Deutsches Aktieninstitut

ESMA's implementing measures under the Market Abuse Regulation: room for improvement

Legal certainty, flexibility for issuers and other market participants and affordable compliance costs should be guaranteed

Response of Deutsches Aktieninstitut on ESMA's policy orientation on possible implementing measures under the Market Abuse Regulation

Summary

Deutsches Aktieninstitut appreciates the opportunity to respond to ESMA's discussion paper on possible implementing measures under the Market Abuse Regulation (MAR). We welcome that ESMA is seeking feedback from market participants at an early stage of the process. This will help to implement the new MAR smoothly and consistently after it will have been published in the official journal.

Deutsches Aktieninstitut has contributed continuously to the debate on the revision of the European Market Abuse Regulation from the perspective of listed companies. German listed companies strongly believe that transparency and the prohibition of abusive practices are pre-conditions for market integrity. However, duties of listed companies should provide for legal certainty as well as manageable compliance costs in order to promote the attractiveness of organised capital markets.

Against this background, we agree with many of ESMA's proposals. However, there are also a number of concerns among listed companies that we would like to bring to ESMA's attention. In short, our main concerns are:

- Publication of inside information: We strongly believe that ESMA's proposals on what would be misleading the public with respect to the delay of the publication of inside information go too far. In essence, ESMA will regard any delay as misleading if the inside information is contracting market expectations. From our point of view any inside information contains elements that contradict market expectations. Otherwise there would be no movement in market prices. As a consequence, one could interpret ESMA's position in a sense that any inside information would have to be published and, as a result, the possibility for a delay according to Art. 12 para. 3 MAR would be removed. The relevant paragraphs thus need to be redrafted in order not to contradict the level-1 text, as will be set out in this paper in more detail.

- Regarding insider lists we oppose both the amount and the level of detail of information that ESMA intends to require with regard to each person to be entered on an insider list. This holds particularly true for private communication data such as private telephone numbers and e-mail addresses as well as the surname of birth. ESMA in fact will create additional bureaucratic burden for issuers and will most likely be in conflict with existing data protection laws. According to the MAR and as confirmed by ESMA in the public hearing on 15 January 2014, the purpose of the

entries into insider lists is (i) to identify relevant persons and (ii) (albeit less clear from the level-1 text) to enable competent authorities to contact such persons. To achieve these objectives much less details are needed.

- Regarding transactions of persons discharging managerial responsibilities (PDMRs) we urge ESMA to exclude transactions from the scope that do not provide markets with additional information on the PDMR's expectations. Consequently, only transactions that follow an active investment decision of the PDMR should be in the scope. In contrast, non-discretionary transactions such as gifts and inheritances but also transactions under a predetermined salary plan should be out of scope in order not to create misleading signals.

Besides this, there are a number of additional comments relating to buy-back programmes and stabilisation measures, market soundings, the publication of inside information, insider lists and managers' transactions which are laid down in detail in the remainder of this paper. We took, however, the freedom not to respond to any of the questions posed.

1 Buyback Programmes and Stabilisation (Chapter I.)

Buyback Programmes

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?

We support the concept of one single competent authority as this would reduce the administrative burden for issuers in connection with buy-back transactions. Among the proposed options we believe that the home competent authority of the issuer according to the prospectus directive would be the most appropriate. In any case, selecting the competent authority based on liquidity appears problematic. Liquidity may fluctuate among trading venues. Thus there is a risk that the competent authority may change and such change may require procedures to specify whether there is a permanent assessment of liquidity or certain review dates and to ensure transparency as to the identity of the competent authority. That seems to increase the administrative burden without creating any added value.

Stabilisation (Refreshing the Green Shoe)

Q21: Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?

Stabilisation measures may help to avoid a significant volatility of a newly issued share or financial instrument. Thus, issuers are interested that the stabilisation works as smoothly as possible and that the safe harbour grants some flexibility to the stabilisation managers as to how to perform their task.

Against this background, Deutsches Aktieninstitut would welcome if ESMA took the opportunity to reconsider its position on "refreshing the green shoe". We understand that sell side trading does not constitute stabilisation in a strict sense

and, therefore, does not fall under the safe harbour provided by Regulation 2273/2003. However, we do not see a need to restrict the application of the safe harbour if such sales have taken place in order to refresh the green shoe. CESR had confirmed in its third set of level-3 guidelines on the Market Abuse Directive of 15 May 2009 (Ref.: CESR/09-219) that this does not imply that these transactions will necessarily be abusive, particularly if carried out in a way that minimises market impact. We do not believe that the fact that a “refreshing” has taken place should restrict the execution of further stabilisation or the full exercise of the green shoe option as long as the requirements of Regulation 2273/2003 are complied with, at least if the possibility to “refresh” the green shoe and the fact that further stabilisation or the full exercise of the greenshoe option is disclosed together with the standard pre-stabilisation disclosures. In that case, market participants are sufficiently informed so that they are not misled and stabilisation and green shoe option that are generally deemed useful tools are not overly restricted.

2 Market Soundings (Chapter II.)

As with stabilisation measures it is in the issuers' interest that market soundings are possible both in an efficient and sensible manner and with an appropriate level of legal certainty.

Against this background, Deutsches Aktieninstitut's views on the issue in short are:

- ESMA should, indeed, not restrict the hours in which market sounding may be performed (Q24).
- The disclosing market participant should seek the consent of the buy side to be wall-crossed on a case-by-case basis, but should not be overloaded with administrative burden (option 1, Q25).
- ESMA should not create a climate of mistrust among those who disclose and those who are wall-crossed. As a consequence, the buy side should only report an improper disclosure of inside information to the competent authority if it has first informed the disclosing market participant and the disclosing market participant continues with the process on a non-wall-crossed-basis (Q36).
- Finally, Deutsches Aktieninstitut feels that ESMA's initial thinking on cleansing appears to be too complicated having in mind that market soundings are often time critical (Q39). It does not appear realistic that a discussion or even an agreement on a cleansing strategy could be reached on a case-by-case basis. We also do not believe that a systemic cleansing strategy could be reached between the buy side and the sell side as there are many parties that could potentially be involved. Rather, we propose that in the course of the wall-crossing the disclosing market participant should set out to the buy side the cleansing strategy it intends to follow. The buy side will then be asked for its consent to be wall-crossed on that basis. If the buy side denies, no wall-crossing will occur.

3 Publication of Inside Information (Chapter VI.)

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

Yes.

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.

Yes.

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.

We agree in principle, however, with the important provision that a change will only trigger the disclosure requirement if it constitutes inside information itself. In other words: there must be a certain level of materiality to make the requirement workable and there should not be yet another definition of inside information to be disclosed to the market.

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

Yes.

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.

Yes.

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.

We agree with most of the proposal made under items 271 to 277.

In particular, we 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.

However, ESMA should carefully draft level-2 measures with respect to ensuring confidentiality (item 273). In particular, it has to be ensured that not any rumour relating to a piece of undisclosed inside information will automatically lead to a publication of undisclosed inside information. The term "sufficiently accurate" should, therefore, be interpreted in a way that there is a very clear indication that a leak has occurred in the sphere of the issuer. Otherwise room for abusive rumour spreading would be created, in particular with respect to M&A activities.

Q79: Would you consider additional content for these notifications? Please explain.

No.

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

No, not necessarily. Issuers should basically be free in how they comply with the MAR duties with respect to the notification of delays. If ESMA is to create 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.

Yes, we agree. It is the nature of an indicative list to be open for additional circumstances that could form a legitimate interest of issuers. This flexibility should be kept.

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

First of all, we agree with ESMA's intention not to provide a long list of detailed and specific examples as to when an information has to be made public in any case (item 306).

However, we are seriously concerned about the more general guidance provided in items 307 and 308. Taken literally, this ESMA guidance would contradict the core idea of the option to delay the publication of inside information in the issuer's own responsibility. It is the very nature of inside information that some aspects of it will "always" (!) contradict market expectations (as the wording of item 307 states in an unqualified manner). This is because only then a movement in the market price after the publication of the inside information is likely. Item 307 thus narrows (if not removes) issuers' discretion in evaluating a specific situation and could effectively remove the right to delay any disclosure of inside information. Thus, Art. 12 para. 3 MAR could even develop into a piece of legislation without application, if ESMA's guidelines took the proposed form. Accordingly, such an understanding of the term "likely to mislead the public" would not be in line with the intention of MAR.

The wording of item 307 should, therefore, be changed. From our point of view, the omission to publish inside information should be considered as misleading only if an issuer actively sets signals that contradict the inside information under delay. In the same manner a "no comment"-policy regarding the undisclosed inside information should not be regarded as misleading. This is the view that the German supervisory authority BaFin rightly takes on the issue in its issuer's guideline (Emittentenleitfaden 2013, item IV.3.2).

With respect to item 308 we feel that it should be clarified as to when a publication of actual results that are not fully finalised becomes due. An issuer must be able to delay disclosure as long as the management and supervisory boards have not yet formed their final view on the treatment of a development in the issuer's financial statements that includes its exercise judgement permitted in the relevant

accounting standards. Otherwise the ESMA guidelines could also contradict the clarification of Art. 12 para. 3 MAR with respect to processes that occur in stages.

4 Insider Lists (Chapter VII.)

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

No.

ESMA proposes a long list of detailed information that need to be included in insider lists (item 318). We strongly believe that the list goes too far for the purpose of identifying and contacting relevant persons and, thus, beyond the purpose of insider lists as set out in MAR.

This holds particularly true for the private communication data but also for other details (such as the surname of birth).

From our point of view, the level of detail may not only run counter data protection laws in a number of member states. It will also create an enormous additional burden for issuers. In particular, private communication data (e-mail address, telephone number etc.) is currently not included in the IT reporting systems that support the creation of insider lists. The upgrade will at least be costly; it may even be impossible for practical reasons.

In addition to that, ESMA should keep in mind that the more data and update thereof is required by ESMA, the higher is the risk of mistakes. Given the fact that violations against Art. 13 MAR can be fined with up to 500,000 Euros for private and 1,000,000 Euros for legal persons according to the final text of the MAR this risk is not negligible from an issuer's perspective.

At last, ESMA's proposal goes far beyond what is common practice. The proposal, therefore, is in contrast to the declared objective of the EU Commission to reduce administrative burden and costs of compliance. Deutsches Aktieninstitut would like to remind ESMA of the fact that the discussion on the revision of the MAR once started with the idea to drop insider lists completely (see call for evidence of EU-Commission, 20 April 2009).

ESMA should also take into account that insider lists (though already administratively burdensome) play only a minor role in authorities' investigations of suspicious transactions. The government's answer to a parliamentary request of the German Free Democratic Party (Freie Demokratische Partei - FDP) dated 27 July 2007 reveals that insider lists have been used only in ten percent of German regulator's insider investigations between November 2004 and July 2007 (see BT-Drs. 16/6136).

Against this background, the administration of insider lists should be as simple as possible. Thus, Deutsches Aktieninstitut is of the opinion that the data to be presented should be limited to name, function, company address and the reason for the inclusion of the respective person. Additional data can be provided to or detected by competent authorities in case of an ongoing investigation. At least, ESMA's final standard should not include private communication data as well as the surname of birth (see also answer to question 85).

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

No.

Following our reservations about the high level of detail that ESMA intends to require we are also concerned about the template. In particular, we believe that the following items of the template in Annex 5 should be deleted:

- Surname of birth
- Date of birth
- Place of birth
- National identification number
- Private email-address
- Private telephone number

In addition to that we agree with ESMA's point of view that it should not be mandatory to provide competent authorities with an integrated list (see item 325.). However, it could be made clearer that Annex V also leaves this option to the issuers.

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…)?

No. This is not necessary from an issuer's point of view.

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

Once the inside information becomes public, there should be no continuous obligation to update the information contained in the insider list. Such information should only have to be updated once, if and when the competent authority requests the insider list.

5 Managers' Transactions (Chapter VIII.)

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

Overall, we believe that ESMA's interpretation of the wording of MAR is very wide.

In item 351 ESMA does not make a difference with regard to how the respective financial instrument has been acquired by the Person Discharging Managerial Responsibilities (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 the listed company. Market participants would, therefore, rather be misled if the duty to report also covered transactions that resulted from situations where the PDMR has no discretion and/or is completely passive.

Consequently, gifts, inheritances and denotations should be out of scope, because they have in common that they cannot be influenced by the person in question.

In the same manner, any non-discretionary purchase, sale or execution of a financial instrument should be out of scope because such transactions will never reveal changes of the PDMR's expectations and thus will rather mislead the market.

In addition to that, the proposed types of transactions under item 352 go far beyond what is market practice in Germany. In particular, we wonder why and to what extent acquisitions under remuneration plans will form a transaction to be notified. From our perspective the duty to notify should be limited at least in two respects. First, any acquisition and sale that follows a non-discretionary salary plan should be out of scope, because such transaction will in essence never provide markets with information on the expectations of the person in question (see above). Second, the duties with respect to derivative instruments under those plans (phantom stocks) should be clarified as to when a notification becomes due. From our point of view it has to be avoided in any case that a reported transaction creates a misleading signal to the market.

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?

A weight of 50% is the threshold applied in Germany (see the BaFin's issuer guide, item V.2.1, page 76). This is sufficient.

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. We instead recommend to narrow the scope of instruments covered (see answer to Q92.)

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

Alternative 3 appears to be the most appropriate; individual orders or transactions are not relevant to inform the market that a PDMR has been active in securities of the issuer. Rather, the information set out in alternative 3 should be sufficient. More detail does not add any information relevant to the market but rather swamps investors with data that are not of interest.

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 suggested approach fails to give an exception where dealing in a company's shares takes place by operation of law - e.g. where a scheme of arrangement automatically causes the manager to exchange his existing shares for another share. We would request that ESMA considers this matter and proposes appropriate wording.

In addition we would welcome a clarification regarding the term "announcement of an interim financial report or a year-end-report" in Art. 14 para. 4a of the MAR. Where the issuer publishes the (key) results for the financial year or an interim period prior to the year-end or interim report, the "closed period" should apply to the publication of the results for the financial year or the interim period, and not to the publication of the (annual) financial report.

Also, it should be specified how the “closed period” should be applied for issuers of debt instruments that do not necessarly publish financial reports – at least on a quarterly basis.

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

Regarding items 373 to 376 ESMA should review the wording and align it with Art. 14 para 4a of MAR. In particular, the period blocked for trading should be called “closed period” instead of “trading window” as it appears to be the case.

Besides this, item 373 to 376 underline our argument not to include transactions of a PDMR where there is no discretion on the side of the PDMR, e.g. when the issuer awards a financial instrument as part of the employee’s remuneration scheme (item 377). There is simply no room for abuse and no signal will be sent to the market. If, in contrast, there is discretion on the side of the PDMR the financial instruments should not be awarded in the closed period.

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