

Regulatory News Alert

ESMA steps up for review of Market Abuse Regulation

4 October 2019

Context and objectives

Earlier this year, the European Commission approached the European Securities and Markets Authority (ESMA) requesting technical advice in regards to a report on the application of the Market Abuse Regulation (MAR). The Commission was required to submit the report on MAR and the threshold levels in relation to managers' transactions in specific circumstances by 3 July 2019.

On 3 October 2019, ESMA launched a **consultation to gather feedback on the MAR review report** which mainly covers:

- The possible inclusion of spot FX contracts within the scope of MAR
- Scope of the benchmark provisions
- The definition and delayed disclosure of inside information in different cases
- The appropriateness of the trading prohibition and insider lists for persons discharging managerial responsibilities (PDMRs)
- Possible cross-market order book surveillance framework
- Cross-border enforcement of sanctions.

Spot FX contracts to be covered

The scope of application of MAR as set out in Article 2 **does not yet include foreign exchange (FX) spot transactions**. Given the size of the spot FX market, the Commission would appreciate ESMA's input on **whether there is a need for that market to be covered by the market abuse regime**.

ESMA has identified a number of **arguments in support** of the inclusion of spot FX contracts under the scope of MAR. Firstly, the national legislative framework of Member States **enable the relevant NCA to act against misconduct** of authorized firms in activities like spot FX activities. There is also **connection between the spot FX market and the markets in financial instruments** and more specifically in FX derivatives.

However, there will be **practical difficulties** that expanding the scope of MAR to the spot FX market may impose. ESMA also considers that some of **the characteristics of MAR would need to be revised and adapted** to make them workable under this new environment.

Topics originally included in Article 38 of MAR

Scope of the benchmark provisions

The definition of **benchmark in MAR** and Benchmark Regulation (**BMR**) **appears to be broadly the same**, apart from the BMR definition including financial contracts and investment fund. However, these two definitions are not fully aligned with reference to AIFs and UCITS not traded on trading venues, credit agreements for consumers, and financial instruments traded via systematic internalizers.

In order to **avoid any market abuse risks** derived from this difference, ESMA highlights **possible changes in MAR** in relation to **benchmarks**, which should be coordinated and coherent with the outcome of the BMR review.

Regarding **sanctions against (attempted) benchmark manipulation and powers of NCAs**, ESMA also suggests **possible amendments that could add the possibility of (temporarily or permanently) banning submitters** from submitting input data to administrators of benchmarks, as well as (temporarily or permanently) banning assessors within an administrator of a commodity benchmark to assess the price of the underlying commodity.

Definition and delayed disclosure of inside information in different cases

ESMA encourages market participants to **identify inside information on commodity derivatives which is not included** in the current definition of Article 7(1)(b) of MAR. ESMA is also consulting market participants on the extent to which this potential harm is appropriate vis-à-vis supporting commercial producers' activities.

ESMA also proposes for the inclusion of a requirement in MAR for **issuers** to have systems and controls for **identifying, handling, and disclosing inside information**.

Appropriateness of the trading prohibition and insider lists for persons discharging managerial responsibilities (PDMRs)

As indicated in ESMA's first annual report on administrative and criminal sanctions and other administrative measures under MAR, Member States could decide not to lay down rules for administrative sanctions where the infringements referred to in the same provision were already subject to criminal sanctions in their national law.

ESMA's preliminary view is that **there is no need to modify MAR in this respect** at this stage.

Possible cross-market order book surveillance framework

ESMA is keen to gather the views of market participants on the possibilities that they could envisage for European cross-market order book surveillance and the pros and cons of those approaches, such as:

- **Harmonization of reporting formats** of order book data
- Impact and cost linked to the **implementation of new common standards** to transmit order book data to NCAs upon request
- **Consequences of using XML templates** or other types of templates
- Impact and cost linked to the **establishment of a regular reporting mechanism** of order book data
- **Cost differences** between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism
- How the impact would change by **limiting the scope of a regular reporting mechanism** of order book data to a subset of financial instruments.

Cross-border enforcement of sanctions

Finally, the Commission requested ESMA to gather information on the cross-border enforcement of financial penalties. Regarding the MAR provisions, ESMA considers that **ensuring cross-border enforcement of the MAR sanctions is extremely relevant** for NCA's capacity to exercise equal, strong, and deterrent sanctioning regimes against financial misconduct.

Therefore, it is **necessary to amend EU law** to ensure that cross-border enforcement of sanctions is carried out smoothly.

Next steps

ESMA will consider the feedback it receives to this consultation before **29 November 2019**. There will be also an open hearing on this Consultation Paper on 5 November.

ESMA, based on the responses received to this consultation, intends to submit a final report to the Commission by **spring 2020 that will serve as a basis for amending the MAD/MAR regulation**.

This consultation is an opportunity to recall that MAR obligations apply to all financial stakeholders credit institutions, and intermediaries, but also funds, fund managers of UCITS and AIFs, and any issuer of listed instruments (be they equity or others), financial or not. Hence, are you already MAR compliant?



How Deloitte can help you

Deloitte's advisory specialists and dedicated services will help you design and implement your business strategy in light of the future evolution of the regulatory framework and market trends. Starting the review of the MAR application is a must-have to prepare for upcoming changes.

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