In the event that the issuer only participates in a call, which is led by the disclosing market participant (the regulated firm), it should be sufficient that the disclosing market participant (rather than the issuer) keeps the records and sounding lists. Non-financial issuers would not necessarily have company recorded mobiles and landlines. These requirements would be especially burdensome for SME growth markets. Otherwise, there is a danger of discouraging market soundings.

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

We agree.

IV. ACCEPTED MARKET PRACTICES

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

We agree on the proposal to leave to the Competent Authority the decision to consider the criteria in order to accept an AMP for OTC trading. Nevertheless, ESMA has an important role in ensuring the best solution in a cross-border situation.

We would like reiterate our question included in our answer to the previous Discussion Paper of November 2013[2] on whether it would be possible to extend automatically an AMP already in place to MTF/OTF (our question was not answered). Alternatively, we would propose that it is necessary that the CA, upon a specific request of the interested parties, extends the existing AMPs also to financial instruments admitted to trading on a MTF/OTF. Otherwise, for the time before ESMA issues its opinion, the AMP for the growth markets would have to be created from scratch.

If ESMA accepts this approach, the notification process foreseen in art. 13, par. 11 would be still valid and the notification would cover not only the AMP in place for the regulated market but also the AMP for MTF/OTF.

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

We support the proposal to leave it up to the discretion of the CA to assess whether a particular AMP should be performed by only supervised persons or whether it is not required.

We also have a comment on the principle proposed by ESMA requiring persons performing an AMP to act independently, ensuring they are not instructed by the issuer or other interested parties (see par 140-141). While we agree with this general principle, we would like to secure a possibility for the financial issuers to appoint another investment firm from the group as a liquidity provider under an AMP. In this case, the condition of independence could be respected through effective Chinese Walls. A similar provision was

[2] http://www.europeanissuers.eu/_mdb/position/270_20140127_EI_ESMA_MAR_final_response.pdf

ensured for the buy-back programmes under Regulation n. 2273/2003 and could reduce the costs[3]. Otherwise, this could lead to situations difficult due to competitive and confidentiality reasons.

VI. TECHNICAL MEANS FOR PUBLIC DISCLOSURE OF INSIDE INFORMATION AND DELAYS

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

ESMA proposes for MTF and OTF to use the same dissemination channels foreseen by the Transparency Directive and already applicable to issuers on regulated market. Regarding the storage, ESMA proposes not to extend the OAM (officially appointed mechanism).
As we already expressed in the answer to the previous Discussion Paper[4], we think that as the Transparency Directive covers only regulated markets, it would not be consistent to extend the same obligation regarding dissemination channels to MTF and OTF. Otherwise, ESMA would seem to exceed its mandate by proposing to extend the scope of the level I legislation.

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

Regarding the format, ESMA proposes to provide a written notification both for the decision of delaying and for the explanation of the delay.

While we agree in principle with ESMA' s proposal, which has the merit of providing a proper record and protecting both the issuers and CAs, for the sake of clarity and precision we would like to draw your attention to the fact that art. 17.4 requires a written form only for the explanation[5].

We also appreciate the decision not to provide a common template for notification of delays.

As far as the content is concerned, we agree with most of the ESMA' s proposal. However, it will be difficult for the issuer to decide on a concrete "time" of the decision as this will mostly take place during a meeting, a call or after an exchange of e-mails. Thus, it would be preferable to allow (or clarify such a permission) for a "time period" to be included in the notification. Art. 5 para. 2 e. should be redrafted accordingly.

We are also concerned about what is meant by the "description of how the confidentiality of the delayed inside information is ensured" (Art. 5 para. 3 c.). ESMA should regard it as being sufficient to confirm the fact that the processes in place to protect the confidentiality of the inside information have been taken into account. A detailed description of "how" such confidentiality is not necessary if there is no reason for the authorities to doubt the existence of such processes.

Also, ESMA should also clarify that the notification of delay has to be provided only in one language even if the inside information is disclosed in multiple languages. Item 267 is not clear on that.

Q21: Do you agree with the proposed records to be kept?

We agree with the ESMA's proposal.

Notwithstanding the issue of record keeping we would like to draw ESMA's attention to some additional issues in the explaining text preceding Q21 of the draft technical standards.

[3] See art. 6, par. 2 of Regulation n. 2273/2003 stating that some restrictions did not apply if the issuer was an investment firm or credit institution establishing effective information barriers (Chinese Walls).
[4] http://www.europeanissuers.eu/_mdb/position/270_20140127_EI_ESMA_MAR_final_response.pdf

Item 269: We fully agree with ESMA's view not to specify which position the person deciding on a delay should have. Issuers should principally be free in determining how they organise their compliance with the possibility to delay. This should include the possibility for the management board to delegate the task of deciding on delays with necessarily participating in the decision making, in order ensure that it will be possible to take and review the decision to delay at any time.

VII. INSIDER LIST

Q22: Do you agree with ESMA‟s proposals regarding the elements to be included in the insider lists?

No, we do not agree with the proposals. We believe that the amount and detail of data required by ESMA is disproportionate to the intended effects of ascertaining someone's identity. Moreover, we are strongly concerned with regulatory burdens incurred by issuers of all size to collect, retain and update the information in their systems, which in turn must be adequate and secure and therefore costly, and which could trigger data protection compliance obligations.

Furthermore, we note that one initial purpose of EU policymakers in creating a template for insider lists in the level I regulation was to decrease administrative burdens on issuers. Paragraph 56 of the Recital of the Market Abuse Regulation (Regulation 596/2014) states that:

> *Insider lists are an important tool for regulators when investigating possible market abuse, but national differences in regard to data to be included in those lists impose unnecessary administrative burdens on issuers. Data fields required for insider lists should therefore be uniform in order to reduce those costs.*

ESMA's proposals for the contents of insiders lists goes completely against the spirit of the level I regulation.

The contents of such a list should be proportionate and take into account the purpose for which the Insider Lists are required. Their creation and updating should be manageable and not impose too much burden on issuers and their advisers (for whom issuers will remain responsible if the creation, maintenance and updating of the Insider List has been delegated by the issuer to them).

Against this background, we strongly oppose the detailed identification requirements as suggested by ESMA. Information regarding national identification number, place of birth and personal phone and electronic email addresses are not required to be kept by organisations in the UK for example without having created any concerns so far. Similarly in Germany no national ID, no personal phone number, no personal e-mail adresses are required. Even obtaining home addresses (and keeping them up to date) and recording dates of birth and national identification numbers (passport or NI numbers) would be administratively and unnecessarily burdensome and disproportionate to the purpose of the insider list, which is to enable a regulator to identify a person and the date and time at which the person obtained inside information. Therefore, this obligation would also run counter to the spirit of European data protection rules.

We would, therefore, suggest that the identification requirements be limited to name, position within the issuer (or adviser), work address and work email address. In all cases, ESMA should also carefully consider the data protection issues for issuers and their advisers in keeping and disclosing such data.

We strongly believe that ESMA should have taken into consideration the numerous concerns expressed by the majority of respondents to the Discussion Paper on the Market Abuse Regulation as well as in the open hearing in January 2014, which were now repeated at the open hearing on 9 October 2014 and we are

disappointed that this has not been the case. These concerns, noted by ESMA on paragraph 294 of the Consultation Paper, included the extent and scope of information included in the insider list, the lack of need for all the data required to identify persons, the failure to decrease administrative burdens on issuers and that insider lists should not be databases where personal data is duplicated. We share all of these concerns.

Summarising, ESMA should note that that these additional bureaucratic requirements would make compliance impossible for issuers for practical as well as legal reason. Moreover, this would also decrease the attractiveness of capital markets for issuers of all size.

We would also like to underline that, regarding third parties working for the issuer, such as auditors, rating agencies, lawyers, accountants, investment banks, etc., it should be clear that the issuer's obligation is limited to include only the name of the legal entity in the list. The issuer is not supposed to know who in that legal entity has been involved in the project and it is up to the third party to draw up its own list. The template should be clarified on this point.

Q23: Do you agree with the two approaches regarding the format of insider lists?

While we welcome recognition by ESMA of issuers' need for flexibility, we do have certain concerns regarding the proposed approach and format of the lists.

We suggest clarifying that the issuer can provide **either one** or **both** a general list **and** a deal specific list. In practice, many issuers keep two types of insider lists – one which is a "general" or "permanent" list for those employees or directors within the issuer that regularly have access to inside information (e.g. CEO or Finance Officers), and another which is a deal specific list (e.g. in relation to specific transaction such as an acquisition). The reason for keeping the two lists is that within issuers, there are people who may always have access to any inside information, e.g. CEO and other directors (thus requiring to be included in a general list), and others having only access to a specific inside information (thus requiring the creation of a deal-specific list). Therefore, **a general list should not keep track of specific events and consequently date and time, because those who are included have permanent access to inside information**: **that's why the last columns in red in template 1 should be eliminated**. Otherwise, there is limited rationale in distinguishing between template 1 and 2, and also it would be very burdensome for an issuer to have to list every project/transaction that a permanent insider, such as CEO, is involved in. It would result in adding numerous additional entries to the insider list for what we see as very little added value to the competent authority, as it should be accepted that certain senior-level employees in an issuer will always have access to inside information. Moreover, the general list should not require all persons having access to inside information to be included. If it does, this essentially makes the two approaches very similar and negates any flexibility offered by having two approaches for producing an insider list.

We welcome the flexibility introduced by ESMA, according to which issuers can provide to the CA either a single consolidated list (list of the issuer together with the one of the third party) or a separate insider list (the insider list of the issuer and the insider list of the third party) (see par. 303). At the same time, we would like to stress that, **in the case of a third party drawing up a list, this party is responsible for providing the lists to the CA** (in accordance with the art. 18 par. 1c of MAR stipulating that it is up to the person acting on behalf of the issuers to provide the insider list to the competent authority).

Regarding SME Growth Markets, we appreciate that ESMA recognises that issuers on SME Growth Markets should provide an insider list including "appropriate information" (see par. 316 CP). Nevertheless, annex VII art. 11 of the draft implementing regulation requires issuers on SME Growth Markets to provide an insider list containing all the information specified in Table 2 of Annex 1. This seems to be contradictory and not in line with art. 18 par. 6 of MAR stating that issuers on SME growth markets shall be exempt from drawing up an insider list, provided that certain conditions are met. Therefore, **in addition to reducing the number of**

required fields for all issuers, we believe that ESMA should not mandate the content and/format of insider lists for SME Growth Markets, as this would be going beyond what is mandated in the level I regulation.

Another point of concern relates to ESMA's proposal regarding the updating of the lists (item 312 and art. 9). From an issuers' point of view the duty to update the list should end as soon as the inside information has been published or has ceased to exist. Otherwise, issuers would be obliged to collect and update data for projects that had been finalised in the past or for persons that may have left the company. The fact that ESMA is going to demand very detailed data will even make things worse.

VIII. MANAGERS' TRANSACTIONS: FORMAT AND TEMPLATE FOR NOTIFICATION AND DISCLOSURE

Q24: Do you have any views on the proposed method of aggregation?

We agree on the fact that the third option for the aggregation provides the necessary information for a particular instrument per day.

ESMA's proposal will, however, de facto create two different notifications regarding mangers' transactions: an aggregated notification for the public and a detailed one on a transaction per transaction basis for the competent authorities (see para. 336.).

The latter will create an additional compliance duty which will massively increase compliance costs for issuers and will make it more complicated to compile the notification. Although the MAR text obliges the issuers/PDMRs to report "every transaction" we are of the opinion that this obligation should be interpreted against the background of the regulatory objective of the notification duty. The objective of reporting managers' transactions is mainly to inform markets on managers' expectations regarding the future development of the company in question. Other market participants may conclude from the notification if a manager loses trust in the future developments or if he/she has positive expectations. An aggregated notification is absolutely sufficient for this purpose. In the same way, for the purpose of detecting potential insider dealings (which should not happen at all, because managers are only allowed to trade if there is no insider knowledge) an aggregated notification is sufficient, not least because CA are able to get information on any single trade from the MIFID/MIFIR duties of financial institutions.

We therefore urge ESMA not to overload managers as well as companies with additional compliance duties.

In addition to the comments on Q24 we would like to raise an important additional concern that should be taken into consideration by ESMA and the national CAs: According to Art. 19.1 it is the PDMR's obligation to notify the CA and the issuer within 3 business days after the transaction has taken place. Unfortunately the level-1 text obliges issuers as well to notify the public within 3 working days after the transaction. Thus, the level-1-text creates a situation where compliance for issuers may prove to be impossible. Imagine that a PDMR notifies the issuer at the end of the 3-day-period. Issuers then may have too little time to comply with their duties. We would therefore recommend that ESMA clarifies the compliance duties in the sense that the issuers have at least one business day time to react on the PDMR's notification. This is the more important as the revised MAR has shortened the notification period from 5 to 3 days, which creates additional time pressure for both the PDMR and the issuer.

Q25: Do you agree with the content to be required in the notification?

Regarding the template, we consider that:

- there should be a separate template for emission allowances market participants/ auction platform in order to clarify the obligations;
- national identification numbers not required by the Regulation do not bring any added value ;
- in §4, there should be a possibility either to give the contact details of the notifying party or the contact details of the person who is filling the form on behalf of the notifying party.

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