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

The objective of this Report is to provide an opinion to ESMA on its Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (hereinafter "MAR") (see ESMA/2013/1649). This opinion has been drafted after the formal end of the consultation given that the new SMSG only met for the first time after the deadline. Nevertheless the SMSG hopes that ESMA will take into account the opinion also at this stage of its work. The SMSG will provide the other inputs requested by EU Regulation 1095/2010 and urges ESMA to have a continuous and constructive dialogue in the preparation of all secondary measures foreseen by MAR.

The SMSG very much welcomes ESMA's excellent Discussion Paper. The Discussion Paper is very detailed and will remain a reference for future interpretation[1].

The SMSG' opinion is focused on some specific topics which are the following: buy-back and stabilisation, market soundings, accepted market practices, public disclosure of inside information and delay, insider list, managers' transactions. There are no specific comments on investment recommendations but the SMSG thinks that their content is a very important element in order to ensure the fair and correct information provision to the client: sometimes the recommendation does not contain clear information about the interests and thus potential conflicts of interest, or it is hidden or found somewhere way back in the related documents. Increased transparency should be ensured in order to define exactly what would be the elementary sales approach when making use of the investment recommendation.

The SMSG opinion is rendered both with some general remarks and with some specific answers to the ESMA's questionnaire, following the numbering in the ESMA paper.

This opinion contains very preliminary comments, which in some cases are detailed. SMSG reserves the right to modify its comments when consulted on the concrete draft texts.

I. Share Buyback programmes and securities stabilisation

[1] ESMA could also reflect on other important aspects emerged, from current practices, especially within multinational groups which practices will not necessarily be solved by the use of Regulation instead of a Directive.

Many of the MAR obligations are related to procedures put in place by market participants. According to the SMSG, there should always be a written acceptance (for example electronic based declaration platforms) of the internal procedure by the users/employees. This acceptance needs to be given again after each modification of the procedure. In the larger companies where there are many procedures and these are changing very often, the users/employees are in a difficult situation if they want to keep themselves continuously updated. But if they don't follow it 100% based on the related regulatory environment, their contracts might be terminated.

In general, market integrity is vital to ensure market confidence, and an efficient allocation of capital. Transparency rules on market abuse cases should be ensured as information to that regard typically is confidential. Sometimes the name of the financial instrument -which was involved in market abuse- is not-published nor mentioned. While on the one hand personal data should be strictly protected, on the other hand all the other data need to be published and the Supervisors need to publish all the closed cases for the benefit of the market participants in order to prevent the recurrence of the incident. Furthermore, all the information related to trading and to the management of inside information and market soundings need to be retained so it is important that financial market participants in their different roles have proper IT systems and storage. It is also important that the responsible person for the reporting and for the identification of the suspicious transaction has unlimited access to all the information within the company with automatic entitlement. It is important that within financial market participants it is clear who is responsible for the Market Abuse' controls centrally. There are different solutions and flexibility should be allowed: this task could be, for example, under the compliance function review, but all the related support functions need to assist the compliance function in order to identify and report the transaction internally. Similarly, there should be a clear definition and division of the roles and tasks between the Compliance function and Internal Audit in order to avoid duplications.

First of all, SMSG observes that for share buy backs, the options indicated in par. 17 present pros and cons. At this stage, SMSG points out that choosing only the home competent authority according to the prospectus directive may not be a sufficient measure.

On stabilisation, the publication of pre-stabilisation notices should not be required prior to the fixing of the issue's final spread.

'Input' responsibility for stabilisation notices and reporting should be within the control of the stabilisation managers. However, in a syndicated context for logistical efficiency, a central stabilisation coordinator should be allowed (but not compelled) to undertake the notification and reporting responsibilities on behalf of the various stabilisation managers.

The notice publication mechanism should be generally aligned with the Transparency Directive ("TD").

There should be clarity as to how any of the safe harbour requirements for stabilisation purchases are to apply to any prior and related overallotment (which ideally should be permissible up to 10% of the issue size to maximise effectiveness).

Finally, notice and reporting 'output' of stabilization on securities should be centralised to promote certainty and efficiency. Indeed just one Member State's TD publication and regulatory reporting mechanisms should normally apply, based on the issuer's place of incorporation (with non-EU issuers to formally select an EU 'home' Member State as stated in the TD). This is important, as MAR's expansion of scope to include the plethora of trading venues on which a particular bond might be traded (some potentially unknown to the issuers concerned) would cause a venue-based publication and reporting conundrum.

II. Market soundings

A general comment on market soundings deals with the notion of information and is related to level 1 (art. 7c of MAR).

While MAR (art. 7c, par. 1) describes market soundings as communication of "information", from par. 2 the concept used is always the disclosure of "inside information".

Moreover, we observe that these "special" market soundings, with disclosure of inside information, can only happen in two cases:

- when the issuer is delaying inside information;
- when inside information is not generated at or by the issuer but, is rather a so-called market information (i.e. the selling of a big stake in the issuer by one of its shareholders).

The two cases are somewhat overlapping in the discussion paper: for example, it is not clear why ESMA proposes in par. 84 a procedure for the case of "non-wall-crossed sounding scripts" because it is not clear if this is a proper market sounding; furthermore, the issuer (as a "disclosed market participant") should always be overburdened by keeping records of any communication of information. Par. 84 could be redrafted as it imposes the setting up of a prescriptive procedure, similar to an insider list, whenever the issuer is sounding the market with non inside information.
The cleansing process under the Market Sounding regime must be (i) as clear as possible and (ii) both the disclosing market-participant and the buy-side firm should be clear on that prior to the wall-crossing occurring.
Furthermore the disclosing market participant should always provide details of when and how the insider information (if any) will cease to be treated as such, allowing the buy-side upfront to take an informed decision whether it wishes to be wall-crossed or not.

Unless obviously wrong the buy-side firm supporting market soundings should be able to rely on the insider relevance as communicated by the disclosing market participant in order not to run the risk of afterwards not knowingly finding itself having been an insider.
It is also very important that buy-side firms can rely on receiving relevant information only via pre-agreed communication channels. Taking into consideration the huge volumes of information being disseminated via e-mail or chat-rooms, buy-side firms should not be burdened with screening information disseminated outside of these channels for their potential market abuse relevance.

The above are very important aspects to enable buy-side firms participating in market soundings, i.e. helping to find appropriate pricings for new issues. Otherwise they run the risk of inadvertently and / or for an indefinite period being blocked from trading in instruments of certain issuers (i.e. not only the sounded issue in question).

More specifically from a fixed income market efficiency and resilience perspective, SMSG believes the soundings safe harbour should recognise that:

- issuers often leave the management of their bond issuance transactions (including whether, what and how to sound) entirely to their syndicates;
- only a few 'core' members of such syndicates are actively involved in the early active management of such transactions (including any soundings);
- sounding information is often required on very short notice (potentially a matter of hours if not minutes);
- wall-crossed soundings can only be proactively 'cleansed' by the sell side through the inside information becoming public (either by the transaction proceeding or the issuer agreeing to a public statement) and cannot (under MAR itself) rely on any private views as to, for example, the fading of significant price sensitivity;
- many issuers will prefer to defer a bond issue or take it to another market rather than commit themselves to potentially making public statements which the markets might misconstrue as a sign of issuer weakness (often transaction postponements/cancellations relate to issuer expectations of better funding opportunities elsewhere); and
- any insufficiency in a proposed wall-crossing can be policed by potential soundings simply refusing to be wall-crossed (as their prior consent is mandated in MAR itself).

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

SMSG welcomes ESMA proposals which aim to enhance clarity and procedural certainty as well as standardisation to market participants in conducting market soundings. However, the proposals seem too prescriptive and could impose undue administrative burdens on issuers, advisors and investors alike. Market soundings may involve initial and secondary offers and so stiffening market soundings could be detrimental for raising new capital, especially as regards SMEs.

VI. Public disclosure of inside information and delays

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

SMSG agrees with this general approach.

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 instru-

ments 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.

The co-existence of different methods of dissemination of different types of information is detrimental to the market and its participants, as it undermines the basic principle of fast and equal access to all the crucial data. At the same time taking into account the size of the issuer and/or of the securities offered could be important in the context of simplifying the long term financing for SMEs

With regard to issuers of MTF/OTF financial instruments, a proportional approach should be followed. In par. 242 of the Discussion Paper regarding the channels for appropriate public disclosure of inside information, ESMA considers that similar requirements to those applicable to issuers listed on regulated market should apply also to issuers on MTF/OTF. SMSG would favour that the requirements of dissemination, storage and filing set forth by the Transparency Directive will be applicable only in a proportionate manner to issuers on MTF/OTF, especially asTD concerns only issuers on regulated markets.

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.

SMSG observes that there seems to be no explicit mandate in art. 12 of MAR for regulating this aspect, even if we acknowledge that it may well be a future level 3 guideline. Moreover, if the "significant change" is so relevant that it in itself constitutes new inside information (to be published according to art. 12), the issuer must inform the public as soon as possible and for this reason the provision is useless. If, on the contrary, the significant change does not constitute new inside information (to be published according to art. 12), the provision could lead to misleading disclosure to the public of uncertain information which may result in market manipulation.

For all the reasons above, SMSG believes that , in any case, the above mentioned provision should not be maintained. Indeed, par. 247 of the Discussion Paper is misleading and can create confusion. Therefore SMSG suggests its removal.

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

SMSG fully supports the suggested criteria.

It may be useful,in cases of any significant changes, that such changes should be marked clearly and in relation to the original information.

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?

This question is a good example of weaknesses arising out of having different sources of regulation for different market activities. Here seemingly the best solution focused on the market monitoring aspect fails, as some issuers could be exempted from monitoring.
Therefore the only reasonable possibility seems to be the proposal described in paragraph 259 of the Discussion Paper, namely basing this on the issuer's liability in terms of information, as such an approach is consistent with current obligations of issuers – irrespective of where they come from. The final part of the proposal in paragraph 259 is also consistent with this approach, as it takes into account all appropriate obligations of issuers, coming from the markets on which their financial instruments are traded. "

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.

SMSG supports the ESMA's suggestion that both the information about the delay and the explanations should be transmitted in written form, using electronic means of transmission.

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.

The SMSG believes that these minimum procedures and arrangements should be sufficiently flexible and provide a general frame-work, allowing Issuers to put in place appropriate procedures and arrangements adaptedto their own organisation, rather than being centralised and prescriptive rules. In particular, it is very difficult to determine ex ante, within an issuer's organisation, a single person responsible for deciding about the delay, and in any case he/she should not necessarily be a "managing board member", as indicated in the sole example provided by ESMA in par. 271.Other examples could be added, e.g. the general counsel, a non executive member of the board, the chairman, the director general outside the board etc.

However we would propose to add another condition to the four topics specified in paragraph 274 of the Discussion Paper. Indeed, special care should be put on cases where the original information has already been disclosed and any new information constitutes a change to such "old" information. Therefore the procedures and arrangements discussed here should provide for special measures to be taken in case of the changes in already published information.

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.

We agree with the proposed content.

Q79: Would you consider additional content for these notifications?

No. The proposed content is already complete.

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

The proposed content and language of information specified in paragraphs 278-285 of the Discussion Paper seem to be reasonable and precise enough. Therefore SMSG does not think that the definition of a common template for notifications would be necessary.

Moreover, issuers should be free to decide how to comply with the MAR concerning the notification of delays. Therefore, if ESMA were to define a common template, SMSG proposes that its adoption by issuers should be optional rather than mandatory.

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

ESMA should clarify that as long as the decision making of the competent authority is pending, the issuer is allowed to delay disclosure. Otherwise, that form of delay would not work.

Q82: 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 exam-

ples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

SMSG agrees with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information. It should however also be clarified that other situations and circumstances may arise qualifying as well as legitimate interest.

Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

MAR clarifies that an issuer can delay the disclosure of inside information if, among other circumstances, it does not mislead the public, and mandates ESMA to issue guidelines in order to identify situations where omitted disclosure is likely to mislead the public. SMSG welcomes the effort done by ESMA to allow issuers to understand when, according to MAR, a delay is always misleading, so that, on the other hand, issuers know when they may safely delay without misleading the public.

The proposed approach could be improved in order to be in line with the spirit of MAR.

The combined result of MAR and ESMA guideline consultation is that the right to postpone disclosure will be the new almost 'automatic' way of preventing premature disclosure in cases of multi-step processes (now particularly mentioned in Art 12.3 MAR).

In par. 307 of the Discussion Paper, ESMA proposes as a general rule that delay is always misleading when it "contradicts the market's current expectation". The proposal risks to be too restrictive because it is the nature of inside information to be "new" to the market and thus be price sensitive, i.e. against market current expectation. It appears unnecessary and even unfair to the company to constrain it to whatever the market thinks of it. To begin with it would be very difficult for an issuer to ascertain with any degree of certainty what the market's current expectations are and, even if it were possible, it appears in any case unnecessary and unfair to the company/issuer to constrain itself to whatever the market's current expectations may be.

The main example of when delay of publication is 'misleading' (which it would always be if we follow the logic of what mandates mandatory disclosure, ie a need to 'lead' the market) is in our opinion when the company actively contradicts the inside information that it is delaying. Thus, if a company is saying that it is not discussing a takeover, when it actually is, that would be misleading. That said, if the company were to refrain from commenting, it would in our opinion not be a contradiction that would be misleading and it would thus be permissible.

Thus, ESMA proposal does not provide enough convincing argumentation in this regard and thus, according to the SMSG's view, para. 307 should be rejected.

A more restricted concept could be used. A preferred solution in the SMSG's view would be to use as a general rule the wording of par. 308: "delay is always misleading only if it contradicts previous public announcement of the issuer". Indeed, this paragraph deals with the case of the issuer's simple duty to correct earlier publication by the issuer (if such publication is no longer correct).

In the case where ESMA were to decide to keep the referrals to market expectations, the SMSG proposes the following approaches.

The omission to publish inside information should only be misleading if an issuer actively sets signals that strongly contradict the inside information under delay. A materiality concept could be added (i.e. "significantly" contradicts market expectations). Eventually a concept of market "long term" expectations could be considered. The word "current" could be deleted. In any case, the example in par. 307 should be modified: rather that stating "embarking on an acquisition strategy" which is a too wide

concept, the sentence should refer to "a strategic acquisition". Another example which could be inserted: "a delay is always misleading if it refers to a major acquisition in a new sector of activity not previously mentioned nor discussed by the issuer".

With reference to the second part of par. 308, ESMA considers that the disclosure will always be required when the issuer, preparing its annual financial statement, understands that "the actual results, even though not fully finalised, substantially differ from the anticipated results as previously publicly announced by the issuer, the issuer would be expected to issue a profit warning without delay until the finalisation of the concerned financial statement". It would be better to delete this part of the paragraph which risks to give rise to more uncertainty than what is solves. In listed companies, organized with directly and indirectly controlled companies, operating in different jurisdictions, it may well happen, when preparing consolidated accounts, that communicated anomalous final results (material and price sensitive) received from subsidiaries, after a time-consuming thorough double-check may well end up as a different final number. If the issuer were to announce such communicated results immediately, without any check, it would mislead the market, rather than the opposite. That is why even the transparency directive prohibits the disclosure of non audited statements. Moreover there should be the risk of continuous profit warnings that may themselves be misleading. For all the reasons above mentioned the second part of par. 308 should be reformulated.

VII. Insider list (Article 13 of MAR)

Insider lists are lists of all persons who have access to inside information. Apart from the case of permanent insiders (for example the CEO of a company), a person is inserted into the list when an inside information arises[2].

As a general remark, the new MAR framework, with a stricter definition of the issuer disclosure obligation, implies that an insider list will be existing only when the issuer is delaying the disclosure of inside information; otherwise either an information is not yet inside or it is already public.

Another consideration concerns art. 13, par. 1a on the possibility for persons acting on behalf of the issuer to keep the "insider list". In our opinion, this covers two cases: i) the first case relates to the insider list kept by a person acting on behalf of the issuer, typically the consultant who has a mandate to keep the list of insiders within the issuer); ii) the second case relates to the "secondary" insider list within the consultant, typically the advisor or investment bank or a law firm who is involved in the preparation of a strategic operation for the issuer. It is up to both types of consultants to keep a list of the persons, who have access to inside information of the issuer but ESMA should nevertheless clarify that in the second case the responsibility of the maintenance of this list should lay on the consultant.

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

It should be necessary to verify if all the details proposed by ESMA do not go against any law of data protection. It could be enough to include in the list, in case of a physical person, the details of the name of this physical person, and in the case of a legal person, the name of a relevant (physical) person within the organisation of the legal person. As an alternative, as there should be a clear link between the information required and the purpose of the list, SMSG proposes to delete some information considered useless like home, work and mobile telephone numbers as well as personal and work email address. In any case, all the information proposed by ESMA could be provided by issuers upon a request of the Competent Authority in case of an investigation.

[2] The present practice shows that if there is an issuer who is a financial institution, their insider employees have another personal banking business relationship, and the suspicious transactions are done there. The other banks can't identify that the person is an insider, because the collection of the information is very time consuming and there is a lack of management intention. This approach (unified EU list) will decrease the single issuer costs, if they do not have to collect all the information individually. The present market practice shows that already now there are huge pressures on the employees.

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

SMSG agrees that a template could be useful but should leave flexibility on the detailed information as indicated above.

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

Yes

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

Yes

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…)?

SMSG welcomes the use of standard tables proposed by ESMA but also thinks that ESMA should not go too far in providing a technical format for the insider list "including the necessary details about the information provided (e.g. standards to use, length of the information fields)", as envisaged in Q88.As the requirements of the insider list set forth by MAR are substantially similar to those established by the implementing measures of the directive 2003/6/EC, there is no reason to modify the actual structure of the insider list requiring such specific details as this could increase costs. For this reason the necessary details about the information provided (e.g. standards to use, length of the information fields etc) should be left to the discretion of the issuer.

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

Yes

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?

Par. 333 should clarify that, according to MAR, the SMEs should create an insider list according to Level 1 and not with the detailed characteristics set up at Level 2. Otherwise there is not any concrete reduction of administrative burdens, as suggested by MAR and, more in general, by the Commission Communication on "A Small Business Act for Europe".

VIII. Managers' transactions (Article 14 of MAR)

SMSG has some general concerns on Level 1 MAR uncertainties about managers' transactions regarding the role of the issuer according to art. 14 of MAR. It should be clarified that the duty of the issuers is to receive information about the transactions conducted by a person discharging managerial responsibilities ("PDMRs") and persons closely associated, and then disclose them or only a subset of them without any data re-elaboration.

Secondly, Level 1 MAR lacks an explicit obligation for a PDMR to disclose to the issuer the persons closely associated to him. Given that the issuer should receive and disclose to the public not only all transactions transmitted by PDMRs but also by all persons closely associated to them, the issuer needs to know the precise and updated list of such persons in order to disclose only true negotiations by such closely associated actual persons.

A preliminary clarification that ESMA should provide deals with thresholds: while only transactions over the 5000€ threshold should be disclosed to the public, it is not clear if those under the 5000€ threshold should nonetheless be disclosed to the competent authority. This is not clear when reading the cross-references in art. 14, parr. 1, 1a and 3 of MAR.

Another further useful clarification regards how a person closely associated withPDMRs transmits information on the transaction to the issuers and especially to the Competent Authority, as nothing is said in Level 1 on this matter: should they use appointed mechanism? Is the competent authority providing specific email address or formats?

It should also be clarified in Level 2 measures that the timing for notification should start only when there is effective knowledge of the transaction by the PDMR (i.e. in case of transaction made by life insurance firm for a life insurance policy of a PDMR).

Q91: Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?

Under the current MAD-regime it is not clear whether gifts, inheritances and donations have to be considered as transactions triggering the duty to disclose. In par. 351 ESMA does not make a difference with regard to how the respective financial instrument has been acquired by the PDMR. From our point of view, an acquisition of a financial instrument may only create signals for the market if there is an active investment decision by the reporting person. This is also the core legislative and economic rationale behind the duty to publish PDMRs' transactions. Other market participants may then extract from the reported transaction what the PDMR's current intentions are with regard to the listed company. Market participants would therefore rather be misled if the duty to report also covered transactions that resulted in situations where the PDMR has no discretion and/or is completely passive.

For example, in Germany, the predominant view in literature and the position of BaFin is that a PDMR does not have to notify the issuer about the acquisition and transfer of shares by way of a received gift. As regards to inheritance, there is a consensus that no disclosure obligation arises (this is also the position of the former CESR). The same approach is used in Italy by Consob.

Indeed, a donor does not give relevant signals to the market when he makes a gift/donation to a third party. Furthermore there are no grounds for fearing that he will take advantage of insider knowledge. The same is true for transactions by inheritance.

Thus, in line with the wording of Art 14 (4a) MAR, the transactions by gift or inheritance should not be subject to notification requirements under MAR and, therefore, left out of the scope. What's more, taking into account also the low threshold set forth by MAR, the market would be otherwise flooded by many transactions without any signalling value.

A final remark concerns the fact that in par. 347 ESMA states that transactions referred to art. 14.2 (b) include transactions executed for the account of the PDMRs within the framework of a fully discretionary asset management contract (meaning that there is no instruction whatsoever from the PDMR) as regards the investment policy of the contract. It is not clear from MAR wording if such notification should also include operations by asset managers when there is no discretion 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?***

ESMA proposes to include in the notifications also transactions executed in derivative or indices or baskets if the financial instrument of the concerned issuer carries a certain weight. The SMSG finds it questionable to include in the notifications also these transactions: PDMRs and persons closely associ-

ated to them should have a certain degree of specific knowledge of the financial instrument (and of their underlying asset). ESMA wishes to include some sophisticated financial instruments while the SMSG considers it worth to limit the notification of derivative financial instruments based on shares of the concerned issuer. In any case, if ESMA were to decide to include the transactions proposed, reference could be made to a "significant" weight (at least 50%).

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?

No.

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

We would favour the first or the third option.

VIII. 4 Trading Window

A PDMR shall not conduct any trading on his account or for the account of a third party during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the relevant issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or according national law. But the issuer may exempt a PDMR from this prohibition under two circumstances (Art. 14 (4a) MAR).

ESMA describes the rule as a "trading window". The term "trading window" is commonly used for describing the period in which trading is permitted. Therefore, SMSG suggests ESMA to instead in this context use the term "closed period" which is more in line with Level I.

Furthermore, SMSG observes that rules on "closed periods" apply prior to the publication of an annual financial report and a half annual financial report. It is questionable whether they also apply prior to the publication of a quarterly financial report. In fact, it should be noted that, even if the Transparency Directive (as amended in 2013) prohibits Member States to require the publication of "additional periodic financial information on a more frequent basis", stock exchanges will still be free to introduce a respective duty. Therefore, a quarterly financial report would be considered as an "interim financial report" in the sense of Art. 14 (4a) MAR. Thus, there would be two additional "closed periods" within a financial year and the final result could be that PDMRs will be prohibited to acquire and sell shares for a period of 120 calendar days/year.

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?

With regard to the definition of exceptional circumstances, according to the wording of art. 14 MAR, SMSG generally agrees that the permission on a case by case basis is only possible for the sale of shares and that any situation in which trading is permitted should be exceptional. But the crucial question is how the term "exceptional circumstances" should be interpreted.

SMSG generally welcomes the effort undertaken by ESMA in evaluating the exceptional circumstances that should be taken into consideration in order to allow managers' transactions, this is very welcome. ESMA puts in evidence the relevance, not only of the feature of exceptional circumstances, but also of the urgent, unforeseen and compelling cause which is external to the person discharging managerial responsibilities. But SMSG observes that it has to be determined on a case by case basis whether these requirements are indeed fulfilled. Other examples might be a disposal of securities arising from the acceptance of a takeover or scheme of arrangement.

Q96: What are you views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

According to Art. 14 (4a) MAR, certain types of dealings may be permitted by the issuer. Firstly, the level 1 text privileges dealings made under or related to employee's share schemes and saving schemes (first category). Secondly, the issuer may permit dealings where the beneficial interest in the relevant security does not change (second category).

As regards the second category, ESMA suggests that the "request should be motivated and should only relate to a transfer of the concerned instruments between accounts of the PDMR. Such transfer should not entail a change in the price of the instruments transferred". On this point, SMSG observes that this interpretation leaves room for discussion. Indeed, neither the wording nor the purpose of Art. 14 (4a) MAR require one to understand the exemption in such a narrow way. The level 1 text allows dealings provided that "the beneficial interest in the relevant security does not change."

This also applies to a transfer of securities by a PMDR to a trust. Such a transaction should not be forbidden during a closed period.

An important question is whether transactions by a PDMR within his/her group of companies are permitted. Example: A (= PDMR) holds 1000 shares and sells them to A-plc wholly owned by him. Again, such a transaction should not be forbidden during a closed period, provided that the shares remain within A's group of consolidated companies.