The ‘new’ market abuse rules have been in force for over three years. Following a Commission request, ESMA is now consulting on how the Market Abuse Regulation is working out in practice and is seeking views on possible changes. This briefing note considers the suggestions made for closed periods, PDMRs, dealing restrictions and insider lists.

1. Prohibition on dealing during closed periods

This currently only applies to PDMRs. ESMA is seeking views on whether the prohibition should extend to issuers and PDMRs’ closely associated persons (CAPs).

Issuers

ESMA states that companies, like PDMRs, are likely to be in possession of inside information, so their position is at least equivalent to the PDMRs’. But it recognises that extending the prohibition could present challenges. It would certainly make it tricky for remuneration committees to grant awards during closed periods (since non-executive directors are PDMRs). ESMA have previously confirmed that this is possible, on the basis that they are merely acting as directors and employees, and not as PDMRs (ESMA Q&A 7.10).

CAPs

Any transaction a CAP carries on behalf of a PDMR would be caught by the prohibition as an indirect PDMR transaction. ESMA queries whether CAPs’ own transactions should also be prohibited and is seeking views on whether this extension would be proportionate. Some companies’ dealing codes do restrict CAPs’ transactions during closed periods. The pre-MAR Model Code also required PDMRs to seek to stop their CAPs from dealing during closed periods, so this would re-impose this old rule. There’s no doubt though that extending the prohibition would increase administrative burdens on companies and PDMRs to ensure CAPs are correctly identified at all times and notified of closed periods.

Both issuers and CAPs are already prohibited from insider dealing (and the other market abuse offences). It’s therefore debatable whether the additional preventative measure of an express prohibition is required.

2. Exemptions from the closed period prohibitions

MAR allows dealings during closed periods only in limited cases:

> Exceptional circumstances such as financial difficulty requiring the immediate sale of shares; and
> Due to the characteristics of the trade involved, for transactions relating to employee share or savings schemes, qualification or entitlement of shares, or transactions with no change of beneficial ownership.

ESMA is seeking views on whether the list of exemptions should be expanded. It specifically refers to allowing sale of all financial instruments (not just shares) in the “financial difficulty” exemption. It will certainly be helpful to have some clarity on which dealings relating to share plans may be permitted, since some of the current exemptions can be confusing. General exemptions for all-employee plans and specific exemptions to sell shares to cover tax on vestings would also assist.

3. Timing of closed periods

Under MAR, closed periods start with announcements of interim or year-end reports. ESMA refers to its Q&A 7.2 confirming that preliminary results announcements may trigger closed periods, but only if they include all key information expected to be included in the year-end reports. ESMA also states that because the requirement to make results public is linked to the relevant exchange rules or national law, companies may have different closed periods across the EU. ESMA is asking if the framework to identify closed periods is working well, or whether it needs clarifying.
Disclosing transactions: thresholds

PDMRs and CAPs need to disclose dealings once these exceed an annual individual threshold of €5,000. National regulators may increase this threshold to €20,000. ESMA reports that only five have done so (France, Denmark, Italy and Spain, plus Germany from 2020) and that some PDMRs notify all transactions despite the threshold, to avoid monitoring issues.

EMSA is seeking views on whether the thresholds and the national regulators’ powers are appropriate, and whether there could be alternative criteria for the thresholds. ESMA would also like to know whether, once the threshold is reached, there should be any specific criteria to determine notifications, but give no details. There are similar questions relating to the 20% threshold for a company’s financial instruments in a collective investment undertaking or a portfolio of assets.

An example of specific criteria to determine notifications would be only notifying large transactions. The overall issue for the disclosure thresholds is what system would strike the right balance between administrative ease and alerting the market.