Alternative Investment Management Association

EUROPEAN SECURITIES AND MARKETS AUTHORITY
103 Rue de Grenelle
Paris
75007
France

27 January 2014

Dear Sir/madam,

AIMA response to Discussion Paper - ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

The Alternative Investment Management Association (AIMA)[1] is grateful for the opportunity to respond to the European Securities and Markets Authority's (ESMA)'s Discussion Paper 'ESMA's policy orientations on possible implementing measures under MAR' (the DP). The ability to interact with ESMA prior to the publication of formal proposals contained within a consultation paper is especially valued by our members.

AIMA's members support the EU legislative institutions' and ESMA's policy aim to combat market abuse and to enhance the existing market abuse regime in order to boost market integrity and investor protection, thus increase confidence and participation in European financial markets. We believe strongly that maintaining fair and efficient financial markets is central to the health of the European economy.

Overall, AIMA agrees with the policy orientations contained within the DP; nonetheless, we have certain comments that we would like to raise in relation to specific aspects of the DP. In particular, market soundings.

AIMA's members represent buy-side participants in global financial markets and regularly receive soundings from issuers of various securities. Measures to prevent inadvertent wall-crossing with inside information are central to their compliance initiatives, as such wall crossing could have significant negative impacts on their abilities to invest freely in accordance with their particular strategies and investment mandates. Our members, therefore, support the policy goal of ensuring that improper disclosure of inside information and any inadvertent wall-crossing is minimised in an efficient and proportionate manner.

Many of AIMA's members also make use of quantitative strategies involving algorithms of varying latency. In this regard, we look to assist ESMA by providing input on the indicators of market manipulation from an algorithmic participant's perspective. In particular, we appreciate the challenges of developing indicators that can distinguish abusive from reasonable behaviour.

Certain AIMA members also provide investment recommendations, as would be caught by Article 15 of MAR. We, therefore, respond directly to certain questions posed by the DP in relation to potential disclosure requirements for conflicts of interest. In particular, we suggest that existing recently amended transparency and disclosure requirements are suitable to meet the objectives of ensuring the appropriate disclosure of conflicts and combating market abuse.

We also provide targeted comments to certain questions on the buy-back of shares.

[1] AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge fund managers, prime brokers, fund administrators, accountants and lawyers, membership comprises over 1,300 corporate bodies in over 50 countries.

AIMA is happy to discuss any of our opinions further and look forward to the opportunity of responding to ESMA's formal consultation paper on the subject of MAR implementing measures. If ESMA has any questions please do contact either myself, Jiří Król (jkrol@aima.org), Adam Jacobs (ajacobs@aima.org) or Oliver Robinson (orobinson@aima.org).

Yours sincerely,

Jiří Król
Deputy Chief Executive Officer
Head of Government & Regulatory Affairs

Annex

Buyback

Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?

AIMA has certain reservations in relation to this potential position. We reference, in particular, that the current market abuse regime under the first EU Directive on insider dealing and market manipulation (MAD I)[2] allows buy-back of stocks with a multiple listing for the purposes of buy-back at the last traded price on any market. We are unsure as to the benefits of amending the current regime by limiting such trading.

In principle, we do not believe that it is abusive for an issuer to engage in a buy-back programme of relevant shares at the highest price reached by any market on which the shares have been legitimately admitted to trading, particularly in light of the improved transparency requirements for trading venues across the EU to be introduced under the new Directive and Regulation on markets in financial instruments (MiFIDII/MiFIR).

In practice, also, we believe that most issuers would not be able to gain unfair advantages or influence prices through selective use of venues. The extensive presence of cross-venue arbitrageurs, we suggest, is likely to ensure price consistency across the venues of a multiple listed stock.

AIMA would also like to highlight its concerns that a consistent notion of the 'most liquid market' would likely be difficult to reach.

Bearing in mind these factors, we would suggest that the proposed requirement could be disproportionately complex and resource intensive when compared to the likely benefits to combating market abuse. We recommend that the current position under MAD I be maintained.

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?

AIMA appreciates the requirement for flexibility to enable legitimate buy-back programmes to be implemented by firms in different market liquidity scenarios, whilst ensuring that the market abuse regime under MAR is not undermined.

However, we do not agree with the multiple thresholds for volume-limitation of shares contained within the DP.

AIMA suggests that the introduction of such thresholds may well be difficult and could introduce an unnecessary level of complexity, thus uncertainty, into the market in the context of share buy-backs. Different stocks trading on different venues for issuers operating in different sectors exhibit a broad variety of trends and characteristics, all of which would have to be taken into account in order to create an accurate and consistent notion of the relevant liquidity levels to enable MAR to be applied consistently and fairly across all stocks and venues within the EU. We consider that it would be prohibitively costly for issuers and authorities to undertake such an analysis.

Market soundings (Article 7c of MAR)

Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

AIMA in general agrees with ESMA's proposals for pre-sounding standards within the DP.[3]

We would, nonetheless, stress the importance of ensuring that any relevant requirements are imposed on all disclosing market participants in a consistent and proportionate manner. A broad range of entities

[2] Available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0006:EN:NOT
[3] At 19-21

could be involved directly in undertaking a market sounding, not only large sell-side firms but small individual issuer firms as well. To prevent unfair burdens or advantages being placed artificially on certain categories of entity, we strongly recommend that such regulatory standards be proportionate to each category of issuer and applied in a consistent manner by all relevant competent authorities responsible for such standards' enforcement.

In relation to market soundings for block trades, we would welcome further clarification of what are the characteristics of a block trade for the purposes of MAR.

Q24: Do you have any view on the above?

In relation to the timing of market soundings, AIMA agrees with ESMA's comment within the DP that it 'might be better not to restrict the hours in which market soundings take place'.[4]

We agree that in the current globalised financial environment, trading in a specific security may occur in different time zones. We would be concerned that a restriction on the timing of a market sounding may place inadvertent restrictions on global trade as market-sounding activities could have to be delayed or take place at an inefficient time. For example, a restriction calibrated according to one time-zone may be entirely unsuitable for activities occurring contemporaneously in another time zone which may be a number of hours ahead or behind. Globalisation of financial markets is very likely to increase further in both scale and efficiency in future and we would be concerned that timing restrictions could have an inadvertent negative impact on this progress.

Overall, AIMA believes that compliance with the other substantive obligations described within the DP is the most important factor to ensuring that market soundings occur properly. We do not agree with the jurisdictions described within the DP which recommend that limitations on market soundings during trading hours are necessary in order 'to limit the possibility of inappropriate use of the information'.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

AIMA believes that an additional and more flexible fourth option for wall-crossing consents could be more appropriate than the three listed within the DP. This fourth option could enable a buy-side firm to nominate a team or designated generic position within a team who will receive all market soundings on behalf of the company – a 'gatekeeper' – which would then determine how best to proceed with and distribute the information received, such that the firm is not inadvertently wall-crossed. Such a mechanism would also help to provide improved certainty to the disclosing market participant as to whether the firm is in fact willing to receive market soundings.

We propose this option as we consider that divergent views are highly likely between individuals or teams within a large financial institution regarding being wall-crossed. For example, index managers or those involved in securities lending may well be unwilling to be made insiders as this could disrupt the fundamentals of their investment process, whereas active managers could be willing on a case-by-case basis. In this regard, a simple blanket categorisation of the buy-side firm as a yes/no in relation to market soundings may not be sufficiently detailed and, therefore, may result in either insufficient market soundings being received by any buy-side firm or the inadvertent wall-crossing of buy-side participants without their consent. Conversely, we also highlight that many hedge fund managers are very small in size, so are often unable to operate effective systems of internal Chinese walls. In this regard, a specific but generic point of contact – with a separate and secure inbox – would be useful to prevent the inadvertent wall-crossing of the entire firm and the improper disclosure of inside information.

AIMA also believes that our suggested fourth option would be consistent with and complementary to certain other proposals within the DP, such as the suggested list of persons responsible for receiving market soundings to be compiled by disclosing participants. In addition, we feel that this option could be less burdensome for disclosing market participants than the options provided by paragraph 82, whilst helping to prevent inadvertent disclosures and providing flexibility to buy-side firms in terms of receipt and further dissemination of information internally.

[4] At 21

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

AIMA agrees in principle with the proposals for scripts contained within the DP[5] to be used when performing market soundings. Soundings will be far safer with a scripted process.

Conveying relevant information is vital and will likely have a direct bearing on the buy-side firm's decision about whether to accept the wall-crossing. The standardised provision of this information could help to ensure that the buy-side firm is provided in all instances with sufficient information allowing it to determine whether to accept the wall-crossing. It also would assist in reducing the compliance burden for such firms when interpreting whether a buy-side firm has in fact been inadvertently wall-crossed.

We believe that such scripts could also prove valuable for disclosing firms, by helping them to avoid improper disclosure. Standardisation will help to remove the requirement to interpret the particular wording used by a disclosing party – instead needing only to answer the question of fact as to whether the disclosing party followed the script correctly.

Whilst we support the principle of scripts, we would recommend that their content does not become unduly restrictive. In particular, we believe that there is a need to strike an appropriate balance that ensures the avoidance of improper disclosure, but which uses time and resources in an efficient manner. In our opinion, an ideal script would contain, among other things, information on cleansing and an expected timing.

Q27: Do you agree with these proposals regarding sounding lists?

AIMA agrees with the proposals contained within section 11.5.3 of the DP, which deals with sounding lists.[6] In our opinion, it is entirely appropriate for disclosing market participants to retain records of the firms contacted and the specific point of contact (generic or otherwise) who received market soundings.

We do not believe, however, that it should be the responsibility of the disclosing market participant to retain records of the individuals within the sounded firm to whom the information is subsequently distributed. This information, in particular, is unlikely to be available to the disclosing market participant.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

In accordance with our response to Question 25 of the DP, AIMA agrees with the requirement within paragraph 89 that each disclosing market participants retain a list of the persons responsible for receipt of market soundings at individual firms – so-called 'gatekeepers'. This should help to prevent situations in which firms receive improper disclosures or inadvertent market soundings.

However, as we describe in our answers above, these could be a generic contact within a particular team rather than specific individuals.

Q29: Do you agree with these proposals regarding recorded lines?

AIMA interprets Article 7c of MAR as not prohibiting the performance of a market sounding through means other than recorded telecommunication. Our purposive interpretation sees the requirements therein as being focused on the need to retain records of information provided which can be provided to competent authorities upon request. On this basis, we suggest that it should remain possible for market soundings to be provided through a means other than recorded telephone lines. In particular, AIMA identifies email as a universally accepted method for communication between market participants which can be saved and archived in order provide the records required by MAR. Face-to-face meetings also represent a key

[5] At 23
[6] At 23-24

method through which market soundings may occur. AIMA believes that it would be undesirable for such a means to be inadvertently prevented. In particular, many soundings are carried out directly by the issuer itself, rather than an investment bank acting on its behalf. The majority of issuers are unlikely to have the necessary recording technology and we consider that it could be disproportionately and dissuasively expensive to require issuers to purchase suitable recording systems.

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

AIMA has concerns that a new requirement for disclosing market participants to obtain written confirmation from investors could disproportionately increase the volume of mandatory communication between such firms, when compared with the current regime.

Consequently, we do not consider that the proposed written confirmations from investors should be mandatory.

In relation to confirmations sent from the disclosing participant to the investor, AIMA believes that procedural efficiencies could potentially be increased by using the record of the scripted confirmation undertaken via the recorded line (when used) as the confirmation.

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

AIMA supports the *ex ante* confirmation of an investor's agreement to be wall-crossed.

In particular, we respect the importance of avoiding the inappropriate disclosure of inside information by sell-side participants and the dangers to buy-side participants of being inadvertently wall-crossed. We, therefore, agree that investors should provide a confirmation to the disclosing market participant that they are willing to be wall-crossed. We also agree with ESMA that such confirmations would be prudent and serve as a good record keeping practice.

In addition, in accordance with our response to the DP questions on single points of contact above, AIMA suggests that this confirmation could be generic with specific reference to the 'gatekeeper' - the team or position within the team that has responsibility for the initial receipt of market soundings – rather than listing all of the specific individuals within the buy-side firm to which information has been distributed.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

AIMA agrees overall with the proposals regarding disclosing market participants' internal processes and controls. However, we highlight that 'disclosing market participant' includes the individual issuer itself. It is, of course, suitable to ensure that both the issuer and its sell-side agent have in place the relevant internal systems, processes, procedures. We believe, however, that it is very important that issuers are made aware of the requirements and what will apply to them so that they are able to implement such systems.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

In relation to paragraph 104 of the DP which proposes that buy-side participants record their own internal assessments of whether information is inside-information, regardless of whether a wall-crossing has occurred, AIMA is concerned that this could create disproportionate burdens on buy-side firms' resources.

Large buy-side firms receive a very large volume of soundings, for which the recording of granular assessment documentation would likely be heavily resource intensive – in particular we identify that a large proportion of market sounding assessments are uncontentious, thus granular recordkeeping may be unnecessary. Of course, AIMA recognises the importance of transparency between market participants

and regulators in the ongoing efforts to combat market abuse. As an alternative to recording each internal assessment, therefore, AIMA would recommend the imposition of a requirement for each buy-side firm to retain records only when there is disagreement as to whether the buy-side firm has been wall-crossed. AIMA considers such a requirement would provide transparency in a proportionate manner, enabling an investigation into the reasoning of each assessment where such is necessary.

As contained within our response to the questions above, AIMA also agrees that buy-side firms should designate a point-of-contact to act as a gatekeeper to the firm, receive soundings and make decisions in relation to the onward dissemination of information. We suggest that this point of contact be designated generically, rather than by the name of an individual person. By setting the point-of-contact by position - for example, the Director of Soundings - changes to the personnel of a firm could be accounted for in an easy manner. Relevant internal controls would of course need to be implemented by the buy-side firm regarding access to the relevant mailbox of the generic position.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

AIMA does not agree with the proposal that, when a discrepancy of opinion occurs, the buy-side firm should be obliged to provide publicly available information to the disclosing market participant. If implemented, we would be concerned that this would place a disproportionate obligation on the buy-side firm without providing sufficient additional benefit to the regime, especially when the public information is not price sensitive.

As we mention in our answer to Question 33 above, we believe that it is appropriate for the buy-side firm to retain its internal assessment when a disagreement arises, thus enabling an evaluation of how such a discrepancy has arisen. We do not believe, however, that this responsibility should extend to the provision of data that is publicly available.

In our opinion, it is the responsibility of the disclosing market participant, as a professional entity, to have obtained and considered all relevant information as part of its reasonable assessment of the circumstances.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

AIMA agrees that firms should inform the disclosing participant when it considers, contrary to the disclosing participant, that information is inside information. Please see our responses to Questions 33 and 34 on discrepancies of opinion.

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

AIMA supports industry-wide cooperation in combating market abuse. However, we believe strongly that proportionality should be maintained at all times. In this regard, AIMA references the current obligations for suspicious transaction reporting under Article 6(9) of MAD I. This obligation is on transactions only. We are concerned that a requirement to report possible improper disclosure not based on an actual transaction would be very difficult and lead possibly to an overreliance on 'hearsay'. This could negatively impact the value of such reports.

Sell-side participants have their own sophisticated systems to ensure information is dealt with in an appropriate manner. MAR will encourage an improvement of these systems. Our members, however, are a step removed from these procedures and would be concerned about attempting to 'second guess' their correctness. Such requirements would represent a significant increase in compliance obligation on AIMA members as buy-side participants which could be disproportionately costly bearing in mind the likely benefits.

Fundamentally, we would be concerned that the hypothetical nature of such reports could result in a large increase in the number of irrelevant reports which could detract national competent authorities' resources away from true suspicious transactions.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above

In relation to the proposal contained at paragraph 115 of the DP on the recording of follow up calls by the buy-side, AIMA is not sure that this is an obligation that should be placed on the buy-side. Article 7c of MAR does not impose these record keeping obligations on the firm being sounded, rather it falls upon the disclosing market participant.

In our opinion, the sell-side firm is likely to fall within the definition of a disclosing market participant, thus it should be the responsibility of that firm to ensure that the requirements of MAR are complied with at all times; including record keeping obligations.

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

AIMA is not currently aware of additional issues that should be included in addition to those contained within the DP and those we highlight above.

In particular we would be especially grateful for guidelines which advise each firm to:

- create a security protected generic inbox - a 'chinese box' – to receive communications in relation to market soundings; and
- maintain records of internal assessments of whether information is or remains inside information in circumstances where a discrepancy or conflict of opinion arises between the buy-side firm and disclosing participant.

Q39: What are your views on these options?

AIMA believes that Option 2, to assess likely cleansing or to agree on a cleansing strategy, would provide the most acceptable solution to ensure certainty and market fairness as to when information is cleansed. We consider that Option 1 would not be appropriate, as buy-side firms are usually not able to dictate either the timing nor nature of the cleansing which may be performed. We note in relation to Option 2, also, that whilst it is necessary for both parties in the transaction to be engaged in discussions, the buy-side firm should not be the party responsible for leading these discussions.

We are of the opinion that it is helpful, although not always essential, for both receiving and disseminating parties to be mutually clear on what constitutes a 'cleansing strategy'. If this consistency of understanding is not achieved, we would be concerned that a risk of market efficiencies being diminished could arise as participants discuss cleansing *ad infinitum*.

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

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

In AIMA's view, the relevant way to measure order cancellation is dependent upon the particular kind of manipulation the cancellation seeks to identify. We identify two major ways to use order cancelation/modifications for market abuse: trading system manipulation (network bandwidth and CPU usages); and general market manipulation.

For trading system manipulation, we suggest that the relevant measure for order cancellation should take account of the number of cancellations per unit of time. This is the most relevant consideration because systems manipulation generally relies on overloading the absolute capacity of the system through pure volume of orders and cancellations over a short period of time. Measuring the volume and rate of cancellations per unit of time is, therefore, the most useful mechanism to detect attempts to clog the system. We would also identify that this kind of manipulation is easier to detect.

General market manipulation, however, is more difficult to detect. AIMA suggests that the relevant measure for manipulation here is the ratio of the number of orders traded (or the market value of orders

traded) to the total number of orders posted/modified (or the market value of total orders) (the 'Execution Ratio'). We agree with ESMA's concerns under paragraph 140 that a simple order cancellation ratio by number of orders, rather than taking account the size of the order, could result in 'gaming' simply by executing a series of low value order to mask the underlying behaviour of submitting and cancelling large orders in a manner which could influence the market. We, therefore, suggest that the Execution Ratio for each participant could be calculated to take account of the market value of orders.

We highlight that additional considerations are, however, necessary in both scenarios in order to ensure that the measures fulfill their regulatory aims without disproportionately impacting upon price formation and/or market stability. We note our belief in the importance of incentivising market participants to be confident in posting bids and offers to the market order book on a continuous basis. Such bids and offers are vital to maximising price formation and market stability through liquidity provision, so making markets more reliable for all participants. For these reasons, we would recommend setting regulatory standards on order cancellations that encourage participants to post bids and offers by enabling *bona fide* cancellations.

We, therefore, propose additional considerations for both of the above measurements of order cancellation in order to assist further in identifying abusive behaviour and distinguishing it from desirable liquidity provision by market participants. Namely: (i) the distance of the bids/offers from the market; and (ii) the length of time the order was resting in the order book.

For example - in the first scenario, trading system manipulation - when an exceptionally large volume of orders are posted at prices far from the market and are subsequently cancelled very quickly, this could be an indicator that such orders were only intended to clog the system, rather than to be executed.

Nonetheless, in the scenario of general market manipulation, a participant which has a low Execution Ratio involving bids or offers that have been placed far away from the market price, but which have been allowed to rest for a long period before cancellation, could be less likely to be intending to manipulate the market than a participant with the same low Execution Ratio, but for orders which have been placed closer to the current market price and cancelled very quickly.

AIMA believes that residual bids and offers placed and left for a longer period of time are beneficial for price formation and should not necessarily be discouraged. These orders can help to smooth out periods of market volatility by ensuring a price is always available to respective buyers and sellers.

We would also recommend that the Execution Ratio be monitored by order type and by market participant. Most markets involve a broad range of market participants, each category of which for legitimate reasons may have a different Execution Ratio. AIMA, therefore, would recommend that ESMA and national competent authorities focus on participants that have consistently low Execution Ratios in comparison to similar participant categories or whose Execution Ratios change dramatically over time without discernible reason. We would also suggest that account be taken of different order types when considering Execution Ratios. For example, AIMA suggests that normal trade ratios of market participants can be higher for market orders and lower for limit orders.

Further analysis would be very useful to establish the features of different categories of participant and order type, as well as the above factors relating to distance of the bids/offers from the market and the length of time the order is left to rest. AIMA would be very happy to assist ESMA in its work on this in the future.

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.

AIMA considers that all of the indicators of abusive behaviour listed within Annex IV[7] are of similar difficultly to detect and distinguish from reasonable trading. Nonetheless, we would identify that technical manipulation, as described within our response to Q42 above, may well be easier to spot than general market manipulation, for which identifying *bona fide* trading from manipulative practices is very difficult.

[7] At 104

In relation to the list of general indicators contained at (a-q) of Annex IV, [8] AIMA would also suggest that the difficulty of detection remains for automated trading, with the exception of 'wash trades' and the trades referred to at point (n) of Annex IV on the entry and cancellation of orders a few minutes prior to the price determination phase of an auction. A 'wash trade' is likely to be detected under points (c) and (d) of Annex IV as it is executed without any transfer of risk. The trade enumerated at point (n) is also likely to be more easily identified, as such a process is likely to follow a particular procedure and involve fewer participants, thus making it easier to identify unusual and potentially manipulative behaviour.

We would also suggest tentatively that the behaviours described at (o), (p) and (q)[9] could be more easily identifiable as the linked derivative may enhance the size of the pay-off relative to the induced price change.

Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?

Our response to question 42 describes briefly the measures to detect certain forms of abusive behaviour involving high volumes of orders. AIMA would, nonetheless, suggest that the particular figure arising from these calculations that would constitute abusive behaviour is highly dependent upon the particular market, its infrastructure capabilities and particular product being traded.

Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

We identify that exchanges have the relevant expertise and control to detect manipulative practices in an efficient manner, for example it is the exchanges that design the matching engines and trading infrastructure. In this regard, we believe that ESMA could collaborate as much as possible with exchanges through the provisions for the prevention and detection of market abuse under Article 11 MAR.

We also suggest that ESMA's resources could be focused on clear indicators of suspicious behaviours, for example identifying unusually high concentrations of trading and evaluating the order cancellation ratios described in our response to Q42 above.

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

Q49: Do you agree with ESMA's approach in relation to entity which can perform or execute an AMP?

AIMA would not recommend that the legitimate performance of AMPs be restricted to only MiFID firms and credit institutions, as envisaged under paragraph 157 of the DP.[10] We believe that, in the context of the extension by MAR of the scope of the current EU market abuse regime to cover a much wider range of instruments (including OTC derivative transactions and spot commodity contracts) it would be desirable to ensure that all firms trading in those instruments are able to rely on the safeharbour.

Suspicious Transaction and Order Reports (Article 11 of MAR)

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

AIMA is of the opinion that a requirement to make reports every fortnight could result in the generation of an excessive number of potentially less useful reports. We consider that increasing the number of reports could result in a dilution of their content, such that supervisors may find it difficult to navigate through the sheer volume of reports in order to identify those reports with clear evidence of abusive behaviour.

[8] At 104-105
[9] At 105
[10] At 36

Investment recommendations(Article 15 MAR)

Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

AIMA is supportive of the current regime under MAD I and would suggest against introducing a new regime. We are not sure that such an amendment is necessary for the purpose of investor protection.

Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

AIMA agrees.

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

AIMA does not support the introduction of further disclosure obligations beyond the 5% shareholding threshold provided currently under Article 6(1)(a) of the MAD implementing Directive 2003/125/EC. It is indeed the case that this threshold is a minimum harmonising measure which would allow Member States to set their own more strict thresholds, however, we do not believe that the harmonisation of such stricter thresholds would be suitable as it may place a disproportionate burden upon industry participants with possibly a limited regulatory benefit.

We note, in particular, that Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Directive)[11] has been revised recently by Directive 2013/50/EU;[12] however, the EU legislative institutions appear not to have not chosen to introduce a harmonised mandatory disclosure of major shareholdings at such a low level as 3% of total issued share capital.[13]

We, nonetheless, support the ability at all times for firms to voluntarily disclose significant shareholdings at a lower level than that provided under the MAD I / MAR or Transparency Directive regime. We also support the provisions of the Transparency Directive which enable competent authorities, where necessary, to oblige further disclosures by firms.

We also note Article 18(2) of Directive 2004/39/EC on markets in financial instruments (MiFID) which obliges firms to disclose any conflicts of interest for which they are unable to prevent the risk of damage to client interests. We consider that MiFID already provides a suitable mechanism through which conflicts of interest can be managed and disclosed, rather than strict compulsory reporting.

Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?

AIMA agrees that information on net short positions could be of use to national competent authorities and ESMA in order to combat market abuse. We would not recommend, however, that any additional reporting requirements be imposed on market participants beyond those contained within Regulation (EU) No. 236/2012 on short selling and certain aspects of credit default swaps (SSR).[14]

We identify that a key aspect of the EU legislative institutions' intention was to enhance transparency, among other things, to enable monitoring and investigation of short selling that could be abusive.[15] In this regard, we support the private notification regime for significant net short positions in shares under Article 5 of the SSR. As such, we suggest that such notifications are already adequately covered by directly applicable EU harmonising legislation.

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[11] Available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0057:EN:PDF http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0057:EN:PDF

[12] Available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0013:0027:EN:PDF

[13] Article 9 of the Transparency Directive and Article 1(2) of Directive 2013/50/EU

[14] Available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF

[15] See Recital 7 SSR

We would be concerned that an additional notification requirement under MAR with a different threshold could introduce undue and unnecessary complexity for market participants. We would, therefore, not recommend that additional rules be developed here.

Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?

We again would like to note the SSR which entered into effect in November 2012 and was intended, among other things, to enable the supervision and investigation of abusive behavior.

In particular, we would highlight that the SSR was not extended to cover corporate bonds and debt, instead being limited to shares and sovereign debt instruments. We note, in particular, Recital 4 which indicates that the SSR's scope should be as wide as possible, but with measures concerning all types of financial instrument only being introduced in exceptional circumstances. We agree with the proportionality analysis of the EU legislative institutions, which did not consider it necessary to introduce standard notification obligations in relation to such non-equity and debt instruments. AIMA would, nonetheless, support such requirements as an exceptional measure in extreme circumstances.

The recent review of the SSR adopted by the European Commission[16] concluded in the main that 'it is too early, based on available evidence, to draw firm conclusions on the operation of the [SSR] framework which would warrant a revision of the legislation at this stage'. Given these conclusions, AIMA suggests against the introduction of additional obligations through MAR.

We would also highlight the difficulties that could be faced by both market participants and competent authorities in attempting to define circumstances in which a net short position is disclosable for all instruments. The current market environment can involve both physical and synthetic holdings, contracts for differences, futures and options and simple stock, all of which have different characteristics and exposure profiles.

Q106 Do you think that additional specific thresholds should be specified with respect to other 'non-equities' financial instruments?

AIMA does not support the introduction of broad based thresholds for other 'non-equities'. Instead, we would support the introduction of a regime similar to that of the UK Financial Conduct Authority whereby the definition of 'significant holdings' is calibrated for each firm that holds relevant instruments, based on its size.

Q107: Do you think that further disclosure on previous recommendations should be given?

AIMA does not support the introduction of a list of previous recommendations relating to general market views. We believe that such information is largely available on researchers' websites.

[16] Available here: http://ec.europa.eu/internal_market/securities/docs/short_selling/131213_report_en.pdf