ESMA
103 Rue de Grenelle
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To be submitted online at www.esma.europa.eu

Dear Sirs,

Discussion Paper – ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

I am writing on behalf of the GC100 to respond to your Discussion Paper – ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation.

GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 127 members of the group, representing some 82 companies.

Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

We welcome the opportunity to respond to your discussion paper and would be happy to discuss our comments with you in greater detail.

Discussion paper questions:

Disclosure of Inside Information

Q.72: 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, however it is important that this requirement continues to work in the way it currently does: additional announcements will only be required where the significant change would be likely to have a significant effect on the price of the relevant securities. It would be useful to include express wording stating that issuers should not, as is currently the case, be required to announce minor changes to the relevant information.

Q.74: 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?

Our preference is for a Prospectus Directive based approach. This appears to be the easiest, most straightforward approach for equity issuers to apply.

Q.76: 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.

In our view requiring issuers to submit an explanation for the delay in the disclosure of inside information immediately after the delayed inside information has been announced will be unduly onerous. We hope that the FCA and other Competent Authorities (CAs) will take up the option in MAR of only requiring such an explanation to be submitted upon the CA's request."

Q.77: 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 strongly agree with the concept of issuers having suitable procedures and arrangements in place. However the procedures and arrangements put forward in paragraph 274 seem unduly onerous. In particular, paragraph 274(b) requires "*records evidencing the fulfilment of the conditions for the delay, both initially and on an on-going basis during the delay period*" to be "*set up and maintained each time the disclosure of inside information is delayed*".

The wording used concerns us and requires clarification. For example:

- the requirement to monitor on an "*on-going*" basis may require issuers to continually – i.e. 24 hours a day – rather than regularly, monitor the position. Many transactions are negotiated over substantial periods of time. It would seem unduly onerous to expect a 24 hours a day monitoring process to be put in place and, presumably, this is not ESMA's intention. An obligation to monitor the decision on a regular basis which is appropriate to the circumstances, in line with ESMA's views in paragraph 277, might be more proportionate; and

- the requirement to have a record "each time" a decision to delay is made may also require a record to be created each time a decision to delay is reviewed. A more proportionate compliance obligation that would still satisfy article 12(3) of MAR might be only to require a new record to be made where the conditions for delay no longer apply and to operate on the presumption that if no record was created the conditions remained satisfied. Issuers would of course still be required to monitor the situation on a regular basis and CAs would still be able to carry out their supervisory/enforcement activity.

In the UK we have a principles-based regime, rather than formal procedural requirements, to deal with these types of procedures. Under Listing Principle 2 of that regime an issuer with a premium listing is required to "*take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations*". In our view it is a more sensible and proportionate approach. We have drawn up guidelines to help our members establish procedures, systems and controls to ensure compliance with the Listing and Disclosure and Transparency Rules. The fact that so few issuers have been fined for non-compliance demonstrates just how well this principles-based approach and the market's response to it works. ESMA may want to consider adopting a similar proportionate and reasonable approach.

Q.78: 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.

No. We do not think this level of detail and additional content is necessary to satisfy the MAR requirements. It imposes a disproportionate compliance burden on issuers. The decision to delay the announcement of inside information may involve several conversations and several parties (both within and outside the issuer's organisation) across various time zones. Furthermore, the decision to delay itself might be taken at multiple times in a short period. We are also concerned that if an issuer complies with the substantive requirements of MAR for delaying the disclosure of inside information but does not technically comply with these procedural requirements, it may nonetheless be found to be in breach of MAR.

We suggest that, as is currently the case, this level of detailed disclosure is only proportionate and reasonable where a CA is undertaking a regulatory investigation.

Q.79: Would you consider additional content for these notifications? Please explain.

No. In our view, the requirement is already unduly onerous.

Q.82: 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 interest could be considered.

In our view, the CESR examples of legitimate interests remain appropriate and the inclusion of a long prescriptive list is unnecessary.

Q.83: Do you agree with the main categories of situations identified? Should there be others to consider?

No. MAR requires ESMA to issue guidelines to establish a non-exhaustive indicative list of situations where omitted disclosure is likely to mislead the public. In our view, ESMA's blanket statement in para 307 that "*disclosure will always be required where the undisclosed information contradicts the market's current expectations*" goes too far and is beyond ESMA's remit. By taking this approach, and potentially making this exemption unworkable, ESMA is limiting a provision of MAR in a way that was never intended or mandated. It may be helpful and more appropriate for ESMA to replace the phrase "*disclosure will always be required"* with *"disclosure may be required".*

We agree that, as paragraph 308 provides, disclosure should be required where an issuer itself – rather than a third party – has generated the market's expectations. However, to require an issuer to make a disclosure because an unfounded rumour has created a certain market expectation, or because absent any rumour simply put the market's expectation and issuer's intentions are different through no fault of the issuer, seems unnecessary and unfair. Well advised market participants may otherwise use this to their advantage and to the detriment of the issuer and its shareholders' by forcing issuers to disclose inside information when they should not have to.

In the UK, we have formal FCA guidance requiring an issuer to assess whether a disclosure obligation arises where there is a market rumour (DTR 2.7). If the rumour is

largely accurate and the information underlying the rumour is inside information then it is likely that the issuer will have to disclose it as soon as possible. In the FCA's view, knowledge that press speculation or market rumour is false is not likely to amount to inside information and even if it does amount to inside information, the FCA expects that in most of those cases an issuer would be able to delay disclosure (often indefinitely). We think that the UK approach is both proportionate and appropriate and suggest that ESMA considers adopting a similar approach.

Insider Lists

Q.84: Do you agree with the information about the relevant person in the insider list?

No. The level of detail required imposes a disproportionate and unnecessary compliance burden on issuers. MAR requires the list to include the identity of each person having access to inside information. The individual's name, address and employer should be sufficient. Telephone and email details are contact, not identification, details, so go beyond the requirements of MAR and ESMA's mandate. In addition, this may give rise to issues under data protection legislation.

Managers' Transactions

Q.92: 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?

This approach is consistent with that adopted in the FCA's disclosure of interests regime (found in DTR 5). We note that under the FCA's approach the transaction is only notifiable where "*(i) the shares in the basket represent 1% or more of the class in issue or 20% or more of the value of the securities in the basket or index, or both or (ii) use of the financial instrument is connected to the avoidance of notification*".

Q.94: What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?

We do not think that the form for notification to the CA needs to be different to that for disclosure and that the distinction is therefore unnecessary. If ESMA proceeds with two separate forms, the requirement for telephone numbers and email details go beyond the requirements of MAR and ESMA's mandate.

Q.95: 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?

We agree with this type of approach which broadly follows the existing position in the UK. As a related point, it would be helpful for ESMA to clarify what "dealings" are and are not caught by the restriction. The FCA and its predecessors have dealt with this point over a number of years and with the benefit of that experience, the UK Model Code on Directors' Dealings (the Model Code) sensibly provides that certain types of actions – e.g. take up of entitlements on a rights issue – are not treated as "dealings".

Q.96: What are your views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

We suggest that ESMA looks at the provisions of the Model Code for useful guidance on how this issue has been dealt with in the UK and considers using similar provisions.

Buy Back Programmes and Stabilisation

Q.6: 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?

No. Issuers should continue to have the ability to look at every trading venue, although it is our view that the place of the primary listing is the best market. It is very hard to see why the current position should change and what particular benefit this policy development will bring. Can ESMA please clarify what underlying issue this policy is trying to address?

Market Soundings

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

We are concerned that under paragraph 73 of the DP where a market participant is about to carry out market soundings and the issuer takes a different view to the market participant as to whether the information is inside information, the disclosing market participant "*shall characterise it as inside information*". In our view, this is wrong. We appreciate the desire on the part of ESMA for there to be uniformity of views about whether or not information is "inside information", however the issuer, with assistance from its professional advisers (as required), is the party that should have the final say. The issuer is best placed to make this decision and manage the consequences that flow from such a decision. This proposal may also lead to the odd and unnecessary result of, amongst other things, an issuer suddenly having to explain to its CA why it had delayed announcing a piece of inside information when in its view there was never any inside information to announce and where the market participant was not in an established and ongoing relationship with the issuer so not in a position to make an informed decision about this in the first place. In our view, giving the issuer the final say about whether the information is inside information would not prevent market participants from treating the relevant information as inside information should they wish to.

We would welcome the opportunity to discuss these points with you in greater detail.

Yours sincerely,

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