



Trading Conduct & International Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London
E14 5HS

3 February 2016

Dear Sirs,

Re: CP15/35 - Policy proposals and Handbook changes related to the implementation of the Market Abuse Regulation (2014/596/EU)

The British Private Equity and Venture Capital Association (“BVCA”) is the industry body for the private equity and venture capital industry in the UK. With a membership of almost 600 firms, the BVCA represents the vast majority of all UK-based private equity and venture capital firms, as well as their professional advisers. Our members have invested over £30 billion in nearly 3,900 UK-based companies over the last five years. Companies backed by private equity and venture capital in the UK employ around 490,000 people and almost 90% of UK investments in 2014 were directed at small and medium-sized businesses.

This submission has been prepared by the BVCA’s Regulatory Committee. We endorse the importance of ensuring that markets operate effectively and are free from market abuse. We welcome measures which appropriately and proportionately seek to achieve that objective.

We have not responded to each question in the list of questions in the Consultation Paper. Our comments are of a more general nature on the approach which the FCA is proposing to take in relation to the MAR Sourcebook. However, these comments are particularly relevant to Q6 to Q15.

Approach to MAR

We recognise that the FCA has limited flexibility in relation to the implementation of the Market Abuse Regulation since it is an EU regulation and therefore directly applicable. As a consequence, we recognise that the FCA cannot retain the Code of Market Conduct in its current form and we welcome the fact that the FCA, in its consultation, is trying to retain such guidance as it feels it can in order to provide assistance to firms and market participants in understanding the scope and application of the market abuse prohibitions.



However, we believe that the proposed mix of some retained guidance and signpost references to articles of the Market Abuse Regulation is likely to prove unnecessarily difficult for many firms and market participants to follow, particularly those smaller firms that have less access to internal and external specialist regulatory and compliance expertise.

We would urge the FCA to copy out the provisions of the Market Abuse Regulation into MAR, rather than merely include references. In addition, we would ask the FCA to include the relevant regulatory technical or implementing standards (and, ideally, any relevant ESMA guidance) in MAR. This would bring together all the relevant provisions in one Sourcebook, enabling firms and market participants to see the applicable requirements in one place. The Sourcebook could continue to be organised as it is currently, but it would contain the substantive text of the Regulation and technical standards in the relevant parts.

We consider that the FCA's current proposed approach is likely to prove difficult for firms and market participants to follow in practice. In addition to the general problem with not having the relevant provisions in one place, the proposed amended Sourcebook text is likely to cause confusion in a number of respects. If the FCA decides to continue with its proposed approach to signpost references, we consider that there are several points which need to be reviewed and addressed in order to avoid confusion. These are: (i) the interaction between the retained headings and the signpost references; and (ii) the absence of references to certain key provisions of the Market Abuse Regulation.

(i) Interaction between headings and signposts

In a number of places the heading from the original Code of Market Conduct is retained, but is then followed by a signpost reference to an article of the Market Abuse Regulation which does not always follow the heading: for example, the heading "Relevant factors: legitimate business of market makers" is followed by a reference to article 9(5) of the Market Abuse Regulation. This article does not relate to the legitimate business of market makers, but is instead a very important provision which makes clear that a person will not commit insider dealing in relation to financial instruments, merely because they know they have decided to buy or sell such financial instruments (sometimes referred to as "giving effect to one's own intention").

The heading and signpost reflect the way the existing Code of Market Conduct is organised. However where only the heading and then a reference to an article of the Market Abuse Regulation is retained a person reading MAR might either be unlikely to identify that "giving effect to one's own intention" is not insider dealing; or they may assume that the provision in article 9(5) of the Market Abuse Regulation only applies to market makers.

If the FCA's proposed approach of signpost references is retained it is extremely important that this approach does not inadvertently mislead firms and market participants.



(ii) Absence of references to key provisions of the Market Abuse Regulation

There are also examples of provisions of the Market Abuse Regulation which the FCA has chosen not to signpost. One of the most important of these is article 9(1), which creates a defence from insider dealing and improper disclosure where a legal person has established adequate and effective internal arrangements to prevent an individual involved in a decision to deal from possessing inside information (i.e. information barriers). This is effectively the successor to MAR 1.3.3 and MAR 1.3.5, which deal with whether a person has dealt “on the basis of” inside information, and which make clear that the existence of effective information barriers is an indicator that a person has not dealt on the basis of inside information. MAR 1.3.3 and MAR 1.3.5 have been deleted without any signpost to article 9(1), so a person reading MAR would no longer be able easily to identify that the existence of effective information barriers can provide a defence to insider dealing. It is also surprising that there is no reference to article 11 of the Market Abuse Regulation dealing with market soundings in MAR 1.4 on unlawful disclosure.

If MAR is to consist of signpost references it is extremely important that these are comprehensive, otherwise firms and market participants may miss or overlook important parts of the market abuse regime.

Conclusion

We recognise the constraints to which the FCA is subject in relation to the implementation of the Market Abuse Regulation. To the extent that there are substantive issues with the new regime, these are in general issues created by the Regulation itself and not by the FCA’s implementation. However, we do believe that the FCA can assist firms in understanding the restrictions of the new regime by bringing together all of the relevant provisions within one Sourcebook, and we would strongly urge the FCA to consider this approach in place of the signpost reference approach adopted in the Consultation Paper.

The BVCA would of course be willing to discuss this submission with you further and, if you so wish, please feel free to Gurpreet Manku at the BVCA (gmanku@bvca.co.uk).

Yours faithfully

A handwritten signature in black ink, appearing to be 'SE', followed by a long horizontal line.

Sheenagh Egan
Chair – BVCA Regulatory Committee