afep

Review of the Market Abuse Regulation

POSITION PAPER – July 2019

Pursuant to article 38 of the Market Abuse Regulation[1] (MAR), the European Commission shall submit by 3 July 2019 a report to the European Parliament and the Council on the application of this regulation with a legislative proposal to amend it, if appropriate. The report shall assess "*inter alia*":

- the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions;
- whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse;
- the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11)[2];
- the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse; and
- the scope of the application of the benchmark provisions.

The scope of the report is however not limited to the topics mentioned above. In this regard Afep wishes to point out additional issues that could be addressed on the occasion of the review of the regulation.

Afep also welcomes the amendments to MAR which will be introduced by the Commission's legislative proposal promoting the use of SME growth markets (the SME Regulation)[3] regarding the exemption from market sounding requirements for private placements and the possibility for issuers, under conditions, to exclude from their insider lists persons already included in the insider lists drawn by persons acting on behalf or on account of those issuers. However further alleviations could be retained to strike a better balance without lowering investor protection or threatening the orderly functioning and integrity of financial markets.

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC 2003/125/EC and 2004/72/EC.

[2] "*Without prejudice to Articles 14 and 15, a person discharging managerial responsibilities within an issuer shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public according to:*
(a) the rules of the trading venue where the issuer's shares are admitted to trading; or
(b) national law."

[3] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets.

1. Clarify and simplify the disclosure delay rules

MAR has strengthened the rules regarding the delay of the disclosure of inside information. If the conditions to meet in order to delay the disclosure have not changed (immediate disclosure is likely to prejudice the legitimate interests of the issuer; delay of disclosure is not likely to mislead the public ; the issuer is able to ensure the confidentiality of that information), more stringent requirements regarding notification of the delay and justification of the reasons for the delay have shed a new light on interpretation and compliance with these conditions.

In this regard, we would like to highlight the following issues:

- The second condition mentioned above (delay of disclosure is not likely to mislead the public) should be clarified since inside information, by definition, is expected to have a significant influence on the decisions by investors to trade on securities. As a consequence, and in theory, any delay could potentially mislead the public. It is also very difficult for issuers to assess beforehand the potential effect of any piece of inside information on the prices of financial instruments. Issuers have pointed out, in particular, the case were information becomes obsolete. MAR should expressly address the situation where inside information becomes obsolete and does not require any disclosure (e.g.: where a planned M&A transaction whose announcement has been delayed pursuant to article 17 is cancelled).
- Another issue with the new delay rules is the fact that issuers have to react to rumours. ESMA's interpretation of this provision of MAR is that the leak of the rumour does not have to necessarily come from the sphere of the issuer in order to trigger the duty to disclose the inside information: "*Article 17(7) does not mention that the leak of the rumour has to come from the sphere of the issuer in order to trigger the duty to disclose the inside information as soon as possible.*"[4] According to this interpretation, issuers could face the risk that a legitimately delayed information must be disclosed prematurely because of rumours stemming from external sources. The review of MAR should address this problem by clarifying that the leak should be new, sufficiently precise, persistent and have an impact on the price of the financial instruments of the issuer to trigger the obligation to disclose inside information, otherwise a no comment policy is possible.
- Considering the lack of clarity and the subjective nature of the conditions framing the delay of disclosure of inside information, we strongly advocate for the removal of the provision laid down in article 17.4 of MAR requiring any issuer who has delayed the disclosure of inside information to inform the competent authority that disclosure of the information was delayed and to provide a written explanation of how the conditions were met. As mentioned above, assessing in particular whether the delay will or will not be misleading is a critical issue. This could result in issuers, in order to protect themselves against any liability, either to overwhelm the competent authorities with notifications or refrain from notifying. In this regard, the SME regulation amends MAR by introducing an exemption for issuers whose financial instruments are only admitted to trading on an SME growth market : these issuers shall provide a written explanation to the competent authority only upon request and, as long as, they are able to justify their decision to delay, it shall not be required to keep a record of that explanation. This exemption should apply to all issuers listed on regulated markets and MTFs.

[4] Final Report on Draft technical standards on the Market Abuse Regulation (ESMA 2015/1455, § 243).

2. Alleviate insider lists

The management of insider lists is burdensome and time consuming considering the amount of information to be collected and the processes which must be put in place by issuers, without clear evidence of the usefulness or effectiveness of these lists. In particular, some information required by Implementing Regulation (EU) 2016/347, such as the time when the inside information was identified and when the persons obtained access to inside information as well as personal details of the concerned persons, raise issues both in practical and legal terms (privacy).

In this regard, Afep recommends to revert to the requirements applicable under the MAD where only a limited number of information was required on the list (first and family name of the persons, reason for being on the list and dates at which the persons are included or removed from the list) and additional information could be requested in the case of investigations by Competent Authorities and collected by issuers. In the course of any investigation, one of the most important steps for Competent Authorities is to rapidly identify the persons holding inside information. Authorities have then the powers, in accordance with article 23 of MAR, to require any additional information relevant to the investigation.

The content of insider lists should therefore be reduced to information essential to identify the persons holding inside information:

- First name,
- Family name,
- Date of birth,
- Professional details (address, phone number and position).

3. Streamline notification requirements regarding managers’ transactions

3.1. Narrow down the scope of transactions

The notification of managers’ transactions under MAR have become over burdensome, in particular due to the extension of the scope of notification to transactions that were previously excluded under MAD and must now be notified.

Managers’ and closely associated persons’ transactions notifications should only be regarded as a preventive measure and not as a means of informing the public and investors. The paradox would be that investors would pay more attention to transactions notifications than to other regulated information disclosed by public companies (e.g. financial reports published under the Transparency Directive). The increase in the volume of notifications is thus counterproductive and diminishes the efficiency of this preventive measure. Therefore, transactions which do not provide any signal to the markets should not be notified (e.g. donations, inheritances).

It should also be clarified that no notification is required for shares granted for free and stock-options at the time of their allocation: the moment shares are granted for free to persons discharging managerial responsibilities (PDMRs) should not be notified since there is no decision by the PDMR and hence no signalling value for the markets. Notification should only happen when the shares are vested and when they are sold. Likewise, no notification should be required when stock-options are granted. Only the exercise of the option and the disposal of the underlying securities should be notified. A different interpretation would imply a duplication of notifications and unjustified additional burden for the issuer (see table below).

Events triggering the notification of performance shares and stock-options

	Award	Vesting	Exercise	Delivery	Disposal
Performance shares	No	Yes		No	Yes
Stock-options	No	No	Yes	No	Yes

Finally, full harmonisation of the content of the notifications would be welcome. As a matter of fact, and although Implementing Regulation (EU) 20165/523[5] provides for a template, some Member States require additional information or a different format**.**

3.2. Exempt companies from drawing up and keeping lists of persons closely associated

Article 19 of MAR requires companies to gather very sensitive information from PDMRs relating to their personal life and to maintain this information up-to-date. This requirement is burdensome considering the number of PDMRs and closely associated persons concerned.

To remedy this situation, we suggest reverting to the pre-MAR situation, where PMDRs would no longer be required to intermediate in transferring the information on the trades made by closely related persons to the issuer. This way, issuers would not be obliged to keep the lists of PMDRs' closely related persons. An alternative solution would be to require issuers to draw such a list only where requested by a Competent Authority in the course of an investigation.

4. Clarify the application of MAR in the context of employee share or saving schemes

Article 19.12 of MAR states that: "*Without prejudice to Articles 14 and 15, an issuer may allow a person discharging managerial responsibilities within it to trade on its own account or for the account of a third party during a closed period as referred to in paragraph 11 either:*

- *(a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or*
- *(b) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change".*

[5] Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council.

Article 9 of Delegated Regulation (EU) 2016/522[6] specifies the transactions which can be authorised by the issuer during closed periods. However, this article lacks of clarity and issuers question whether transactions such as subscriptions to a capital increase reserved for employees or allocations of amounts paid under profit-sharing or incentive schemes to employee savings plans are included in the scope of Article 9. Part of the issue also comes from the fact that the French Competent Authority, the AMF, published guidance recommending to apply article 19.11 of MAR and the closed period rules to all persons who have access to inside information occasionally or regularly.

In our view, even if PDMRs hold inside information, they should be able to subscribe or take allocation decisions since:

- The transactions mentioned above are addressed, under the provisions of Labor law, to all employees of the issuer;
- These transactions are planned well in advance and PDMRs and employees have no control over the choice of the subscription period;
- The shares subscribed are blocked for several years (generally 5 years except in the event of release), which neutralises the effects of the holding of inside information;
- In certain cases, the shares may be released by regular payments or regular deductions from wages, which precludes their sale during this period;
- There is a time gap between the date of subscription and the date of allocation of the shares in the savings plans, so that their allocation may occur at a time when the information has been made public.

Article 9 of delegated Regulation (EU) 2016/522 should be amended to expressly cover these transactions. ESMA should furthermore ensure consistent implementation of MAR by Competent Authorities to avoid requirements going beyond the provisions laid down in the regulation.

5. Simplify share buyback and accepted market practices reporting requirements

Article 5 of MAR provides for an exemption to the prohibitions of articles 14 and 15 for transactions carried out under a buy-back programme or for the stabilisation of securities.

As regards buy-back programmes, to benefit from the exemption issuers shall report each transaction relating to the programme to the competent authority of the trading venue on which the shares have been admitted to trading "*or*" are traded. MAR thus only refers to one competent authority which is the competent authority of the regulated market where the shares have been admitted to trading or, when there has been no admission to trading on a regulated market, the competent authority of the MTF where the shares are traded.

However, in its final report on draft technical standards on the MAR[7], ESMA adopted a very wide interpretation of the reporting requirement: ESMA "*has further considered the approach with respect*

[6] Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014.
[7] 28 September 2015|ESMA/2015/1455.

to the competent authority or authorities to which to report the buyback transactions, as compared to the [consultation paper]*, and now it is proposing in the final draft RTS that all the transactions relating to the buy-back programme are notified to all the competent authorities of all the trading venues on which the shares are admitted to trading or are traded*." This interpretation is materialised in article 2 of Delegated Regulation (EU) 2016/1052[8] which requires the issuer to report to the competent authority of each trading venue on which the shares are admitted to trading or are traded.

We consider that this interpretation goes beyond the requirement of level 1 and imposes unjustified burden on issuers implementing a buy-back programme. Details of share buy-back programmes are made public by the issuers as well as details of each transaction and any interesed party can have access to the information. Therefore we consider that the above mentioned Delegated Regulation should be amended to require, when the shares have been admitted to trading on a regulated market, notification of the transactions only to the competent authority of that regulated market.

As regards accepted market practices (AMP), Delegated Regulation (EU) 2016/908[9] determines the conditions that a market practice must meet in order to be established by a Competent Authority as an AMP. In particular article 3 of the Delegated Regulation requires, in terms of transparency and reporting, once the market practice is performed as an AMP that, on a periodic basis, the details of the trading activity relating to the performance of the AMP be disclosed to the public (number of transactions executed, volume traded, average size of the transactions and average spreads quoted, prices of executed transactions).

In France, Liquidity contracts have been accepted by the Competent Authority, the AMF, as an AMP. Although the Delegated Regulation does not refer to a specific reporting period, the French Authority has considered that the details to be disclosed to the public could not be aggregated over the reporting period. This results in disclosing substantial volume of information on the details of the transactions, for each trading day where the AMP was performed. We agree that the details of all the transactions should be notified to the Competent Authority to allow proper supervision, but making public these details does not bring significant added value to market participants. Therefore, we recommend that article 3 of the Delegated Regulation be amended to expressly allow aggregation over the reporting period of the information to be made public and require only notification of all the transactions to the Competent Authority.

6. Market soundings

As mentioned above, we welcome the exemption from market sounding requirements for private placements introduced by the SME Regulation.

[8] Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures.

[9] Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance.

However, additional improvements to article 11 of MAR could be introduced. Currently, article 11 sets forth *inter alia* that "*Without prejudice to Article 23(3), disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company to parties entitled to the securities, shall also constitute a market sounding, provided that:*

(a) the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities; and

(b) *the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger*."

These two tests do not appear very clear. As a consequence, we recommend to either modify them or to provide a more general caveat for market sounding in this context and clarify that the market sounding rules do not include communication of information made to a limited number of persons in view of gauging their interest in and preparing a take-over bid or a merger, provided confidentiality of the information is maintained.

7. Establish more proportionate sanctions

Afep considers that it is not appropriate to determine the sanctions on the basis of a percentage of a company's total turnover, as is the case in competition matters.

Regarding in particular the sanctions applicable to legal persons for infringements to article 14 (insider trading) and 15 (market manipulation) of MAR, sanctions should be determined on the basis of the profits realised or loss avoided.

As regards the sanctions for infringements to article 17 (disclosure of inside information), determining the sanctions on the basis of a percentage of a company's total turnover appears disproportionate, considering the complexity of the regime imposed by MAR regarding the delay of disclosure to the public of inside information. In such cases, MAR should set a minimum and maximum amount and allow Competent Authorities to determine the sanction based on the effects or consequences of not timely disclosing inside information – and provided that there is no other breach of regulations.

Finally, as regards infringements to article 18 (insider list) and 19 (managers' transactions notifications), we consider that the EUR 1 million floor is also disproportionate and should be lowered – provided also that there is no other breach.

About Afep

Since 1982, Afep brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority. Afep has around 115 members. More than 8 million people are employed by Afep companies and their annual combined turnover amounts to €2,600 billion.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

Contacts
Odile de Brosses – o.debrosses@afep.com
Le Quang Tran Van – lq.tranvan@afep.com

Association française des entreprises privées
French Association of Large Companies

www.afep.com
Transparency Register identification number: 953933297-85