KROMANN REUMERT

INTRODUCTORY REMARKS

Our answers have been provided after consultation with approx. 20 Danish companies listed on Nasdaq Copenhagen A/S (including several C25 companies).

ARTICLE 5 MAR - BUY-BACK PROGRAMMES (BBPS)

Q7. Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

Yes, we agree. The obligation to report to competent authorities of all the trading venues on which the shares are traded is in practice not easily manageable for the issuers. The issuer is not always aware of where its shares are traded and the shares may be traded on several different trading venues, which makes it time-consuming for issuers to obtain information on the identities of the competent authorities of such venues and how reporting should be made to each such authority.

Q8. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

No, we do not agree that Option 3 is the best way forward. We believe that Option 2 will be the best option. Option 2 is less burdensome for issuers as the issuer will know the trading venue on which its shares are admitted to trading due to the issuer's own request. The relevant market in terms of liquidity under Option 3 may change from time to time and therefore the issuer will become obliged to assess on a regular basis to which competent authority the reporting would have to be made.

Q9. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

Yes, we agree.

Q10. Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

Yes, we agree.

Q11. Do you agree with ESMA's preliminary view?

Yes, we agree.

ARTICLE 7 MAR - DEFINITION OF "INSIDE INFORMATION"

Q13. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

Introduction

In our experience (and following discussions with a large number of Danish listed companies) the question of determining what information constitutes "inside information", in particular at what point in time such information in the context of protracted processes becomes sufficiently "precise" to constitute inside information, causes considerable difficulties.

The inherent uncertainties involved in determining if and when information constitutes inside information must be viewed in light of the fact that non-compliance with MAR (i) is a criminal offence and i.e. subjects the issuers (and potentially individual persons as well) to fines or other sanctions and (ii) may lead to civil law claims from investors against the issuer for breach of the issuer's obligation to disclose inside information to the market "as soon as possible". Please note that, as also made clear in the Consultation Paper, Denmark has opted out of having administrative sanctions for violation of the most important provisions of MAR, i.e. any violation (whether committed intentionally or negligently) of Articles 14, 15, 16(1) and (2), 17(1), (2) to (5), (7), (8), 18(1) to (6), 19(1) and (2), (5), (7), 19(11) and Article 20(1) of MAR will be prosecuted as criminal offenses against the issuer and/or persons acting on behalf of the issuer.

The fact that the concept of inside information is used both in relation to the determination of the issuers' disclosure obligation and in relation to insider trading makes the practical difficulties even greater. Issuers will want to bar management and other employees from trading if there is even the slightest risk of such trading constituting insider trading. Thus, from an insider trading perspective issuers will want to move the determination that inside information exists forward, but under the current regime this also triggers the disclosure obligation on the issuer; in this context the possibility of delaying the disclosure of inside information is not sufficient to give the issuers a reasonable level of comfort that such delay of disclosure will not be challenged by regulators or others subsequently. Conversely, inside information, as defined in MAR (and by the Court of Justice), may entail that the disclosure obligation is triggered at a stage where the inside information is still highly uncertain. This may lead to increased uncertainty and speculation among the investors. We question whether such premature disclosure works towards ensuring market efficiency.

Regulators and others should not set issuer's assessment aside

Given the uncertainties involved in determining if and when inside information exits, and the consequences thereof from both a criminal and civil law perspective, we recommend that it is made clear, in MAR or in accompanying guidelines, that it is for the issuer to decide, based on all facts known to the issuer, whether inside information exists (or no longer exists) in relation to future probable (but not certain) events (the *"business judgment"* principle). Regulators (and courts) shall only set aside the issuer's assessment if such assessment was clearly unjustified, based on all facts known at the relevant point in time (*ex ante* and specifically excluding an *ex post* assessment made by the regulators (or the courts)).

While the above stated principle may already apply, see recital 15 of MAR, we consider it necessary and important, taking into account the practise of regulators (and courts), to make the principle clear to all parties.

Inside information

We (and the issuers we have conferred with) would highly welcome more precise guidelines on both when information is of a "precise nature" within the meaning of Article 7(2) and the reasonable investor test in Article 7(4) of MAR:

Precise nature

We find that the "reasonable prospect" test to be applied when assessing whether future events (or particular steps in a protracted process) constitute inside information leaves very considerable room for uncertainty. We appreciate that it may be impossible to operate with fixed percentages as the decisive criterion in all circumstances, but nevertheless indications such as "more than [*] per cent likelihood" or similar could serve as a meaningful tool. In this context, the statement in recital 16 of

MAR: *"However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration"* is in certain situations unhelpful, as it provides the issuers with less flexibility than would otherwise be the case when rendering a decision on whether inside information exits or not, and we ask ESMA to consider whether MAR should be amended or clarified.

As noted above, one factor leading to the notion "precise nature" being such a concern is the fact that the existence of inside information is the decisive criterion both in term of the issuers' disclosure obligations and the insider trading ban. In our view, mandatory disclosure of information at a point in time when there is solely a "reasonable prospect" that a given future matter (in particular in the context of protracted processes) will become a reality is not in the best interest of the investors, given the underlying uncertainties. It is in practice very difficult for issuers to give investors more precise guidance as to the expected outcome of an on-going process. In turn, this will lead to increased uncertainty and speculation among the investors and thereby adversely affect the market's efficiency. While it is in our view appropriate to exclude insiders from trading in securities as and when there is a "reasonable prospect" of a given future outcome of an ongoing process, the same criterion is not well suited for triggering the issuer's disclosure obligation. We refer also to our comments to Question 17 below.

Reasonable investor test

When assessing if information is likely to have a significant effect on the price of the financial instrument, one key uncertainty is for how long a period such possible price effect should be measured. We recommend it be specified that the assessment should be made based on the expected mid- and long-term effects on the price on the financial instrument rather than on a short-term (speculative) effect, which in our experience is currently the primary focal point of the regulators. Emphasis on the mid- and long-term perspective would increase the issuer's ability to determine whether inside information exits and would also work towards protecting the issuer as well as the market at large against the impact of activist and similar investors.

Further, we find that MAR is imprecise when it comes to the importance of and defining what information the "reasonable investor" would be likely to use as part of his/her investment decision.[1] For instance, it is currently not clear how issuers should factor in analysts and similar reports available in the market. While it must be obvious that such analysis cannot and should not be relevant to take into consideration when considering the issuer's disclosure obligation, they may be relevant to take into account when considering whether an insider (while not possessing inside information) can trade securities. More generally, there are situations when a piece of information is not *"likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments"* but where it is nevertheless a piece of information that a reasonable investors *"would be likely to use as part of the basis of his or her investment decisions"*. The fact that MAR uses two different concepts for defining the same component of inside information causes uncertainties.

ARTICLE 17 MAR - DELAYED DISCLOSURE OF INSIDE INFORMATION

Q25. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

We do not find that the current regime with potential delay of public disclosure of inside information is optimal. The system entails considerable risks on the part of the issuers: first, there is inherent uncertainties as to whether the criteria for delay of disclosure are met or not (e.g. in relation to the interpretation of the notions "legitimate interests" and "mislead the public")

[1] We refer to SMSG Position Paper regarding EMSA's work on MAR Level 3-measures of 21 September 2015, EMSA/2015/SMSG/025, para. 33ff.

and second, the issuers' risk that their determination of the fulfilment of those criteria are set aside by the regulators or courts in subsequent proceedings. Furthermore, it should be recognized that under the current system, delay of disclosure is an exemption to the main rule and that disclosure must be made as soon as possible after inside information has come into existence; in accordance with general principles of interpretation of EU legislation, the current system leads to a too narrow field being available to issuers to delay disclosure of inside information, including at a point in time when there is only a "reasonable prospect" of an uncertain future event becoming a reality.

The best solution would be to amend MAR so that the issuer's obligation to publish inside information is not triggered until the inside information becomes a "reality", i.e. the matter in question is no longer a future probable event but a fact (unless there is a leakage of the inside information, i.e. confidentiality is no longer ensured) whereas the prohibition against insider trading (as well as restrictions on communication of inside information to third parties) would take effect immediately when the inside information came into existence. This was the state of law in Denmark before MAR came into force and worked to the satisfaction of all market participants and (we believe) also regulators. This approach would safeguard the need to prevent market abuse, which we (and all issuers consulted by us) strongly support and at the same time work better than the current regime in terms of ensuring that all investors receive valid and "certain" information and thereby restrict speculative trading (market efficiency perspective).

Alternatively, we recommend it be considered to revert to the proposal set out in the EU Commission's 2011 draft MAR (published 20 October 2011), i.e. incorporating a concept of *"relevant information not generally available" (RINGA)*. This would allow issuers early on to ensure that people having knowledge of RINGA are barred for trading, without the issuer having to take the position that inside information exists (and then consider delaying disclosure thereof).[2] Such an approach should be coupled with a reassessment of the issuer's disclosure obligation so as to safeguard the legitimate interests of the issuer and market efficiency.

Lastly an option (possibly combined with introduction of the RINGA concept), is to broaden the possibilities for delaying public disclosure of inside information and clarify that the regulators should not interpret the right to delay narrowly.[3] Similar to the assessment of whether inside information exists, where we recommend that it be clarified that such assessment shall be left for the issuer to make on an informed basis, it should be made clear that the regulators (and courts) shall only set aside the issuer's determination with regard to a delay of disclosure if such decision is clearly not in accordance with the requirements set out in MAR. In particular, we find that the issuers should be left with reasonable discretion to determine what constitute their "legitimate interests" without such assessment being subject to subsequent review by regulators and others.

Furthermore, we would welcome a reconsideration of ESMA's guidelines as to when the criteria for delay of disclosure are met or not. In particular, it would be helpful to clarify that the notion "issuer's legitimate interests" should be interpreted to encompass the issuer's *direct or indirect* interests. For instance, it is not clear whether the issuer is today entitled to take into consideration the interests of a counter party to a transaction when considering whether to delay disclosure of inside information. Such interests are only indirectly in the interest of the issuer but nevertheless an important factor. The same applies in terms of the interests of employees of the issuer. We also recommend it be clarified that the issuer's legitimate interests include those of its shareholders at large. More generally, we recommend that ESMA provides guidelines that as long as a given matter remains uncertain (i.e. it is not a reality), it is legitimate for the issuer to delay disclosure thereof to the market.

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[2] In this connection we refer for instance to J. Payne *"Disclosure of inside information"*, University of Oxford, law working paper no. 422/2019, August 2019

[3] See SMSG Position Paper of 21 September 2015, including para. 25 thereof: *"The SMSG therefore wishes to emphasize that the right to delay should not be interpreted narrowly. An issuer should be allowed to keep the information secret if disclosure of the information may be detrimental to him. A mere probability that such detriment may occur should suffice for the right to delay disclosure to become applicable."*

Such a clarification (or enhancement) of the concept of *"issuer's legitimate interests"* would be useful for instance in relation to determining when it is required to issue an update to the issuer's prior announcements to the market, e.g. its financial guidance.

Likewise, it would be helpful to clarify the situations where a delay of disclosure is likely to mislead the market. This should only be the case if the inside information at hand is in direct conflict with prior disclosures or other statements made by authorized officers of the issuer. The notion *"signals"* is very broad and leaves room for uncertainty.[4]

In this context we note that in its Consultation Paper on Draft guidelines on the Market Abuse Regulation (ESMA/2016/162), page 22, para 67, ESMA acknowledged that in the case of an unexpected and significant event, some time may be needed for the issuer to clarify and ascertain the situation before being obliged to disclose the information to the market. Such time ESMA considered falling under the general provision in Article 17 of MAR to disclose inside information "as soon as possible". We recommend that ESMA confirms this opinion as set out in the Consultation Paper ESMA/2016/162, even as a possibility for the issuer to delay disclosure of inside information.

Q26. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

Such examples include: (a) considerations to dismiss an executive manager; (b) a decision or ruling from public authorities the consequences of which the issuer needs to ascertain, including merely to read a long ruling/decision and distribute such ruling/decision internally, e.g. to the chairman of the board of directors before disclosing it to the market; and (c) in the course of preparation of financial reports it becomes possible that the issuer has to lower or raise its financial guidance.

Q27. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

We would find it helpful to include in MAR general/high level requirements for issuers to have such processes etc. in place. However, it should be made clear that it is for the issuer to decide on what processes etc. are best suited to meet the needs of the issuer. In Denmark, many issuers have in place internal rules regarding the handling of their disclosure obligations, which in fact lays out the relevant process to follow in this respect.

Q28. Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

Relevant examples include: (a) "transformational transactions", such are takeovers, especially in the early stages of the transactions (see in this context recital 16 of MAR which excludes the issuer from taking into consideration the magnitude of an event on the prices of the financial instruments concerned when determining whether inside information exists); (b) potential breach of financial covenants; (c) considerations on changes to the executive management and the board of directors; (d) forecasts, including approval of the budget and changes to forecasts that the issuer has disclosed to the market; (e) amendments to or introductions of new rules and regulations (especially relevant in "heavily" regulated industries), judgements and approvals/rejections from authorities; and (f) amendments to the issuer's business strategy.

[4] We refer to the comments made in SMSG Position Paper of 21 September 2015, para. 27-29

Q29. Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

We do not agree. The notification obligation considered by ESMA would be a disproportionate burden on the issuers and it should be recognized that the NCAs (not the issuers) are responsible for monitoring and investigating market abuse.

In the case of protracted processes, the proposed requirement to inform the NCA would also possibly entail that issuers would have to inform the NCA several times with regard to the same matter, because information may at some stages constitute inside information, but then developments makes the information loose its insider nature and then subsequently the information again becomes inside information.

ARTICLE 11 MAR - MARKET SOUNDING

Q33. Do you agree with the proposed amendments to Article 11 of MAR?

No, we do not agree. Recital 35 in conjunction with Article 11(4) of MAR in our opinion makes it clear that the market sounding rules laid down in Article 11 are a "safe harbour" regime only. To make it compulsory to follow the rules would subject market participants to further risks and administrative burdens. If anything, the proposal could work against issuers being willing to having on-going dialogues with key shareholders, which is otherwise encouraged by EU.

Q34. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

If the market sounding regime is made obligatory, we find it necessary to further clarify the scope of the definition of market soundings and that guidelines with examples are provided. Otherwise, a compulsory regime would leave issuers with extra burdens and uncertainties.

ARTICLE 18 MAR - INSIDER LIST

Q39. Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

No, we do not agree. The requirement to draw up and maintain insider list is a disproportionate administrative burdensome and time-consuming obligation for issuers when considering that the only (or main) purpose of insider lists is for competent authorities to be able to identify insiders in case of an investigation.

Q40. Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

Yes, we agree. We believe that the current requirements for the content of insider lists go considerably beyond the purpose of the insider list as a working tool for competent authorities to be able to identify insiders. The purpose of the insider list

should only be to enable competent authorities to identify insiders in case of an investigation, which we believe should generally be possible by providing name and position of the insider.

The issuer will often have additional contact information (private address, telephone number, social security number etc.) about the insiders which competent authorities could request from the issuers in case not being able on the basis of the insider list to identify an insider.

Q43. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

If the permanent insider section would only include the persons that ESMA has listed on page 53, para 183 of the Consultation Paper, we do not consider the permanent insider section useful. In our experience, the entire executive management and the board of directors will in general have the same inside information as the CEO and the chairman, and therefore it will not be meaningful to have a permanent insider section if such persons cannot be included. We recommend that MAR leaves the issuers with flexibility when determining who should be on the list of permanent insiders.

Q44. Do you agree with ESMA's preliminary view?

Yes, we agree.

Q45. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

We refer to our answer provided in Q40.

ARTICLE 19 MAR - MANAGERS' TRANSACTIONS

Q47. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

Yes, the option to keep a higher threshold should be kept.

In respect of the content of the notification template we question whether it is useful information for the investors to have details of each transaction carried out by the PDMR on the same day as required in field 4 c) and f) in the Annex to Commission Implementing Regulation (EU) 2016/523. In case of the PDMR carrying out trades on many different trading venues, and in case of several small transactions, these requirements result in (very) long notifications that are both time consuming to prepare and may disguise the important/relevant information for the investors in the notification. We find that the aggregated information to be provided in field 4 d) in Regulation (EU) 2016/523 would sufficiently serve the purpose of providing transparency about trades carried out by PDMRs.

Q54. **Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.**

We believe that the current framework generally works well.

Q55. **Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.**

We recommend not to extend the closed periods to the issuers or persons closely associated with PDMR's. We do not see a particular need to further protect persons closely associated with PDMR's from insider dealing, including by subjecting them to a closed period, in particular as such requirement would place an additional administrative burden on the issuers (or the PDMR) if they should inform persons closely associated with the PDMRs that a closed period begins. We note that a PDMR today is prohibited from trading via holding companies as the ban on insider trading also includes indirect trading. Furthermore, it ought to be the exception that a PDMR has disclosed inside information to a person closely associated with the PDMR, see MAR Article 10.

In respect of issuers, we find that such requirement would disproportionately limit the issuer in carrying out transactions in a closed period as also noted by ESMA. In the same way as persons closely associated with PDMR, issuers will always be subject to the general prohibition against insider dealing and there is not the same "protective considerations" as is the case with PDMRs.

Q57. **Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.**

We see no particular need for further exemptions.

SANCTION AND MEASURE

Q70. **Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.**

As noted in the Consultation Paper, and as also referred to in our answer to Question 13 above, Denmark has opted out of having administrative sanctions for violation of the most important provisions of MAR, i.e. any violation (whether committed intentionally or negligently) of Articles 14, 15, 16(1) and (2), 17(1), (2) to (5), (7), (8), 18(1) to (6), 19(1) and (2), (5), (7), 19(11) and Article 20(1) of MAR will be prosecuted as criminal offenses against the issuer and/or persons acting on behalf of the issuer.

We and the issuers we have consulted find that the Danish regulatory regime places Danish issuers (and their executive managers and directors) at a regulatory risk and disadvantage compared to companies etc. resident in other countries. Even relatively simple cases of infringement of MAR will be pursued as criminal offences by the regulators. In the first instance, the Danish FSA investigates a possible offence of MAR; if the Danish FSA finds that there is a mere "suspicion" that a violation has been committed it will refer the case to the Danish Office of Serious and International Crimes for further

investigations. The Danish FSA's decision must under Danish law be made public. The further investigations typically take 1-3 years before court proceedings are initiated and the court proceedings can also last 2-4 years. The reputational and other adverse effects for the issuer, management etc. may be severe, including given the publicity.

Under these circumstances, and recognizing that the Danish implementing regulation is not, as such, for ESMA to take into account, we would nevertheless believe it beneficial to amend MAR article 30(1) so that all NCAs have the capacity of imposing administrative sanctions.