Market Abuse Regulation - Investment Recommendations

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On 26 October 2016, ESMA updated its Q&A on the market abuse regulation ("MAR"), in order to keep promoting common supervisory practices in the application of MAR and its implementing measures. The last update focuses on investment recommendations.

Investment Recommendations - Relevant Provisions

Under Article 14 of MAR ("Prohibition of insider dealing and of unlawful disclosure of inside information") a person shall not, inter alia, "recommend that another person engage in insider dealing or induce another person to engage in insider dealing".

Article 8 of MAR provides that "recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and: a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal, or b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment".

Under Article 3 of MAR an "information recommending or suggesting an investment strategy" means information: (a) "produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer"; or (b) produced by persons other than those referred to in point (a), "which directly proposes a particular investment decision in respect of a financial instrument". Furthermore, Article 3 of MAR provides that "investment recommendations" means information "recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public".

According to Article 20 of MAR, "Persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy shall take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates".

The Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 provides "regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and
for disclosure of particular interests or indications of conflicts of interest” (“Delegated Regulation”).

**ESMA Q&A on Investment Recommendations**

ESMA provided useful guidelines on the interpretation of the concept of investment recommendation under MAR. First, ESMA clarified that the form (oral, electronic, etc.) of a communication is not relevant in order to assess whether a communication amounts to an “investment recommendation” under MAR. According to ESMA, an assessment should be made based on the substance of the communication, irrespective of its name or label and the format, form, or the medium through which it is delivered. Therefore, even an oral communication or a communication through telephone calls and chat functions could be deemed as an investment recommendation under MAR. According to ESMA, “whether a specific oral or electronic communication, or a communication labelled as “morning notes” or “sales notes”, may be considered an investment recommendation within the meaning of MAR, it should be established on a case-by-case basis” (emphasis added).

Second, ESMA pointed out that a communication that does not refer to either a financial instrument or an issuer should generally not be considered as an investment recommendation. However, according to ESMA, even such an assessment “should be conducted on a case-by-case basis”. In this respect, “Communication relating solely to spot currency rates, sectors, interest rates, loans, commodities, macroeconomic variables or industry sectors and not referring to a financial instrument or an issuer would be considered as an investment recommendation where it contains information assessed as allowing a reasonable investor to deduce that the communication is implicitly recommending specific financial instruments or issuers and provided that the other criteria of the definition of ‘investment recommendation’ within the meaning of Article 3(1)(35) of MAR in conjunction with Article 3(1)(34) of MAR are met. For example, an opinion on a specific sector that is composed of a very limited number of issuers may be considered an investment recommendation regarding those issuers” (emphasis added).

Third, ESMA stated that “material intended for distribution channels or for the public concerning one or several financial instruments that contains statements indicating that the concerned financial instruments are ‘undervalued’, ‘fairly valued’ or ‘overvalued’” falls within the definition of investment recommendations under MAR insofar as “it contains a valuation statement as to the price of the concerned financial instruments”. ESMA added that “material containing an estimated value such as a ‘quantitative fair value estimate’ that is providing a projected price level or ‘price target’, or any other elements of opinion on the value of the financial instruments, is also considered to be information implicitly recommending or suggesting an investment strategy” under MAR.

With reference to such material, ESMA clarified that “a third party that disseminates such material is considered as a disseminator of investment recommendations and therefore needs to comply with the relevant obligations and standards set out in MAR” and Delegated Regulation.

Lastly, from a subjective perspective, ESMA clarified that investment recommendation rules under MAR apply to investment firms whether or not the “production of investment recommendations is the main business of the investment firm”. According to ESMA, circumstance that a person “whose main business is to produce investment recommendations” set out in Article 3 of MAR “concerns any other person than independent analyst, investment firms and credit institutions”.

**Updating Ongoing**

Following ESMA clarifications and the broad definition of “communication” and “investment recommendation” applied by ESMA, market players should review and update their policies on
investment recommendations, providing a case-by-case approach in the assessment whether a communication falls within MAR. A similar approach should be adopted in connection with the material distributed by the same market players.

Furthermore, it should be noted that, according to ESMA, investment recommendation regulation (MAR and Delegated Regulation) should apply to all independent analyst, investment firms and credit institutions as well as to person "whose main business is to produce investment recommendations" and even to a third party that disseminates such material.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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