EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Director General

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Mr Steven Maijoor
Chairman
European Securities and Markets Authority (ESMA)
103 Rue de Grenelle
75007 Paris

Subject: **Formal request to ESMA for technical advice on the report to be submitted by the Commission under Article 38 of Regulation (EU) No 596/2014 on Market Abuse**

Dear Mr Maijoor,

Under Article 38 of Regulation (EU) No 596/2014 on market abuse ('MAR') the Commission is required to submit, by 3 July 2019, a report to the European Parliament and to the Council on, firstly, the application of MAR and, secondly, the level of thresholds set out in its Article 19(1a)(a) and (b) in relation to managers' transactions in certain specific circumstances. The Commission will rely on this report as a basis for any legislative action it may deem appropriate. In light of the Commission's obligation under Article 38, I wish to seek ESMA to provide the Commission with advice on the elements set out in the first section below.

Under Article 38, the Commission may also consider other elements of the MAR framework it deems necessary in order to put forward purposeful legislative amendments. It is with this in mind that the Commission seeks ESMA to consider in its technical advice not only the mandatory elements indicated in the first section, but also to provide its input on the considerations specified in the second section.

1. Advice on the mandatory elements of the report

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements:

(a) appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for **insider dealing and market manipulation**

In relation to the above point and pursuant to the second paragraph of Article 38, the Commission notes that ESMA is required to undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of MAR, of the application of such criminal sanctions within Member States. Any data made available under Article 33(1) and (2) are also to be included in that exercise.

(b) whether the definition of **inside information** is sufficient to cover all information relevant for competent authorities to effectively combat market abuse

(c) appropriateness of the conditions under which the **prohibition on trading** is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply

(d) possibility of establishing a Union framework for **cross-market order book surveillance** in relation to market abuse, including recommendations for such a framework

With respect to this point, the Commission would like ESMA to formulate its recommendations having particular regard to the transaction reporting obligation under Article 26 of Regulation (EU) No 600/2014 and how data reported to national competent authorities pursuant to that obligation can help in designing such a framework.

(e) scope of application of the **benchmark provisions**

Furthermore, under the second subparagraph of Article 38 the Commission is required to submit, after consulting ESMA and by 3 July 2019, a report to the European Parliament and to the Council on the level of the thresholds set out in Article 19(1a)(a) and (b) in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets, with a view to assessing whether that level is appropriate or should be adjusted. Pursuant to that second subparagraph, the Commission must consult ESMA prior to submitting its report. As such, the Commission seeks ESMA's contribution on this matter, so that it can proceed in preparing the report as required.

2. Advice on non-mandatory elements of the report

(a) whether **spot FX contracts** should be covered by MAR

The scope of application of MAR as defined by its Article 2 does not include foreign exchange spot transactions. Given the size of the spot FX market, the Commission would appreciate ESMA's input on whether there is a need for that market to be covered by the market abuse regime. In its assessment, ESMA should give due regard to whether national competent authorities ('NCAs') have the necessary regulatory tools to effectively and efficiently supervise and sanction market abuse on spot FX markets and whether extending the scope of MAR to these markets would prove to be the most appropriate way of remedying supervisory gaps, if any exist. To that effect

ESMA is encouraged to analyse and take into account the particularities of the spot FX market and how well these would mesh with the MAR framework.

(b) scope of reporting obligations under the exemption for **buyback programmes**

Under Article 5(3), in order for its buyback programme to benefit from the exemption from application of certain provisions of MAR, the issuer must report each transaction relating to the buy-back programme not only to the NCAs of the trading venues on which the shares are admitted to trading but also to those of each trading venue where they are traded. This reporting obligation is reiterated in the Commission Delegated Regulation (EU) 2016/1052[1], which lays down technical standards for the conditions applicable to buy-back programmes. Since issuers are not necessarily aware of their shares being traded on a certain venue, full compliance with the reporting requirements might prove to be challenging for the issuers. In light of that consideration, the Commission would like ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

(c) effectiveness of the mechanism to **delay disclosure of inside information**

Currently the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4). Possibly reflecting a diverging approach to treatment of inside information across Member States, the Commission has received indications that relying on the mechanism of delaying disclosure of inside information is used to a varying extent across jurisdictions in the Union. It would appear that, while in some Member States issuers rely on this mechanism regularly, issuers of others use it on an exceptional basis. Therefore, for the Commission to better understand whether this tool needs to be calibrated, ESMA should gather information on the usage of this mechanism across Member States and identify points of divergence in its application, if any. Furthermore, the Commission would like ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism. Finally, to gain a complete picture of the use of this mechanism, ESMA should provide information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, as provided in the third subparagraph of Article 17(4). In this latter case, the Commission would like to receive information on how many such requests have been submitted by those NCAs.

(d) usefulness of **insider lists** drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse

[1] Article 2(2) provides that 'the issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are traded'

In relation to the above point, the Commission would in particular like to know to what extent NCAs rely on insider lists within the meaning of Article 18 in investigating instances of market abuse. To that end, the Commission would appreciate if ESMA, in providing its answer, gathers information on the following:

- number of requests to receive insider lists addressed by the NCAs to issuers
- whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so the breakdown of requests pertaining to one or the other
- how instrumental insider lists are in completing investigations initiated by NCAs.

(e) adequacy of the requirement to notify **managers' transactions** as applied to collective investment undertakings

In relation to this point, the Commission would like ESMA to assess and provide feedback on whether legislative amendments are needed regarding the following issues in particular:

i. personal scope of Article 19(1) in conjunction with Article 3(1)(25)

Article 3(1)(25) defines a person discharging managerial responsibilities ('PDMR') as a person '*within an issuer*' satisfying certain conditions. That definition as such might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds without a legal personality. The same logic applies to investment funds with a legal personality managed externally. In light of these considerations, the Commission would like ESMA to assess whether there is a need for the managers of management companies to be covered by the requirement to disclose their transactions and how to best adapt the scope of that requirement to ensure a level regulatory playing field between different management structures of investment firms (external vs internal management) while preserving the effective attainment of the policy objective pursued by Article 19.

ii. material scope of Article 19(1)(a)

The above-mentioned provision requires PDMRs to notify transactions conducted on their own account relating to shares or debt instruments of the issuer within which they are discharging managerial responsibilities. The PDMR obligations also apply to managers of collective investment undertakings ('CIUs'). However, the current drafting of the provision does not explicitly mention units in collective investment undertakings, which are, alongside shares, a type of ownership interest in a CIU. Therefore, it could be argued that on a strict reading of Article 19(1)(a) units in CIUs are outside of the scope of that provision, which may result in an unlevel regulatory playing field between CIUs issuing shares and those issuing units. The Commission would consequently like ESMA to assess whether this presents a regulatory loophole that should be addressed.

(f) appropriateness of certain aspects of the requirement to notify **managers' transactions**

Regarding the above point, the Commission seeks ESMA's input on the following two aspects of that requirement:

i. level of thresholds

Currently the threshold that triggers the notification obligation is set to EUR 5 000, with the possibility for NCAs to raise it to EUR 20 000. The Commission

would welcome ESMA's analysis on whether these thresholds are appropriate to ensure a high level of market transparency and integrity without creating a disproportionate compliance burden for managers and issuers.

ii. transactions to be notified once the threshold is reached

Under Article 19, after the relevant threshold has been reached, managers and issuers have to notify and disclose all subsequent transactions, regardless of the size of the individual transactions. The Commission seeks ESMA's advice and assessment on whether this reporting methodology is most appropriate to capture relevant transaction data and whether it strikes the right balance between a high level market transparency and a proportionate compliance burden.

(g) **cross-border enforcement** of sanctions

The Commission would like ESMA to gather information on whether NCAs encounter difficulties in the recognition and enforcement of financial penalties imposed under MAR in cases with a cross-border element. Examples of such cases could include situations where the sanctioned person is a resident or has its registered seat in another Member State or when that person leaves the Member State of the sanctioning NCA without paying the fine. To better understand and assess the nature and the breadth of the problems NCAs may face, as well as potential ways of addressing them, the Commission would like ESMA to conduct an analysis of legal obstacles to the recognition and enforcement of financial penalties, if any. In doing so, it is encouraged to take into account in particular the following:

i. number of financial penalties imposed by NCAs vis-à-vis non-residents and how successful the NCAs were in enforcing them;

ii. whether the interpretation given to the Council Framework Decision 2005/214/JHA[2] in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties;

iii. whether under the current legislative framework there are tools that might be used to facilitate the cooperation between NCAs in order to address the issue and what role ESMA could play in this process.

3. Guiding principles

In carrying out its analysis of the elements covered by the mandate and set out in sections 1 and 2, ESMA is invited to take into account the following principles:

- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by the mandate;
- while preparing its advice, ESMA should seek coherence within the regulatory framework of the Union;
- ESMA is encouraged to widely consult market participants and stakeholders in an open and transparent manner. In doing so, ESMA's advice should take account of different opinions expressed by the market participants and stakeholders during their consultation;

[2] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, p. 16)

- ESMA is invited to provide sufficient empirical evidence and factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered.

4. Final remarks

Given that the procedures which need to be followed for the adoption of the report to the European Parliament and the Council are potentially lengthy, I would kindly ask ESMA to provide its contribution by no later than **31 December 2019**. I look forward to receiving ESMA's input and remain at your disposal for any questions.

Yours faithfully,

Olivier GUERSENT