LATHAM & WATKINS

Client Alert
News Flash

Latham & Watkins Financial Regulatory Practice

16 May 2019 | Number 2502

EU Kicks Off MAR Review

The European Commission has set out the elements of MAR that it wishes to consider as part of a planned review.

Key Points:

- The formal review of MAR will consider not only the topics mandated for review by the legislation, but also other areas that may benefit from reform.
- For instance, the Commission wants to explore whether spot FX contracts should be brought within scope of the regime.
- ESMA will be preparing technical advice this year, and interested market participants should take the opportunity to feed into this process.

As the third anniversary of the EU Market Abuse Regulation (MAR) entering into force approaches, so does the deadline by which the European Commission is due to submit a report on the application of MAR, with a view to tabling any suggested amendments to the legislation.

It seems that the Commission will not meet the 3 July deadline, given that it only recently instructed ESMA to provide technical advice on the elements of MAR that the Commission plans to cover in its report. The Commission's request, dated 20 March 2019 and published on 14 May, provides a useful indication of the areas the Commission is considering that could be ripe for reform.

Although it will be some time before any potential legislative changes are proposed, market participants will be interested to understand the issues that the Commission is considering. In particular, the Commission asks ESMA to consult market participants and other stakeholders widely in preparing its advice, and so interested parties will want to ensure that they take the opportunity to feed into this process.

Of course, Brexit makes it difficult to predict the UK's potential role in shaping any reforms. However, UK market participants should assume that the UK government will want to keep close to the EU position and may well seek to implement the same or similar changes to the UK regime if the UK is no longer a member of the EU at the relevant time.

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in France, Hong Kong, Italy, Singapore, and the United Kingdom and as an affiliated partnership conducting the practice in Japan. Latham & Watkins operates in South Korea as a Foreign Legal Consultant Office. Latham & Watkins works in cooperation with the Law Office of Salman M. Al-Sudairi in the Kingdom of Saudi Arabia. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Phone: +1.212.906.1200. © Copyright 2019 Latham & Watkins. All Rights Reserved.

Possible Areas of Reform

As well as asking ESMA to consider the areas mandated by MAR for review (*see box below*), the Commission is also asking ESMA to consider various other aspects of MAR, which signals that these aspects could potentially be subject to reform.

Scope — Spot FX

The Commission is asking ESMA to consider whether spot FX contracts should be caught by the market abuse regime. Moreover, the Commission wants ESMA to assess whether national regulators are likely to be able to supervise and sanction market abuse within spot FX markets effectively and efficiently.

Benchmark manipulation was brought within scope of MAR during the legislative process, around the time that the LIBOR scandal was unfolding. However, potential manipulation in spot FX markets had not been uncovered at that time. In the UK, the Bank of England's Fair and Effective Markets Review Final Report, published in June 2015, noted that there was a gap in the regime and recommended that a new UK statutory civil and criminal market abuse regime should be created for spot FX. This recommendation has not yet been taken forward, and is presumably on hold for the time being due to Brexit. Nevertheless, an extension of MAR to cover spot FX products most likely remains a policy goal in the UK.

Rules on Delayed Disclosure of Inside Information

The Commission highlights how the same definition of inside information applies in relation to the market abuse offences, and the obligation on issuers to disclose inside information to the public. The Commission acknowledges that, as information undergoes different levels of maturity and precision, it could be argued that in certain situations inside information is mature enough to trigger the prohibition of market abuse, but insufficiently mature to be disclosed to the public.

The Commission asks ESMA to consider how issuers across the EU make use of the ability to delay disclosure of inside information. In particular, the Commission is aware that there may be a divergence across Member States as to how frequently issuers rely on the ability to delay disclosure. ESMA is also tasked with exploring whether the conditions for delayed disclosure are well framed and sufficiently clear.

At present, the conditions for delaying disclosure are narrowly framed, which can make it difficult for issuers to delay disclosure, although issuers in the UK do rely on this fairly frequently. There is no doubt that issuers would welcome more generous and clearer conditions for delaying disclosure.

Insider Lists

The Commission would like ESMA to explore the usefulness of insider lists to national regulators, in particular the extent to which national regulators rely on insider lists when investigating instances of market abuse.

Although issuers and persons acting on their behalf have got up to speed with the requirements, the prescriptive format and content requirements for insider lists continue to impose a significant administrative burden. It will be interesting to see whether the compliance burden is yielding a commensurately valuable resource for regulators.

Areas mandated by MAR for review
1. The appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation 2. Whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse 3. The appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) [PDMR transactions] with a view to identifying whether there are any further circumstances under which the prohibition should apply 4. The possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for such a framework 5. The scope of application of the benchmark provisions

Reporting Obligations Under the Buyback Exemption

The Commission asks ESMA to consider whether the reporting obligations under the buyback exemption could be modified to reduce the compliance burden on issuers. Currently, an issuer is required to report each transaction relating to the buyback programme they wish to benefit from the safe harbour to the regulator of each trading venue where the shares are traded, not just the regulator of the venue where the shares are admitted to trading. This makes it difficult for issuers to comply in the case of involuntary listings (where the issuer's shares are traded on a venue without the issuer's consent or knowledge).

Rules on PDMR Transactions

The Commission is seeking to understand the appropriateness of the rules regarding the notification of PDMR transactions. In particular, the Commission asks ESMA to look into the level of the annual threshold that triggers the notification obligation, and whether it is appropriate that, once the threshold is crossed, all subsequent transactions have to be disclosed, regardless of size.

ESMA has previously released data showing that only Denmark, France, Italy, and Spain have increased the initial threshold from €5,000 to €20,000, so in most Member States the compliance burden remains high.

One of the biggest issues with the obligation, however, is the timing of when the issuer has to make the transaction public. At present, PDMRs have three business days after the transaction to notify the issuer of the transaction, but the issuer also has only three business days after the transaction to make the information public. Fortunately, existing legislative proposals aim to change this so that issuers will have two business days from receipt of the PDMR's notification in which to make the information public.

The Commission is also concerned about how the rules apply to fund managers (such as AIFs and UCITS). As drafted, MAR defines a PDMR as a person "within an issuer", meaning that managers within

external management companies are not caught. The Commission wants ESMA to consider whether such individuals should be caught, in order to ensure a level playing field between internally and externally managed funds. The Commission also notes another potential loophole in relation to investment funds: the provisions on PDMR transactions only reference transactions relating to shares or debt instruments of the issuer, not units. ESMA is asked to consider whether this discrepancy should be addressed, to ensure a level playing field between funds that issue shares and those that issue units.

Cross-Border Enforcement of Sanctions

Finally, the Commission asks ESMA to gather information on whether national regulators experience difficulties in the recognition and enforcement of financial penalties imposed under MAR, in cases with a cross-border element.

What Is Not Addressed?

MAR has many outstanding grey areas and challenging obligations. In particular, ongoing issues remain in relation to the territorial scope of the obligations, and the impact on third-country issuers. This is especially true in the case of the market soundings regime, which can apply even when there is no immediately apparent EU nexus. The fact that some issuer obligations apply simply when an issuer has an involuntary listing in the EU make the rules difficult to navigate in practice.

Unfortunately, it does not seem that the Commission is planning to examine this aspect of the regime as part of its review, although of course the scope may evolve as the review progresses.

Next Steps

The Commission has asked ESMA to provide its technical advice no later than 31 December 2019. It is not clear at this stage when the Commission is planning to finalise its report, or when it might seek to bring forward any legislative proposals. Given that ESMA has been asked to consult widely, in an open and transparent manner, market participants should look for opportunities to contribute to ESMA's work.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

David Berman
david.berman@lw.com
+44.20.7710.3080
London

Kishore Bhindi
kishore.bhindi@lw.com
+44.20.7710.4785
London

Brett Carr
brett.carr@lw.com
+44.020.7710.4695
London

Charlotte Collins
Knowledge Management Lawyer
charlotte.collins@lw.com
+44.20.7710.1804
London

Becky Critchley
becky.critchley@lw.com
+44.20.7710.4519
London

Stuart Davis
stuart.davis@lw.com
+44.20.7710.1821
London

Carl Fernandes
carl.fernandes@lw.com
+44.20.7710.4777
London

Nicola Higgs
nicola.higgs@lw.com
+44.20.7710.1154
London

Gabriel Lakeman
gabriel.lakeman@lw.com
+44.020.7710.4645
London

Anne Mainwaring
anne.mainwaring@lw.com
+44.20.7710.1018
London

Sam Maxson
sam.maxson@lw.com
+44.20.7710.1823
London

Rob Moulton
rob.moulton@lw.com
+44.20.7710.4523
London

Denisa Odendaal
denisa.odendaal@lw.com
+44.20.7710.1845
London

Jonathan Ritson-Candler
jonathan.ritson-candler@lw.com
+44.20.7710.1815
London

You Might Also Be Interested In

FCA Fires Warning Shot to Brokers in Wholesale Markets

MiFID II Costs and Charges — Room for Improvement

Brexit and Financial Services — FCA Issues Further Guidance for Firms

Regulating Crypto-assets and ICOs? ESMA and EBA Consider the Benefits

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp to subscribe to the firm's global client mailings program.