Market Abuse Regulation (EU MAR) Q&A (*Updated 22 May 2018*)

Prepared by the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code

*In the light of uncertainties in the interpretation of the Market Abuse Regulation (MAR) and related subsidiary regulations, this Q&A (the "**Q&A**") has been drafted by the above Joint Working Parties as a suggested approach to implementing certain aspects of MAR. This Q&A represents the Joint Working Parties' explanation of how, in their view, MAR should apply to certain practical situations, but is subject to review and amendment in the light of practice on the implementation of MAR and to any relevant future UK or EU guidance published in relation to MAR.*

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PART C - CONTRACTUAL ARRANGEMENTS INVOLVING A SUBSCRIPTION FOR SHARES

Q. Where parties are negotiating contractual arrangements in relation to a transaction, and those arrangements involve a subscription of shares (e.g. an issue of consideration shares in connection with an acquisition, an undertaking to subscribe for shares under a firm placing or signing an irrevocable undertaking in connection with a takeover):

(a) ***is the issuer able to selectively disclose inside information to the counterpart(ies) in connection with such arrangements;***

(b) ***if so, is the issuer able to delay disclosure of the inside information to the market, notwithstanding its disclosure to the counterpart(ies); and***

(c) ***if so, is the relevant contractual arrangements can be entered into with the counterpart(ies)?***

PART A: GENERAL

PDMR Dealings (Article 19)

Q1. What is the interaction between the MAR closed periods for PDMR dealings in Article 19(11) and the insider dealing offence in MAR Articles 8 and 14 ?

A1. The insider dealing offence in Articles 8 and 14 of MAR (and the legitimate purpose test in Article 9 of MAR) apply during the MAR closed periods in the same way that they do at any other time, and must therefore be taken into account by the relevant issuer and PDMR. So even if, as for example described in the Q&As below, the relevant transaction does not fall within the prohibition in Article 19(11) of MAR or is exempt under Article 19(12), consideration must always be given to whether it would constitute insider dealing and it is not a permitted transaction if it would do so.

Rationale: Article 19(11) is "without prejudice" to Articles 14 and 15 and see also ESMA Final Report paragraph 141.

Q2. Does the FCA's position on closed periods and preliminary announcements in its statement of 25 May 2016 apply to all issuers, wherever their securities are traded?

A2. Yes, in the view of the Joint Working Parties.

Rationale: The statement refers to issuers without qualification so we understand it to apply to all issuers.

Q3. Is the meaning of "transaction" the same for the purposes of Article 19(11) as it is for the purposes of the disclosure requirement in Article 19(1)?

A3. Yes.

Rationale: There is no separate definition of "transaction" in Article 19(11) and therefore the provisions for the interpretation of "transaction" in Article 19(1) and 19(7) apply to Article 19(11) (see ESMA Final Report paragraph 143). However, this does not always mean that a transaction that has to be disclosed falls within the Article 19(11) restriction or vice versa. This is because Article 19(1) applies to "every transaction conducted on their own account" whereas Article 19(11) states that during a MAR closed period a PDMR "shall not conduct any transactions on its own account or for the account of a third party". Therefore Article 19(11) only applies where it is the PDMR conducting the transaction, whereas Article 19(1) does not (see ESMA Final Report, paragraph 146) and Article 19(11) applies to transactions on behalf of a third party whereas Article 19(1) does not. The timing of the restriction versus the notification obligation is also different as described in Q4 below, because Article 19(11) only applies when the PDMR conducts the transaction during a closed period.

Q4. How do the MAR closed periods affect conditional transactions?

A4. Provided that at the time of entry into the transaction, he or she does not have inside information, a PDMR may enter into a conditional transaction where one or more conditions outside the control of the PDMR is satisfied during a MAR closed period (whether or not the transaction is then completed), but cannot enter into a conditional transaction during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the conditional transaction) is made outside the MAR closed period, the PDMR is not "trading" during the MAR closed period (see Recital (61) to the MAR). Therefore if satisfaction of the condition is outside the control of the PDMR and the only action taken by a PDMR takes place before the start of a closed period, there is no "conduct" by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the transaction is completed during the closed period, so that the acquisition or disposal of shares occurs during a MAR closed period. If the PDMR takes any action during a MAR closed period, then that will fall within the restriction even if the transaction is completed after the end of the closed period. Similarly the prohibition applies to a conditional contract entered into during a closed period even if the condition cannot be satisfied until after the end of a closed period and even though the transaction is not required to be disclosed under Article 19(1) until the condition is satisfied. See also Article 9(3) which makes it clear that performing a contractual obligation entered into prior to possessing inside information is not insider dealing.

Q5. Is an issuer subject to the MAR closed period?

A5. A transaction in relation to its shares or debt instruments by the issuer does not fall within the prohibition or PDMR transactions in Article 19(11), even though it will be the PDMRs (or some of them) that cause the issuer to act. For example, the approval by one or more PDMRs of a buyback by the issuer or an award of shares under an employee share scheme or another issue of shares during a MAR closed period would not fall within the restriction in Article 19(11). However, the transaction could still be market manipulation or (if it had inside information at the time) insider dealing by the issuer– see Q1.

Rationale: Article 19(11) EU MAR prohibits PDMRs from conducting any transactions "on its own account or for the account of a third party" during a MAR closed period. However, the actions by a PDMR, acting in his capacity as a director or employee of the issuer, when approving transactions undertaken by the issuer do not amount to conducting a transaction "for the account" of the issuer.

Q6. What exchange rate should be used for calculating the EUR 5,000 threshold in EU MAR Article 19(8)?

A6. See ESMA's Questions and Answers on the Market Abuse Regulation: Section 2 (Managers' transactions) Question and Answer 1
https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf

Q7. I am a director of a company, A, whose shares are traded on AIM. I am also a person discharging managerial responsibilities in another company, B. I do not control more than 50% of the shares of B. Is B one of my "persons closely associated" so that B must notify A under Article 19(1) of transactions in A's shares conducted on its own account?

A7. B will be a "person closely associated" to the director (a "person discharging managerial responsibilities" in A) for the purposes of EU MAR if any one of the following applies:

(a) the managerial responsibilities of B are discharged by the director (or a "person closely associated" to the director); or

(b) B is directly or indirectly controlled by the director (or a "person closely associated" to the director); or

(c) B is set up for the benefit of the director (or a "person closely associated" to the director), or

(d) the economic interests of B are substantially equivalent to those of the director (or a "person closely associated" to the director).

If B carries out a transaction in the financial instruments of A at a time when it is a "person closely associated" to the director (a "person discharging managerial responsibilities" in A) under any of (a) to (d), and the transaction either itself or when aggregated with previous transactions has reached the threshold of EUR 5,000, then B must notify A and the Competent authority of that transaction as required by Art 19(1).

B will not be a "person closely associated" to the director under (a) above unless and until B carries out a transaction in A's financial instruments. If B does carry out a transaction in the financial instruments of A, B will only be treated as a "person closely associated" if the director took part in or influenced the decision of B to carry out that transaction. To avoid making B a "person closely associated" under (a), the director should not vote on, participate in any discussion in relation to or otherwise influence any decision of B to carry out a transaction in financial instruments of A. It will be sufficient for these purposes for the director to recuse him/herself from any board meeting discussing or relating to A, unless on the specific facts of the case the director otherwise exerted an influence on B's decision. A should not include B on its list of "persons closely associated", and the director should not notify B in writing of its obligations as a "person closely associated" to a "person discharging managerial responsibilities" in A under Art 19(5) unless and until B carries out a transaction in the financial instruments of A and the director participated in or influenced B's decision to do so.

As there is no definition of "control" in MAR, the reference in (b) above should be given its ordinary meaning of a majority of the voting rights of the entity. As (b) sets out a standalone test, if the director owned 60% of B this would make B a "person closely associated" to the director even if the director did not take part in or influence any decision of B to carry out a transaction in financial instruments of A.

Rationale: ESMA Q&A 7.7 https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf.

Q8. How should the introduction to Article 9 of the Delegated Regulation be interpreted as regards the issuer having a right to permit dealings "including but not limited to" the circumstances listed in Article 9?

A8. This means that the circumstances set out in Article 9 are a non-exhaustive list of circumstances to which the exception in Article 19(12)(b) can apply, but the issuer should not permit other transactions unless they meet the tests in Article 7(1) of the Delegated Regulation and are analogous in substance to those listed in Article 9.

Rationale: The wording of Article 9 of the Delegated Regulation makes it clear that the list is non-exhaustive. In making a judgement as to whether to permit a particular transaction, issuers should apply a substantive test using the principles illustrated by the specific circumstances listed in Article 9.

Q9. What falls within the exception for "entitlement of shares" in Article 19(12)(b)?

A9. The scope of the exception for "qualification or entitlement of shares" is uncertain, but we consider that it would be broad enough to encompass rights issues and bonus issues under which (subject to exclusions for certain overseas shareholders) all shareholders are allocated nil-paid rights (in the case of a rights issue) or ordinary shares or subscription shares free of payment in the case of a bonus issue. Provided the PDMR is given permission by the issuer to deal and the transaction cannot be conducted at another time than during a MAR closed period because the opening date and the final date for the entitlement fall during a MAR closed period, a PDMR is permitted to receive shares under a bonus issue and (provided they have no inside information) to undertake or elect to take up entitlements under a rights issue or to allow entitlements to lapse.

Rationale: Transactions made under or related to an entitlement of shares fall within the permitted exceptions in EU MAR Article 19(12)(b). The concept should be regarded as including any entitlement to shares derived from being an existing shareholder, and see Article 9(e) of the Delegated Regulation.

Q10. Can a PDMR acquire shares under a share savings scheme or a dividend reinvestment plan during a MAR closed period?

A10. Whether or not they are an employee of the issuer, if a PDMR enters into a share savings scheme or makes a standing election to reinvest dividends and other distributions received in the issuer's shares in each case outside a MAR closed period or prior to 3 July 2016 and has no inside information at that time, the PDMR can continue to acquire shares under the relevant scheme or election but must not cancel or amend his or her participation during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the trading or savings scheme or dividend investment plan) is made outside the MAR closed period, the PDMR is not "trading" during the MAR closed period (see Recital (61) to the MAR). Therefore the only action taken by a PDMR takes place before the start of a closed period, there is no "conduct" by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the acquisition of shares occurs during a MAR closed period.

Q11. Can a PDMR acquire or dispose of shares under a trading plan during a MAR closed period?

A11. The trading plan is a written plan entered into between the PDMR and an independent third party, which sets out a strategy for the acquisition and/or disposal of shares by the PDMR and either:

(a) specifies the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in; or

(b) gives discretion to that independent third party to make trading decisions about the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in; or

(c) includes a method for determining the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in.

Provided that the trading plan is entered into prior to 3 July 2016 or outside a MAR closed period and the PDMR has no inside information at that time, the PDMR can continue to acquire or dispose of shares under the trading plan but must not cancel or amend their participation during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the trading or savings scheme or dividend investment plan) is made outside the MAR closed period, the PDMR is not "trading" during the MAR closed period (see Recital (61) to the MAR). Therefore the only action taken by a PDMR takes place before the start of a closed period, there is no "conduct" by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the acquisition or sale of shares occurs during a MAR closed period.

Q12. If a PDMR has entered into an arrangement, outside a MAR closed period, to acquire shares on a monthly basis from salary (including under an HMRC tax-advantaged Share Incentive Plan), can the PDMR continue to acquire shares for the month in which the acquisition date falls within a closed period?

A12. Yes, as the purchase is pre-planned outside the MAR closed period.

Rationale: Implementation of transactions committed in advance of a MAR period are not transaction conducted by the PDMR during the closed period. (See Q3 and Q4 and ESMA Final Report paragraph 146). In addition the purchase falls within Article 9(d) of the Delegated Regulation (EU) 2016/522 and Article 7(1)(b) of the Delegated Regulation will be met (as the purchase is pre-planned and the PDMR's purchase must be made at the same time as purchases are made by all other participating employees).

Q13. Can a PDMR who is a non-executive director and has agreed, outside a closed period, to receive shares monthly in lieu of fees, or reinvest cash fees received in the acquisition of shares, receive or acquire shares in a closed period?

A13. Yes, so long as the receipt or acquisition of shares is an automatic event (i.e. there is no decision made, or discretion exercised, by the PDMR).

Rationale: Implementation of transactions committed in advance of a MAR period are not transactions conducted by the PDMR during the closed period. (See Q3 and Q4 and ESMA Final Report paragraph 146). In addition, this receipt or acquisition is permitted under Article 9(d) of the Delegated Regulation and Article 7(1)(b) of the Delegated Regulation will be met (as purchases/acquisitions are made on a pre-planned timetable). Although Article 9(d) refers to "an employee saving scheme" (and a non-executive director is not an employee), Article 9(d) must be read in the context of Article 19(12)(b) MAR which refers to an issuer being permitted to allow a PDMR to trade on its own account under "an employee share or savings scheme" (and this term is also used in Recital (24) of the Delegated Regulation).

Q14. Apart from the events specifically referred to in Article 10 of the Delegated Regulation (EU) 2016/523, should transactions be notified where the PDMR and their persons closely associated do not take any other action in relation to a transaction in financial instruments?

A14. Only when the shares are transferred to the PDMR or their person(s) closely associated. For example the automatic vesting of a share award prior to the transfer of shares to the PDMR or dealings by the trustees of an employee benefit trust (EBT) (of which the PDMR or their person(s) closely associated is a beneficiary) for the benefit of all beneficiaries will not be notifiable until the shares are transferred to the PDMR.

Rationale: In addition to the events specifically referred to in Article 10 of the Delegated Regulation (EU) 2016/523 which are notifiable, transactions likely to be considered 'conducted on the PDMR's own account' and thus notifiable under Article 19(1) of the Market Abuse Regulation (EU) 596/2014 are transactions for which the PDMR has not given any instruction, consent or otherwise had any control over at any point before the shares are transferred to the PDMR. (*Note: References in A13 to PDMR include references to the persons closely associated with the PDMR*).

Q15. Can a PDMR transfer shares of the issuer following exercise of an option under an HMRC tax-advantaged SAYE option scheme (or equivalent scheme) or release of shares from an HMRC tax-advantaged Share Incentive Plan (SIP) (or equivalent plan) into a savings scheme investing in securities of the issuer during a MAR closed period?

A15. Provided that (i) the transfer is for nil consideration, (ii) the PDMR does not possess inside information and (iii) the issuer is satisfied with the PDMR's explanation that the transaction cannot be conducted at another time, the issuer may permit the transfer. An example of this would be where shares are transferred within 90 days of coming out of a SAYE or SIP to an Individual Savings Account (ISA) with the same capital gains tax base cost.

Rationale: The transaction falls within Article 19(12)(b) and 9(e) and Article 7(1)(b) of the Delegated Regulation and see Recital (25) of the Delegated Regulation.

Q16. Is the cancellation or surrender of an option (or other right to acquire shares) awarded to a PDMR under an employee share scheme permitted during a MAR closed period?

A16. An automatic cancellation (i.e. a lapse under the scheme rules) is permitted but a surrender by a PDMR is not. A surrender by the PDMR will be a transaction conducted by the PDMR and should not take place during a closed period, whether or not the PDMR receives any payment or other consideration for it.

Rationale: A cancellation automatically under the scheme rules is not trading by a PDMR and so is outside the scope of Article 19(11) (see Recital (61) of MAR and Recital (24) of the Delegated Regulation).

Q17. I am one of three trustees whose investments include securities of a company of which I am a PDMR. Can the trust deal during a MAR closed period?

A17. Yes if the decision to deal is taken by the other trustees or by investment managers on behalf of the trustees independently of you, that is without consultation with or other involvement of you.

Rationale: The trustee who is a PDMR is not participating in the decision for the trust to deal so the transaction is not conducted by the PDMR.

Q18. What evidence (if any) does a PDMR have to provide when asking for permission to deal in a MAR closed period.

A18. In general the PDMR must be able to demonstrate that the particular transaction cannot be executed at another moment in time than during the MAR closed period. Where the proposed dealing is in relation to (i) an employee share or saving scheme or (ii) qualification or entitlements of shares, it is not necessary for the PDMR to provide a reasoned written request (a clearance from the issuer is still required although a single clearance can be given at the outset of the arrangement given that the arrangement is implemented by the issuer).

Rationale: Article 7(1)(b) of the Commission Delegated Regulation (EU) 2016/522 applies to all transactions for which Article 19(12) is being relied on to provide an exemption for conducting a transaction during a closed period, and not just to exceptional circumstances. Article 7(2) of the Delegated Regulation only applies to Article 19(12)(a)) and paragraph 156 of ESMA's Final Report provides that an issuer can permit dealings under Article 19(12(b) without requiring a case-by-case assessment.

Q19. Must a PDMR or their PCA notify dealings by him in units or shares in a collective investment undertaking or portfolio of assets where the undertaking or portfolio invests in shares of the issuer in relation to which he or she is a PDMR?

A19. If the collective investment undertaking or portfolio of assets is one in respect of which (i) the PDMR or PCA has ascertained that exposure to the shares or debt instruments of the issuer does not exceed 20% of the total assets held by that collective investment undertaking or portfolio of assets at the time of dealing or (ii) the PDMR or PCA does not know, and could not reasonably know, the percentage of total assets represented by the issuer's share or debt instruments and there is no reason for the PDMR to believe that the 20% limit is exceeded, the transactions in the issuer's shares by the collective investment undertaking or portfolio of assets are excluded from the obligation to notify transactions under Article 19(1).

Rationale: Article 19 (1a) of MAR as inserted by the Benchmark Regulation and see paragraphs 145-146 ESMA Final Report.

Q20. Must a PDMR or PCA notify deals in the issuer's securities by a collective investment undertaking (such as UCITS, a NURS and an Alternative Investment Fund, including a quoted investment trust or company) or a portfolio of assets in which the PDMR or PCA holds units or shares?

A20. Transactions in shares or debt instruments or linked financial instruments by a collective investment undertaking in which the PDMR or PCA has invested do not need to be notified if the manager of the undertaking has full discretion and does not receive any instructions or suggestions on portfolio composition directly or indirectly from the investors in the collective investment undertaking.

Rationale: Article 19(7) of MAR as amended by the Benchmark Regulation.

Q21. Is an investment by a PDMR in a collective investment undertaking or portfolio of assets that is excluded from the notification obligations (by virtue of Article 19(1)(a) – as inserted by the Benchmark Regulation) prohibited during a MAR closed period?

A21. No.

Rationale: As noted above in Q3, there is no separate definition of "transaction" in Article 19(11) and therefore the provisions for the interpretation of "transaction" in Article 19(1) and 19(7) apply to Article 19(11). There is no policy reason why investments by a PDMR in funds/portfolios of assets that do not meet the threshold for notification should be subject to restrictions during a closed period. As noted above in Q3, transactions executed by the manager of such a collective investment undertaking on a fully discretionary basis would not be caught at all by the language of Article 19(11) as the PDMR is not itself conducting the transaction.

Q21A. How does Article 19 apply to issuers that have only debt financial instruments admitted to trading on an EU trading venue?

A21A. Article 19 applies to PDMRs of debt issuers and their PCAs if the debt instruments are admitted to trading on an EU venue, but dealings by PDMRs and their PCAs in shares or other debt instruments of the debt issuer do not fall within the provisions in Article 19 unless those shares or other debt instruments are themselves traded on an EU venue or are "linked" financial instruments in relation to the traded debt.

Rationale: Article 19(4) states that Article 19 applies to issuers which have requested or approved admission of their financial instruments to trading on an EU trading venue (of the type set out in Article 19(4)). Therefore, the notification requirements and closed period restrictions in Article 19 apply to PDMRs and PCAs of debt issuers. (Equally, Articles 17 and 18 apply to debt issuers by virtue of Articles 17(1) and 18(7) respectively).

The obligation to disclose in Article 19(1) and the MAR closed periods in Article 19(11) apply to transactions in "the shares or debt instruments of that issuer" or "derivatives or other financial instruments linked thereto".

The scope of MAR as set out in Article 2(1) means that the reference to "shares or debt instruments" in Article 19 (1) and (11) only applies to (i) shares or debt instruments which are traded in the EU and therefore fall within paragraphs (a),(b) or (c) of Article 2(1); and (ii) derivatives or other financial instruments "linked" to the shares or debt instruments which are traded in the EU. Therefore dealings by PDMRs and PCAs of debt issuers in shares or other debt instruments of that issuer will not need to be disclosed unless those shares or other debt instruments are themselves admitted to trading on an EU venue or they are derivatives or "linked" financial instruments in relation to the shares or debt instruments of that issuer which are traded on an EU venue. If shares or other debt instruments of another entity in the same group as the issuer are admitted to trading on an EU trading venue, then they are not shares or debt instruments of the "issuer" and therefore would only fall within the Article 19 provisions if they fall within the concept of a "linked" financial instrument.

The closed periods in Article 19(11) are the periods of 30 days prior to an interim financial report or year-end required by the rules of (a) "the trading venue where the issuer's shares are admitted to trading" or (b) national law. The reference to a trading venue where the issuer's shares are admitted to trading should be regarded as applying to an EEA trading venue only, because MAR Article 3(10) defines "trading venue" as "a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU" (that is MIFID II). If the issuer's shares are not admitted to trading on any EEA trading venue then only the reference to national law in paragraph (b) is relevant.

Q22. Can the manager of a collective investment undertaking or portfolio of assets in which a PDMR is invested deal during the MAR closed period?

A22. Yes, provided that the conditions set out in the answer to Q20 apply to that PDMR.

Rationale: This is not a transaction conducted by a PDMR.

Share Buy-Backs (Article 5)

Q23. Can an issuer operate a share buy-back programme which does not satisfy the conditions in Article 5 of EU MAR and the Level 2 Regulation?

A23. Provided that an issuer has disclosed all inside information at the relevant time, and the share buy-backs are conducted in a way which does not otherwise mislead or manipulate the market, own share buy-backs outside the Article 5 exemption will not constitute market abuse. Issuers may think it appropriate to observe the same restrictions on purchases of their own securities during MAR closed periods as applied under the Listing Rules in force prior to MAR implementation, that is by doing so under a time-scheduled or independent broker-managed buy-back programme.

An investment company can purchase its own shares during a MAR closed period if it is satisfied that all inside information that the directors and the issuer may have has previously been notified to a RIS. In order to demonstrate this, investment companies should consider whether, prior to conducting any buy-backs during a MAR closed period, they should follow the practice previously required under the Listing Rules of making a regulatory announcement at the start of the MAR closed period or, if later before conducting any share buy-backs, that the issuer is satisfied that all inside information has previously been notified.

Rationale: Recital (12) of EU MAR states that "trading in own shares in buy-back programmes… which would not benefit from the exemptions under this Regulation shall not of itself be deemed to constitute market abuse", so it is clear that the Article 5 exemption provides a safe harbour and is not prescriptive.

The safe harbour under Article 4 of the Level 2 Regulation does not apply to share buy-backs during a MAR closed period except where there is a time scheduled buy-back programme or it is lead managed by an investment firm or credit institution which makes its trading decisions independently of the issuer. This does not mean that share buy-backs cannot be undertaken during a MAR closed period outside the exemptions provided that the issuer does not have inside information and the share buy-back does not constitute market manipulation or mislead the market.

Q24. Is stake-building permitted (by Article 9(5)) provided the only inside information the bidder has is (i) its intention to bid and (ii) its intention to stake-build?

A24. Yes. This falls within Article 9(5) which refers to "its own knowledge that it has decided to acquire … financial instruments" and is wide enough to include both the intention to make a bid and the intention to acquire shares through stake-building.

Rationale: See also Recital (31) which provides that "Acting on the basis of one's own plans and strategies for trading should not be considered as using inside information".

The exclusion of stake-building from Article 9(4) does not impact the scope of Article 9(5).

Disclosure (Article 17)

Q25. What must an issuer do to comply with the Implementing Technical Standards (ITS) for public disclosure of inside information?

A25. Where an announcement (for example an announcement about a transaction), includes some items that are inside information, even if it includes other information that is not, it is sufficient to include a general reference such as "This announcement contains inside information". Where the announcement covers a number of clearly different matters that could have been the subject of separate announcements it would be appropriate to distinguish between those matters that include inside information and those that do not. However, it is important that inside information within the announcement is not concealed (ie buried in with large amounts of non-inside information).

Rationale: Article 1(b)(i) of the draft ITS requires that communications clearly identify that the information communicated is inside information. We consider that the general reference we have proposed will be sufficient to ensure investors are aware that the announcement contains inside information and to require greater specificity would be disproportionate.

Q26. In an announcement containing inside information who should be identified as the person making the notification?

A26. The individual who manages the release of the announcement (for example the company secretary) should be named.

Rationale: We consider this approach to be appropriate because it provides potentially useful contact information.

Q27. How may an issuer comply with the requirement for inside information to be located "in an easily identifiable section of the [issuer's] website"?

A27. Issuers can post announcements of inside information on the section of their website that contains all regulatory announcements and do not need to establish a separate section, only containing announcements which include inside information.

Rationale: This is consistent with paragraphs 220 and 221 of the ESMA Final Report.

Q28. How should an issuer notify inside information when an RIS is not open for business?

A28. Following DTR 1.3.6G will ensure that DTR 6.3.4R is complied with when a RIS is not open, although this may not be appropriate when an issuer also has securities traded on venues in other jurisdictions

Rationale: Article 17(1) requires issuers to make inside information public as soon as possible and states that the issuer "shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council". Article 2 of the ITS on publication of inside information further states that inside information must be disseminated to as wide a public as possible, free of charge simultaneously throughout the Union.

DTR 1.3.6 previously stated that when inside information is required to be notified via an RIS at a time when the RIS is not open for business, the out of hours method of releasing inside information specified in DTR 1.3.6 "must" be used. The retained guidance in DTR 1.3.6 from 3 July states that the out of hours methods "may" be used when the RIS is not open for business. This means that issuers can satisfy their obligation to make inside information public as soon as possible under Article 17 by using the out of hours methods set out in DTR 1.3.6 although this may not be appropriate when an issuer also has securities traded on venues in other jurisdictions. Issuers could instead wait for the RIS to open for business, but in that case an issuer would need to consider by reference to the individual circumstances (including whether or not the securities are traded on another venue which will be open for business before the RIS opens and how long it is before the RIS opens) whether waiting for the opening of the RIS would reasonably be regarded as making the information public as soon as possible.

Insider Lists (Article 18)

Q29. Which individuals should be included on insider lists for advisers to issuers?

A29. For advisers to issuers, staff need only be included on the insider lists if they meet two tests:

- performing tasks through which they have access to inside information on the issuer; and
- they are acting on behalf of or for the account of the issuer.

It is the deal teams and client-facing staff who generally should be included on the list, if they have access to inside information. Secretarial staff and other support staff who have access should also be included (although individuals with the ability to access IT systems but whose duties do not require them

to access inside information do not need to be included unless they actually have accessed it). Senior management who receive management information or sit on review committees even if they are not involved in the transaction must be included.

Rationale: This test is substantially the same as under the Market Abuse Directive and see Market Watch 24 and CESR guidance.

Q30. How do issuers and their advisers complete the national identification number column in the Insider List templates in respect of British and other nationals who do not have national identification numbers?

A30. For UK nationals this can be left blank, as it is only required to be completed "if applicable". For other nationals, who have a national identification number, that number should be included.

Rationale: UK citizens do not have national identification numbers so the requirement cannot apply.

Investment Recommendations (Article 20)

Q31. If a circular contains a voting recommendation by the board of an issuer, as required by the Listing Rules, does this constitute an "investment recommendation" for the purposes of Article 20 of EU MAR?

A31. A voting recommendation in the form required under the Listing Rules is not an "investment recommendation" or "information recommending or suggesting an investment strategy" for the purposes of EU MAR and so falls outside the requirements of Article 20.

Rationale: Communications between a Board and shareholders are subject to legal duties and responsibilities and are not within the scope of "persons other than those referred to in point (i) of Article 1(34)(ii). Also a decision to vote is not an "investment decision" for the purposes of Article 1(34)(ii). See also Q32.

Q32. Will the directors' recommendation of a takeover offer be treated as "an investment recommendation or other information recommending or suggesting an investment strategy" under Article 20?

A32. No. Article 20 is not intended to capture directors' recommendations on a takeover, whether effected by way of a contractual offer or a scheme of arrangement. This is the same whether the consideration is cash or bidder shares, or includes a mix and match. Neither should the independent adviser's opinion to the target company board be treated as falling within Article 20.

Rationale: Such recommendations are made in the context of the specific relationship/duties existing between directors and shareholders and are subject to the specific regime and requirements set out in the Takeover Code. See also Q31.

PART B: TAKEOVERS

Market soundings (Article 11)

Q1. If the bidder and target negotiate the terms of an irrevocable undertaking to accept the offer/vote in favour of the scheme (as applicable) that is intended to be given by target directors, will those communications fall within the market soundings regime?

A1. No.

Rationale: The negotiation of the terms of the irrevocable undertaking involves communications between the bidder and target (represented by its directors) and not communications with a "person entitled to securities" of the target as referred to in Article 11(2). A bidder seeking a recommendation from a target board will approach the target board and put forward an indicative offer that is subject to a number of conditions. These will invariably include a requirement that those target directors who hold shares will give irrevocable undertakings to accept the offer/vote in favour of the scheme (as applicable).

If a recommendation is forthcoming, the target directors will agree to provide such undertakings. The approach to the target board is not made in order to ascertain the willingness of the directors to accept the offer/vote in favour of the scheme but in order to obtain a recommendation of the offer (and in considering whether to do so the directors are expected to consider the interests of the company and all its shareholders and not their own personal position). The fact that a decision to recommend will lead to an expectation that the directors will enter into irrevocable undertakings is a consequence and not an objective of the approach, which is not therefore a market sounding. If target board decides to recommend the offer, the terms of the irrevocable undertaking would then typically be negotiated and agreed as between the bidder and target and their respective legal advisers (see Q2 below), and, as noted, all the target directors would then be expected to enter into the agreed form of undertaking.

Q2. Where the terms of an irrevocable undertaking to accept the offer/vote in favour of the scheme (as applicable) intended to be given by target directors have been agreed between the bidder and target as outlined above, will the provision of the agreed form irrevocable to the target directors fall within the market soundings regime?

A2. No.

Rationale: This is merely an ancillary process relating to communications that have already taken place with the target directors (in their capacity as such) in connection with the proposed offer, including the negotiation of a form of irrevocable undertaking as between the bidder and target (as discussed above). In this context, the process (whether conducted directly by the bidder or by the target company) of providing the final form of irrevocable undertaking to the target directors and gathering executed copies of the same does not involve the communication of inside information "necessary to enable the…[target directors]…to form an opinion on their willingness to offer their securities" as referred to in Article 11(2).

Q3. Will communications between the bidder and shareholders with a view to seeking irrevocable undertakings to accept the offer/vote in favour of the scheme (as applicable) from them fall within the market soundings regime?

A3. Yes, if the shareholders are not target directors (who are covered in Q1 and Q2 above).

Rationale: These would fall within Article 11(2) as they would involve wall-crossing such shareholders and, as referred to in Article 11(2), communicating inside information to them which is "necessary to enable the…[shareholders]…to form an opinion on their willingness to offer their securities".

Q4. In Article 11(2), is a communication within the market soundings regime only if it is made by the bidder – i.e. given the lack of equivalent to Article 11(1)(d)?

A4. No. References to the bidder in Article 11(2) should be read as including references to persons clearly acting as the bidder's agent/on its behalf (e.g. its financial adviser or broker).

Rationale: To read the provisions of Article 11(2) more restrictively would produce an anomalous result.

Q5. Can market soundings be conducted other than in strict compliance with Article 11 and the Implementing Technical Standards?

A5. Yes, non-compliance with the market sounding requirements (when a communication is within Article 11(1) or (2) and inside information is disclosed) does not automatically mean that the communication is unlawful or that the person making the communication is subject to sanctions simply on the basis of non-compliance. This is subject to the obligation under Article 11(3) which must be complied with in all cases (i.e. that the disclosing market participant must consider in advance whether the sounding will involve disclosure of inside information and make a written record of its conclusions and the reasons therefor).

Rationale: Recital (35) provides that "There should be no presumption that market participants who do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against the

unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation…".

Article 11(4) states that "For the purposes of Article 10(1) [(unlawful disclosure)], disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article" – i.e. compliance with the provisions of Article 11 is mandatory to fall within the safe harbour, but non-compliance does not automatically mean that there has been a breach of Article 10.

The fact that Article 30 (administrative sanctions) does not include reference to breach of Article 11 also lends weight to this analysis.

Article 11(3) imposes a stand-alone obligation that is not specifically limited to the safe harbour set out in Article 11(4).

Stake-building on a takeover

Q6. Will due diligence information that amounts to inside information preclude stake-building pre-announcement as a result of Article 9(4)?

A6. Article 9(4) is expressed not to apply in relation to stake-building. Therefore bidders cannot rely on Article 9(4) to stake-build pre announcement when in possession of any inside information (other than knowledge of their own intention to bid/stake-build – see Q24 of Part A above). Bidders will need to consider/apply their judgment on a case by case basis as to whether stake-building is otherwise permitted. For stake-building post-announcement, see Q7 below.

Q7. Will due diligence information that amounts to inside information cease to be inside information once a bid is announced if the bid price is in excess of the price effect the inside information had been expected to have (i.e. if the impact of any inside information would be absorbed by the bid premium)?

A7. It will be necessary to consider this issue/apply judgment on a case-by-case basis to determine whether in a particular instance the information has ceased to be inside information. Where a recommended bid has been announced it may well be possible for the bidder to come to the view that the information is no longer inside information including on the basis that its impact will have been absorbed by the recommended price.

Where a non-recommended or hostile bidder has inside information about the target, it may also be possible for the bidder to come to the view that the bid price it has announced effectively absorbs the impact of that inside information, but it may be harder to reach this conclusion than on a recommended deal. However, once the defence document has been published by the target board it would normally be the case that the information is no longer inside information. Shareholders are required to be given sufficient information and advice to enable them to reach a properly informed decision on an offer; no relevant information should be withheld from them.

PDMR dealings (Article 19)

Q8. Where a PDMR has entered into an irrevocable undertaking outside a closed period, can they satisfy that irrevocable undertaking during a closed period?

A8. Yes.

Rationale: The point at which the PDMR conducts the transaction is the point at which they enter into the irrevocable undertaking rather than the point at which they satisfy it. Provided it is entered into outside a closed period it can therefore be satisfied during a closed period (see Q3 and Q4 in Part A above).

It should also be noted that, where a bid is announced at the same time as interims/prelims are released, irrevocables that have been signed and held in escrow for release at the time of the bid being announced will not be treated as being dealings during the immediately preceding closed period as they only become effective upon release from escrow (at which point the closed period has ended).

Q9. During a closed period under Article 19(11) can a PDMR vote in favour of/enter into an irrevocable undertaking to vote in favour of a takeover conducted by way of scheme of arrangement?

A9. Yes. Note, however, that where an irrevocable undertaking on a scheme includes an obligation to accept a contractual offer if the transaction structure is switched by the bidder, entering into the irrevocable undertaking should be treated in the same way as entering into an irrevocable undertaking in respect of a contractual offer (see Q10 below).

Rationale: This does not involve the PDMR conducting a transaction within Article 19, but rather involves them voting/giving an undertaking to vote their shares in favour of the scheme of arrangement. In addition, the transfer of shares on completion of a scheme of arrangement by order of Court would not be restricted during a closed period as it would take place automatically by operation of law rather than being a trading by the PDMR (see Recital (61) to MAR).

Q10. During a closed period under Article 19(11) can a PDMR accept/enter into an irrevocable undertaking to accept a contractual takeover?

A10. Unless an exemption applies, no.

Rationale: This involves the PDMR conducting a transaction within Article 19 (subject to Q9 above (i) where an acceptance is made during a closed period pursuant to an irrevocable undertaking which was entered into prior to commencement of the closed period or (ii) where an irrevocable is released from escrow at the point of announcement in the case of a bid which is announced at the same time as interims/prelims are released).

Q11. Do any of the matters referred to in Q9 or Q10, whether they occur within (if permitted) or outside a closed period, need to be disclosed in accordance with Article 19(1)?

A11.1 Voting in favour of/entering into an irrevocable undertaking to vote in favour of a scheme does not need to be notified under Article 19(1).

Rationale: This does not involve a transaction being conducted on the account of the PDMR. In addition, no notification would be required in relation to the transfer of shares on completion of a scheme of arrangement by order of Court as the target company would be delisted upon the scheme becoming effective.

A11.2 Entering into an irrevocable undertaking to accept a contractual offer does not need to be notified under Article 19(1). Accepting a contractual offer (whether pursuant to an irrevocable undertaking or otherwise) does not need to be notified until the offer becomes wholly unconditional.

Rationale: Pursuant to Article 10(2)(i) of Regulation (EU) 2016/522 conditional transactions need only be notified on occurrence of the conditions and actual execution of the transaction. Even when the irrevocable undertaking is satisfied by submission of an acceptance of the offer, that acceptance remains conditional until the offer becomes unconditional. Notification would not therefore be required under Article 19(1) until the offer became wholly unconditional. Acceptances made by PDMRs prior to the offer becoming wholly unconditional should be notified by them when the offer becomes wholly unconditional, and acceptances by PDMRs made after the offer has become wholly unconditional should be notified when made.

Note that, notwithstanding this analysis in respect of MAR, disclosure of irrevocable undertakings and acceptance/approval levels would need to be announced in accordance with any applicable takeover legislation/regulation.

PART C: CONTRACTUAL ARRANGEMENTS INVOLVING A SUBSCRIPTION FOR SHARES

Q: Where parties are negotiating contractual arrangements in relation to a transaction, and those arrangements involve a subscription of shares (e.g. an issue of consideration shares in connection with an acquisition, an undertaking to subscribe for shares under a firm placing or signing an irrevocable undertaking in connection with a takeover):

(d) is the issuer able to selectively disclose inside information to the counterpart(ies) in connection with such arrangements;

(e) if so, is the issuer able to delay disclosure of the inside information to the market, notwithstanding its disclosure to the counterpart(ies); and

(f) if so, is there a requirement for the inside information to be announced before the relevant contractual arrangements can be entered into with the counterpart(ies)?

A(a) Whilst the facts must be considered on a case-by-case basis, we would typically expect this to be permitted in accordance with Articles 10 and 14 of MAR.

Rationale: Article 10 provides that unlawful disclosure (in breach of Article 14) will arise where a person discloses inside information "*except where the disclosure is made in the normal exercise of an employment, a profession or duties*". The guidance in DTR 2.5.7(2) recognises that an issuer may be justified in making selective disclosure to certain types of recipient including (but not limited to) "*persons with whom the issuer is negotiating, or intends to negotiate, any commercial financial or investment transaction (including prospective underwriters or placees of the financial instruments of the issuer)*". However, it makes clear that selective disclosure to any or all of these persons may not be justified in every circumstance where an issuer delays disclosure of inside information. The FCA indicated in CP 16/38 (paragraph 2.15) that it did not intend to amend these provisions as its view is that they are not impacted by the MAR Guidelines and confirmed this in PS 17/2. Whilst not constituting formal or binding guidance, in paragraph 76 of its Final Report on Draft technical standards on the Market Abuse Regulation (ESMA/2015/1455) ESMA also recognises (in the context of market soundings under Article 11) that information disclosed will generally be the information relating to the characteristics of the transaction in question but that it may also include "…*some other information not necessarily directly related to the possible transaction but providing important context to the transaction. For example general information about the issuer such as its financial standing could be useful*". This is expressed to be subject to the caveats that inside information about the financial standing of the issuer should have been made public unless delayed disclosure is justified and that disclosing market participants should avoid disclosing any unnecessary additional inside information. By way of example, where an issuer intends to conduct an equity fundraising to finance an acquisition, it would typically be considered justifiable to disclose the fact of the associated acquisition to potential subscribers and placees. Disclosure made in accordance with the market soundings regime will be deemed to be disclosure made in accordance with Article 10 of MAR (Article 11(5) and recital 35), although non-compliance with the market-soundings regime does not (of itself) necessarily mean that disclosure has not been made in the normal course of an employment, a profession or duties (see Q5 in Part B above*)*.

A(b) The facts must be considered on a case-by-case basis, but a delay in disclosure would be permitted provided each of the three conditions set out in Article 17(4) are met.

Rationale: Article 17(4) permits issuers to delay disclosure of inside information to the public provided that immediate disclosure is likely to prejudice the issuer's legitimate interests, delay is not likely to mislead the public and confidentiality can be maintained. The MAR Guidelines published by ESMA in relation to delayed disclosure (ESMA/2016/1478) set out a non-exhaustive indicative list of circumstances in which an issuer may have a legitimate interest in delaying disclosure that includes situations where the issuer is conducting negotiations and the outcome would be likely to be jeopardised by immediate public disclosure. Provided that all three conditions are met there is therefore no requirement for the fact that negotiations are taking place in relation to a potential transaction to be announced prior to contractual arrangements being entered into. Article 17(8) (which requires that

where inside information is disclosed to third parties it must be simultaneously disclosed to the market) does not apply where the recipient owes a duty of confidentiality (whether such duty is based on a law, regulation, articles of association or contract).

A(c) Whilst the facts must be considered on a case-by-case basis, we would not typically expect disclosure to the market to be required before the relevant contractual arrangements can be entered into with the counterpart(ies).

Rationale: Recital 23 of MAR notes that "*the essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties…and, consequently, the undermining of the integrity of financial markets*" and consequently that the prohibition on inside dealing should apply where "*a person who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into market transactions in accordance with that information*".

Recital 24 of MAR provides that "*Where a legal or natural person in possession of inside information acquires or disposes of, or attempts to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, it should be implied that that person has used that information*" but that the question of whether a person has infringed the prohibition on insider dealing or has attempted to commit insider dealing "*should be analysed in the light of the purpose of this Regulation, which is to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information*."

Recitals 23 and 24 of MAR are consistent with the ECJ's judgment in *Spector Photo Group* regarding the insider dealing prohibition in the Market Abuse Directive (**MAD**), paragraph 61 of which includes language similar to Recital 24 of MAR but also goes on to note that "*Only usage which goes against that purpose constitutes prohibited insider dealing*". The judgment in *Spector Photo Group* also refers in a number of places specifically to "market transactions" – for examples paragraphs 48, 49 and 53 which refer to the Commission's proposal for the adoption of MAD being "*…to ensure equality between the contracting parties in stock-market transactions"* and *"based on the will to prohibit insiders from drawing an advantage from inside information by entering into market transactions to the detriment of other actors on the market who do not have access to such information*" and that "*…the prohibition on insider dealing applies where a primary insider who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into a market transaction in accordance with that information*". The judgment also notes that the insider dealing prohibition in MAD did not need to be interpreted in such a way that any primary insider who entered into a market transaction automatically fell within the prohibition on insider dealing and that, as pointed out by the UK and Italian governments, such an extensive interpretation would "*…entail the risk of extending the scope of that prohibition beyond what is appropriate and necessary to attain the goals pursued by [MAD]*" and could "*…, in practice, lead to the prohibition of certain market transactions which do not necessarily infringe the interests protected by [MAD]*" and that therefore it is "*necessary to distinguish 'uses of information' which are capable of infringing those interests from those which are not*" (paras 45 and 46).

Contracting with counterpart(ies) in the circumstances described in the Q should be distinguished as a use of information that does not infringe the interests protected by MAR. Structuring of transactions in this manner is consistent with market practice and does not constitute misuse of the inside information or undermine the integrity of the financial markets but rather is legitimate and useful to the proper and orderly functioning of the financial markets. There is equivalence of information as between the issuer and the counterpart(ies) and in this situation no unfair advantage is taken of the information by either party, as by its nature the entering into of the transaction is not to the detriment of other market participants who do not have access to the information and are not able to and do not directly or indirectly participate in the transaction which is not a "market" transaction. Whether this will be the case in other situations would need to be considered in the context of the interests protected by MAR.

Whilst all three issues must always be considered separately and on a case-by-case basis, as a more general point, given that (subject to the caveats summarised above) MAR provides a safe harbour to

allow disclosure of inside information to be delayed by issuers and also permits issuers to selectively disclose such information, it would be inconsistent to require issuers to announce the relevant information before they can contract with the counterpart(ies) simply because the transactions in question involve an issue of shares to the counterpart(ies). In this context, it should also be noted that Recital 32 to MAR states that market soundings are a "*highly valuable tool to…ensure deals run smoothly*" and Recital 33 refers to one of the purposes of market soundings as being "*to obtain a financial commitment to participate in the transaction*".

30 October 2017

APPENDIX

Members of the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code

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