Market Abuse Regulation Update: What Does the ESMA Consultation Mean for the Future of MAR?

In common with other EU legislation, the Market Abuse Regulation (MAR) requires the Commission to review and report on its working to the European Parliament and Council and, to this end, the European Securities and Markets Authority (ESMA) has consulted on its advice to the Commission. Besides the mandatory aspects of the review, the Commission's mandate to ESMA included important additional issues, such as whether foreign exchange spot (spot FX) contracts should be covered by MAR. Taking into account any feedback received, ESMA will submit a final report to the Commission this spring from which legislative proposals to amend MAR may derive. Many of these topics will affect buy and sell side firms as well as issuers of traded securities. While ESMA does express some views, much of the consultation paper sets out the issues and calls for opinions and evidence from market participants.

A recap on MAR

MAR took effect on 3 July 2016. It replaced the Market Abuse Directive (MAD), in force since July 2005, to reflect technological and market developments, to better align the market abuse regime with the recast Markets in Financial Instruments Directive (MiFID 2) and to increase harmonisation of the regime across the EU. In contrast to MAD, the regulation has direct effect in national law and, consequently, the civil market abuse offences are contained in this regulation and not, as previously in national law. MAR is supplemented by technical standards and guidelines published by ESMA.

This briefing discusses the key items from ESMA's consultation, which contains its intended advice to the Commission.

Key takeaways

- Spot FX: Extending MAR to spot FX trades may simply be a bridge too far in terms of market monitoring and the additional costs to trading firms, particularly when the FX Global Code has already achieved beneficial results in this market. The market has voiced its resistance to any extension of MAR to spot FX.
- Inside information: The consultation leaves the door open for future guidance on the identification of inside information, and questions whether practices such as front running and pre-hedging are subject to sufficient constraints under the current regime.
- Benchmarks: MAR needs to be better aligned with the more recent Benchmarks Regulation (BMR). To ensure any changes are "coordinated and coherent," ESMA will also take account the outcome of the separate BMR Review.
- Market soundings: The current market soundings procedure is said to be overly complex and ESMA proposes simplifying the regime, including requiring all calls to be recorded and making the "cleansing" process more straightforward.
- Insider lists: Firms are drawing these too widely; they should only include persons who have effective access to inside information and not those who simply have the ability to access inside information. In this regard, questions arise over the future of the permanent insider section.
- Funds and management companies (ManCos): ESMA seeks to clarify how MAR applies to funds and their managers so they are subject to similar controls as issuers, but are appropriate to their circumstances, and that a level playing field exists between different types of management structures.

- Cross-Market Book Surveillance Tool: ESMA has consulted on introducing a cross-market surveillance framework to improve the ability of EU regulators to monitor for market abuse across different trading venues.
- PDMRs: ESMA is calling for evidence on whether the EUR 5,000 threshold for notification strikes the right balance between achieving market transparency and integrity without placing a disproportionate burden on managers and issuers. It is also seeking to clarify MAR's application to the PDMRs of fund ManCos.
- Delaying disclosure of inside information: ESMA has consulted on whether issuers should be required to establish and maintain effective arrangements, systems and procedures for managing inside information, particularly over delaying disclosure.
- Buy-back programmes: ESMA is looking at whether this obligation can be "fine-tuned" to reduce the reporting burden on issuers without reducing market transparency.
- Cum-ex frauds: Should the remit of national supervisors be extended to allow enforcement action not only for market abuse, but also for any behaviour by regulated entities that poses a risk to financial market integrity?

ESMA's remit in the MAR review

MAR requires the Commission to report on the following:

- Whether the definition (or scope) of inside information is sufficient to effectively combat market abuse
- The operation of closed periods (i.e., the trading prohibition) in respect of persons discharging managerial responsibilities (PDMRs) including the mandatory notification thresholds
- The level of the thresholds in relation to PDMRs' transactions where an issuer's financial instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets
- A possible cross-market order book surveillance framework
- The scope of the application of benchmark provisions
- The appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions – MAR allows Member States not to impose civil sanctions where there are criminal penalties (i.e., Denmark, Finland, Germany, Ireland and Poland) and ESMA's fact finding does not suggest a pressing need to change this requirement

The Commission has also asked ESMA for advice on a number of topics related to the mandate in MAR:

- The possible inclusion of spot FX contracts within the scope of MAR
- The scope of reporting obligations on issuers for buy-back programmes
- The effectiveness of delayed disclosure by issuers of inside information
- The usefulness of insider lists in investigating market abuse
- Additional aspects of PDMR notification requirements relating to collective investment undertakings

- The ability within the EU to enforce cross-border sanctions – ESMA is considering whether it is necessary to amend EU law to better facilitate cross-border enforcement

ESMA has taken the opportunity to consult on further "closely linked" issues concerning the workings of MAR, including:

- The operation and parameters of the market soundings regime
- The obligation of collective investment units admitted to trading, or traded on a trading venue, to disclose inside information and to draw up insider lists
- Dividend arbitrage schemes i.e., cum-ex and multiple withholding tax reclaim schemes

Extending MAR to spot FX markets

Spot FX is a market that trades around the clock across multiple jurisdictions where standards have historically been guided by voluntary sets of principles drawn up on a national basis

- The suggestion that MAR should be extended to include spot FX arises from the Commission's request for ESMA to consider if these contracts should be explicitly covered by MAR to give authorities the regulatory tools they need to supervise the spot FX markets effectively. Since spot FX contracts are not MiFID-regulated financial instruments, currently, they are not caught directly by the scope of MAR, although in the UK they fall within Principle 5 of the FCA's Principles of Businesses that requires an authorised firm to observe proper standards of market conduct.
- ESMA sets out a number of arguments in support of, and against, extending MAR to spot FX contracts. For example, ESMA identifies the well-publicised misconduct related to the G10 spot FX market, the fact that Fair and Effective Markets Review (FEMR) advocated some time ago for a spot FX regime replicating features of MiFID 2 and MAR, and the clear connection between the spot FX markets and the wider FX derivatives market.
- However, ESMA also points out that the FX Global Code of Conduct has already made progress in raising standards in wholesale FX markets and that there are clear practical difficulties in expanding the scope of MAR to spot FX contracts. The fact that the spot FX market is largely over the counter (OTC), in particular, means that price determination does not occur in the same way that it would with exchange-traded instruments (making price manipulation more difficult to monitor from a regulator's perspective).
- Finally, ESMA has identified that extending MAR to spot FX trades would be ineffective without simultaneously applying MiFID-like reporting and record-keeping obligations. Without these associated obligations, national supervisors would simply not have the tools to ensure that market participants were effectively adhering to the requirements of MAR.
- Based on ESMA's commentary, the initial indications are that extending MAR to spot FX trades may simply be a bridge too far for regulators in terms of monitoring costs and the additional costs to trading firms, particularly when the FX Global Code has already achieved beneficial results in this market. With Brexit in mind, the EU may also be conscious of the negative impact that increasing the cost of spot FX trading in the EU may have.

Baker McKenzie.

Possible revisions to inside information framework

Definition of inside information

MAR contains bespoke definitions of inside information for commodity derivative, emission allowances and for persons charged with the execution of orders

- ESMA has consulted generally on whether:
  - Market participants have experienced any difficulties identifying what information is inside information and the moment that it becomes inside information;
  - The current definition of inside information is sufficient for combatting market abuse;
  - Market participants have identified information that they would consider to be inside information, but which is not covered by the current definition of inside information; and
  - The slightly different bar for inside information in the commodity derivatives markets poses any issues in terms of compliance and oversight, i.e., information that is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions, etc.
- There appears to be a potential for ESMA to extend the current definition of inside information, which may have unforeseen consequences for the market.
- Issuers, in particular, do run into difficulties identifying when information becomes sufficiently precise to affect the pricing of their shares, for example, so a more prescriptive regime may increase legal certainty. However, there may also be disadvantages to this approach because, at present, the regime does permit a degree of judgement to be exercised.

Front running

I.e., where a broker is aware of a forthcoming order or transaction and uses that information by acquiring or disposing of the relevant financial instrument ahead of the order or transaction

- MAR introduced a specific definition of inside information to cater for those persons charged with the execution of orders concerning financial instruments, but there is some doubt based on the text over whether it would catch other persons who may be aware of a future relevant order (e.g., directors of an issuer, the issuer itself and institutional investors).
- ESMA nonetheless confirms its view that front-running behaviour would be caught by the general prohibition on insider dealing. It also points out that front running could simultaneously breach certain MiFID 2 standards (including best execution). It is seeking views on whether amendments could be made to MAR to clarify and deal more comprehensively with the issue of front running, and whether specific conditions should be added to MAR to cover front running on illiquid financial instruments in particular.
- This suggestion may reflect the general perception that front running and other negative practices are more common in illiquid markets, partly because less transparent pricing conditions make it more difficult to identify market manipulation (a complaint we have heard from a number of firms on the buy side). The FCA has previously picked up on this point; for example, in its September 2018 Market Watch, the FCA encouraged firms to look out for a number of negative trading practices occurring in less liquid markets.

- There is, however, the question of how far such reforms would extend, given that MAR applies to instruments traded on a trading venue, which are (as a result) more likely to have a reasonable level of market liquidity.

Pre-hedging

I.e., where a broker undertakes a trade in anticipation of a client order with a view to managing the risk associated with client trades

- ESMA points to a number of negative aspects of pre-hedging, including the risk of insider dealing, the risk of breaching conflict of interest rules and the impact on the market price of the instrument (i.e., where the broker's "pre-hedging" trade affects the price that other brokers are willing to offer). However, the consultation paper does not appear to accept that there could be benefits to pre-hedging behaviours, given that it specifically requests information on this point.

- At this point, it appears that ESMA is still at the stage of gathering information about pre-hedging, and trying to determine whether, as a practice, it should be further restricted. There is a suggestion in the paper that brokers using pre-hedging strategies may pose conduct risks (e.g., conflicts of interests) and should make clear how those strategies benefit the client, potentially in mandated disclosures. This type of disclosure obligation, in theory, could act as a curb on brokers' behaviour in situations where there is no clear commercial rationale for pre-hedging trades and it may enable clients to query the practice after the fact.

Scope of benchmark provisions

I.e., the inter-relationship between MAR and BMR

- ESMA considers that MAR with its specific prohibition on benchmark manipulation and the more recent BMR, which focuses on the "accuracy, robustness and integrity" of benchmarks, are broadly complementary. There are, however, differences between MAR and BMR, for example, regarding the definition of benchmarks. The scope of BMR is wider, extending beyond financial instruments to financial contracts and investment funds. Again although UCITS and AIFs (defined below) are financial instruments, not all are listed on trading venues and, therefore, they may not necessarily always be caught by MAR.

- Another discrepancy arises in relation to enforcement. MAR sets out the administrative sanctions that national supervisors may impose on investment firms for market manipulation. Administrators of benchmarks and contributors of input data are not specified and, unless they are investment firms, will not be amenable to these powers. This anomaly arises because administrators and contributors were not recognised concepts when MAR was developed.

- ESMA proposes that any changes to better align MAR over benchmarks should be "coordinated and coherent" with the outcome of the separate BMR review where it submitted its response to the Commission in January 2020.

Market soundings

I.e., the communication of information [by an issuer or significant secondary offeror], prior to the announcement of a transaction, to gauge the interests of potential investors in a possible transaction … to one or more potential investors

- In the aftermath of market abuse cases (such as Punch Taverns PLC in 2012), MAR introduced a formal regime for sounding out potential investors. As a result of certain national differences in implementing rules, ESMA proposes to clarify that market soundings are an effective "safe harbour" from regulatory sanctions. It wants to "remind" readers of the consultation paper that the market soundings regime exists to encourage soundings by protecting disclosing market participants (DMPs) from allegations of unlawful disclosure of inside information.

- ESMA points out that the recitals to MAR imply that there is no requirement on market participants to use the regime set out in the regulation. In its view, however, DMPs are in fact under an obligation to do so and in complying with its requirements are protected. ESMA considers its view as consistent with one of the regime's main goals, namely, ensuring that supervisory authorities obtain "a full audit trail on a process that is by nature at risk of unlawful disclosure of inside information."

- In addition, ESMA expresses concern that the current market soundings procedure is overly complex in nature, which it says may be leading to a higher than necessary number of buy-side firms simply expressing a wish not to receive market soundings. With this in mind, ESMA makes some suggestions as to how the regime could be simplified, including requiring all calls to be recorded (rather than wall-crossing firms asking recipients for consent to record calls) and making the "cleansing" process more straightforward. In the December 2018 edition of Market Watch, the FCA stated that it had not seen any impact on issuers' ability to raise capital on UK markets following the introduction of the market soundings regime. On the other hand, this was at a time of high demand for new issues of securities, making market soundings less important.

- ESMA has also voiced concern that the current definition of market soundings is too broad, covering a very wide range of interactions, e.g., where DMPs engage in soundings aimed at directly offering a deal or a transaction to one or more potential contractual counterparties. Consequently, ESMA is cautiously mooting whether to exclude certain types of transactions or if further clarification on scope should be provided. On the other hand, it might be said that a broad, well defined definition encourages firms to use the regime.

Insider lists

MAR requires "the issuer or any person acting on their behalf or on their account" to draw up and maintain insider lists.

- Insider lists reflect one of the key themes in MAR, namely, identifying and controlling the dissemination of inside information. Well-drawn lists are a key tool for regulators investigating potential market abuse. In this regard, the Commission's mandate requires ESMA to report on the extent to which national supervisors rely on insider lists for such investigations and ESMA has taken the opportunity to look at the detail of the regulatory framework.

- ESMA expresses concern that insider lists are currently being drawn too widely by regulated firms, in the sense that they should only include persons who have effective access to a piece of inside information and not those who simply have the ability to access inside information, for instance, all

compliance staff, despite most never having accessed inside information. Such "inflation" of numbers reduces the utility of the list. As a result, ESMA is considering whether the regulatory framework ought to be changed to provide greater clarity on the purpose and function of the insider list. In particular, while technically outside ESMA's remit from the Commission, it will look at the role of the permanent insider section of the list, which should only contain a limited number of individuals who have access to inside information at all times, and ask if there is value in retaining this section. Uncertainty around how widely drawn insider lists should be, and the temptation to include more individuals rather than less, is something that we see frequently in practice.

- Industry associations have objected to issuers maintaining entire lists of natural persons including those identified by external service providers. ESMA's paper highlights a need for clarification and harmonisation between some practices of Member States and issuers. The FCA's December 2018 Market Watch touched on this issue, referring to issuers asking intermediaries, such as investment banks, to provide their employees' personal information to complete their insider list. The FCA recommends, as does ESMA, that MAR is clarified so that intermediaries only provide a contact point for the issuer (to include on its list) and confirm that a complete list of their natural and legal persons accessing inside information will go to the relevant national supervisor on request. In fact, ESMA's MAR Q&As clarify that advisers have an independent obligation to maintain an insider list - the implication therefore is that it is unnecessary for an issuer to maintain an omnibus list covering insiders at its advisers. That this is still an issue is supported by our own experience where an issuer requested that our firm send details of our insider list to them to hold.

Application of MAR to Collective Investment Undertakings (CIUs)

I.e., clarifying how MAR applies to funds and their managers so they are subject to similar controls as issuers, as appropriate

- CIUs are collective investment undertakings in transferable securities (UCITS) or alternative investment funds (AIFs) and units in them are financial instruments, which fall within the scope of MAR. There are, however, issues about how the regime should apply in the case of CIUs with no legal personality and where compliance with MAR should sit (i.e., whether there should be recognition in MAR that the responsibility to disclose inside information, etc., rests with the management entity), as some MAR obligations are only suited for conventional issuers. ESMA wants to ensure that there is a level playing field for all types of CIUs.

- Additionally, ESMA has consulted on what it refers to as other "interlinkages" between CIUs and MAR, for example, the obligation on an issuer (i.e., in this case, the management company) to disclose price-sensitive information as soon as possible and to maintain insider lists. Importantly, ESMA clarifies that its comments in the consultation paper extend solely to CIUs (or their managers) that have requested or approved admission of CIU units to an EU-trading venue. Thus, as we would expect, any proposed revisions to the regime would focus on exchange-traded funds. Moreover, the reforms would not appear to extend to funds that have been listed, for some reason, without any input from the management company (i.e., if another entity in the market has put forward fund units for listing, which does occasionally occur, albeit in the corporate sector).

- ESMA notes that despite some "overlaps" with the obligations in the UCITS Directive/AIFMD and MAR, significant gaps remain vis-à-vis MAR obligations: the ban on personal transactions in a closed period. Therefore, ESMA proposes including an explicit acknowledgement in MAR that PDMR obligations are extended to persons employed by management companies and sub-managers of

exchange-traded funds, although there are questions around precisely which managers would be caught. One proposal to identify these managers, which is open for consultation, is to adopt the definition in the UCITS implementing directive of "relevant persons" who are subject to a special regime for personal transactions, the conflict of interest policy and the rules of conduct for management companies. Such individuals would sit alongside managers of CIUs with legal personality that currently meet the definition of PDMR. As a corollary, a further question to consider centres on whether the issuer or the management company should be empowered to waive the prohibition on personal transactions in exceptional circumstances. Going beyond ManCos, ESMA asks whether individuals in, for example, depositaries should be treated as PDMRs. The supervisory authority sees no reason not to apply the obligations on PDMRs to their close associates.

- A further discrepancy on which ESMA and the Commission agree is that PDMR obligations in MAR appear to be limited to transactions in shares and debt instruments. This means that CIUs without legal personality that issue units fall out of scope and, therefore, it is proposed that the provisions on PDMR transactions be amended to expressly refer to "units" issued by CIUs alongside shares or debt instruments. In practice, references in the fund industry to units and shares are interchangeable.

- In line with recent MAR Q&As (ESMA 70-145-111), ESMA considers that the obligation on issuers to inform the public of inside information as soon as possible extends to financial instruments admitted to trading, or traded on a trading venue, issued by a CIU despite it having no legal personality. In such cases, the management company would potentially be liable for infringements. ESMA, nonetheless, is concerned that the lack of legal personality may impede enforcement in certain jurisdictions and has consulted on whether to amend MAR to provide that such CIUs will be liable where a management company, on their behalf, has requested admission to trading and that this ManCo should be liable notwithstanding any delegation to an asset manager.

- Insider lists are discussed above generally, but ESMA has further consulted on whether to include an express obligation on CIUs to draw up lists. It does not consider this step necessary, but is seeking stakeholders' views.

Cross-Market Book Surveillance Tool

National supervisors currently monitor order book data to detect and investigate potential cases of market abuse, including when the suspicious trading activity has taken place in another EU jurisdiction.

- ESMA has consulted on the introduction of a cross-market order book surveillance framework to enhance the ability of EU regulators to monitor for market abuse across different trading venues. Such an assessment is mandated by MAR and may reflect an increasing desire by regulators for firms to monitor trading conditions on other markets to assess whether market manipulation has occurred in relation to a specific trade.

- A first step to create such a framework would be to harmonise the format in which trading venues transmit their order book data to national supervisors (i.e., using ISO 20022 and XML templates) and, as a corollary, to introduce mandatory reporting of order book data. The UK's potential exit from the EU would affect this project.

Persons discharging managerial responsibilities

Disclosure around own account dealing by issuers' managers facilitates market transparency

- ESMA has been charged with reviewing various issues around transactions by issuers' own senior executives, PDMRs, in their financial instruments. It considers that their notification acts as a preventive measure against market abuse, providing useful information to issuers and investors.

- MAR requires PDMRs, and their closely associated persons, to notify the issuer and the national supervisor of every transaction conducted on their own account in the shares or debt instruments of the issuer (or derivatives or other linked financial instruments). Broadly speaking, mutual funds and investment portfolios are excluded where exposure to the issuer's securities does not exceed 20%.

- Does the threshold for notification strike the right balance between achieving market transparency and integrity without placing a disproportionate burden on managers and issuers? This is currently set at EUR 5,000 and national supervisors are able to raise it to EUR 20,000. Only five national supervisors have or are increasing the threshold — those in Denmark, France, Spain, Italy and Germany — while most have opted for the minimum threshold, including the FCA in the UK. ESMA observes that some issuers/PDMRs notify all transactions regardless of the EUR 5,000 threshold to avoid having to monitor and face the risk of exceeding the threshold. For this reason, we normally advise that issuers/PDMRs disregard the EUR 5,000 threshold. ESMA, however, also reports that other market participants are calling for substantially increased thresholds to reduce the administrative burden and ease compliance. Although, as required by MAR, ESMA will review the carve-out for mutual funds and investment portfolios (which applies where exposure to the issuer's securities does not exceed 20%) any change is unlikely. This is because it considers that the 20% threshold is working well and, in any event, having been in place for only two years, considers that it is too early to reach a proper view.

- Once the threshold for own account dealing is reached, is it necessary to require notification and disclosure of all subsequent transactions, regardless of the size of individual transactions? ESMA considers that the current approach is straightforward because it does not require any additional controls to be in place, e.g., to monitor additional thresholds.

- PDMRs may not trade during a closed period, e.g., within 30 days of the publication of issuers' legally mandated interim and year-end financial reports. ESMA is looking at whether there are any further instances when this prohibition should apply. Moreover, because national law, the rules of trading venues and market practice vary between Member States, issuers are often subject to different closed periods across the EU. For example, in the UK, market practice dictates that the closed period generally starts on the first day after the end of the relevant financial reporting period. In this respect, therefore, ESMA asks whether there is scope for further clarification beyond its existing Q&As on MAR. In any event, as a matter of practice, in the run up to publication of mandated interims and year-end reports, issuers will usually have inside information making this prohibition in MAR unnecessary.

- Additionally, ESMA has consulted on extending the closed period to issuers' own dealings and to a PDMR's closely associated persons. With respect to the latter, bearing in mind that the offences of insider dealing and market manipulation offences apply, in any event, to close associates and taking into account logistical requirements, it is questionable whether such an extension would be proportionate. A prohibition would, however, provide symmetry with the existing notification obligation that applies to closely associated persons. While not expressly within ESMA's remit, the

authority is also seeking views on the exemptions to closed periods (e.g., where a PDMR is in severe financial difficulty) and whether to broaden these from shares to include other financial instruments.

Delaying disclosure of inside information

I.e., the general rule is that an issuer should inform the public as soon as possible of inside information that directly concerns that issuer

- ESMA has been asked to look at how the provisions governing the delay of information by issuers are being applied, as practice seems to vary across the EU - the Commission has evidence that this provision is used to varying degrees across the EU. As background, issuers must disclose inside information to the public as soon as possible, but may delay doing so where immediate disclosure is likely to prejudice their legitimate interests, but where the public is unlikely to be misled and confidentiality can be maintained. Therefore, an issuer must identify whether information is price sensitive and, where applicable, whether the conditions are met for delaying immediate publication.

- Accordingly, ESMA has consulted on whether MAR should include a requirement on issuers to establish and maintain effective arrangements, systems and procedures for the identification, handling and disclosure of inside information. An analogous duty in MAR regarding the detection and reporting of suspicious orders and transactions already applies to persons arranging or executing transactions (e.g., investment firms) to establish and maintain effective arrangements, systems and procedures. Such a requirement would help issuers first identify inside information needing to be disclosed and then to properly consider whether disclosure may be legitimately delayed. It is proposed that this should be a high-level obligation to allow for such arrangements to be tailored to reflect the size and nature of each issuer. The FCA already applies such a duty through its Listing Principles to UK-listed issuers. In our view, because an issuer when delaying disclosure is required to monitor whether the conditions for delay continue to be met and to give reasons to the regulator for the delay once disclosure is made, it is difficult to see how they could fulfil their current obligations without establishing and maintaining such arrangements, etc.

- Where an issuer delays the disclosure of inside information — assuming that the conditions to do so are met — it must inform its national supervisor immediately after the information is publicly disclosed, providing a written explanation of its reasons. However, where in the meantime the information ceases to be price sensitive, that duty falls away as the information is now out of scope. ESMA considers that this information nonetheless continues to have value in enabling the authorities to identify possible insider dealing with respect to the period when it was assessed to be inside information and, therefore, it proposes a rule change whereby notification should still be made. As MAR gives Member States the option to require a written explanation on request only by supervisors in individual cases, presumably any rule change would end this concession - this would represent a change for the UK as HM Treasury has taken advantage of this option.

Should the scope of reporting for buy-back programmes be scaled back?

Buy-back programmes represent a safe harbour, although trading in own shares that do not benefit from the exemptions in MAR does not in itself constitute market abuse.

- MAR provides an exemption from insider dealing and market manipulation for trading in an issuer's own shares as regards buy-back programmes that satisfy certain criteria. One of these requires the issuer to report each transaction to the national supervisor for the trading venues where the shares are admitted to trading and to those of each venue where they are traded. Apart from issues of duplication,

it is often the case that issuers do not know that their securities are being traded on a specific venue. This is because some MTFs or regulated markets allow trading at the initiative of market participants without the approval or acquiescence of the issuer.

- ESMA was asked by the Commission to ascertain whether this obligation might be "fine-tuned" to reduce the burden on issuers without reducing market transparency. While the Commission only asked ESMA to look at which national supervisors should receive reports, the authority considers this an opportunity to look at modifying the content of the information reported and published. On the basis that the reporting mechanism is burdensome, ESMA's preferred option would see an issuer report to the national supervisor of the most liquid market for its shares, who, in turn, would (on request) forward this information to the supervisors of those venues where the shares were admitted to trading, as well those where the shares were traded.

- MAR requires issuers to report information on buy-back trades by reference to Article 25 (the obligation to maintain records for five years) and Article 26 (the obligation to report transactions) of the Markets in Financial Instruments Regulation (MiFIR). The former requires investment firms to keep a record of, and make this information available to, national supervisors and ESMA. In fact, ESMA believes that this is unnecessary because supervisors can access this information under MiFIR and it proposes to remove this obligation in MAR. In contrast, Article 26 does have value because the reporting system was not designed to identify buy-backs, although ESMA does see merit in harmonising and reducing to the essential the information provided by investment firms to issuers and issuers, in turn, to national supervisors.

- Finally, while not part of ESMA's mandate, the authority questions whether the publication of disaggregated trading data provided to national supervisors is useful for market participants. It suggests that the market would find more helpful data showing the aggregated volume traded and the weighted average price paid for the shares in each trading session.

Cum-ex and multiple withholding tax reclaim schemes

"Cum" refers to the dividend payable on shares. The cum-ex frauds — the name given by the German media — are believed to have cost taxpayers billions of euros.

- This form of dividend arbitrage involves trading shares to place them in a favourable tax jurisdiction (whether on a cum-ex or cum-cum basis) to reclaim a tax refund with respect to national withholding taxes. In certain circumstances, this can amount to tax evasion. Although these schemes have no direct connection with market abuse, ESMA considers that they damage market integrity. This is less of an issue in the UK, but it has been a serious concern in other EU countries, in Germany in particular.

- Under MAR and MiFID 2, there is no provision for national supervisors to share information on dividend arbitrage that derives from STORs received from other national supervisors or from transaction reporting data. In this regard, ESMA has consulted on amending MAR to broaden the remit of national supervisors, allowing them not only to investigate and sanction insider dealing and market manipulation, but also behaviour by regulated entities that poses a risk to financial market integrity. Such a prohibition would appear to be very broad and more akin to a regulatory principle. Separately, ESMA would make it also be easier for supervisors to co-operate with tax authorities and share information on request.