Brussels, 29 November 2019

EACB Answer
to ESMA's consultation paper on
'MAR review report'

November 2019

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

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Introduction

The EACB welcomes the opportunity to participate in ESMA's consultation on the revision of the Market Abuse Regulation (MAR) because it provides the possibility to address in particular issues of scope.

We also take this as an opportunity to *inter alia* address:

- the viability of application of the MAR regime to certain transactions such as spot FX, to which we do not support an extension of the regime;
- the need to specify the closed period of 30 days before publications of the (semi) annual figures; and
- simplification of insider lists information without reducing the objective of transparency and market abuse surveillance.

Furthermore, EACB members shall provide their answers to some of the selected questions as per the below.

Responses to questions on 'Scope of MAR'

1 **Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.**

The EACB shares the same concerns raised by ESMA in paragraphs 20, 22 and 23 of Section 3 'Scope of MAR' of its consultation report, and is thus not in favour of extending the scope of MAR to spot FX contrasts. Furthermore, the EACB agrees with ESMA's arguments that the international principles in the FX Global Code currently bridge the gap with MiFID II, which would have to be revised from a wholesale market perspective. The FX Global code is meant to cover the wholesale market and trading, meaning that all necessary parties from the buy and sell sides, as well as, trading platforms vendors should commit to the principles. Compliance with these high standards provides good enough coverage to be able to monitor all different kinds of market abuse (market impact, suspicious trading, market toxicity etc.). Therefore, including spot FX transactions under the scope of obligations to maintain records under Article 25 of MAR and to report transactions under Article 26 of MiFIR, would lead to development and maintenance costs.

2 **Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

The EACB agrees that the FX Global Code covers spot FX and also FX derivatives, including the internal and external processes and behaviours for both the market and customer side. Considering this and the fact that the spot FX market is an OTC market, this indicates that the current framework of MAR is not very suitable in covering spot FX contracts.

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3 Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

No, the EACB is of the opinion that no changes are necessary.

Responses to questions on 'Article 5 MAR: Buy-Back Programmes (BBPs)'

7 Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

The EACB agrees that there is a need to modify the reporting mechanism under Article 5(3) of MAR. The reporting obligations should be limited to reporting to the NCA in those jurisdictions where the issuer requested admission to trading. However in other alternative scenarios the issuer or the reporting party may have difficulties in identifying all the markets and trading venues where equities are traded. This leads to inappropriate and disproportionate compliance efforts, and raises the question whether reporting to many NCAs is beneficial at all from a market abuse perspective.

Further to the above, we wish to propose that the scope of the safe harbour provisions for buy-back programmes under Article 5(2) MAR should not be limited as per the current case. In the future, the safe harbour should apply to:

- all buy-backs of shares permitted under corporate law (see Article 21 of Directive 2012/30/EU); and
- buy-backs of debt instruments.

There does not appear to be any market abuse rationale behind why issuers should only have the protection offered by the safe harbour for certain limited purposes otherwise permissible under law and why the safe harbour should be limited to buy-backs of equity securities.

8 If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

We confirm agreement with the proposed modification and that Option 3 is clearly the best proposed option by ESMA. That said, we would like to emphasise that the definition of "most relevant market" should be established in this regard.

9 Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

Yes the EACB agrees with this removal following ESMA's reasonable justifications.

10 Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

We agree with the list of fields proposed.

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Responses to questions on 'Article 17 MAR: Delayed disclosure of inside information'

27 Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

In essence, the suggested requirement could help to ensure that issuers comply with their obligation under Article 17 but we wish to highlight that there is no system or control that could automatically identify and control inside information. Since situations vary, interpretations would need to be made on a case-by-case basis. If introduced, these would have to be high-level requirements instead of detailed obligations.

We also wish to advise that at the moment the off-the-shelf systems currently available to detect inside information do not take into account the particular characteristics of the business model of co-operative banks (network structure) and thus some proprietary changes would be required. Due to the added cost of such proprietary systems in order to put in place internal arrangements and procedures, it would not be ideal to have fixed requirements in MAR. Flexibility is required on this aspect.

29 Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

We believe that a notification to the NCAs should still not be necessary when the information has lost its inside nature. Q&A 5.2 of ESMA clearly states how to act. An issuer should deal with a situation where it has delayed a disclosure of inside information in accordance with Article 17(4) of MAR and, due to subsequent circumstances, that information loses the element of price sensitivity and therefore its inside nature. Where the issuer has delayed the disclosure of inside information in accordance with Article 17(4) of MAR and the information subsequently loses the element of price sensitivity, that information ceases to be inside information and thus is considered outside the scope of Article 17(1) of MAR. Therefore, the issuer is neither obliged to publicly disclose that information nor to inform the competent authority in accordance with the last paragraph of Article 17(4) that disclosure of such information was delayed. This will also avoid extra administrative burden from both the side of NCAs and market participants.

32 Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

We take this opportunity to explain a difficulty being experienced by some members on the scope of this Article 17 regime on disclosure of inside information, as well as, compliance with other requirements of the MAR regime.

Some members believe that the revision provides a good opportunity to re-think the applicability of MAR to the issuers which trade exclusively their own bonds on a multilateral trading facility (MTF). In fact it must be understood that many co-operative banks, in order to guarantee liquidity to their own bonds, have chosen to list them on a MTF because of

the lighter obligations related to this type of market. The 2014 Regulation extended to the issuers which trade their financial instruments on MTF the obligations related to the disclosing of inside information. In addition, such issuers have also been obliged to take on duties related to the keeping of insider lists and the management of managers' transactions.

Such "new" duties, creating quite evidently added costs for banks, have not generated significant benefits and have caused the paradox of depriving investors of the liquidity of the instruments held.

Furthermore, the EACB is of the opinion that the provisions of MAR, especially those related to disclosing of inside information, are relevant to the equity market, more volatile, with prices of financial instruments are more exposed to the influence of information about the issuer. As for the bonds market, instead, it must be considered that the price of a security, less subject to volatility, is a function of the financial variables existing per se within the instrument itself, rather than referred to the information about the issuer.

In view of the above, we strongly advise that the Regulator consider it reasonable to exclude issuers that exclusively trade their bonds on MTF from the scope of application of MAR.

As an alternative to the total exemption, there are valid reasons to grant to such issuers a reduction of the obligations provided by MAR. In this respect, diversification of the application of the relevant provisions according to the type of the issuer and/or the type of the financial instrument could be defined.

For instance, an issuer which trades exclusively their own bonds on MTF could be requested:

i. to disseminate only certain types of inside information;
ii. to implement only the permanent insider section of the insider's list; and
iii. not to communicate the so called managers' transactions.

Responses to questions on 'Article 11 MAR: Market sounding'

33 Do you agree with the proposed amendments to Article 11 of MAR?

In principle, the EACB does not object the proposed amendment to Article 11 of MAR but we do not feel that the principle set out in Recital 35 should be overturned, i.e. non-compliance with the sounding requirements of Article 11 would not automatically presume unlawful disclosure of inside information.

34 Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

Some EACB members believe that clarification is required (perhaps at Level 2 regulation) with respect to the SME listing package. Where a municipality (or similar type of an issuer, with listed bonds) is considering an issue of a bond and the contemplated issue is not

considered inside information, it should be clear that market sounding requirements need not be followed.

Furthermore the EACB believes that the market sounding procedures as set out in Article 11, as well as the RTS and ITS adopted thereunder, should (contribute to) be a safe harbour provision and not a strict obligation. The legal nature as a safe harbour (conceptually comparable to Article 5 MAR relating to buy-back programmes and stabilisation) clearly follows from Recital 35 and Article 11(4), as well as the general notion that market sounding is a "highly valuable tool" and "important for the proper functioning of financial markets" (Recital 32 MAR). Therefore, we understand that it has been one of the intentions of the legislator to facilitate market sounding and not to complicate it.

Responses to questions on 'Article 18 MAR: Insider list'

39 Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

We believe that insider lists primarily serve issuers who are not also investment firms or credit institutions offering MiFID II investment services and activities (hereinafter called together "investment firms") because such lists enable issuers to monitor insider information and keep insider information confidential (see recital 57 MAR cited in paragraph 164 of the Consultation Paper). Investment firms already have internal systems to detect and register employees with access to insider information. This is because they are inter alia subject to organisational requirements and obligations to monitor employee's transactions (see Article 29 Delegated Regulation (EU) 2017/565). Due to the level of detail required of insider lists maintaining such lists is a considerable - and additional – effort (for example the obligation to record (and keep up-to-date!), for example, the private telephone numbers of employees, type in the date and time in the unusual UTC format as provided for in the format templates (Annex I and Annex II Implementing Regulation (EU) 2016/347)) without adding any additional protection to the market. Against this background, we believe that simplified requirements for insider lists are needed for investment firms. Instead of insider lists, investment firms must be able to use their internal systems, i.e., simplified name list of employees with access to insider information. However, the internal monitoring systems of the investment firms have to be sufficient and meet the purposes of the insider lists (identification of those persons who have access to insider information and determination of the point in time at which they gained access - also recital 57 MAR quoted in paragraph 164 of the Consultation Paper). In this respect, it is key that the internal systems are suitable to ensure the availability of the relevant data in the event of a request by a NCA. The internal systems of investment firms fulfil this requirement. We also like to point out, that in practice, such requests occur only in very rare cases.

Furthermore, we wish to reiterate our answer to Q32 on the proposal to exempt or permit 'opt-out' from certain requirements he issuers which trade exclusively their own bonds on MTF, from the requirements in Article 18 regime on maintaining insider lists.

40 Do you consider that the insider list regime should be amended to make it more effective? Please elaborate

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Despite ESMA's requirement to restrict insider lists to a specific group of people sounding good in theory, it will be hard in practice to determine the circle of people who will effectively access a piece of inside information. Therefore, we believe that the current insider list regime should be maintained.

41 What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

As explained in our answer to Q40 above, we do not support an amendment to the insider list regime, but would advocate for simplified requirements for investment firms.

42 What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

We do not see reason to expand the scope of Article 18(1). However, our members acknowledge that there may be clarification required as to whether external auditors should be included in insider lists and whether a distinction should be made between those, which the company itself commissions, and those that act on behalf of a supervisory authority. If they are to be included, it should also be sufficient here to include only one person on behalf exclusively with their business contact data. Please also refer to our answer to Q44.

43 Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

We would like to refer to our answer to Q39, in which we advocate for simplified requirements for insider lists for investment firms. .

44 Do you agree with ESMA's preliminary view?

The EACB agrees with ESMA's preliminary view. But it should further be clarified, that only the business contacts of the (natural) contact person for the respective legal person should be included.

Responses to questions on 'Article 19 MAR: Managers' transactions'

46 Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

Our members have supported an increase in the de-minimis from €5,000 to at least €20,000. This should apply similarly in all EU member countries without country specific considerations by NCAs.

And although this is not part of the consultation paper we also would like to make the following general remarks in respect of Article 19 MAR:

- In our view the report should take into account a distinction between conscious transactions effected by PDMRs to those transactions which are not made as an investment decision. According to Article 10(2)(k) Delegated Regulation (EU) 2016/522 gifts and donations made or received and inheritance received are falling within the scope of the reporting obligation of Article 19(1). Such "transactions" are neither compelled by the PDMR nor made as a conscious investment decision. The same applies for decisions by a portfolio manager taken independently from the "manager". In those cases, the PDMR cannot influence the "transaction" and thus cannot commit market abuse or insider dealing within the meaning of the Regulation. Therefore, such cases should be exempted from the scope of Article 19 MAR and neither the disclosure obligation nor the closed period should apply to:
    - Inheritance;
    - automatic allocations of management incentive programs; and
    - transactions by a portfolio manager independent from the PDMR;

- We are also in favour of an exemption from the directors' dealings requirements for investment firms in relation to financial instruments issued by these investment firms where the underlying is a financial instrument of a third party (e.g. certificates, options). For these types of financial instruments, a transaction by an PDMR has no signal effect on the price; and

- We also note that Article 19(3) the problems of congruence of time limits between notification by the manager and publication of these transactions by the issuer has already been the subject of discussions in the MAR legislative procedure. In particular, if the manager takes the entire notification period of three days, publication by the issuer within these three days is not feasible. This means, as is generally known, that the issuer cannot ensure that the transactions entered into are also published within the 3-day time limit. This contradiction could be resolved through a corresponding Commission proposal to adapt the time limits. One suggestion could be that the manager would have three days' time limit, and then the issuer company would have e.g. two days' time to process and pass that information forward after it has received it from the manager.

- Furthermore, we wish to reiterate our answer to Q32 on the proposal to exempt issuers which trade exclusively their own bonds on MTF from the managers' transactions regime under Article 19.

47 Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

We propose the same €20,000 limit to all the EU Member States, as mentioned in our answer to Q46.

54 Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

We believe that the framework for determining the period of non-trading should be specified. Here we are referring to Article 19 (11) MAR which states that there should be a trading ban 'during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report'. If specified, then we advise that at least the time (hours) until the publication of a relevant report should be included in the trading ban period. This is because in our opinion this phrase can also be understood as the publication itself not being included, which however in view of the protective purpose of Article 19 MAR, cannot be effective. Moreover, it takes a certain amount of time to determine which capital market participants usually need to assess the information. This is usually possible during the day of publication. Therefore, it would be desirable to clarify whether the trading ban period also extends to the day of publication and, if so, whether only the hours before publication or the whole day are counted in the period.

55 Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

(i) We do not support the proposal for the closed periods under Article 19(11) to be extended to the issuer since the protection afforded by Articles 7, 8 and 9 of MAR is sufficient in our opinion. Trading prohibitions for issuers will seriously impact on-going (re)financing through funding programmes for issuers that should with due regard to their activities be able to issue securities on a continuing basis, and or limit the liquidity of secondary market transactions in these securities; and

(ii) We also believe that it is unnecessary to limit the transactions of persons closely associated with the PDMR. ESMA had already expressed this view in its Final Report (ESMA's technical advice on possible delegated acts concerning the Market Abuse Regulation, 3. February 2015 – ESMA/2015/224, paragraph 140). Accordingly, the closed period should only apply to PDMRs and not to persons closely related to them. According to recital 58 MAR, there should be an appropriate balance between the level of transparency and the number of reports notified to competent authorities and the public. Transactions by persons closely related to PDMRs have no signaling effect to the market and therefore, it is not necessary to extend the closed period provision to such closely related persons from point of view of market transparency.

Contact:

The EACB trusts that its comments will be taken into account.

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