MAR review

On 24 September, ESMA published its final MAR Review report that covers *inter alia* several aspects ICMA has been engaging on. The final report follows ESMA's prior consultation, to which ICMA submitted a response in November 2019 (reported at pages 36-37 of the First Quarter 2020 edition of this Quarterly Report).

Regarding the concept of inside information, ESMA concluded in its report that the definition is sufficient and should remain basically unchanged. ESMA however proposed widening the definition in relation to MAR Article 7.1(d), so that inside information under that heading is constituted not just in relation to persons charged with order execution. ESMA also noted it stands ready to issue guidance on the definition of inside information (on specific scenarios, as a first step, that could enhance clarity on concrete and recurring issues and so may assist issuers). Distinctly, ESMA concluded no amendments are necessary to MAR in relation to delaying the disclosure of inside information (noting again in this respect ESMA's willingness to provide guidance on the definition of inside information).

Regarding pre-hedging (which can occur in the context of new bond issuance), ESMA noted it was not possible to conclude generally on its legitimacy, but again proposed to accede to requests for guidance. In this respect, ESMA noted three points that it would like to further develop in more comprehensive guidance:

(a) that pre-hedging should constitute a risk-management tool, to contain the exposure deriving from possible orders for which an RFQ has been submitted and should be designed to benefit the client in connection with the relevant orders and any resulting transactions;

(b) the context of RFQs concerning illiquid instruments;

(c) that compliance considerations arise under both MAR and MiFID II/R (with ESMA intending to further consider the broader context of order optimisation in market makers' and brokers' strategy, of market rules and of market impact).

Regarding (c), ESMA already identified some factors to consider when assessing if specific pre-hedging poses market abuse / conduct risks – namely whether (i) (on a case by case basis) clients clearly request, or are made aware of and consent to, pre-hedging, (ii) any pre-hedging benefit is passed to the client, (iii) reasonable steps are taken to minimize pre-hedging impact on the market and (iv) the client is informed how the pre-hedging has impacted execution of their transaction. Fulfilling all four factors would be a significant shift from current market functioning (but ESMA might merely be flagging them ahead of further guidance).

Regarding pre-sounding, ESMA acknowledged different readings of the regime's current enforceability (ICMA's response had raised this) and consequently proposed MAR be amended to clarify that MAR's Article 11 requirements are indeed obligatory (and not just a safe harbour), including provision for mandatory (rather than voluntary) national sanctioning powers. ESMA also proposed to amend the definition of pre-sounding to clarify that the regime applies not only where a transaction announcement follows the interactions concerned. It otherwise decided specific cases not be excluded from the regime's scope, noting negotiation/offering is already outside of definition following the recent SME listing package. (Many considered this was the case even before that.) In terms of simplifying the regime's procedural provisions, ESMA proposed:

(a) where no inside information is communicated, (i) that no prior consent be required from the market sounding recipient (MSR) to receive inside information, (ii) that no related prohibition/ confidentiality warnings need be given and (iii) that no further notice be required regarding information assessed as no longer being inside information – however these provisions might have already seemed to be intrinsically inapplicable;

(b) where inside information is communicated, (i) that no further notice be required regarding information assessed as no longer being inside information where the transaction is publicly announced, (ii) that where recording facilities are not available, written minutes agreed and exchanged via email or other electronic means suffice without a more formal exchange of signatures and (iii) that follow-up discussions can be covered by the initial pre-sounding warnings;

(c) in both cases, an ESMA power to amend its *Guidelines on Persons Receiving Market Soundings* to add recommendations specific to different MSRs (being "natural and legal persons, regulated and non-regulated entities, SMEs and large cap issuers").

Regarding insider lists, ESMA *inter alia* proposed (i) to maintain detailed information requirements (phone numbers, addresses etc), seeing such lists as serving a forensic investigation purpose (and not just as an evidentiary purpose), (ii) that insider lists' covering of effective/actual access to inside information could be managed by providing this be "to the best of [the list compiler's] knowledge", (iii) that service providers

technically not acting on an issuer's behalf/account also need to keep their own lists and (iv) that issuers do not have to centralise the insider lists of persons acting on the issuer's behalf/account.

Regarding closed periods, ESMA proposed they not be extended, from persons discharging managerial responsibilities (PDMRs), to issuers (having concluded that on balance the benefits of extension did not justify the risks).

ESMA acknowledged certain other points, not specifically consulted on, that were raised (noting it will assess their merit), including (i) the scope of the buy-back safe harbour, (ii) implications of MAR's scope extension to MTFs, (iii) the risk of additional costs to market participants and (iv) the need to consult on any proposals not covered in ESMA's prior consultation. These points were raised in ICMA's response, but ESMA did not seem to acknowledge other points raised in ICMA's response regarding (i) bull market conditions arguably masking the full impact of the implementation of MAR, (ii) there having been no ESMA feedback on ICMA's 2014 proposed improvements to the stabilisation safe harbour or (iii) the potential value in ESMA's Market Integrity Standing Committee having its own consultative working group. ESMA also noted it may consider whether non-disclosure of inside information should be characterised as market manipulation.

It will be for the European Commission to consider ESMA's proposals in terms of legislating any changes to MAR under the review. ICMA is considering the implications of ESMA's final report with its members (including in terms of the practicability or otherwise of ESMA's proposals such as those on pre-hedging and pre-sounding). ESMA's conclusions at least on the enforceability of the pre-sounding regime are likely to be disappointing, to the extent they add additional administrative burdens and further disincentivise pre-sounding even where it is clear no inside information is involved – rather than "encourage" it, in line with ESMA's view of the regime's purpose. ICMA will generally continue to engage on the next steps of the review as they unfold.

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