Deutsches Aktieninstitut

ESMA Guidelines on delay in the disclosure of inside information need adjustments

Response to Consultation Paper on Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision (ESMA70-156-3934), 27 August, 2021

Responses

Q1: Do you agree with the proposed amendment to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds?

We generally agree with the amendment as we believe that the explicit prohibition of an announcement of redemptions, reductions and repurchases of own funds instruments prior to the approval of the Prudential Competent Authority makes it obvious that compliance with such a legal requirement must constitute a "legitimate interest of the issuer".

However, ESMA should also note the fact that due to the nature of the authorisation process the information about a potential redemption, reduction or repurchase can hardly be regarded as precise. ESMA should therefore not conclude that the mere decision to send an application for approval to the relevant authority will constitute inside information. This is also important, because authorisations processes take up to four months which would prevent any issuance activity of the issuer during this entire period. As a result, it should clearly be the exception that plans to redeem capital instruments are considered to be inside information prior to the approval of the competent authority.

Q2: Do you see other areas of interactions between MAR transparency and other supervisory frameworks where the same approach should be pursued?

We propose to expressly permit a delay of disclosure in accordance with Art. 17 (4) MAR where the implementation of a project, decision or transaction depends on the approval of a committee, third party or especially authority. Anything else will mislead the market participants as the disclosure of this information is premature and puts unnecessary pressure on the parties.

In addition, a delay of publication should always be possible, when the MAR transparency obligation creates an obvious conflict to fundamental principles of law or confidentiality obligations under other legislation. In this context, we want to point out especially a topic regarding competition law. If an issuer commits a (possible) violation of antitrust law, which may have considerable financial consequences in the form of fines, loss of reputation and other sanctions the question arises whether such violation will potentially be considered as inside information and the issuer will then potentially be obliged to disclose this information. Such an obligation could potentially collide with the right to keep silent for the purpose of not exposing oneself to criminal proceedings.

On the antitrust side, this issue is complicated by an additional aspect: the so-called “principal witness programme” or leniency programme. After a potentially antitrust-infringing conduct has been uncovered, the company management has the possibility to file a leniency application in order to obtain immunity from fines or at least a reduction of the fine [cf. Sections 81h et seq. German National Act against Competition Restrictions (GWB), whereby a corresponding regulation exists at European level].

However, a leniency application complicates the situation under capital market law at the same time because the cartel authority generally requires, in accordance with the provisions of cartel law, that the companies treat the application as well as its content confidentially until it is released from confidentiality.

If the company adheres to the confidentiality agreement, it simultaneously withholds the information concerned from the capital market. This could give rise to concerns on the part of the company that the ad hoc publicity obligation - which is also subject to considerable sanctions - is being violated. If, on the other hand, the responsible corporate bodies complied with their supposed obligation under Article 17 (1) MAR to disclose the inside information in connection with the conceivable cartel law violation, they would breach their duty of confidentiality under cartel law and thus run the risk of losing their status as a state witness and, as a result, the assurance of full immunity from fines or a possible reduction in fines. There is obviously a tension between the confidentiality requirement under cartel law and the disclosure requirements under MAR.

Therefore, we suggest including the topic of the "preparation and implementation of a national or European antitrust leniency programme" a separate case group in the guidelines on legitimate interests in deferral.

The preparation and implementation of a leniency programme will regularly correspond to the interest of existing and potential shareholders, as the immediate disclosure of a potential inside information after the discovery of a (possible) cartel violation may lead to a less favourable outcome of the cartel proceedings and thus to considerable (financial) disadvantages for the company. A legitimate interest to postpone the ad hoc publicity obligation within the meaning of Art. 17 (4) MAR will thus generally exist.

So far, the ESMA Guidelines on legitimate interests of issuers to delay the disclosure of inside information do not explicitly address this case (cf. also para. 11 of the ESMA consultation paper of 8 July 2021, Annex III draft Guideline 1), the self-exemption is associated with a certain legal uncertainty from the issuers' perspective.

Q3: Do you agree with the proposed amendment to the MAR Guidelines in relation to draft SREP decisions and preliminary information related thereto?

N/A

Q4: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2R?

General comment: As ESMA rightly points out in paragraphs 104 and 119 of the Consultation Paper, the assessment of whether or not information constitutes inside information must be made on a case-by-case basis.

Against this backdrop, we do not think that ESMA's aim to provide useful guidance to bank issuers of financial instruments will be reached as Guidelines 3 and 4 will impose a factual obligation on issuers to disclose publicly information as inside information in the sense of Art. 17 Section 1. Guidelines 3 and 4 hence will result in overdisclosure which is generally perceived as not being beneficial for capital market efficiency.

ESMA is of the view that P2R will be expected to be considered as inside information (paragraph 107; draft Guideline 3). This view is founded in particular on the assumption that P2R is highly likely to be of a price sensitive nature (paragraph 107; draft Guideline 3). We doubt that this correct as P2R has to be evaluated against the actual level of overall capital of the institution as well as existing market expectations. While – against this background – P2R *may* be of price sensitive nature in certain situations such general assumption is not justified, in particular for the following reasons:

- If an institution only acts as an issuer of debt instruments, P2R would only in a very limited number of cases be used by reasonable investors as part of their investment decisions (e.g. if compliance with P2R would impede the issuer's ability to make relevant payments on the debt instruments when they become due). The distinction between institutions that have shares (and bonds) admitted to trading on the one hand and institutions that have only bonds admitted to trading on the other hand, however, is currently not reflected in Guideline 3 (while it is implicitly reflected in paragraph 108 in which ESMA refers to an "impact on the institution's share price").

- But even for bank issuers of shares, draft Guideline 3 is phrased too broadly. The definition of inside information in Article 7 requires the information to likely have a significant effect on the price of the financial instrument. In light of this requirement, not each and every change to P2R should be regarded as having such a significant effect, but only P2R

changes of a certain magnitude; further, even significant changes to P2R might not necessarily be of a price sensitive nature taking into consideration the issuers overall capital situation.

- Consequently, ESMA should not generally assume a "high likelihood" that P2R are price sensitive and, hence, deemed inside information and clarify the wording accordingly in the final guidelines.

Q5: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2G?

General comment: please see the general comment on question 4 above

ESMA is of the view that P2G, outside of certain exceptional cases, is expected to be considered as inside information (paragraph 132; draft Guideline 4). This view is founded on the general expectation that P2G is price sensitive (paragraphs 123, 130; draft Guideline 4).

- Once again, if an institution only acts as an issuer of debt instruments, this expectation does not seem to be correct. Please see the response to question 4 above.

- More generally, we think that the relationship of rule and exception in Guideline 4 should be reversed: In our opinion, P2G would usually not be expected to have a significant effect on the price of the financial instrument (rule). The review of all details of the case might (in rare circumstances und depending on the individual situation), however, lead to the conclusion that P2G might have such significant effect (e.g., in case of a high discrepancy between the institution's P2G and the current level of capital) (exception).

- In addition, by using vague language ("where it may not be the case") ESMA indicates that even in the three "exceptional situations" listed in Guideline 4, P2G might be of a price sensitive nature. In our view, in the cases listed (with their respective conditions), this is rather unlikely. In our view, they will almost never result in a significant effect on the price of the financial instrument.

- Finally, the requirement "fully in line" in the third "exceptional situation" will hardly ever be met. ESMA should consider replacing "fully" with "largely" or "generally".

Q6: With regard to the examples listed in paragraph 130, do you agree with the examples of cases when P2G may not be price sensitive, and do you consider it useful to list these examples in the MAR Guidelines?

Please see Responses to Question 5.

Q7: Do you see other cases where P2G may not be price sensitive?

Please see Responses to Question 5.

Generally, we believe that the concept of the guidelines should be amended. P2R and P2G should not in itself be deemed inside information, but rather only if an institution's actual capitalisation falls significantly short thereof and supervisory action is taken with a view to such gap being closed.

Q8: Do you agree with the proposed approach in relation to other supervisory measures?

We agree.

Q9: Do you see any other element that ESMA should consider in a potential amendment to its MAR Guidelines?

We strongly support, that Guideline 1.c. accounts for the specifics of the so-called "two-tier board structure" and allows for the delay of the public disclosure of inside information where the approval of a corporate organ other than the management body (especially the supervisory board) is pending. This element of the guidelines is important to avoid the risk that projects or agreements which are subject of to such an approval may be jeopardised as a result of the issuer being forced to pre-mature disclosure. However, it could be clarified that this guideline ultimately regards a proper decision-making process (enabling supervisory board to take informed decisions in an appropriate period of time) as a legitimate interests of the issuer.

This applies even more from the governance perspective and the role of the supervisory board: If important projects or agreements are (provisionally) disclosed before the supervisory board has given its approval, the supervisory board can hardly decline these projects or agreements without provoking major disadvantages for the company. This would undermine its rights and significantly weaken the participation of shareholder representatives and - in co-determined companies - employee representatives. The supervisory board should be able to form an opinion without undue pressure. This is an important part of their supervisory role.

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