ESMA Discussion Paper, ESMA/2013/1649

Comments by NASDAQ OMX

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In view of its activities, NASDAQ OMX welcomes the opportunity to comment on the ESMA Discussion Paper titled “ESMA’s policy orientations on possible implementing measures under the Market Abuse Regulation” (ESMA/2013/1649, November 2013).

In particular NASDAQ OMX would in this context like to highlight the importance of establishing efficient cross border surveillance in order to detect and prevent cross-venue or cross-product manipulation. As is further outlined in our answer to question 43 our proposal is based upon the principle of mutual recognition, whereas the surveillance that is performed for one trading venue would be considered appropriate and adequate also for trading on another venue, although such venue would operate in another jurisdiction within EU. This is a necessity for a cross border surveillance structure to be efficiently implemented and it seems to be very much in line with one of the key objectives of MiFID II, i.e. to secure a level playing field among different types of trading venues and comparable trading activities with regards to i.e. surveillance requirements.

Buyback programmes and stabilisation (Article 3 of MAR)

Buyback programmes

Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

A1: Agree.

Q2a: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures?

Q2b: If so, should then the details of the transactions be disclosed on the issuer’s web site?

A2a: Agree.

A2b: No. There is no need to put such a burdensome obligation on the companies. It is sufficient to require that the companies must store this information for an appropriate number of years (5?) and be obliged to disclose it to the competent authority.
Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

A3: The deadline should be reduced, and disclosure should be made the following trading day.

Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?

A4: Agree (following trading day).

Q5a: 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?

Q5b: If so, what are your views on the proposed options?

A5a: Yes.

A5b: The home competent authority of the issuer according to the Prospectus directive for shares admitted to trading on Regulated Markets, and otherwise the competent authority of the trading venue where the shares was first admitted to trading.

Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?

A6: Agree.

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

A7: Appears acceptable in theory but it is a very detailed rule. It would be as interesting to know which price an order can be placed at. The highest bid is not relevant during an auction.

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

A8: No. Criteria are useful but the suggested criteria would not work very well for our markets. Three of them would capture a very large number of securities, including such that we consider quite liquid, and one would only cover a very small number. It will be very challenging to find a common, relevant definition that includes absolute numbers in the criteria. One would probably need to apply a different approach or define the criteria for each market.

Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

A9: Sounds reasonable, but this is not a problem today.

Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

A10: Only RM and MTFs should be included.
Another method could be to calculate volume by venue and to allow the percentage on each venue. The rule aims to ensure that the issuer does not dominate trading by executing excessive volumes.

**Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.**

A11: Agree. However, it would be useful to further elaborate on what requirements must be fulfilled to be able to apply the exceptions. What constitutes a “time scheduled” or “lead managed” programme? What kind of independence is required? The definition of the time scheduled programme should also be developed as it is unclear and causes a number of interpretation problems today – the maximum length of the time period for example.

**Stabilisation measures**

**Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?**

A12: Agree. In general they are relatively long.

**Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?**

A13: Yes.

**Q14: Do you agree with these above mentioned details which have to be disclosed?**

A14: Agree.

**Q15a: Do you agree that there should be an exclusive responsibility with regard to transparency requirements?**

**Q15b: Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?**

A15a: Agree.
A15b: The entity which is actually undertaking the stabilisation shall be responsible.

**Q16a: Do you agree that there should be an exclusive responsibility with regard to reporting obligations?**

**Q16b: Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?**

A16a: Agree.
A16b: The entity which is actually undertaking the stabilisation shall be responsible.

**Q17a: Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority?**

**Q17b: If so, what are your views on the proposed options?**

A17a: Yes.
A17b: The home competent authority of the issuer according to the Prospectus directive for shares admitted to trading on Regulated Markets, and otherwise the competent authority of the trading venue where the shares was first admitted to trading.

Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?

A18: Agree.

Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?

A18: No.

Q20: Do you agree with these conditions for ancillary stabilisation?

A20: Agree.

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?

A21: Yes.

Q22: Do you agree that “block-trades” cannot be subject to the exemption provided by Article 3(1) of MAR?

A22: Agree.

**Market soundings (Article 7c of MAR)**

Q23: Do you agree with ESMA’s proposals for the standards that should apply prior to conducting a market sounding?

A23: Agree.

Q24: Do you have any view on the above?

A24: Yes, market sounding may, depending on the circumstances, have to take place several days prior to launch. In general the proposed procedures appears relatively burdensome to the market participants. For NOMX the most important thing is that there are requirements/procedures and that there is documentation describing the steps taken and the parties to whom information has been disclosed and the timing thereof.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

A25: Option 1. It is likely that the sell-side firms even in absence of a record will have a general understanding of buy-side firms that do not wish to be wall-crossed.

Q26a: Do you agree with these proposals for scripts?
Q26b: Are there any other elements that you think should be included?
A26a: Agree.
A26b:

Q27: Do you agree with these proposals regarding sounding lists?

A27: Agree.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

A28: No. No need for regulation.

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

A29: Agree. [What about conversations in physical meetings – are such conversations prohibited?]

Q30a: Are you in favour of an ex post confirmation procedure?
Q30b: If so, do you agree with its proposed form and contents?

A30a: Agree.
A30b: Agree

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

A31: Agree.

Q32: Do you agree with these proposals regarding disclosing market participants’ internal processes and controls?

A32: Agree.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

A33: No.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

A34: Agree.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

A35: We think that the buy-side should not be under such an obligation. It is very important not to put onerous and complicated obligations on non-regulated entities – the buy side may very well consist of non-regulated institutional or other large investors. Such obligations maje damage the liquidity on the market, if it prevents such actors from acquiring large stakes in listed companies.

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?
A36: No. It is a cornerstone that each party is responsible for its own actions, and others may not know all circumstances of relevance to the party’s stance in a particular situation. In addition, a majority of market participants may, as stated above, very well be non-regulated, and should not be made subject to regulatory burdens unless strongly called for.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

A37: Could be onerous for a buyer, especially if the buyer is an institutional shareholder rather than a broker. A shareholder should not be obliged to have company recorded lines.

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

A38: No.

Q39: What are your views on these options?

A39: Option 2 could be onerous on the disclosing market participant. An obligation to assess when the situation is likely to be cleansed, a matter which the issuer typically controls, might prevent market soundings. Option 1 on the other hand could be onerous on buyers, for example institutional shareholders etc. that are not brokers. Cleansing strategies should therefore not be regulated.

Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

Q40: Which practices do you think are more related to manipulation of benchmarks?

A40: Should be the same type of activities as is normally considered abusive, e.g. small trades with market impact that are carried out on especially sensitive times, non bona fide orders and trades that have an impact on the calculation of the benchmark and collusion to influence the benchmark.

Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

A41:

I.c Improper matched orders
Would be useful if “the same quantity” was changed to “very similar quantity”

II.j Advancing the bid
We do not quite understand how this would play out in practice. It is already in the regulation but we have never seen it and do not know what it refers to.

III.n Dissemination of false or misleading information
The text includes positioning and execution of a transaction. That is reasonable to expect in a normal case but not a condition. If someone circulated false and misleading information without conducting a transaction or having a position; that would still be market abuse if the information was intended to improperly influence the price. A sabotage would be in the scope.

Q42: In your view, what other ways exist to measure order cancellations?
Q43: What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?

A43:
In this context we would like to point at the importance of establishing efficient cross border surveillance in order to detect and prevent cross-venue or cross-product manipulation. It is important that it is clearly regulated how venues have to share data and that it is specified which party or parties that shall be responsible for consolidating data and performing surveillance based upon it. It also has to be addressed what data needs to be shared and how costs would be allocated in a cross border surveillance structure.

There is a need to address this matter and to achieve a more efficient structure for cross-border surveillance. The following basic models have been discussed in the industry:

- Status quo
- One venue supervises all trading in one share
- One institution supervises all trading in all EU shares

The first model does not add any value over the current situation, of course. Its only advantages are simplicity and direct costs.

The second and third models both address and propose solutions to the problem, i.e. the current lack of cross border surveillance in EU. Some of the advantages that could be achieved by establishing a cross border surveillance set up are:

- Strengthen the systems to detect illegal insider trading. Although the Competent Authorities already have access to consolidated transaction records, the trading venues would be in a better position to contribute to this extremely important task;
- Significantly enhance the possibilities to detect and enforce manipulative order entry strategies, e.g. Order Book Layering and Spoofing;
- Introduce possibilities to detect and enforce manipulative order entry strategies that mislead participants when implementing best execution programs;
- Improve the overview of the effects of trading incidents and system disturbances, as such incidents are often spread between interlinked trading venues.

NASDAQ OMX believes that the second model would be the most efficient one to achieve the objectives of cross-border surveillance across the EU.

One venue supervises all trading in one share
This model would be less complicated to establish than the proposal to create one institution with overall responsibility for surveillance of pan EU trading. This proposal is based upon existing structures, systems and organizations, which would be less costly and could be established in shorter time than it would take to build something new.

Our proposal is based upon the principle of mutual recognition, whereas the surveillance that is performed for one trading venue would be considered appropriate and adequate also for trading on another venue, although such venue would operate in another jurisdiction within EU. This is a necessity for a cross border surveillance structure to be efficiently implemented and it seems to be very much in line with one of the key objectives of MiFID II, i.e. to secure a level playing field among different types of trading venues and comparable trading activities with regards to i.e. surveillance requirements.
The basic principle for this model would be to require all venues that admit a certain instrument for trading to establish procedures to transmit order and trade data to the party that would be responsible for surveillance of trading in that particular instrument and for the venue to commit to sharing costs of surveillance for such instrument. In order for that to function, there would have to be approved interfaces for submitting order and trade data and the model for sharing cost would have to be determined upfront. A model for governing such structures would be required. The interfaces for feeding data could probably be generic and based upon existing protocols used in the industry, although trading and surveillance systems differ between venues. The cost sharing model should probably be based upon number of messages that would be processed for each venue, as message rates tend to drive technology costs.

The model to consolidate data in one venue per security, but not to create one central facility for storage and analysis for the whole of EU, is consistent with how the Competent Authorities cooperate around the Transaction Reporting Systems so it would seem natural to apply the same principle in this context.

When deciding which venue would be appointed as the primary responsible for a particular order book, there are two natural options to consider. One would be to appoint the venue with the highest market share of trading and the other one would be to select the primary listing venue. We would suggest the latter model, for the following reasons:

- The primary listing venue has a relationship with the issuer and information that can be obtained in such relationship is often useful for surveillance purposes.
- The primary listing venue of a company is typically a more stable factor than which trading venue has the highest market share for a certain period of time. There will be costs and administrative burden connected with changing which venue is responsible for surveillance and such costs should be reduced.
- The surveillance activities could identify situations in which interventions in trading should be the primary listing venue.

**Challenges**

This is a complex topic and a difficult task to perform, so naturally there will be challenges. The most obvious of such challenges are:

- Creating frameworks for information sharing. National legislations would need to be reviewed to ensure that trading venues could share the relevant data under local regulation. There are jurisdictions where such information sharing are currently restricted to involve Regulated Markets only. Trading venues would also have to review their respective rules and regulations to ensure that there would be no restrictions for information sharing in e.g. its agreements with participants.
- Establishing and governing a model for cost allocation. This has been mentioned above but it will be crucial and it will be challenging. There are structures in other parts of the world where such models have been implemented though, e.g. in Canada.

There would no doubt also be technical challenges relating to consolidating data and ensuring proper sequencing, consistent time stamps, etc. The task of creating relevant controls to be performed on the consolidated data would also be a challenging one. Such matters should be regarded as tasks to be handled during the implementation processes though, as they are natural matters to address also in local projects in the surveillance field.

**Closing remarks**

As complex and challenging as this topic may be considered, it is too important not to be explored. NASDAQ OMX remains committed to the extremely important task to maintain and enhance the
confidence in the European securities market and would be willing to contribute actively to the development of a European framework along the lines of what has been briefly outlined above.

Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

A44:

We propose that the following changes and additions are included:

Order entered with the knowledge that this will offset another order that is being placed at the exact same time. The action is considered illegal because it excludes competition.

Transactions carried out at a price that has been agreed in advance excluding other parties from the market.

i. Transactions that modify valuation without decreasing/increasing size of position
   Any transaction will decrease/increase position. Perhaps include “materially”?

l. Bypass trading safeguards
   We do not understand in which situation that would be abusive. It may be reckless and lead to disorderly trading but why would it be market abuse?

n. Entering misleading orders in an auction
   This is a very good point to include! But does it really make sense to include “minutes” and “seconds”? Should not a text like this only refer to e.g. long and short time frames?

Small prints with price impact (not included)
   One thing that we are missing and that we have had issues with in the Nordics is when someone repeatedly executes very small trades that update the last traded price. It could be considered to be covered by i. but not really. We would prefer something like: “Unusual concentration of transactions that are small in size and that to a large extent update the last traded price or that to a large extent represents and influence the last traded price of a trading session.”

Transactions conducted by persons with a vested interest in a security (not included)
   There are several indicators that target manipulation of prices to favorably affect a position or a transaction. That is natural but we often also consider it to be abusive when someone who has a vested interest in a security trades with unnecessary market impact. If you are a large shareholder and/or a representative of the company you will benefit from a higher share price versus a lower. Abusive practices thereby do not have to be narrowly defined as influencing the price at which a certain transaction can be conducted or only at year end. We believe that it should at least be considered as an indication of market abuse when someone who should reasonably be considered to have a vested interest in a share would act in a way that would cause significant market impact.

Signals of market abuse in an automated environment
   Do not those bullets rather constitute abusive practices than indicators of such? We believe the section should be moved.
r. Ping orders
Ping orders are problematic to point at as abusive in themselves. What if I for example search for liquidity and when I find it I trade against it at prices that I have not exercised any influence on. Why would that be abusive? If that item is to be included, there must be some wording on “taking inappropriate advantage of” or “influencing the price of subsequent executions” included.

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.
A45:

Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?
A46:

Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?
A47:

Accepted Market Practices (Article 8a(5) of MAR)

Q48: Do you agree with the approach suggested in relation to OTC trading?
A48: Agree.

Q49: Do you agree with ESMA’s approach in relation to entity which can perform or execute an AMP?
A49: Agree.

Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?
A50:

Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?
A51:

Q52: Do you agree that the factors listed seek to ensure a high degree of safeguards and proper interplay of forces of supply and demand?
A52: Agree.

Q53: Do you agree with the fact that AMPs may in some instances protect specific market participants (retail clients)?
A53:

Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should this principle be adapted?

A54:

Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?

A55: Yes.

Q56: Should an ex ante list of situations when the AMP should be temporarily suspended or restricted be established (e.g. takeover bids)?)

A56: Yes.

Q57: Do you agree with the above mentioned principles that seek to ensure that AMPs do not create risks for the integrity of related markets and would you consider adding others?

A57: Agree.

Q58: What kind of records of orders, transactions etc. should a person that performs an AMP have?

A58:

Q59: Do you agree with the above mentioned principles that take into account the retail investors’ participation in the relevant market? Would you consider adding others?

A59: Agree.

Suspicous Transaction and Order Reports (Article 11 of MAR)

Q60a: Do you agree with this analysis?
Q60b: Do you have any additional views on reporting suspicious orders which have not been executed?

A60a: Agree.
A60b: No.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

A61: Agree.

Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?

A62: Agree.

Q63: Do you have any views on what those reasons could be?
Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn’t be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

A64:

Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.

A65: Yes.

Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

A66:

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

A67:

Q68a: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template?

Q68b: Do you have any views on what ESMA should consider when developing these templates?

A68a: Agree
A68b:

Q69: Do you agree with ESMA’s view for a five year record-keeping requirement, and that this should also apply to decisions regarding “near misses”?

A69: Agree, but this should not apply do decision regarding “near misses”. Either a STR is made or not. To accept “near misses” could mean that firms are given the opportunity not to make STR’s, but be able to claim that it was a “near miss”. If there are suspicions, a STR should be made.

Public disclosure of inside information and delays (Article 12 of MAR)

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

A70: Agree.

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.

A71: Agree.

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

A73: 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?

A74: The home competent authority of the issuer according to the Prospectus directive for shares admitted to trading on Regulated Markets, and otherwise the competent authority of the trading venue where the shares was first admitted to trading.

Using the Transaction Reporting MiFID based approach would increase the administrative burdens on the issuer, since it may happen that the issuer has not approved the admission/trading on a venue in the member state of the competent authority of the most relevant market in terms of liquidity, and that authority would not have any competence under other directives/regulations about other information that the issuer is required to publish. Considering that the notification of delays is an ex post notification (and not a prior notification enabling the authority of the most liquid market to increase the surveillance of the trading) we do not consider that the market monitoring aspects referred to in paragraph 258 of the DP are sufficient reasons to justify increased administrative burdens on issuers.

Q75: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by emission allowances market participants?

A75: 

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.

A76: One general problem with the definition of inside information in MAR following the European Court’s judgement of June 28, 2012 (the Daimler Case), is that many plans, discussions etc. within the Board or within management will constitute inside information, and this will occur very early in any such process or discussion. This will mean that most listed companies may possess many and different types of inside information at any given time, where disclosure of this information is delayed. The listed companies will likely get problems of coping with the suggested administrative requirements coupled with delayed disclosure. ESMA should therefore be very careful when introducing administrative requirements that are not expressly called for by MAR. There should therefore be no requirement to notify all disclosure delays to the competent authority. There should for example be exemptions in relation to regular delays such as inside information to be included in upcoming financial reports etc. There should only be a requirement to explain the reason for the delayed disclosure in writing upon the request by the CA.

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.

A77: Agree. However, ESMA must be very careful not to put to heavy and impractical administrative burdens on companies that may affect the willingness to have its shares listed. As stated above, inside information may occur both often and in a very early stage in a listed company - in the Board, management and other bodies and entities. Companies must be given the opportunity to focus on its
business and not only on excessive administrative burdens, which means that ESMA must listen to listed companies to create rules that actually work in practice.

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.

A78: A notifications should not, as explained above, be required per se. In addition, the proposed content of the notification is too detailed. If a listed company were to follow MAR and its definition of inside information strictly, there would be hundreds of delayed disclosures every year. It will not always be possible to identify the persons having taken part of the decision making process. The legitimate interest at stake is always obvious – not to damage the company. How should the assessment that the omission of information would not mislead the public be meaningfully construed? To describe, in each case, how inside information is protected, also seem superfluous, as there are rules regarding how the information should be protected.

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

A79: No.

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

A80:

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

A81: Agree.

Q82a: Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information?

Q82b: Do you consider that CESR examples are still appropriate?

Q82c: If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

A82a: Agree.
A82b: Yes.
A82c: In situations like in the European Court’s judgement of June 28, 2012 (the Daimler case) where a CEO is planning to leave it could be of legitimate interest for the issuer to delay disclosing until successor is contracted/in place. Another difficult area is protected negotiations, where any disclosure of intermediate steps could be detrimental to one or all parties concerned.

Q83a: Do you agree with the main categories of situations identified?

Q83b: Should there be other to consider?

A83a: The first example (307) is not relevant. A company cannot be made responsible for something it has not communicated itself.
A83b: No

Insider list (Article 13 of MAR)

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

A84: No.
We note that the purpose of developing a precise harmonized format for insider lists is to facilitate issuers and those acting on their behalf or on their account, in the creation, updating, storage and submission of insider lists, since the current national differences with regard to the data included in insider lists have imposed unnecessary administrative burdens on issuers. Further, it is expected that a harmonized format for insider lists should minimize the issuers’ costs for keeping insider lists. (Please refer to recital 27 of MAR and paragraphs 314-315 of the DP).

However, the example of the proposed format of the insider list included in Annex V of the DP would not facilitate the creation, updating, storage and submission of insider lists. Nor would it decrease administrative burdens on issuers or minimize costs. On the contrary the proposed format in Annex V would, at least from a Swedish perspective, increase administrative burdens and related costs. The reason for this is that the proposed format requires issuers to include numerous data on the persons having access to inside information that are not necessary to identify such persons. From a Swedish perspective it would be sufficient to include the name, surname and national identification number in order to be able to identify Swedish residents.

An issuer does not have access to information such as the name of birth or place of birth of its employees/advisors etc. Nor does it have access to information on its advisors’ private address and/or personal contact details. Including such data in the insider list would significantly increase the administrative burdens on both issuers and the persons having access to inside information. In addition, even though information on e.g. an employee’s private address is available within the issuer, the person responsible for maintaining the insider list would not normally have access to this information but may need to approach other persons within the organization (e.g. the HR department) in order to get this information, if the required information is not provided by the employee included in the list. From a general point of view we consider that ESMA should not require that information be included in insider lists, where the person responsible for maintaining the insider list would need to approach other employees (not having access to the relevant inside information) within its organization in order to get access to the required information, unless such information would be necessary to fulfill the purposes of the insider list. The reason for our view is that attracting the attention of non-insiders to the fact that certain other employees within the organization are insiders may lead to speculation within the organization which would increase the risk of market speculation and even leaks.

We further believe that the proposed format would render the work of the competent authorities more difficult since the unnecessary data included in insider lists are likely to make it more difficult to handle the insider lists.

As stated above, it would from a Swedish perspective be sufficient to include the insider’s name, surname and national identification number in the insider list in order to be able to identify Swedish residents. Consequently the proposed harmonized format in Annex V requests issuers to collect and process personal data even though the data is not necessary to identify the persons having access to inside information. Since the requested data is not necessary for the competent authorities when investigating possible market abuse the proposed format is disproportionate, which in turn implies that the proposed format is incompatible with the basic principles of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, i.e. that the data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or processed.

We would therefore suggest that the proposed harmonized format only require issuers to insert data that are necessary to identify the persons having access to inside information. This could be done by stating in the respective column that the data must only be inserted in the list if it is necessary in order to identify the person having access to inside information. We further suggest that it be stated in the harmonized format that for persons having a unique national identification number it would not be
necessary to insert other personal data than the first name, surname and the unique national identification number.

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

A85: No.

As set out above, the proposed format contains data not necessary to identify persons having access to inside information. Please refer to our comments to Q84.

As to the requested information on “Company Name” and “Company Address”, this information would only be relevant if the person having access to inside information is not employed by the issuer or its subsidiaries. We therefore consider that it should be clarified that these columns would only need to be completed if the insider is employed by an outside agent (such as an adviser, accountant or credit rating agency).

Where the issuer has delegated the creation, maintenance and update of the insider list to a person acting on its behalf or on its account (for example if an adviser keeps a separate/secondary insider list of persons within its own organization having access to inside information relating to the issuer), we consider that it should be evident from the insider list kept by the issuer that there is also one or more secondary insider list(s) kept by the issuer’s adviser(s). Under such circumstances we would suggest that the insider list kept by the issuer contain information on (i) the company name of the adviser responsible for keeping the secondary insider list and (ii) the name, surname and national identification number of the issuer’s principal contact employed by this adviser.

In addition, we consider that it would not be relevant to include information on start date and end date of employment of the insider. If an employee has received inside information, his/her status as an insider would not be affected by the fact that his/her employment with the issuer terminates. The former employee will remain on the insider list until the information either is disclosed to the public or no longer constitutes insider information (e.g. because the issuer decides not to proceed with a contemplated transaction). As set out above (please refer to our comments to Q84) we consider that ESMA should avoid requiring that information be included in insider lists, where this information is not available to the person responsible for maintaining the insider list without the need to approach other employees within its organization. Information on start date/end date of employment is another example of information obviously available within the issuer’s HR department, but the person responsible for maintaining the insider list would not normally have access to this information.

There should be a possibility for companies to have a standard insider list for standard processes like financial reports, where the list should contain all relevant persons with regular access to insider information in relation to the process of preparing the company’s financial reports. This list should state the date the person started to have access to inside information in relation to reports and when this access ceased.

Q86: Do you agree on the proposal on the language of the insider list?

A86: Agree.

Q87a: Do you agree on the standards for submission?

Q87a: What kind of acceptable electronic formats should be incorporated?

A87a: No, this will create to large administrative burdens on small companies.
A87a: There should be no requirements on electronic format
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...)?

A88: No. A technical format for the insider lists would not assist issuers or competent authorities.

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

A89: Agree.

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?

A90: Agree.

Managers’ transactions (Article 14 of MAR)

Q91a: Are these characteristics sufficiently clear?
Q91b: Or are there other characteristics which must be shared by all transactions?

A91a: Should any exemptions or simplified reporting requirements be included, for example in relation to different rights in relation a new issue of shares?
A91b: A requirement for an action by the PDMR should be included – automatic conversions, conversions decided by the issuer etc., should not need to be reported by the PDMR.

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?

A92: A certain weight requirement seems appropriate; the minimal weight could be 25%.

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?

A93: Debt instruments should be specifically dealt with, as these have previously not been covered by the rules and therefore could cause questions.

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

A95: All the transactions made on the same day seem most appropriate.

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?

A95: Extreme urgency should not be a requirement – urgency should be enough. In addition, a sale could be made even if the PDMR holds inside information, if the sale is made to a person that already possesses the same inside information.

Q96: What are you views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.
A96: P 376. Under current Swedish legislation a person in possession of insider information may sell or exercise an option at the expiration of the exercise period. There is, however, no similar carve-out for PDMR transactions in a closed period, but only the possibility of receiving an exemption for the competent authority. Requiring an irrevocable notification of exercise four months before expiration could lead to unforeseen consequences which might be detrimental to the holders. We propose that exercise and sale of options, warrants or convertibles that expire during a closed period should be allowed without any notification requirement. Another situation which might be considered in this context is if a PDMR has launched a public takeover offer. The timetable for such an offer may be affected by merger control regulation which in turn may lead to a situation where the acceptance period expires during a closed period, a consequence which is outside the control of the offeror. In our opinion the offeror should in this situation be able to go unconditional and purchase the tendered shares also during a closed period. The same would apply if a public offer has been launched regarding shares held by a PDMR.

Investment recommendations (Article 15 of MAR)

Q97: Do you have suggestions on how to determine when an investment recommendation is “intended for distribution channels or for the public”?

A97: No.

Q98: Do you think that there should be a threshold for what constitute “large number of persons” for the purpose of determining that an investment recommendation is intended for the public?

A98: Yes

Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?

A99: Yes

Q100: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?

A100: Yes

Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

A101: 

Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

A102: Yes

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?
A103: The threshold should be set as an appropriate sum in Euro in relation to the market value of the shares or other instruments held in the issuer. A percentage requirement is not relevant in this context.

Q104a: Do you agree on the introduction of a disclosure duty for net short positions?
Q104b: If yes, what threshold do you consider would be appropriate and why?

A104a:
A104b:

Q105a: Do you agree on the introduction of a disclosure duty for positions in debt instruments?
Q105b: If yes, what threshold do you consider would be appropriate and why?

A105a: Yes
A105b: The same threshold as for shares.

Q106: Do you think that additional specific thresholds should be specified with respect to other ‘non-equities’ financial instruments?

A106: Yes.

Q107: Do you think that further disclosure on previous recommendations should be given?

A107: Yes

Q108: If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?

A108:

Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

A109: Yes

Q110: Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?

A110: Case-by-case assessment.

Q111: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

A111: 

**Reporting of violations (Article 29 of MAR)**

Q112a: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up?
Q112b: Do you see other topics to be addressed?

A112a: Agree.
A112b:
Q113a: Do you agree on the proposed approach to the protection of the reporting and reported persons?
Q113b: Do you see other topics to be considered?

A113a: Agree.
A113b: P 436. The competent authority should have an obligation to actively inform the reporting person that confidentiality may not be ensured in the circumstances in p 436.

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