French Association of Large Companies

Revision of the Market Abuse Regulation (MAR)

POSITION PAPER

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Key messages

AFEP welcomes the efforts to simplify and clarify some provisions of MAR.
Generally speaking, AFEP supports the changes put forward by the European Commission regarding in particular share buy-back programmes, the market sounding regime, the disclosure requirements regarding protracted processes, the conditions for delaying disclosure of inside information and the increase of the exemption threshold of managers' transactions.

AFEP considers however that **the timing of the notification to the Competent Authority of a delay of publication of inside information should not be changed**. In addition, **AFEP does not support the introduction of the requirement to establish a list of permanent insiders**. Regarding the timing of notification, the change proposed by the Commission would **add complexity and generate additional burden** for both regulators and issuers. From the issuer's perspective, the amendment would also offer the possibility for regulators to question the decision to delay the disclosure of inside information. Therefore, AFEP advocates for the status quo: notification to the Competent Authority that the information was delayed immediately after the information is disclosed to the public. As regards permanent insiders' lists, large companies have adapted their processes and organization in order to draw up a list of all persons having access to inside information. Therefore, they **do not see the need to change their processes** for a requirement to draw up a list of permanent insiders which **would furthermore be prejudicial for said permanent insiders**, as they would be prohibited from carrying out any transactions on a continuous basis.

Finally, in order to ensure that MAR is fit for purpose, AFEP considers that **additional changes should be made to reduce the number of items to be included in insider lists** and to **repeal the requirement to establish and update lists of persons closely associated** with persons discharging managerial responsibilities.

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AFEP's comments on the proposal for a regulation amending MAR

A. Amendments supported by AFEP

AFEP welcomes the revision of MAR and the effort to simplify and clarify some provisions. In particular, **AFEP supports the following amendments** put forward by the Commission that would simplify the management of inside information and insider lists, the implementation of buy-back programmes and market soundings and hence reduce disproportionate burden without lowering investor protection or impairing the proper functioning of financial markets:

1. The exemption for buy-back programmes (Article 5)

AFEP members **welcome the simplification of disclosure requirements regarding buy-back programmes and the clarification as regards to which Competent Authority the transactions should be reported to**. They consider however that to really simplify the exemption for buy-backs, **further clarifications should be introduced in Commission Delegated Regulation (EU) 2016/1052**[1]:

- To **clarify the information that could be made public in an aggregated form**.
- To amend Recital 2 of **Delegated Regulation (EU) 2016/1052**[2] **(the Delegated Regulation)** to clarify that **although transactions in financial derivatives cannot benefit from the exemption granted by MAR, they are not prohibited**. Buy-back programmes can involve transactions on derivatives instruments. Such an amendment would mirror recital 12 of MAR which states that "Trading in own shares in buy-back programmes and stabilising a financial instrument which would not benefit from the exemptions under this Regulation should not of itself be deemed to constitute market abuse."
- To **amend the drafting of Article 4.4 of the Delegated Regulation** which is more restrictive than the drafting of Article 6.2 of Commission Regulation (EC) No 2273/2003[3]. In Article 4.4 of the Delegated Regulation, the reference to "persons responsible for the trading of own shares on behalf of clients" does **not address all the situations in which investment firms or credit institutions may have to deal on their own shares when providing services to their clients**. Indeed, beside the situation where they may trade on their own shares on behalf of their clients, the situations where the credit institution or the investment firm would act as a counterparty of their clients when trading in own shares should also be mentioned. This paragraph could be amended as follows:

  " 4.Points (b) and (c) of paragraph 1 shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective

[1] 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

[2] 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

[3] Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments

internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information by persons having access to inside information concerning directly or indirectly the issuer, including acquisition decisions under the buy-back programme, to persons responsible for the trading of own shares ~~on behalf of~~ **in the context of transactions with** clients, when trading in own shares ~~on behalf of~~ **in the context of transactions with** those clients."

2. The market soundings regime (Article 11)

AFEP **welcomes the Commission's proposed amendments the market soundings regime.** Further changes are however necessary. The current **scope of market soundings is too wide** and policy makers should return to the original definition as illustrated in recital (33) of MAR[4]:

1. By explicitly **excluding private placements of debt securities**.
2. By **restricting the market sounding regime to entities providing investment services as defined by MiFID 2**[5]. Entities providing only ancillary services as defined by MiFID 2 should not be included in the scope.

Furthermore, the 2 tests mentioned in Article 11(2) of MAR do not appear very clear. We recommend modifying this paragraph or to provide a more general *caveat* for market soundings in this context (take-over bid and merger) 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 preparing a take-over bid or a merger**, provided confidentiality of the information is maintained. At the very least, the potential discussions between a bidder and the owners of blocks of shares in a listed company which may lead to block sales to be completed prior to the launching of a tender offer should not fall within the definition of market soundings.

3. The reduction of the scope of the disclosure obligation for protracted processes (Article 17 §1)

AFEP **welcomes that the disclosure requirement does not apply to intermediate steps of a protracted process.** This clarifies that issuers have to disclose only the information relating to the event that is intended to complete a protracted process and simplify the disclosure obligation. AFEP support also the provision according to which issuers shall ensure the confidentiality of inside information (subject to the prohibition of insider dealing) and to immediately disclose such inside information to the public in the case of a leakage.

[4] « Examples of market soundings include situations in which the sell-side firm has been in discussions with an issuer about a potential transaction, and it has decided to gauge potential investor interest in order to determine the terms that will make up a transaction; where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; or where the sell-side is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors. »

[5] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

4. The replacement of the general condition that the delay is not likely to mislead the public by a list of specific conditions (Article 17 §4 b)

AFEP welcomes the proposal to replace the general condition that the delay is not misleading by a list of specific conditions. However, the third condition of the list which requires that the inside information the issuer intends to delay **"is not in contrast with the market's expectations" is not clear enough**. We therefore suggest amending the wording to require that the inside information "**is not materially different** from market's expectations", which is already used in point i). Furthermore, AFEP considers that **guidelines published by ESMA regarding the delay of inside information are useful to markets participants** and should remain in force. AFEP members would also welcome additional guidelines from ESMA as regards the "reliability" of rumours.

5. The increase from EUR 5.000 to EUR 20.000 and from 20.000 to 50.000 of the exemption thresholds for managers' transactions (Article 19)

AFEP members welcome the proposal to increase both thresholds but they consider that **it should be clarified that no notification is required for shares granted for free**. The moment in which shares are granted for free to persons discharging managerial responsibilities (PDMRs) - meaning the moment in which shares are credited in the account of said PDMRs - should not be notified since there is no discretion by the PDMR and no signaling value for the market. Notification should take place only while when the shares are sold. It should also be clarified that **gifts, inheritances and donations are excluded form the notification requirement** as these transactions are completely passive from the PDMR's point of view.

B. Necessary additional amendments

To ensure that MAR is fit for purpose, AFEP considers that the following amendments are also necessary:

6. Reduce the number of items to be included in insider lists

In order to provide alleviations to companies listed on regulated markets, AFEP considers that **the number of items to be included it insider lists,** as required by implementing regulation (EU) 2016/347[6], **should be reduced**. Pieces of information such as in particular the **date and time at which a person obtained access to inside information, the date and time at which a person ceased to have access to inside information, the home and personal mobile telephone numbers and personal full home address could be deleted** without impairing the powers of Competent Authorities.

[6] Commission implementing regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council

7. The requirement to establish a list of closely associated persons should be repealed (Article 19 §5)

AFEP considers that **the requirement of keeping a list of persons closely associated with persons discharging managerial responsibilities should be repealed**. 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, it would be better to require issuers to draw such a list only where requested by a Competent Authority in the course of an investigation.

C. Amendments not supported by AFEP

Finally, AFEP does not support the following amendments envisaged by the Commission:

8. The change of the timing of notification to the NCA of the delay of disclosure of inside information (Article 17 §4)

According to paragraph 4 where an issuer intends to delay the disclosure of inside information, it shall inform the competent authority of its intention to delay the disclosure of inside information and shall provide a written explanation of how the conditions set out in this paragraph were met, immediately after the decision to delay is taken. **The notification has to take place immediately after the decision to delay disclosure is taken** by the issuer instead of immediately after the information is disclosed to the public as currently required.

This change is problematic as it will not reduce the administrative burden for issuers who will still have to document their decisions and will increase the workload both for issuers and regulators who will have to set up a permanent dialogue. In particular, changing the timing of the notification will require regulators to put in place procedures in order to ensure that confidentiality of information is guaranteed. Preserving the confidentiality of inside information is a major concern for issuers. From the issuer's perspective, the amendment will offer the possibility for regulators to question the decision to delay the disclosure of inside information. In addition, it will add complexity as regulators will likely want to monitor the process until the disclosure of the information (eg: if an issuer decides to give up an M&A transaction, regulators will certainly expect also a notification at the time where the project is abandoned). Finally, in order to avoid such notification we fear the risk that issuers would qualify as late as possible an information as inside information which would be counterproductive. Therefore, **AFEP advocates for the status quo**: notification to the Competent Authority that the information was delayed immediately after the information is disclosed to the public.

9. The requirement to establish a list of permanent insiders (Article 18)

Issuers and especially large companies have adapted their processes and organization in order to draw up a list of all persons having access to inside information. Therefore, they **do not see the need to change their processes for a requirement to draw up a list of permanent insiders**

which would furthermore be prejudicial for said permanent insiders as they will be prohibited from carrying out any transactions on a continuous basis. Issuers advocate for **maintaining the current wording of Article 18** and to introduce the possibility to establish a list of permanent insiders as an option for Member states that would apply only to companies whose securities are traded on SME Growth markets.

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