ESMA's Consultation Paper on MAR: including proposals to extend the scope to spot FX, amendments to the definition of inside information and whether the definition of a PDMR should include issuers and closely associated persons of the PDMR.

The European Securities and Markets Authority (“ESMA”) has released a consultation paper (“CP”) on the Market Abuse Regulation 596/2014 (“MAR”), setting out a wide range of topics for stakeholder review and comment by the end of November 2019. The feedback will be used by ESMA to develop a technical advice report to be sent to the European Commission (“EC”) to assist the EC in preparing its own report on the application of MAR as well as proposals for any future legislative action to amend MAR. The EC report, and any legislative proposals, will be presented to the European Parliament and the Council.

At a glance

Why has ESMA issued this CP?
MAR contains a requirement for the EC to present a report to the European Parliament and the Council assessing several issues within MAR by 3 July 2019. In March 2019, the EC sent ESMA a letter (the “Letter”) requesting assistance on the report it must submit in the form of technical advice from ESMA. The CP originates from this EC mandate to ESMA, and the topics covered include those mandated by Article 38 MAR, as well as connected topics identified by the EC and ESMA along with issues linked to the topics.

What topics are raised in this CP?
**Scope** – whether MAR should be extended to include spot FX contracts, and overlap between MAR and Benchmark Regulation provisions.

**Buy-back programmes (“BBP”)** – the contents of the post-trade reports and to which authorities they should be made.

**Inside information** – whether the definition of inside information is adequate to prevent market abuse and whether notification requirements should apply when inside information goes stale before it is announced.

**Market soundings** – confirmation that market soundings are obligatory but proposals limiting the definition of what constitutes a market sounding and simplifying the soundings procedures.

**Persons discharging managerial responsibilities (“PDMRs”)** – whether the ban on dealing in closed periods should be extended to issuers and closely associated persons of PDMRs.

**Insider lists** – some clarifications that could make insider lists more useful to competent authorities and less burdensome on issuers.

**Collective investment undertakings (“CIUs”)** – when CIUs are listed and within the scope of MAR, what modifications might be needed.

**Market surveillance by national competent authorities (“NCAs”)** – a proposal for a cross-market order book surveillance framework requiring amendments to be made to MiFIR Article 25(2) and potential extension for NCA powers to investigate and sanction unfair behaviour which threatens the integrity of the financial markets as a whole.

**Sanctions** – whether the cross-border enforcement of sanctions is effective.

Next steps
ESMA has asked for comments to the 71 questions raised in the CP to be received by 29th November 2019, with a view to creating the final report for submission to the EC in the spring of 2020. The original EC request for technical advice stipulated a deadline for ESMA’s response of no later than 31 December 2019, therefore any further previously stated timelines for review and potential amendments to MAR will most likely be delayed.
## Scope

### Spot FX contracts

Currently spot FX does not fall within the scope of financial instruments and contracts covered by MAR, and the CP asks whether spot FX contracts should be covered by MAR. This is not one of the topics mandated by MAR’s Article 38, however it was one of the questions included in the Letter from the EC.

The CP acknowledges the potential and very significant difficulties that such an extension would entail, for example noting that the spot FX market would need to develop features required by MiFID II such as trading venues, transparency and reporting obligations, and also underlines the very conceptual changes to MAR that would be required for such an extension (who issues spot FX and what would constitute inside information?). However, ESMA does find several points in favour of the proposal, including in work done by the Financial Conduct Authority (“FCA”), Bank of England and HM Treasury in their Fair and Effective Markets Review (“FEMR”) which concluded in 2015 that a new statutory civil and criminal market abuse regime should be created for spot FX that should include some of the key features of the current MAR-MiFID II scheme.

### Benchmarks Provisions

The scope of the application of the benchmark provisions is a topic mandated for review by Article 38 MAR.

The Benchmarks Regulation 2016/1011 (“BMR”) came into force nearly two years after MAR did, and imposed new obligations (e.g. governance, oversight, conduct, methodology) on the users, contributors and administrators of benchmarks. The BMR does not include provisions dealing with benchmark manipulation, referring instead to MAR on this. ESMA therefore describes the two frameworks as “complementary”.

ESMA considers that the two definitions of benchmark in MAR and BMR are largely overlapping, covering the same types of benchmarks. However, it notes the BMR is wider as the BMR definition of financial instrument captures AIFs and UCITS not traded on trading venues, and captures credit agreements for consumers which are not covered by MAR. On this last point, it is worth noting the example given by ESMA of interest rates being the most common benchmark which credit agreements such as loans used, and that if a credit agreement refers to interest rates that are also used in some financial instruments as defined under MAR Article 2(1)(d), then such rates would also be covered by the scope of MAR.

The CP asks whether stakeholders agree with its analysis and whether the difference between the MAR and BMR definitions raises any other market abuse risks. In addition, ESMA is proposing to include references to administrators of benchmarks and supervised contributors as persons who can be subject to the sanctions and measures that National Competent Authorities (“NCA”) can impose.

### Buy Back Programs

ESMA proposes removing some duplication between MiFIR and MAR as to reports to be made by investment firms/brokers on a share buyback, as well as looking at whether the details on each individual trade that currently have to be reported bring any benefit to the market over reporting in aggregate form.

ESMA also proposes removing the requirement for issuers to make post-trade reports to every competent authority where the shares may be listed, as this can be burdensome for issuers, especially if shares are traded on other markets without their consent or knowledge.

### Inside Information

ESMA asks for details of any difficulties with identifying what information is inside information and the moment at which information becomes inside information under the current MAR definition, as well as views on whether the current definition is adequate to prevent market abuse, in particular in relation to front-running or pre-hedging conduct.

ESMA is also looking at the definition of inside information in relation to commodity derivatives.

### Delaying Disclosure

ESMA is considering whether the conditions for delaying disclosure of inside information are adequate and clear, and whether there should be a specific obligation on issuers to maintain systems and controls to identify, handle and disclose inside information. It also asks whether a notification should be made to the competent authority when inside information goes stale before it is announced.

ESMA also asks whether changes are needed to the ability to delay to preserve the stability of the financial system (which applies to credit institutions and financial institutions only).
## Insider Lists

ESMA looks at whether insider lists could be made more useful by drawing a distinction between those who have actual access to inside information (who should go on the insider list) as opposed to those with potential access (who should not go on the list), and by clarifying how the permanent insider section of the list should work so that it is not misused.

ESMA is considering whether the obligation to draw up and maintain insider lists should be explicitly expanded to other persons performing tasks through which they have access to inside information, even if they do not act on behalf or on the account of the issuer. The two examples identified by ESMA at this stage are auditors and notaries, but there might be other cases.

To reduce the administrative burden on issuers, it is also proposed to clarify that where an external service provider is acting on behalf of the issuer, the issuer only need identify one contact name rather than every individual working for that service provider.

## PDMR Transactions

ESMA considers whether the ban on PDMR dealing in closed periods should be extended to cover closely associated persons and the issuers themselves. It also notes that there are some variations across the EU in when the closed period runs, particularly where the period is triggered by preliminary results announcements.

ESMA asks should the annual exempt amount of €5,000 be changed? Only four (to become five) national regulators (France, Denmark, Italy and Spain, plus Germany from 2020) used the power given to increase it to €20,000. This indicates €5,000 strikes the right balance between administrative ease and alerting the market.

There is also a question as to whether there need to be any changes to the current exemptions from the ban.

## Collective Investment Undertakings

ESMA considers whether modifications to MAR are needed in the case of a listed CIU which is an issuer within the scope of MAR.

## Market Soundings

ESMA confirms its view that persons who are carrying out a market sounding (the disclosing market participant (“DMP”)) are under the obligation to follow the requirements set out in Article 11 MAR on market soundings.

ESMA is therefore proposing to change the drafting of Article 11 in order to:

(a) make it clear that whenever a behaviour meets the definition of market sounding the relevant obligations apply;

(b) confirm the fact that DMPs carrying out market soundings in accordance with the relevant requirements should be granted full protection against the allegation of unlawfully disclosing of inside information; and

(c) to harmonise the regime across the EU, to ensure that administrative sanctions for not complying with the market sounding regime are established by MAR, without prejudice to any further sanction whenever the conduct constitutes market abuse.

ESMA is assessing whether there should be some limitation on the very broad scope of interactions caught within the soundings regime. Therefore, ESMA is requesting views on whether additional clarification on the scope of the market soundings definition is required, as well as whether to simplify the market soundings procedures.

## Market Surveillance

### EU Framework for Cross-Market Order Book Surveillance

Another of the MAR Article 38 mandated topics for review is the possibility of establishing an EU-wide framework for cross-market order book surveillance in relation to market abuse.

In order to set up such a surveillance framework, it would first be necessary to harmonise the format in which trading venues transmit their “end of day” order book data to NCAs. ESMA believes that the first step is to revise the current regulatory framework designed by Article 25(2) of MiFIR to ensure that trading venues record and report order book data in an electronic and machine-readable format and using a common template.

From the CP, it is clear that ESMA favours the ISO 20022 methodology with XML templates, and intends to gather information on the impact and costs that trading venues would incur to implement new common standards and transmit such data to NCAs upon request.

ESMA also raises the possibility of a more comprehensive cross market order book surveillance framework by using compulsory, ongoing reporting of order book data to NCAs. ESMA is therefore consulting trading venues on the costs and impact of daily reporting on all financial instruments or on a number of subsets, and in particular the difference in costs between ad-hoc reporting on request and daily compulsory reporting.

While noting that the final advice on this issue may be impacted by different regulatory and structural developments such as the withdrawal of the United Kingdom from the European Union, ESMA is asking market participants for their views, including on impact and costs, on the possibilities for European cross-market order book surveillance frameworks.
NCA Powers and Sharing information with Tax Authorities

In light of the recent focus on withholding tax and “Cum/Ex” trading, ESMA is asking for views on a proposal which would see MAR amended to:

a) Give NCAs powers to investigate and sanction unfair behaviour, beyond insider dealing and market manipulation, carried out by regulated entities that represent a threat to the financial markets as a whole, and

b) Grant the NCAs the possibility to cooperate and share information with tax authorities across the EU upon request.

Over the last few years, in the UK there have been various pieces of work undertaken on when regulators should intervene, including in areas which are on the regulatory perimeter, such as the Fair and Effective Markets Review which ESMA mentions in this CP, and the FCA’s consultation in 2017 on extending the application of certain rules and standards to unregulated business (CP17/37).

Sanctions and Measures

Article 38 of MAR also mandated for review the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation.

MAR provides that where Member States already have criminal sanctions in place for insider dealing and market manipulation, they could decide not to implement administrative sanctions. Several Member States exercised this option, and following a fact-finding exercise, ESMA’s preliminary view is that there is no need to modify MAR at the current time.

Additionally on sanctions, the EC requested ESMA to gather information on the cross-border enforcement on financial penalties, and specifically whether the interpretation given to the Council Framework Decision 2005/214/JHA102 (“the Framework Decision”) in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties. The CP requests input from stakeholders on this point.

Key contacts

Sebastian Barling
Partner, Financial Regulation Group
London
Tel: +44 20 7456 5352
sebastian.barling@linklaters.com

Peter Bevan
Partner, Financial Regulation Group
London
Tel: +44 20 7456 3776
peter.bevan@linklaters.com

Nik Kiri
Partner, Financial Regulation Group
London
Tel: +44 20 7456 3256
nikunj.kiri@linklaters.com

Lucy Reeve
Counsel, Corporate
London
Tel: +44 20 7456 3459
lucy.reeve@linklaters.com

Julia Dixon
Partner, Financial Regulation Group
London
Tel: +44 20 7456 4406
julia.dixon@linklaters.com

Harry Eddis
Partner, Financial Regulation Group
London
Tel: +44 20 7456 3724
harry.eddis@linklaters.com

Martyn Hopper
Partner, Financial Regulation Group
London
Tel: +44 20 7456 5126
martyn.hopper@linklaters.com

Michael Kent
Financial Regulation Partner and Global Head of Finance and Projects, London
Tel: +44 20 7456 3772
michael.kent@linklaters.com

Peter Bevan
Partner, Financial Regulation Group
London
Tel: +44 20 7456 3776
peter.bevan@linklaters.com

Julia Dixon
Partner, Financial Regulation Group
London
Tel: +44 20 7456 4406
julia.dixon@linklaters.com

Harry Eddis
Partner, Financial Regulation Group
London
Tel: +44 20 7456 3724
harry.eddis@linklaters.com

Martyn Hopper
Partner, Financial Regulation Group
London
Tel: +44 20 7456 5126
martyn.hopper@linklaters.com

Michael Kent
Financial Regulation Partner and Global Head of Finance and Projects, London
Tel: +44 20 7456 3772
michael.kent@linklaters.com

Lucy Reeve
Counsel, Corporate
London
Tel: +44 20 7456 3459
lucy.reeve@linklaters.com

Abu Dhabi | Amsterdam | Antwerp | Bangkok | Beijing | Berlin | Brisbane | Brussels | Cape Town*** | Dubai | Düsseldorf
Frankfurt | Hamburg | Hanoi* | Ho Chi Minh City* | Hong Kong | Jakarta** | Jeddah* | Johannesburg*** | Lisbon | London
São Paulo | Seoul | Shanghai** | Singapore | Stockholm | Sydney* | Tokyo | Warsaw | Washington, D.C.

* Office of integrated alliance partner Allens
** Office of formally associated firm Widyawan & Partners
*** Office of collaborative alliance partner Webber Wentzel

* Office of integrated alliance partner Allens
** Office of formally associated firm Widyawan & Partners
*** Office of collaborative alliance partner Webber Wentzel

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers. Please refer to www.linklaters.com/regulation for important information on our regulatory position.