Market Abuse Regulation

27 January 2014

LSEG Response to Discussion Paper:
ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

EXECUTIVE SUMMARY

1. We have reviewed ESMA's proposed approach to suspicious transaction and order reports, and we believe that the Suspicious Transaction Reports (STR) proposed by ESMA in the discussion paper will lead to the reduction in the amount of information that the competent authority receives from trading venues. This is because at present, Regulated Markets (RMs) and Multilateral Trading Facilities (MTFs) already submit reports and notifications to their national competent authorities, that provides more detailed information than is required in the proposed STR templates.

2. In relation to Buybacks and the issue of reporting requirements, we believe that where a single competent authority is to be used for reporting purposes, the determining criteria for designating the responsible authority should be the location of the most liquid market. The competent authority of the most liquid market is best placed to monitor and ensure the implementation of measures taken by the trading venue to prevent market abuse.

3. While we welcome ESMA's bid to enhance clarity and procedural certainty for market participants, we believe that the proposed record keeping requirements are onerous and are likely to result in unnecessary administrative burdens, especially for the smaller market participants. We would suggest that in this area, market driven solutions in compliance practices and procedures should be encouraged. Therefore, in this instance we would prefer that ESMA issues guidelines, rather than binding technical standards.

4. We suggest that it is important to ensure that any categorisation of financial instruments according to their liquidity, (for example '*shares with extreme low liquidity')* is only applied in the context of the activities allowed during a buy-back programme and not as a new category of more general application or categorisation of companies or issuers. If apparently adopted as a broader categorisation of issuers, we believe that this could discourage investment in SMEs, as asset managers would be reluctant (or unable) to include such instruments in their portfolio of eligible assets. This will undo the considerable and important work that is being undertaken at EU and Member State level, to foster investment in and development of SMEs.

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INTRODUCTION

London Stock Exchange Group plc (LSEG) welcomes the opportunity to respond to the ESMA Discussion Paper on its “policy orientations on possible implementing (ESMA/2013/1649) under the Market Abuse Regulation”. LSEG supports ESMA in the development and implementation of technical standards to ensure the consistent application of the Regulation throughout the Union.

In providing this response, we have drawn on our experience as an operator of multiple neutral, well regulated markets within Europe’s leading diversified exchange group, operating four trading venues (London Stock Exchange, Borsa Italiana, Turquoise, Euro MTS); four Central Counterparties (CC&G and three within LCH.Clearnet Group Ltd), Trade Repository (UnaVista Ltd); and a Central Securities Depository (Monte Titoli).

LSEG is highly experienced at operating in a regulatory environment and having regulatory responsibilities in that context. As a provider of neutral and efficient markets, LSEG is committed to taking all appropriate steps to prevent and detect market abuse.

In our response, we only deal with those aspects that are relevant to LSEG and not of the majority of the wider points, which we believe will be addressed more appropriately by other market participants and the regulatory authorities.

This submission represents the views and experience of London Stock Exchange plc, Borsa Italiana and other market operators and investment firms within the LSEG.

We acknowledge that this response may be published by ESMA.

RESPONSE TO QUESTIONS

I. Buyback programmes and stabilisation (Article 3 of MAR)

I.1 Buyback programmes

Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

Whilst we agree with the general premise, we believe that in case of non-equity Multilateral Trading Facilities (MTFs), a proportionate approach should be introduced, especially with reference to dissemination and storage mechanisms, which should be dependent on the size and type of trading venue. This is because of the difference in levels of information flows between equity and non-equity MTFs.

Q4: **Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?**

In principle, we believe that where a single competent authority is to be used for reporting purposes, the determining criteria should be the location of the most liquid market.

The competent authority of the most liquid market is best placed to monitor and ensure the implementation of measures taken by trading venues to prevent market abuse. Furthermore, once MiFID is implemented, the competent authority will receive the data from transaction reporting. As is already the case with the Short Selling Regulation, and to ensure legal certainty for market participants, mechanisms should be put in place to check regularly the most liquid market for the particular security and to then update relevant stakeholders.

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

We do not agree with the rationale for the proposal to exclude from the safe harbour the “last third” of the auction. Our experience has shown that the price formation process during the end of auctions is particularly sensitive, especially in relation to the orderly functioning of the market, rather than solely with reference to market abuse.

However, we believe that discretion for setting of safeguards and the particular requirements for every auction phase should be left to the market operator. This is not only with regards to the issuer’s operation, but also with reference to the other market participants’ activities on the market.

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

We agree with ESMA that market participants require more certainty as to whether and when they are allowed to buy back shares in the circumstances described. However, we suggest that it is also important to ensure that any categorisation of financial instruments according to their liquidity, (for example '*shares with extreme low liquidity')* is only applied in the context of the activities allowed during a buy-back programme and not as a new category of more general application or categorisation of companies or issuers. We suggest that these categorisations, if applied more widely, could result in unintended consequences, for example in the area of UCITS.

The UCITS Directive (85/611/EEC) lays down a set of rules concerning the financial instruments in which a UCITS can invest ("eligible assets"). Article 1 of the Directive defines these, at a high level, as being "*transferable securities and… other liquid financial assets*". We suggest that appearing to categorise instruments as '*shares with extreme low liquidity*' could prevent some asset managers from investing in these shares (and those in the other criteria mentioned), because they cannot be included in an assessment of "eligible assets". We see also that the notion of "*less liquid*" has been introduced in the coming CSD regulation where, for example, the liquidity of the financial instrument is taken into account in the provisions concerning measures to address settlement discipline.

We believe that adoption of these categorisations more widely could discourage investment in SMEs and risks frustrating the work that is being undertaken at EU and Member State level, to foster investment in SMEs and develop their markets. Therefore we would urge that any approach in relation to the trading in buy-back arrangements is clearly restricted to the specific trading circumstances discussed in the DP and is not for more general application.

Stabilisation measures

Q22: Do you agree that "block-trades" cannot be subject to the exemption provided by Article 3(1) of MAR?

We do not see how the issue described in paragraph 53 can arise, as the stabilisation activity is performed at market prices and so block trades are *per se* out of the scope of the exemption.

II. Market soundings (Article 7c of MAR)

We welcome the proposals in the paper that aim to enhance clarity and procedural certainty for market participants, as well as introducing standardisation to the market soundings process. However, we would suggest that the proposals are too prescriptive and could impose undue administrative burdens on issuers, advisors and investors.

Market soundings often involve initial and secondary offers, so tightening the requirements for market soundings could be detrimental to efforts in raising new capital, especially for SME issuers. This is of crucial importance with regard to initial offerings and, in particular, for those jurisdictions where the scope of the market abuse regulation will be wider due to specificities of the domestic legal framework. For instance, in Italy the provisions of the market abuse requirements will apply two months in advance of the start of trading, because the processes of admission to listing and admission to trading coincide and are performed by the market operator in parallel with the prospectus procedures.

For these reasons, we would suggest the following:

- Allow some discretion in the record keeping requirements. We believe that the requirement for market participants to maintain written records about each consideration in the assessment process (including the conclusions and the reasons behind each conclusion), is onerous and is likely to result in undue administrative burdens**,** especially for the smaller market participants.
- Market driven solutions in compliance practices and procedures should be encouraged. Therefore, in this instance, we would prefer that ESMA issues guidelines that can be adopted by each market having regard to its specific circumstances, rather than binding technical standards.

III. Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

Q41 Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

We have reviewed the proposed indicators of market manipulation that are listed in Annex III of ESMA's discussion paper. We support ESMA's analysis and have no further comments.

Q42: In your view, what other ways exist to measure order cancellations?

We agree with the measures proposed with regards to order cancellation. However, we believe that reference should also be made to the size and characteristics of the market participant involved. For instance, it is natural that cancellation rates will vary between small traders and more sophisticated operators. Therefore, consideration should also be given to the type of instrument in question. For example, derivatives and ETFs always have a much higher rate of cancellations than equities, since these instruments are tracking either a single or a range of underlying securities, where the underlying prices are constantly changing in the relevant market and these changes must be reflected in the participants' orders for the ETF or derivative.

Q43: What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?

We agree with the ESMA analysis. However we would like to stress that Market operators may not be in a position effectively to detect cross-venue and cross-product market manipulation.

This is because, in general, they only have a view of their own markets and in those cases where liquidity is fragmented across multiple venues, the view given will be partial (please refer to ESMA's own assessment - under the sub heading v.2.2 ***Partial view*** paragraph 201).

Moreover, although market operators can rely on public data, information sharing and the cooperation of the other market operators, this data is not standardised, can be costly to retrieve from the various venues and/or information providers, and not easy to manipulate for extraction of the relevant data.

IV. Accepted Market Practices (Article 8a(5) of MAR)

We have reviewed the example of AMP listed in Annex IV of ESMA's discussion paper. We support ESMA's analysis and have no further comments.

V. Suspicious Transactions and Order Report (Article 11 of MAR)

V.1 The reporting obligations

V.1.1 Attempted market abuse (including reporting of orders)

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

We recognise that MAR Article 11(1) creates a requirements for market operators and investment firms that operate a trading venue to establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting market abuse, and to detect attempts to engage in market abuse in accordance with Articles 31 and 56 of MiFID.

Regulated Markets (RMs) and Multilateral Trading Facilities (MTFs) already submit reports and notifications to their national competent authorities containing more detailed information than is required in the STR templates as proposed by ESMA in the discussion paper. Any combined STR template should seek to reflect the level of information that the competent authorities currently receive.

It would be useful if ESMA could clarify whether national competent authorities will have the discretion to retain existing reporting requirements from RMs and MTFs.

VI. Public disclosure of inside information and delays (Article 12 of MAR)

VI.1.1 Inside Information already disclosed

Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

We understand the need for an active distribution of information from the issuers to the media with a view to reaching investors as expressed in paragraph 244.

However, as the new market abuse regulation will apply to all types of MTFs, regardless of the model and regulatory characteristics, we believe that there should be room for specific exemptions based on a proportionate approach. We refer in particular to non-equity MTFs that allow SMEs to access public markets and raise capital through bond issuances.