



Issues of Legal Uncertainty Arising in the Context of the Market Abuse Regulation

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¹ Owing to the role of the FCA in considering the implementation of the Market Abuse Regulation, Sean Martin did not take any part in the preparation and drafting of this paper and it should not be taken to represent the views of the FCA.

² Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

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1. INTRODUCTION

- 1.1. The role of the Financial Markets Law Committee (the “**FMLC**”) is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.
- 1.2. On 3 July 2016, the majority of the provisions of Regulation (EU) No 596/2014 on market abuse (“**MAR**” or the “**Market Abuse Regulation**”) came into effect. These replaced and repealed Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (“**MAD**” or the “**Market Abuse Directive**”). By introducing the new regulation, the legislative institutions of the E.U. hoped to address lacunae identified under MAD and to broaden the reach of the market abuse regime. This broadening impetus was concerned chiefly with the instruments within scope. These will now include not only those traded on regulated markets but also those traded on multilateral trading facilities (“**MTFs**”) and organised trading facilities (“**OTFs**”).³ They will also include, as discussed below, any financial instrument the price or value of which depends or has an effect upon the price or value of a financial instrument admitted to trading in the E.U.
- 1.3. Stakeholders have brought a number of practical and legal issues raised by the Market Abuse Regulation to the FMLC’s attention. In response, this paper addresses legal uncertainties identified and analysed by the Committee, with the ultimate aim of achieving legal clarity.

2. EXECUTIVE SUMMARY

- 2.1. The paragraphs below explore uncertainty as to the financial instruments that fall within scope of MAR (Section 3). The paper then considers the new E.U.-wide market soundings regime introduced by Article 11 MAR (the “**Market Soundings Regime**”), and, in particular, analyses the terms “transaction” and

³ The terms “regulated market”, “multilateral trading facility” and “organised trading facility” are defined by Article 4 of Directive 2014/65/EU on markets in financial instruments (“**MiFID II**”). It is worth noting that under Article 4 of MAR, ESMA is obliged to publish and keep updated a list of all financial instruments admitted to trading or for which a request for admission to trading has been made. The requirement for ESMA to publish the Article 4 list has been postponed until MiFID II goes live in January 2018. Importantly, however, abuse can take place in relation to instruments admitted to trading which have not yet made it onto the list (Recital 9).

“announcement” within the definition of market sounding (Section 4). These sections are followed by an impact analysis (Section 5), before the FMLC outlines its proposed solutions (Section 6). By way of closing, the FMLC’s conclusions are briefly restated (Section 7).

3. UNCERTAINTY AS TO SCOPE OF MAR

3.1. MAR has extended the reach of the market abuse regime, a direction of travel forecast in Recital 35 of MAD which noted that “establishing a level playing field in Community financial markets requires wide geographical application”. This principle is enshrined in Article 2(4) of MAR, which stipulates that the prohibitions and requirements of MAR apply to any act or omission, whether in the E.U. or in a third country, provided that such acts or omissions concern instruments which are themselves within the scope of MAR.

3.2. Article 2 operates to limit the scope of MAR to certain financial instruments (“**In Scope Financial Instruments**”). Article 2(1)(d) stipulates that MAR applies to

“financial instruments..., the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in [points (a), (b) or (c) of Article 2(1)]”

where the financial instruments referred to are those:

- (a) admitted to trading on a regulated market (or for which a request for admission to trading has been made);
- (b) traded on an MTF or admitted to trading on an MTF (or for which a request for admission to trading has been made); or
- (c) traded on an OTF.⁴

3.3. The addition of paragraph (d) in Article 2(1) means that market abuse can be committed in respect of instruments which are not themselves admitted to trading in the E.U. but whose price or value depends on or has an effect on the

⁴ This latter criterion, regarding financial instruments that are traded on an OTF, will only come into force in January 2018, when MiFID II comes into force.

price or value of E.U.-traded securities. For instance, where new securities (“**New Securities**”) are admitted to trading on or listed on a non-E.U. trading venue by an issuer with other existing listed/traded equity or debt (“**Issued Securities**”) on an E.U. trading venue, that issuer will need to consider whether the price or value of the New Securities “depends on *or has an effect on* the price or value of” (emphasis added) the Issued Securities.

- 3.4. There is limited guidance and considerable uncertainty over the meaning of the words “or has an effect on” in this context. While it is clear that this test, unlike the definitional test for inside information,⁵ does not impose a requirement for there to be a “significant” effect on price or value, different interpretations are possible. The drafting suggests that this connection between New Securities and Issued Securities will be interpreted exclusively as a causal connection. Some, however, have suggested that a wider interpretation should be adopted: for example, where the prices of both instruments are assessed by reference to the same underlying factors, such as the creditworthiness of the issuer.
- 3.5. If a causal connection is the correct interpretation to apply, it becomes clear that two considerations are relevant. First, whether the fact of the issue of New Securities has any effect on the price or value of the Issued Securities. Second, if there is such a price or value effect, whether it is the *price or value* of the New Securities that has an effect on the price or value of the Issued Securities; i.e. is there a *causal connection* between the price at which the New Securities are to be offered and the price at which the Issued Securities are trading, or whether it was the mere fact of the New Securities (i.e. the fact of the transaction rather than the price at which the New Securities are issued) that will have an effect on the price or value of the Issued Securities.
- 3.6. The nature of the relationship required when interpreting the phrase “or has an effect on” in this context is a matter of significant legal uncertainty, which could potentially have a wide range of effects. Below, the FMLC considers the impact of this uncertainty at Section 5, using the context of the Market Soundings Regime as an example, and proposes potential solutions to resolve this uncertainty at Section 6.

⁵ MAR, Article 7(1)(a) and (4).

4. UNCERTAINTIES AFFECTING MARKET SOUNDINGS

Introduction: what is a market sounding?

4.1. The FMLC has identified two areas of legal uncertainty that arise in the context of the Market Soundings Regime: (i) uncertainty as to the meaning of the term “transaction” within the definition of market sounding—including related uncertainty about the types of financial instruments concerned, which is to be inferred from the analysis set out in Section 3, above; and (ii) uncertainty as to the meaning of the term “announcement” within the definition of market sounding.

4.2. Article 11(1) of MAR defines a market sounding as follows:

[a] market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors by: (a) an issuer; (b) a secondary offeror of a financial instrument in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors; (c) an emission allowance market participant; or (d) a third party acting on behalf or on the account of a person referred to in point (a), (b) or (c).⁶

It should be noted that the definition refers to any communication of information and not more narrowly to the communication of inside information or to communications partly comprising inside information.

4.3. Notwithstanding the generality of the definition, the purpose of Article 11 is to implement a safe-harbour for market soundings in respect of the prohibition, in Article 14(c) of MAR, on the unlawful disclosure of inside information.⁷ Recital 32 observes that market soundings

are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run

⁶ MAR, Article 11(1).

⁷ The unlawful disclosure of inside information is itself the subject of a definition in Article 10(1) of MAR.

smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile. Thus the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse.

- 4.4. Pursuant to the objective of creating a regulatory safe-harbour, Article 11(4) provides that inside information disclosed by a DMP in the course of a compliant market sounding is deemed to be communicated “in the normal exercise of a person’s employment, profession or duties” for the purposes of Article 10(1) of MAR, thereby not infringing the prohibition against improper disclosure of inside information set out in Article 14(c).⁸
- 4.5. Several of the remaining provisions of Article 11 impose obligations on a person falling into any of the categories mentioned in Article 11(1) (i.e. a disclosing market participant, or “**DMP**”), who must:⁹
- a) specifically consider, prior to conducting a market sounding, whether the communication in question will involve the disclosure of inside information, record the conclusion reached and the reasons for the conclusion;¹⁰
 - b) where inside information has been disclosed during a market sounding, inform recipients when it considers the information has ceased to be inside information;¹¹ and
 - c) keep records for at least five years.¹²

⁸ MAR, Article 11(4) and Recital (35).

⁹ For a full definition of “disclosing market participant” see Article 3(1)(32).

¹⁰ MAR, Article 11(3).

¹¹ MAR, Article 11(6).

¹² MAR, Article 11(8).

- 4.6. Regulatory Technical Standards (“**RTS**”) and Implementing Technical Standards (“**ITS**”) have been formulated by the European Securities Markets Authority (“**ESMA**”) pursuant to Articles 11(9) and 11(10) MAR to ensure a consistent approach to the arrangements and procedures firms must follow to comply with these regulatory requirements. Last year, ESMA’s published standards were implemented in legislative acts to coincide with the coming into force of MAR. The relevant measures are Commission Delegated Regulation (EU) 2016/960 (the “**CDR**”) and Commission Implementing Regulation (EU) 2016/959 (the “**CIR**”).

Uncertainty as to the meaning of “transaction”

- 4.7. A market sounding is a communication to gauge the interest of potential investors “in a possible transaction”.¹³
- 4.8. The term “transaction” is not defined in Article 11. There are, however, a number of pertinent references in the recitals which suggest that the Market Soundings Regime applies paradigmatically where the DMP contemplates a primary or secondary offering on a regulated market, MTF or OTF—a situation which is “distinct from ordinary trading”.¹⁴ This approach may possibly suggest that the “transaction” in question must be a transaction in instruments traded or admitted to trading in the E.U. on the markets set out in Article 2(1)(a) to (c). If so, transactions in financial instruments referred to only in Article 2(1)(d)—i.e. financial instruments “the price or value of which depends on or has an effect on the price or value of a financial instrument” traded on, or admitted to trading on, a regulated market, MTF or OTF—are not contemplated by Article 11(1) and the communication of information prior to such transactions would not fall within the Market Soundings Regime. The FMLC notes that this interpretation, while it can be supported in the manner just described, is narrower than another, competing interpretation which has found justification in the text of MAR.

¹³ MAR, Article 11(1), *supra* paragraph 4.2.

¹⁴ Recital 32 of MAR observes that market soundings “could involve an initial or secondary offer of relevant securities”. Meanwhile, Recital 33 provides a number of examples of situations involving market soundings, including discussions which take place in the context of debt issuances and additional equity offerings. Block trades are also mentioned. Recital 34 then observes that “it is possible that inside information may be disclosed... in the course of a market sounding *after a financial instrument has been admitted to trading on a regulated market or has been traded on an MTF or an OTF*” (emphasis added)—presumably in contrast to the more common scenario in which market soundings are conducted *before* a financial instrument has been admitted to trading on a regulated market or has been traded on an MTF or an OTF.

4.9. This competing interpretation derives from the text of Article 2(3) of MAR, where the word “transaction” also appears. Article 2(3) restricts the scope of the regulation to “any transaction, order or behaviour concerning any financial instrument” falling within Article 2(1).¹⁵ The phrasing has suggested to several commentators that “transaction” should be interpreted as a transaction in one or more In Scope Financial Instrument(s), *including* those falling within Article 2(1)(d). If so, the uncertainty noted in Section 3 above—as to the meaning of the phrase “which depends on or has an effect on...” in Article 2(1)(d)—is also uncertainty as to the field of application of the Market Soundings Regime.

4.10. On the other hand, the FMLC is aware that the U.K. Financial Conduct Authority (“FCA”) has indicated in a consultation paper that, subject to any view taken by ESMA, the FCA considers that those transactions falling within Article 11 comprise:

all transactions of an issuer which has existing financial instruments admitted to trading on a trading venue, or where a request for admission on to a trading venue has been made (emphasis added),

provided that the other elements of the market sounding definition are fulfilled.¹⁶ This is arguably inconsistent with Article 2(3).

4.11. A lack of clarity as to whether the transactions contemplated by Article 11 are only transactions in securities traded (or admitted to trading) on a regulated market, MTF or OTF; or whether they may include any transactions in In Scope Financial Instruments, including in the securities to which Article 2(1)(d) refers; or, indeed, whether they include all the transactions of an issuer puts DMPs in a position of uncertainty as regards the scope of the Market Soundings Regime. Below, the FMLC considers the impact of this uncertainty at Section 5. At Section 6 the FMLC proposes a potential solution to resolve this uncertainty, while noting that ESMA reportedly intends to address this issue in the context of its well-established question and answer (“Q&A”) process.

¹⁵ Article 2(3) also refers to transactions etc. concerning financial instruments referred to in paragraph 2(2) but Article 11 does not apply to these instruments.

¹⁶ FCA, “Reforming the availability of information in the U.K. equity IPO process” (March 2017, CP 17/5), at para.4.22, available at: <https://www.fca.org.uk/publication/consultation/cp17-05.pdf>.

Uncertainty as to the meaning of “announcement”

- 4.12. According to the definition of a market sounding at Article 11(1), set out at paragraph 4.2 above, the Market Soundings Regime only applies in relation to communications which take place “prior to the announcement of a transaction”. Like the term “transaction”, “announcement” is undefined in MAR, giving rise to uncertainty.
- 4.13. A purposive reading of Article 11 suggests that the transaction itself and the transaction terms must have reached a sufficient degree of development before the transaction can be “announced” but there is clearly room for disagreement as to the degree of development required. Ultimately, the required degree of development or detail will, in any event, depend on the nature of the transaction.
- 4.14. Below, the FMLC considers two common market transactions referred to in Recitals 32 and 33 of MAR—an initial public offering (“**IPO**”) and a debt offering—with accompanying suggestions for identifying the point at which an “announcement” occurs:¹⁷
- (i) With respect to IPOs, owing to the extended period of time during which they occur, investor communications are different to communications that occur prior to most other transactions in the equity or debt capital markets. In the U.K., the early investor engagement phase of an IPO (i.e., the period between the first investor communications and publication of the intention to float announcement (the “**ITF**”)) typically lasts between two and six months. By contrast, in equity capital markets transactions other than IPOs and debt capital markets transactions, it is common practice to engage with potential investors only immediately prior to announcing the transaction.
 - (ii) Various announcements are typically made in the context of a U.K. IPO: (i) an initial announcement that an IPO is being explored; (ii) the ITF; (iii) in certain cases, announcement of the publication of a prospectus and commencement of a management roadshow; and (iv) the final pricing announcement.

¹⁷ The examples given are drawn from market practice in the U.K. and while some features may be unique to London markets, other features are determined by E.U. regulation.

- (iii) One logical opportunity for a communication first to be treated as an “announcement” for the purposes of the Market Soundings Regime may be the ITF, provided that it is sufficiently detailed as to the terms of the proposed IPO.¹⁸
- (iv) In the context of a debt offering, there is greater heterogeneity among the approaches that may be taken to the issue and therefore a greater potential variety of investor communications. In view of this, it may be yet more difficult to say when a communication is first to be treated as an announcement.
- (v) One situation, however, may provide a useful paradigm. The following features have been drawn to the FMLC’s attention as strongly indicative—or characteristic—of an “announcement”:
 - (a) a short-form notice or statement making clear that a meeting with potential investors is being sought;
 - (b) an indication of likely deal terms (e.g., currency, an adjective describing likely tenor, whether senior or subordinated and listing venue);
 - (c) a statement that a deal is expected to or will follow, subject to market conditions; and
 - (d) wide dissemination in the market (e.g., *via* a media platform such as Bloomberg); to the public at large (by means of a statement on the issuer’s website) or through market disclosure systems such as a Regulatory News Service.¹⁹

4.15. Notwithstanding these illustrative and possibly helpful paradigms, there is clearly potential for debate as to when a transaction might be considered “announced”.

¹⁸ The ITF typically contains the following information: overview of the transaction, including information on the IPO’s timing, size and scope; use of proceeds; description of management; information about the issuer, including its historical financial performance, strengths and strategies; contact information of the issuer, underwriters and any public relations consultants advising on the IPO; and certain disclaimers.

¹⁹ These illustrative examples are not exhaustive and do not represent a standardised market approach. Other areas of debate have been drawn to the FMLC’s attention, including a definitional issue as to the implications of a “series of announcements” and the question as to whether an earlier announcement may be relied upon provided that no additional information is communicated beyond what is in the earlier announcement and what is in the public domain.

5. IMPACT

- 5.1. The FMLC is given to understand that the uncertainties described above are already having a practical impact.
- 5.2. Many of the case studies reported to the FMLC concern third country issuers. For example, where, hypothetically, a U.S. issuer has issued debt securities which are admitted to trading on an MTF (“**Issued Securities**”) and is intending to issue equity securities in the U.S. (“**New Securities**”), a question arises as to whether the New Securities would be considered In Scope Financial Instruments for the purposes of MAR.²⁰
- 5.3. As to the uncertainties discussed in paragraphs 4.2ff above, if the interpretation of “transaction” remains unsettled, the issuer may consider itself required, in order to manage its risk, to comply with the Market Soundings Regime in respect of any transaction in the New Securities, even though the transaction does not concern an instrument admitted to trading on a regulated market, MTF or OTF—indeed, even though the transaction may not concern an In Scope Financial Instrument.
- 5.4. Moreover, a broad interpretation of “announcement” would apply the highly prescriptive Market Soundings Regime to *any* communication of information made to potential investors in order to gauge their interest in the New Securities.
- 5.5. This would impose a sizeable burden upon such an issuer and its underwriters in respect of securities transactions with little or no connection to the E.U. Such a burden is compounded, moreover, by the obligations imposed on issuers by the CDR, which expressly apply whether or not the issuer believes a market sounding contains inside information (see, for example, Article 3(4) of the CDR).²¹ These obligations include the requirement to obtain the consent of the

²⁰ A further, more situated example is as follows. A U.S. investment manager receiving a market sounding from a U.S. broker in respect of a U.S. NASDAQ-listed issuer whose debt securities are also admitted to trading on an E.U. MTF would conceivably be a market sounding recipient subject to the Market Soundings Regime.

²¹ It is not clear that the approach to market soundings taken by the CDR—in which they are regulated whether or not there would otherwise be a risk of contravening the prohibition in Article 10 on the unlawful disclosure of inside information—is mandated by MAR itself.

person receiving the market sounding (see Article 3(4)(e) of the CDR), and to maintain records of all market soundings (see Article 6 of the CDR).²²

- 5.6. Taking these points together, an issuer may regard itself as obliged to comply with the Market Soundings Regime, including those obligations set out in the CDR, whenever it communicates to potential investors, even if the transaction does not concern an In Scope Financial Instrument and even if the issuer believes that the relevant communication does not involve the transmission of inside information.
- 5.7. Demarcating the limits of the Market Soundings Regime will be crucial to DMPs when handling transaction information. Divergences in interpretation and expectations among national regulators could cause significant difficulties for investors and DMPs during capital markets transactions.

6. PROPOSED SOLUTIONS

- 6.1. The FMLC takes the view that guidance concerning the scope of MAR and its practical application in relation to capital markets transactions outside the E.U. could usefully be developed. This might take the form of additions to the existing MAR Q&A document produced by ESMA, or guidance given by national regulators.²³
- 6.2. In particular, the FMLC believes that guidance should be given on the indicative factors to be taken into account when determining whether or not a particular instrument will be an instrument whose price or value depends on or has an effect on the price of a financial instrument admitted to trading on an E.U. trading venue (including the requirement for a causal connection), and how the regulators expect market participants to approach the extra-territorial application of MAR even where an In Scope Financial Instrument exists but the nexus to E.U. markets or investors is otherwise remote.

²² These provisions of the CDR track requirements set out in Article 11(5) of MAR. There is nothing, however, in Article 11 MAR which expressly requires these requirements to be observed even in cases where the issuer believes a market sounding contains no inside information (see also *ibid.*).

²³ As to the former, see ESMA, Questions and Answers on the Market Abuse Regulation, available at: https://www.esma.europa.eu/sites/default/files/library/2016-1664_mar_qa_december_2016.pdf.

- 6.3. Furthermore, it would be very helpful were ESMA to clarify whether the term “transaction” within the definition of market sounding only refers to transactions in financial instruments within the scope of Article 2 MAR, as strongly suggested by Recitals 32 to 34 and Article 2(3) of MAR. Once more, the FMLC expects that this clarification could take the form of an update to the existing MAR Q&A document, or guidance given by national regulators.
- 6.4. Finally, ESMA could provide indicative factors that would signal when a particular communication will be an announcement for the purposes of the MAR regime, as this important term is currently undefined. These factors would be sensitive to the fact that, ultimately, the required degree of development/certainty (and associated level of detail) will depend on the nature of the transaction. The FMLC expects that this clarification could take the form of an update to the existing MAR Q&A document, or guidance given by national regulators.

7. CONCLUSION

- 7.1. This paper has identified and, where appropriate, suggested solutions with the potential to ameliorate issues of legal uncertainty affecting global capital markets transactions arising from MAR and, more specifically, the Market Soundings Regime. The FMLC has drawn attention to issues of uncertainty relating to: (i) the scope of instruments not admitted to trading on an E.U. trading venue but which are nevertheless caught by MAR, particularly in the context of the Market Soundings Regime; (ii) the meaning of the term “transaction” in the context of the Market Soundings Regime; and (iii) the meaning of the term “announcement” in the context of the Market Soundings Regime. To address these uncertainties, the paper sets out a proposed solution which involves the provision of further guidance by ESMA on these issues in the form of amendments to the existing MAR Q&A document, or other guidance by national competent authorities.

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