

Examining the FMLC paper on the Market Abuse Regulation

01/06/2017

Financial Services analysis: Christopher Poon, counsel at Akin Gump Strauss Hauer & Feld, examines and assesses the background, scope and main findings of the Financial Markets Law Committee (FMLC) paper concerning the uncertainty as to the financial instruments that fall within scope of the Market Abuse Regulation (MAR).

Original news

FMLC report suggests ways of clarifying the Market Abuse Regulation, [LNB News 08/05/2017 150](#)

FMLC has published a report exploring uncertainty around the financial instruments that fall within the scope of the Market Abuse Regulation (EU) 596/2014. The report considers the new EU-wide market soundings regime introduced by Article 11 of the Market Abuse Regulation, and, in particular, analyses the terms 'transaction' and 'announcement' within the definition of market sounding.

What is the background to the FMLC paper?

The FMLC is tasked with identifying and proposing solutions to current and future issues of legal uncertainty or misunderstanding.

On 5 May 2017, the FMLC published a paper entitled *Issues of Legal Uncertainty Arising in the Context of the Market Abuse Regulation*.

The Market Abuse Regulation came into effect on 3 July 2016 and had the effect of widening the types of financial instruments to which the EU market abuse regime applies.

The Market Abuse Regulation applies to financial instruments which are:

- admitted to trading on a regulated market or for which a request for admission to trading has been made (Article 1(a))
- traded on a multilateral trading facility (MTF) or admitted to trading on an MTF or for which a request for admission to trading has been made (Article 2(1)(a))
- traded on an organised trading facility (OTF) (Article 2(1)(a)), or
- not covered by the above, but the price or value of which depends on or has an effect on the price or value of a financial instrument referred to above (Article 2(1)(d))

Additionally, the Market Abuse Regulation introduced new rules that are applicable to persons conducting market soundings (market sounding regime). A 'market sounding' has been defined by Article 11(1) of the Market Abuse Regulation to mean:

'...the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors by: (a) an issuer; (b) a secondary offeror of a financial instrument in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors; (c) an emission allowance market participant; or (d) a third party acting on behalf or on the account of a person referred to in point (a), (b) or (c).'

What is the scope of the FMLC paper?

The FMLC published the paper in response to the practical impact on market participants which the FMLC has understood was occurring as a result of legal uncertainties pertaining to the Market Abuse Regulation.

Many of the case studies reported to the FMLC concerned third country issuers. For example, where, hypothetically, a US issuer has issued debt securities which are admitted to trading on an MTF (issued securities) and is intending to issue equity securities in the US (new securities), the FMLC understands that there is some uncertainty among market participants as to whether the new securities would be captured within the Market Abuse Regulation's scope generally and/or for the purposes of the market sounding regime.

The FMLC paper explores two main legal uncertainties within the Market Abuse Regulation, namely:

- the uncertainty as to whether there must be a causal connection for the price or value of a financial instrument that has been admitted to trading on an EU trading venue to be regarded as 'depend[ing] on' or 'ha[ving] an effect on' the price or value of a financial instrument that has not been admitted to trading on an EU trading venue (which is important for determining whether the former financial instrument is within the Market Abuse Regulation's scope pursuant to Article 2(1)(d)), and
- the uncertainty as to the meaning of the terms 'transaction' and 'announcement' within the definition of a 'marketing sounding' (which is important for determining at what point the market sounding regime rules become applicable)

What are the main findings of the FMLC paper?

The FMLC acknowledges the practical difficulties resulting from these legal uncertainties and takes that view that it would be useful for guidance concerning the scope of the Market Abuse Regulation and its practical application in relation to capital markets transactions outside the EU to be developed. The FMLC also suggests that such guidance might take the form of additions to the existing Market Abuse Regulation Q&A document produced by the *European Securities and Markets Authority* (ESMA) or guidance given by national regulators.

What advice should lawyers give to their clients regarding the approaches?

Practitioners should be aware of the legal uncertainties present within the Market Abuse Regulation and, until further clarity is provided by ESMA or national regulators, should adopt an approach/interpretation that is reasonable given the situation and the nature of the client.

Interviewed by Susan Ghaiwal.

This article was first published on Lexis®PSL Financial Services on 1 June 2017. Click for a free trial of [Lexis®PSL](#).

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



CLICK HERE FOR
A FREE TRIAL OF
LEXIS®PSL

About LexisNexis | Terms & Conditions | Privacy & Cookies Policy
Copyright © 2015 LexisNexis. All rights reserved.