



Commodity Markets Council – Europe

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Ms Helen Boyd

Manager, Trading Conduct and Settlement Policy
The Financial Conduct Authority
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Clarifying application of certain MAR provisions

Dear Helen,

I am writing to you on behalf of the Commodity Markets Council – Europe (**CMCE**) and regarding the application of various provisions of Regulation 596/2014 on market abuse (“Market Abuse Regulation” or **MAR**).

CMCE is an industry group bringing together commercial market participants active across agriculture and soft commodity, energy, base and precious metals and environmental markets. The group includes commodity producers, merchandisers and consumers, the main commodity trading venues and price reporting agencies. CMCE advocates effective regulation that facilitates the key role of these markets in price discovery and risk management.

CMCE members are subject to a wide range of MAR provisions beyond the general prohibitions. For some of the requirements, there is still a need for additional clarifications so as to provide legal certainty and assist market participants in their efforts to be fully compliant with applicable rules on July 03. More specifically:

- Confirmation is required in respect of our members’ current assumption that the date of application of the requirements for “emissions allowance market participants” (**EAMPs**) will be the date of application of MiFID II/R (03 January 2017 or 2018).
- There remains some confusion in respect of the application of the market soundings - related provisions to “block trades” undertaken by members.

Application of requirements for EAMPs (Article 39(4) MAR)

MAR imposes new requirements on market participants above specified thresholds that are deemed to be EAMPs. Unlike issuers, EAMPs are not currently subject to similar rules under the Market Abuse Directive so there is considerable work needed to be done ahead of the July 3 2016 implementation date to ensure full compliance with the new rules.

CMCE members note that ‘emission allowances’ are defined in MAR with reference to MiFID II and thus, the current assumption is that the date of application of the relevant MAR requirements will be the date of application of MiFID II/R (03 January 2017 or 2018). This view seems to be in line with:

- (i) the MAR Level 1 text - notably Article 39(4) MAR that defers application to 03 January 2017 (or 2018) for any/all MAR provisions that reference definitions and concepts of MiFID II and
- (ii) the European Commission's proposal - in the form of a Regulation amending MiFID II/R, CSDR, and MAR - for a delayed application of MiFID II that highlights that "it is necessary to clarify in MAR that provisions referring to (...) emission allowances or auctioned products based thereon shall not apply until the new date of entry into application of MiFID II."

In light of the above, CMCE members currently expect that **all** MAR provisions applicable to EAMPs will apply from 03 January 2017 or 2018.

Market Soundings and Block Trades (Article 11 MAR)

Article 11 MAR describes a market sounding as a 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 size or pricing, by (a) an issuer; (b) a secondary offeror (...); (c) an EAMP; (...)¹. A disclosing market participant (**DMP**) in the course of a market sounding conducted in accordance with Article 11 will not be committing market abuse; the disclosure is deemed to have been made in the normal course of the exercise of its employment, profession or duty.

CMCE members note the clarification on block trades offered by ESMA in its Final Report². The report provides that Article 11 would apply for market soundings related to and conducted prior to undertaking a block trade where the DMP is acting on behalf of a secondary offeror. ESMA goes on to say that such soundings will usually take place in cases where blocks are so significant that their size (...) would impede their execution within the average trading day or where the information about the block trade would be likely to have a significant effect on the price of the financial instrument.

Our members are of the view that the examples of market soundings set out in Recital 33 MAR as well as ESMA's interpretation of the 'market soundings' and 'block trades' concepts are far removed from the practice of block trades in commodity markets. In commodity derivatives transactions to which CMCE members are typically party, block trades are not offered to investors; they are entered into between wholesale market participants and are conducted in the context of trying to conclude a transaction at the current market price. In line with ESMA's thinking, such practice would not fall within the definition of a market sounding and Article 11 would not apply because the market participant would not be trying to gauge the conditions relating to the potential size or pricing of a transaction. Regardless, the general prohibitions of MAR in respect of insider dealing and unlawful disclosure of inside information would still apply.

We would urge the FCA to confirm that our understanding of both the above provisions is correct so as to provide legal certainty to commodity market participants as soon as possible. I and fellow CMCE members remain at your disposal to provide any additional information on the analysis above that might assist you and your colleagues.

Sincerely,



Jonathan Hill

Chairman, CMCE Executive Committee

¹ We note that there is no definition of "secondary offeror" in the Level 1 text or indeed the draft Level 2 rules.

² ESMA: Final Report - Draft technical standards on the Market Abuse Regulation (28 September 2015) [ESMA/2015/1455].