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FESE response to ESMA discussion paper
Policy orientations on possible implementing measures under the Market Abuse Regulation
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1. Introduction

The Federation of European Securities Exchanges (FESE) represents 41 exchanges active in equities, bonds, derivatives and commodities through 21 full members from 30 countries, as well as 2 Observer Members from European emerging markets. FESE is a keen defender of the Internal Market and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE represents public Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation.

At the end of 2013, FESE members had up to 8,950 companies listed on their markets, of which 8% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium sized companies across Europe to access the capital markets; 1,478 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets.

FESE supports efficient, fair, orderly and transparent financial markets that meet the needs of well protected and informed investors and provide a source for companies to raise capital and for investors to hedge their portfolios

Below you will find our response to certain questions included in this discussion paper.

2. Response to Discussion Paper

Section I. Buyback programmes and stabilisation (Article 3 of MAR)

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

We agree to maintain the current deadline of 7 market sessions for public disclosure.

Regarding paragraph 13, according to the current regime (Article 4(4) of Regulation No 2273/2003), the issuer must publicly disclose transactions related to buy-back program no later than the end of the seventh daily market sessions following the date of **execution** of such transactions.

We believe that the date of the **settlement** and not the **execution** shall be the starting point for counting the 7 market sessions because sometimes settlement may be delayed by unforeseen circumstances.

Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

Only one single competent authority should be determined for the purpose of buy-back transactions reporting and this authority shall be the regulator which has initially approved the public offering of securities prospectus. We believe the term "most liquid market", mentioned in I.1.3.1 needs further definition.

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

We disagree with the cumulative criteria for extreme low liquidity because of the significant differences of the size of markets in member states. We would support that each local regulator is able to scale the criteria according to the specifics of the local market. This is particularly relevant for very small markets where their levels of liquidity does not reach any of the criteria stated in the discussion paper.

Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

We support that calculation of volume limits takes into account not only volumes on regulated markets but also on other venues. However, the current market structure makes it difficult for both the issuer and the competent authority to be aware of such volumes.

Section III. Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

Q40: Which practices do you think are more related to manipulation of benchmarks?

We believe that when assessing the potential for a benchmark to be subject to market manipulation a key aspect to consider is the nature of the data that is used to construct that benchmark. It is critical to understand that data for benchmarks is usually being sourced from various different markets with differing degrees of regulation, i.e. transparent, regulated markets in the case of certain benchmarks, or less transparent and less regulated OTC markets in the case of others.

We believe that data in the form of estimates/indications submitted by parties with a beneficial interest in the underlying product or index creates a clear conflict of interest (e.g. their submission of "subjective" data can influence the benchmark used by them as an underlying or reference price for financial exposure within their company). These types of submissions will be more prone to the exploitation of conflicts of interest than data submitted by regulated trading venues where price formation takes places according to pre-defined and transparent rules and under extensive market surveillance, unless those conflicts of interest are managed effectively.

Consequently, FESE distinguishes benchmarks by dividing them into the following three categories:

(a) Category 1: benchmarks based on panel-based data when they are prone to a conflict of interest and experience discretionary powers;

(b) Category 2: benchmarks based primarily on transaction data from OTC markets;

(c) Category 3: benchmarks based primarily on regulated transaction data from regulated markets, and MTFs operated by regulated markets (regulated data).

Cases of misconduct or attempted manipulation of benchmarks in category 1 have been identified by regulators and are currently being investigated. An apparent conflict of interest was at the heart of this misconduct where data providers and those actively investing in index-based financial products were identical and thus beneficiaries of certain index values. The reliability of certain benchmarks in category 2 is also currently under scrutiny for the same reason.

In contrast, benchmarks in category 3 have not been the subject of regulatory concern, nor have the regulatory authorities identified any demonstrable misconduct in relation to their compilation. A key differentiating factor of benchmarks within Category 3 is that they are calculated on the basis of a regulated trading venue's transparent data. In particular, regulated markets are required to comply with stringent regulation concerning market integrity, orderly and transparent price formation, the operation of efficient markets and are not permitted to have any trading exposure in their indices or related financial products. Moreover, their compliance with such regulations is subject to close and continuous oversight by the relevant regulatory authorities. It can be considered though, that according to the pending EU COMM benchmark regulation proposal, even transaction data from OTC market shall be considered "regulated data" when stemming from an approved reporting arrangement as defined in point (20) of paragraph 1 of Article 2 of [MIFIR] in accordance with mandatory post trade data requirements.

Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

We support ESMA compiling a non-exhaustive list of market manipulation practices. We also believe that OTC must be included within this scope, especially considering the high volume of trading volume taking place in such non-transparent environment. However, we do recognise the current lack of available or verifiable OTC in certain instances, which is being addressed in the MiFID Review.

Q42: In your view, what other ways exist to measure order cancellations?

As stated in III.2.1. para 140, a ratio of cancelled orders alone is prone to manipulation due to the fact that it may be offset by executed small volume orders. It is favourable to avoid this by introducing an order-to-trade ratio based on the number of shares. Hence, this kind of manipulation by small volume orders is not possible and, in addition, a combination of the ratio of cancelled orders and a ratio on volume would not be needed. Therewith, we propose an order-to-trade ratio based on number of shares, rather than number of orders and trades.

Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

We also consider that orders which are not cancelled but which have extremely inflated/deflated prices and are later left outstanding on the order book for an inordinate amount of time should be added to this list. We consider that there is potential for these orders to left on the order book in the attempt to move the market in their direction or to give a false indication of the direction of the market. In certain cases such orders have been left outstanding on exchange order book for up to 1 year.

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.

FESE agrees with the list of indicators. However, we do not think that this practice is specific to algorithmic traders only. By definition, any trader that, by whatever means, seeks to disrupt the market in this manner must be brought under the provisions of market manipulation. For this reason, we believe that it should be stated that practices can be applied to all trading strategies, not just algorithmic trading and HFT, and therefore are not specific to recent technological methods of trading. This would ensure that all traders are subject to these provisions.

FESE also supports the need to sanction 'attempts of manipulation'. This offence would necessarily be intent-based rather than effect-based, i.e. it would differ from the basis of the offence of market manipulation itself. It is important that the burden of proof for demonstrating intent lies with the regulator as the alleged perptrator cannot reasonably be expected to prove a negative. This could be made clearer in the text.

Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?

Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

We believe it would be hard to set out a general indicator of quote stuffing as in our view it would be very difficult to determine at what moment an inflow of orders becomes difficult to analyse, as this would depend on the particular nature of each market, its companies and the types of securities traded.

Section IV. Accepted Market Practices (Article 8a (5) of MAR)

Q48: Do you agree with the approach suggested in relation to OTC trading?

Q49: Do you agree with ESMA's approach in relation to entities which can perform or execute an AMP?

We agreed with ESMA's approach to OTC trading and its approach in relation to entities which can perform or execute an AMP. However, we would like to again emphasise the current lack of available and reliable OTC data, therefore, AMPs should only take place on regulated and transparent trading venues, i.e. RMs & MTFs.

As an infrastructure provider and regulated market we support 'Accepted Market Practices' as we allow these practices in our market and have the respective mechanisms in place that also support these practices (e.g. hedging). Additionally, we have further rules to ensure market integrity and a fair use of those well-defined practices.

Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?

Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?

As a general remark, we consider that any exemptions to the current transparency regime should be minimised in order to avoid any loopholes.

Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should this principle be adapted?

As a general remark, we consider that any exemptions to the current transparency regime should be minimised in order to avoid any loopholes.

Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?

The entity that implements an AMP must be supervised by the competent authority of the home Member State of the market where this AMP will be applied in order for the specificities of that market to be fully recognised.

Section V. Suspicious Transaction and Order Reports (Article 11 of MAR)

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

We would question how this would be possible to implement in the OTC space.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

Yes, we agree with this approach. In particular, we agree that STRs should be submitted as soon as possible and in general within 2 weeks of the suspected breach. However, in certain cases, in particular in some market manipulation enquiries, a trading venue may need more time to investigate it before reporting it as suspicious to the competent authority. Therefore, we believe this time limit should be capable of being extended in certain justified cases.

Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

If all trading venues are the subject to establishing and using surveillance system following the requirements being laid out in MAR, we insist clear rules and requirements to the system are set forth. Furthermore, we would question how this would be possible to implement in the OTC space.

However, we are of the view that while all relevant entities need to ensure they have adequate systems to monitor and detect market abuse, we do not think it should be imposed that all entities have 'automated surveillance systems' as this could be very onerous for small brokers, particularly where they can meet the requirements of MAR using systems that are appropriate for their business.

Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.

Trading venues should keep trading sessions recorded in order to facilitate monitoring in the event that any abusive practice on any instrument traded on such venue is detected.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

We agree with the content required, but in relation to the layout, we think the details of the person making the notification should be at the end, not in Section 2, so that all details of the suspected breach are together.

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

Yes, we agree with the proposals but we also believe there still should be some degree of flexibility and that the use of the electronic template should not be mandatory.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

Yes, we agree with this proposal and believe it is important that a record of potentially suspicious transactions that have been examined but not reported to the competent authority should also be kept.

**Section VI.	Public disclosure of inside information and delays (Article 12 of MAR)**

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

We wish to highlight the need for clarity with regard to the application of articles 5 and 12 in relation to disclosure requirements for issuers.

FESE supports the aim of achieving the highest level of information disclosure. In the wake of the ongoing economic and financial crisis, we support the work of the G20 to strengthen financial supervision and regulation and to build a framework of internationally agreed high-level standards. We support the Commission proposal to maintain the highest level of transparency & disclosure requirements for European markets across all asset classes in line with the Prospectus and Transparency Directives. This is vital to ensure investor protection.

In order to to ensure that the appropriate actors are covered by disclosure provisions in MAR FESE believes that:

- The trilogue discussions did not provide clarity on the definition of 'issuer of a financial instrument' which is needed in order to have a robust public disclosure regime for inside information.
- When defining the 'issuer of a financial instrument', Regulators must take into account the appropriate firm that must be covered by these provisions. There should be clarity that there are no unintended consequences from an inappropriate extension of these disclosure requirements to certain firms that would hinder market efficiency.
- **Therefore, Level 2 should outline that regulators must consider the current definition of an 'issuer of a financial instrument' as included in the Prospectus Directive[1] to avoid ambiguity on which firms should be subject to these provisions.**
- Moreover, we support the highest level of transparency and disclosure requirements for European markets across all asset classes (in line with the Prospectus and Transparency Directives), it is vital to ensure investor protection. However, it is important to consider the limited means of SMEs to fulfil the same requirements as Big Caps. Therefore it is crucial to for further RTS for exemptions on SMEs wherever appropriate.
- It is imperative that rules against insider dealing cannot be circumvented by trading in derivatives.

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?

The competent authority of the home Member State of the issuer must be in charge of notifying delays in disclosure of inside information by such issuers as it adds certainty of who must perform the surveillance.

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.

Yes, we agree with this approach.

[1] DIRECTIVE 2003/71/EC: http://www.esma.europa.eu/system/files/ProspectusDir_2003_71.pdf

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

We support that the so called "oral approvals", if issued by phone or other voice media, should be recorded by both parties for confirmation purposes.

Section VII. Insider list (Article 13 of MAR)

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

We believe that any move to include such levels of information required for insiders (i.e. home address, home and work phone numbers, personal email address) should take into account personal data legislation.

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

We believe it needs to be clearer why an insider is included on the list i.e. it needs to set out at a high level what inside information the insider is aware of.

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

Yes, but it is important that the updates should not change previous information, they should just add to it as it is beneficial to view the full chronology of events.

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?

We do not support issuers being subject to different requirements when listed on the same market. However, issuers that are listed on a RM or MTF where SME's instruments are predominantly traded (i.e. junior markets), regardless of whether is a registered 'SME Growth Market', should be also exempted from the obligation to draw up an insider list in order to guarantee a level playing field for SME listings.

Section VII. Manager's Transactions

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

We believe these characteristics are still unclear and should be further clarified.

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?

We do not fully understand what "minimal weight" according refers to in Q92. This could refer to the weight of the financial instrument in the structure of the index, or a certain percent of the personal portfolio of the insider person, etc. We consider that it would be difficult for an insider to know exactly what the weight of their company is in the index on a daily basis, as this information is may not be publicly available, including information as to when their company was included in an index that includes a large number of companies.

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 believe the second alternative for aggregation, stated in 362, should be used.

Section XI. Investment Recommendations

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

We do not support the proposal. Fragmentation of disclosure requirements lower than 5% shall not be considered, as long as the legal framework permits no additional shareholders' rights at lower thresholds than 5%.

Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?

We do not support the proposal. Disclosure of any short position with no threshold may be treated as implicit recommendation, as well as, could prompt unfair positions taken by market participants against the short position (playing against the short). This comes with even stronger impact to less liquid markets.

Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?

We do not support the proposal. There are no legal rights to bondholders that grant them additional rights regardless of the threshold.

Q106: Do you think that additional specific thresholds should be specified with respect to other 'non-equities' financial instruments?

We do not support the proposal. There are no legal rights to instrument holders, apart from equity, that grant investor additional rights regardless of the threshold. While related to open-end instruments and exchange traded derivatives, determination of a threshold is practically infeasible, as long as the volume of instruments outstanding is non-constant.

Q107: Do you think that further disclosure on previous recommendations should be given?

We do not support the proposal. Such requirements in retrospect might not be accomplishable, as written evidence of recommendations might not be available. The requirement should set forth the disclosure as of the date of entry into force.

Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

We do not support the proposal. The set of "all the financial instruments potentially impacted by the recommendation" is unlimited. This applies especially to recommendations regarding government issued securities. If the requirement for detailed disclosure should be extended to practically all the holdings of the issuer of the recommendation this might (1) infringe the confidentiality of the analysts' portfolio and (2) such disclosure could be treated as implicit recommendation by an analyst (follow the smart money recommendation).

Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?

We do not support the proposal. Non-written recommendations have no legal statute and could not be basis for court settlements, therefore, any such attempts to broaden the scope of the requirements would only increase the regulatory burden, but add no practical purpose to the matter.