EUMEDION
CORPORATE GOVERNANCE FORUM

European Securities and Markets Authority (ESMA)
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Submitted by e-mail

Subject: Eumedion's response to the ESMA's discussion paper on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649)
Ref: B.14.06

The Hague, 29 January 2014

Dear Sir, dear Madam,

Eumedion welcomes the opportunity to submit comments on ESMA's Discussion Paper on possible implementing measures under the Market Abuse Regulation (MAR), which was issued on 14 November 2013. By way of background, and to put our comments in context, Eumedion is the shareholder engagement platform of 69 Dutch and non-Dutch institutional investors – all with a long term investment horizon – and aims to promote good corporate governance and sustainability in the listed companies our participants invest. Eumedion participants have a strong interest in the integrity and efficiency of financial markets and in promoting the confidence of the investing public. Matters relating to market abuse are of fundamental importance to them.

The ESMA Discussion Paper derives from the new MAR which was agreed upon by the European Parliament, the European Council and the European Commission in June 2013. Ten areas of the MAR will have to be specified in delegated acts or technical standards and are captured in the Discussion Paper. In the Discussion Paper ESMA seeks input on these areas.

General

In general we concur with the MAR implementing arrangements envisaged by ESMA in the Discussion Paper. Yet, we are concerned that the reporting, notification and document requirements for the buy side regarding possible inside information received during market soundings are onerous and go far further than those elements needed to identify improper sounding practices and/or inside information disclosures. They do not take into account that it is the sell side, and not the buy side, that is responsible to assess and make clear when information is inside and ceases to be inside information after a market sounding. The part that the buy side is meant to play, including updating the required information on an on-going basis, will inevitably demand buy side parties to undertake substantial system upgrades, at great expenses. These costs could be mitigated if the buy side is able to rely to a larger extent on the analysis of the issuer and/or the disclosing market participants regarding market soundings and inside information.

Below, we respond to those questions that are relevant for institutional investors investing in listed shares and associated financial instruments.

Buyback programs

Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

Yes we agree. From an institutional investors point of view, there is no need to disclose the details of each single transaction concerning share buyback programs. Aggregated figures on a daily basis are appropriate and are likely to offer comprehensive and understandable information to institutional investors. Hence, publication of the details of each transaction on the issuer's web site would be unnecessary.

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

Yes, we agree. The 7 days disclosure period is a reasonable market practice and offers investors sufficient information on the issuers buyback programs proceedings.

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?

Yes, we believe that a single competent authority should be determined when the concerned share is traded on two or more trading venues in different Member States. The Prospectus Directive offers an appropriate framework for determining the home competent authority in such cases.

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?

Yes, we agree. The price formation process at the end of the auction appears to be a sensitive issue. Therefore, it seems appropriate to prevent issuers to enter any orders to purchase shares during the last third of the auction time.

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.

Yes we agree. Under the current framework it is sometimes difficult to determine how the term 'extreme low' liquidity should be interpreted. Therefore, it makes sense to introduce the cumulative criteria mentioned by ESMA, which stem from the existing term ´liquid market´ in article 22 MiFID.

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?

We do not think that the volume-limitation for liquid shares should be lowered. The current threshold which limits the ability for issuers to purchase more than 25% of the average daily volume of the shares appears to be appropriate.

Stabilisation measures

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?

Yes, we agree with ESMA. The exemption provided by Article 3 (1) of MAR focuses on price support, which is best achieved through the purchase rather than the sale of a security. To this end, refreshing the greenshoe falls outside the scope of the safe harbour principle and of the exemption provided by Article 3 (1) of MAR, but does not necessarily qualify as abusive activity.

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

Yes we agree. In relation to stabilisation, block trades should not be considered as a *significant distribution of relevant securities* (ancillary stabilisation) as they are primarily private transactions. An investment bank disposing a block trade before the trade becomes public, thereby potentially spoiling the market, could in our view amount to inside trading.

Market soundings (Article 7c of MAR)

Q25: Which of the 3 options to obtaining buy side agreement do you think should apply? Should any other options be considered?

We think that option 1 is preferable to the other two options. It is simple, up to date and fully in accordance with the requirements of Article 7c(6)(a)(i) MAR.

Q 35. 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?

We generally believe the buy side should not be obliged to inform the issuer (disclosing market participant) when it thinks that it has received inside information. The issuer is responsible and best equipped to determine whether or not information should be considered to be inside. The buy side does not have a formal role to play in this. Only in the case when the sell side explicitly indicates that information should be considered as inside information and the buy side disagrees with this view, the buy side has good reasons to discuss this with the sell side.

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.

The MAR already contains a suspicious transaction reporting obligation on the sell side. We are not convinced that there is a need to extend these obligations should to the buy side. For the buy side it is in general much more complicated to determine to what extent certain information is suspicious and not properly disclosed by the issuer involved.

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

In principle we agree that is sensible for the buy side to assess whether securities purchased are related instruments and whether information that is inside is likely to be cleansed. However the full audit trail and documentation requirements envisaged by ESMA are rather burdensome in their nature and seem to disregard that it is typically the sell side's responsibility to determine when inside information which is the subject of a market sounding should be disclosed and/or is likely to be cleansed. The requirements are unlikely to encourage buy side parties to be less reluctant to engage in market soundings.

We believe the buy side should maintain the possibility to rely, at least to a significant extent, on the analysis of the sell side. Also, the cleansing issue should be more left to the discretion of the parties in a specific market sounding situation.

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

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

Yes, we agree. Transactions that take place outside a trading venue (OTC transactions) are included in the scope of the MAR (Article 2 (4)). As a result, ESMA and the national competent authority should include OTC trading in its assessments of market practices and whether these practices meet the necessary criteria. The approach to only allow the firms that are subject to supervisory duties (MiFID-regulated credit institutions) to perform accepted market practices ensures proper surveillance and supervision of these practices.

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

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, for institutional investors it is for reasons of efficiency and transparency fundamental that the dissemination of information requirements equally apply to issuers of all Regulated Markets (RM), Multi Trading Facilities (MTF) and Organized Trading Facilities (OTF).

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.

Yes, we fully agree that significant changes to already disclosed information should be publicly disclosed immediately after the change occurs.

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.

Yes, we agree. During the delay, the issuer should permanently assess whether the conditions for the delay continue to be fulfilled, particularly but not only the condition concerning the confidentiality of the

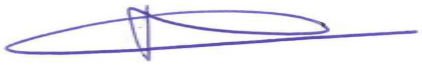
delayed inside information. Therefore, it is needed that issuers have proper procedures and arrangements in place to be able to fulfil this control responsibility.

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

No, we do not agree. We believe that the competent authority for the sake of market integrity and transparency should asses *every trading day* whether the conditions for delaying disclosure continue to be met. It is clearly not sufficient to conduct that assessment, as proposed, only once a week.

If you would like to discuss our views in further detail, please do not hesitate to contact us. Our contact person is Wouter Kuijpers (wouter.kuijpers@eumedion.nl, +31 70 2040 302).

Yours sincerely,



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