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Joint Nordic comments

– technical advice concerning the Market Abuse Regulation –

In December 2024, ESMA launched a consultation on draft technical advice concerning the Market Abuse Regulation in light of changes made under the Listing Act.

The Market Abuse Regulation has an important purpose to ensure market integrity and investor protection by preventing market abuse, insider trading, market manipulation, and unlawful disclosure of inside information. It is a rather heavy piece of legislation that has forced issuers to strengthen their internal processes to secure compliance. It is clear that securing compliance with parts of the Market Abuse Regulation provisions has proven to be particularly (and unnecessarily) difficult and burdensome for issuers. Therefore, the aims of the Listing Act were welcomed by many, i.e., to enhance legal clarity, address disproportionate requirements for issuers and increase the overall attractiveness of the capital markets within the EU, while ensuring an appropriate level of investor protection and market integrity.

Now that the Listing Act has been adopted and level two legislation is in the process of being developed, we see a clear risk that some of the changes made under the Listing Act will not provide the simplifications sought but instead risk leading to new and additional burdens for issuers, contrary to the aims of the legislation and to the EU's current focus on competitiveness and better regulation. In practice, some of the ESMA proposals now being consulted upon, presumably unintentionally, miss an important opportunity to support issuers and strengthen the competitiveness of the capital markets within the EU.

With this statement we urge ESMA and the European Commission to, when preparing delegated acts under the Market Abuse Regulation, stay attentive to and remain focused on the purpose of the Listing Act amendments. Below we have exemplified a few key matters where the ESMA proposals clearly risk increasing the regulatory burden of issuers and negatively impacting the competitiveness of European capital markets.

Protracted processes and disclosure obligation (article 17)
In order to achieve the objectives of the changes made under the Listing Act, it is key that the disclosure obligation under Article 17 of the Market Abuse Regulation is not triggered unless and until the inside information has developed into a *reality*. This is so, simply because neither the market nor issuers benefit from premature disclosures of uncertain 'maybes'. Such disclosure would not be conducive to informed decision-making and would typically harm issuers and their investors by jeopardizing ongoing negotiations and the materialization of the end result, be it a final agreement or a final decision on a corporate event. As regards *processes involving a counterparty*, for example when it comes to negotiations of a potential contract, these processes are, by definition, fraught with uncertainty until a *binding agreement* is executed. Hence, the triggering event for disclosure (i.e. the final event) cannot be earlier than the execution of the *binding agreement*. Any potential prior "sign off" is not relevant for these purposes. This must be generally acknowledged in the delegated act. Requiring disclosure at an earlier stage would not make sense as there is then no deal to disclose. Forcing issuers to disclose information too soon would also put European companies at a competitive disadvantage and cause them to miss out on business opportunities. It could also provide the market with information that is incomplete or subject to change, leading to confusion rather than clarity.

Regarding *processes that are "internal" to the issuer*, it must be acknowledged that processes that may seem to be "internal" often include external parties and sometimes agreements with counterparties (this is the case e.g. with respect to decisions to raise capital). It is important that this is acknowledged by the delegated act and in such processes, it will be key that the disclosure obligation is not triggered until a *final* decision has been taken by the Board. Otherwise, the requirements risk to unnecessarily add to the burdens of companies with no benefit to the market.

Today, issuers' obligation to determine the existence of inside information coincide with the obligation to determine the permissibility of delayed disclosure (which is a continuing obligation). Setting the triggering event earlier than at the true final event would impose additional unnecessary complicated and burdensome obligations on issuers to first determine not only when inside information exists, but also at a later stage when the purportedly final event would have occurred, as well as whether or not delayed disclosure may be permissible at that stage. Ensuring compliance with such obligations would introduce more complexity and administration than today adding to the administrative burdens of issuers, contrary to the objectives of the Listing Act.

Obligation to provide justification regarding final event

We note ESMA's proposed inclusion of a requirement that issuers are expected to be able to provide a justification regarding the identification of the final event or the final circumstance, upon the request of the National Competent Authority. There is no explicit support for such a requirement in the Amended Regulation. Imposing such a requirement would shift the burden of proof onto issuers, contradicting fundamental legal principles, while also introducing new administrative burdens by requiring issuers to submit documentation to authorities upon request. This would add unnecessary complexity and compliance costs for issuers, contrary to the objectives of the Listing Act.

Delayed disclosures

In order to secure legal certainty, it is key that merely official communication from the issuer, targeted to the market, be considered relevant for purposes of assessing whether information is in contrast with prior communications.

It is good that it is clear from the consultation paper that the possibility to delay the disclosure remains applicable to the final event or circumstance in a protracted process, provided that the conditions for a delay are met. To avoid any uncertainties, it will also be important for ESMA to clarify that the possibility to delay disclosure is also relevant for one-off events. This is how we understand the letter and the spirit of the Amended Regulation, and it is important that this is made clear to ensure that the interpretation by National Competent Authorities (which by experience is sometimes literal) acknowledges the possibility to delay disclosure also in the case of one-off events.

Clarification that the definition of inside information is not impacted

Although the definition of inside information is not in scope for the changes made under the Listing Act package of the Consultation Paper, it would be of value to make clear in the delegated act that the threshold for when certain information constitutes inside information within the meaning of the Market Abuse Regulation shall not be lowered on account of the amendments made regarding protracted processes and delayed disclosures. It must be clear that the processes, final events, and situations now listed may or may not constitute inside information and that the assessment may differ on a case-by-case basis, depending e.g. on the issuer and the relevant facts.