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The European Securities and Markets Authority (ESMA)
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Consultation Paper - Draft guidelines on the Market Abuse Regulation (ESMA/2016/162)

Comments by the Confederation of Swedish Enterprise

The Confederation of Swedish Enterprise is the main business organization in Sweden representing over 60.000 member companies and almost all sectors of business with the exception of the banking industry.

The Confederation of Swedish Enterprise is pleased to provide the following comments to ESMA's Consultation Paper relating to *market soundings* and *disclosure to the public of inside information*.

Guidelines for persons receiving market soundings

The draft guidelines comprise two sections, where the first section provides guidance for persons receiving market soundings. The Confederation of Swedish Enterprise questions whether the level of details of these guidelines, including the administrative burden and amount of formalities imposed by recipients of market soundings in the form of an obligation to draw up lists, draft minutes and keep records, can be justified given the underlying purpose of the Market Abuse Regulation ("MAR"). In our opinion, there is an imminent risk of losing a sense of the general principles and purposes of the regulation when setting up guidelines on such a detailed level as is now proposed and it must therefore be ensured that there is proportionality between the purpose and the intended effects of the guidelines. The Confederation of Swedish Enterprise questions the existence of such proportionality in this case.

Guidelines on legitimate interests of issuers to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public

The Confederation of Swedish Enterprise agrees with ESMA's statement that the listed examples included in the guidelines shall be indicative (point 70 page 23, cf. point 66 page 22). ESMA stresses however, under several sections in the Consultation Paper, that the possibility of delaying disclosure

of inside information under article 17(4) of MAR should be *narrowly* interpreted. The Confederation of Swedish Enterprise does not agree with this statement but would like to stress that the conditions for delaying disclosure should, on the contrary and in light of the purpose of MAR, be applied with generally good judgment (cf. point 65 page 22).

Proposal of guidelines regarding “1. Legitimate interests of the issuer for delaying disclosure of inside information” (page 29)

The Confederation of Swedish Enterprise is of the opinion that section 1 c (the list of cases where immediate disclosure is likely to prejudice the issuers’ legitimate interests) should be amended slightly as follows (proposed change underlined and in italic): “the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer’s bylaws or internal guidelines, the approval of another body, other than the shareholders general assembly, of the issuer in order to become effective, provided that all the following conditions are met:”

Proposal of guidelines regarding “2. Situations in which delay of disclosure of inside information is likely to mislead the public” (page 30)

The Confederation of Swedish Enterprise questions the reason for including section 2 c in the list of “Situations in which delay of disclosure of inside information is likely to mislead the public” (and would not be allowed), cf. point 99 page 27. Section 2 c sets out that “the inside information whose disclosure the issuer intends to delay is in contrast with the market’s expectations, where such expectations are based on signals that the issuer has previously set.” Inside information is by definition not in line with the market expectations, since it shall “be likely to have a significant effect on the prices” of the relevant financial instruments. Therefore, excluding delayed disclosure in all cases where the information in question is “contrary to market expectations” would exclude practically all situations from delayed disclosure. Further it is difficult to assess whether the market’s expectations as based on “signals” from the issuer or other circumstances and it is almost always a mix of both. The Confederation of Swedish Enterprise therefore considers that section 2 c could risk excluding too many situations from being considered as cases of legitimate delay of disclosure.

In our opinion it should be enough to rely on section 2 a, which is a much more specific example of a case when delay in disclosure is likely to mislead the public. Section 2 a reads: “the inside information whose disclosure the issuer intends to delay is materially different from a previous public announcement of the issuer on the matter to which the inside information refers to”.

THE CONFEDERATION OF SWEDISH ENTERPRISE



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