

Market Abuse Regulation (EU MAR) Q&A

Prepared by the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code

In the light of uncertainties in the interpretation of the Market Abuse Regulation (MAR) and related subsidiary regulations, this Q&A (the "Q&A") has been drafted by the above Joint Working Parties as a suggested approach to implementing certain aspects of MAR. This Q&A represents the Joint Working Parties' explanation of how, in their view, MAR should apply to certain practical situations, but is subject to review and amendment in the light of practice on the implementation of MAR and to any relevant future UK or EU guidance published in relation to MAR.

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PDMR Dealings (Article 19)

Q1. What is the interaction between the MAR closed periods for PDMR dealings in Article 19(11) and the insider dealing offence in MAR Articles 8 and 14 ?

A1. The insider dealing offence in Articles 8 and 14 of MAR (and the legitimate purpose test in Article 9 of MAR) apply during the MAR closed periods in the same way that they do at any other time, and must therefore be taken into account by the relevant issuer and PDMR. So even if, as for example described in the Q&As below, the relevant transaction does not fall within the prohibition in Article 19(11) of MAR or is exempt under Article 19(12), consideration must always be given to whether it would constitute insider dealing and it is not a permitted transaction if it would do so.

Rationale: Article 19(11) is "without prejudice" to Articles 14 and 15 and see also ESMA Fund Report paragraph 141.

Q2. Does the FCA's position on closed periods and preliminary announcements in its statement of 25 May 2016 apply to all issuers, wherever their securities are traded?

A2. Yes, in the view of the Joint Working Parties.

Rationale: The statement refers to issuers without qualification so we understand it to apply to all issuers.

Q3. Is the meaning of "transaction" the same for the purposes of Article 19(11) as it is for the purposes of the disclosure requirement in Article 19(1)?

A3. Yes.

Rationale: There is no separate definition of "transaction" in Article 19(11) and therefore the provisions for the interpretation of "transaction" in Article 19(1) and 19(7) apply to Article 19(11) (see ESMA Final Report paragraph 143). However, this does not always mean that a transaction that has to be disclosed falls within the Article 19(11) restriction or vice versa. This is because Article 19(1) applies to "every transaction conducted on their own account" whereas Article 19(11) states that during a MAR closed period a PDMR "shall not conduct any transactions on its own account or for the account of a third party". Therefore Article 19(11) only applies where it is the PDMR conducting the transaction, whereas Article 19(1) does not (see ESMA Final Report, paragraph 146) and Article 19(11) applies to transactions on behalf of a third party whereas Article 19(1) does not. The timing of the restriction versus the

notification obligation is also different as described in Q4 below, because Article 19(11) only applies when the PDMR conducts the transaction during a closed period.

Q4. How do the MAR closed periods affect conditional transactions?

A4. Provided that at the time of entry into the transaction, he or she does not have inside information, a PDMR may enter into a conditional transaction where one or more conditions outside the control of the PDMR is satisfied during a MAR closed period (whether or not the transaction is then completed), but cannot enter into a conditional transaction during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the conditional transaction) is made outside the MAR closed period, the PDMR is not “trading” during the MAR closed period (see Recital (61) to the MAR). Therefore if satisfaction of the condition is outside the control of the PDMR and the only action taken by a PDMR takes place before the start of a closed period, there is no “conduct” by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the transaction is completed during the closed period, so that the acquisition or disposal of shares occurs during a MAR closed period. If the PDMR takes any action during a MAR closed period, then that will fall within the restriction even if the transaction is completed after the end of the closed period. Similarly the prohibition applies to a conditional contract entered into during a closed period even if the condition cannot be satisfied until after the end of a closed period and even though the transaction is not required to be disclosed under Article 19(1) until the condition is satisfied. See also Article 9(3) which makes it clear that performing a contractual obligation entered into prior to possessing inside information is not insider dealing.

Q5. Is an issuer subject to the MAR closed period?

A5. A transaction in relation to its shares or debt instruments by the issuer does not fall within the prohibition or PDMR transactions in Article 19(11), even though it will be the PDMRs (or some of them) that cause the issuer to act. For example, the approval by one or more PDMRs of a buyback by the issuer or an award of shares under an employee share scheme or another issue of shares during a MAR closed period would not fall within the restriction in Article 19(11). However, the transaction could still be market manipulation or (if it had inside information at the time) insider dealing by the issuer– see Q1.

Rationale: Article 19(11) EU MAR prohibits PDMRs from conducting any transactions “on its own account or for the account of a third party” during a MAR closed period. However, the actions by a PDMR, acting in his capacity as a director or employee of the issuer, when approving transactions undertaken by the issuer do not amount to conducting a transaction “for the account” of the issuer.

Q6. What exchange rate should be used for calculating the EUR 5,000 threshold in EU MAR Article 19(8)?

A6. Until clarifications are provided PDMRs and their PCAs should be consistent throughout the relevant calendar year and should consider using a widely accepted Euro/Sterling (or Euro/other) exchange rate published for the date of the relevant transaction.

Rationale: A practical solution.

Q7. I am a director of a company, A, whose shares are traded on AIM. I am also a person discharging managerial responsibilities in another company, B. I do not control more than 50% of the shares of B. Is B one of my “persons closely associated” so that B must notify A under Article 19(1) of transactions in A’s shares conducted on its own account?

A7. B will only be treated as a “person closely associated” for the purposes of EU MAR if the director is:

- (a) the sole director of B or has the right to appoint a majority of the board of directors of B; or
- (b) the director (or senior executive) that personally has control over B’s management decisions affecting B’s future development and business prospects.

Rationale: B does not fall within Article 3(1)(26)(b) because the director does not control B and is not solely responsible for its management decisions. See also Market Watch No 12 - the definition of a PCA is the same as that under the Market Abuse Directive.

Q8. *How should the introduction to Article 9 of the Delegated Regulation be interpreted as regards the issuer having a right to permit dealings "including but not limited to" the circumstances listed in Article 9?*

A8. This means that the circumstances set out in Article 9 are a non-exhaustive list of circumstances to which the exception in Article 19(12)(b) can apply, but the issuer should not permit other transactions unless they meet the tests in Article 7(1) of the Delegated Regulation and are analogous in substance to those listed in Article 9.

Rationale: The wording of Article 9 of the Delegated Regulation makes it clear that the list is non-exhaustive. In making a judgement as to whether to permit a particular transaction, issuers should apply a substantive test using the principles illustrated by the specific circumstances listed in Article 9.

Q9. *What falls within the exception for "entitlement of shares" in Article 19(12)(b)?*

A9. The scope of the exception for "qualification or entitlement of shares" is uncertain, but we consider that it would be broad enough to encompass rights issues and bonus issues under which (subject to exclusions for certain overseas shareholders) all shareholders are allocated nil-paid rights (in the case of a rights issue) or ordinary shares or subscription shares free of payment in the case of a bonus issue. Provided the PDMR is given permission by the issuer to deal and the transaction cannot be conducted at another time than during a MAR closed period because the opening date and the final date for the entitlement fall during a MAR closed period, a PDMR is permitted to receive shares under a bonus issue and (provided they have no inside information) to undertake or elect to take up entitlements under a rights issue or to allow entitlements to lapse.

Rationale: Transactions made under or related to an entitlement of shares fall within the permitted exceptions in EU MAR Article 19(12)(b). The concept should be regarded as including any entitlement to shares derived from being an existing shareholder, and see Article 9(e) of the Delegated Regulation.

Q10. *Can a PDMR acquire shares under a share savings scheme or a dividend reinvestment plan during a MAR closed period?*

A10. Whether or not they are an employee of the issuer, if a PDMR enters into a share savings scheme or makes a standing election to reinvest dividends and other distributions received in the issuer's shares in each case outside a MAR closed period or prior to 3 July 2016 and has no inside information at that time, the PDMR can continue to acquire shares under the relevant scheme or election but must not cancel or amend his or her participation during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the trading or savings scheme or dividend investment plan) is made outside the MAR closed period, the PDMR is not "trading" during the MAR closed period (see Recital (61) to the MAR). Therefore the only action taken by a PDMR takes place before the start of a closed period, there is no "conduct" by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the acquisition of shares occurs during a MAR closed period.

Q11. *Can a PDMR acquire or dispose of shares under a trading plan during a MAR closed period?*

A11. The trading plan is a written plan entered into between the PDMR and an independent third party, which sets out a strategy for the acquisition and/or disposal of shares by the PDMR and either:

- (a) specifies the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in; or

- (b) gives discretion to that independent third party to make trading decisions about the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in; or
- (c) includes a method for determining the amount of shares to be dealt in and the price at which and the date on which the shares are to be dealt in.

Provided that the trading plan is entered into prior to 3 July 2016 or outside a MAR closed period and the PDMR has no inside information at that time, the PDMR can continue to acquire or dispose of shares under the trading plan but must not cancel or amend their participation during a MAR closed period.

Rationale: The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. When the decision to trade (here the entry into the trading or savings scheme or dividend investment plan) is made outside the MAR closed period, the PDMR is not "trading" during the MAR closed period (see Recital (61) to the MAR). Therefore the only action taken by a PDMR takes place before the start of a closed period, there is no "conduct" by the PDMR during the closed period for the purposes of Article 19(11) and so the restriction will not apply even if the acquisition or sale of shares occurs during a MAR closed period.

Q12. *If a PDMR has entered into an arrangement, outside a MAR closed period, to acquire shares on a monthly basis from salary (including under an HMRC tax-advantaged Share Incentive Plan), can the PDMR continue to acquire shares for the month in which the acquisition date falls within a closed period?*

A12. Yes, as the purchase is pre-planned outside the MAR closed period.

Rationale: Implementation of transactions committed in advance of a MAR period are not transaction conducted by the PDMR during the closed period. (See Q3 and Q4 and ESMA Final Report paragraph 146). In addition the purchase falls within Article 9(d) of the Delegated Regulation (EU) 2016/522 and Article 7(1)(b) of the Delegated Regulation will be met (as the purchase is pre-planned and the PDMR's purchase must be made at the same time as purchases are made by all other participating employees).

Q13. *Can a PDMR who is a non-executive director and has agreed, outside a closed period, to receive shares monthly in lieu of fees, or reinvest cash fees received in the acquisition of shares, receive or acquire shares in a closed period?*

A13. Yes, so long as the receipt or acquisition of shares is an automatic event (i.e. there is no decision made, or discretion exercised, by the PDMR).

Rationale: Implementation of transactions committed in advance of a MAR period are not transactions conducted by the PDMR during the closed period. (See Q3 and Q4 and ESMA Final Report paragraph 146). In addition, this receipt or acquisition is permitted under Article 9(d) of the Delegated Regulation and Article 7(1)(b) of the Delegated Regulation will be met (as purchases/acquisitions are made on a pre-planned timetable). Although Article 9(d) refers to "an employee saving scheme" (and a non-executive director is not an employee), Article 9(d) must be read in the context of Article 19(12)(b) MAR which refers to an issuer being permitted to allow a PDMR to trade on its own account under "an employee share or savings scheme" (and this term is also used in Recital (24) of the Delegated Regulation).

Q14. *Apart from the events specifically referred to in Article 10 of the Delegated Regulation (EU) 2016/523, should transactions be notified where the PDMR and their persons closely associated do not take any other action in relation to a transaction in financial instruments?*

A14. Only when the shares are transferred to the PDMR or their person(s) closely associated. For example the automatic vesting of a share award prior to the transfer of shares to the PDMR or dealings by the trustees of an employee benefit trust (EBT) (of which the PDMR or their person(s) closely associated is a beneficiary) for the benefit of all beneficiaries will not be notifiable until the shares are transferred to the PDMR.

Rationale: In addition to the events specifically referred to in Article 10 of the Delegated Regulation (EU) 2016/523 which are notifiable, transactions likely to be considered 'conducted on the PDMR's own account' and thus notifiable under Article 19(1) of the Market Abuse Regulation (EU) 596/2014 are transactions for which the PDMR has not given any instruction, consent or otherwise had any control over at any point before the shares are transferred to the PDMR. (Note: References in A13 to PDMR include references to the persons closely associated with the PDMR).

Q15. Can a PDMR transfer shares of the issuer following exercise of an option under an HMRC tax-advantaged SAYE option scheme (or equivalent scheme) or release of shares from an HMRC tax-advantaged Share Incentive Plan (SIP) (or equivalent plan) into a savings scheme investing in securities of the issuer during a MAR closed period?

A15. Provided that (i) the transfer is for nil consideration, (ii) the PDMR does not possess inside information and (iii) the issuer is satisfied with the PDMR's explanation that the transaction cannot be conducted at another time, the issuer may permit the transfer. An example of this would be where shares are transferred within 90 days of coming out of a SAYE or SIP to an Individual Savings Account (ISA) with the same capital gains tax base cost.

Rationale: The transaction falls within Article 19(12)(b) and 9(e) and Article 7(1)(b) of the Delegated Regulation and see Recital (25) of the Delegated Regulation.

Q16. Is the cancellation or surrender of an option (or other right to acquire shares) awarded to a PDMR under an employee share scheme permitted during a MAR closed period?

A16. An automatic cancellation (i.e. a lapse under the scheme rules) is permitted but a surrender by a PDMR is not. A surrender by the PDMR will be a transaction conducted by the PDMR and should not take place during a closed period, whether or not the PDMR receives any payment or other consideration for it.

Rationale: A cancellation automatically under the scheme rules is not trading by a PDMR and so is outside the scope of Article 19(11) (see Recital (61) of MAR and Recital (24) of the Delegated Regulation).

Q17. I am one of three trustees whose investments include securities of a company of which I am a PDMR. Can the trust deal during a MAR closed period?

A17. Yes if the decision to deal is taken by the other trustees or by investment managers on behalf of the trustees independently of you, that is without consultation with or other involvement of you.

Rationale: The trustee who is a PDMR is not participating in the decision for the trust to deal so the transaction is not conducted by the PDMR.

Q18. What evidence (if any) does a PDMR have to provide when asking for permission to deal in a MAR closed period.

A18. In general the PDMR must be able to demonstrate that the particular transaction cannot be executed at another moment in time than during the MAR closed period. Where the proposed dealing is in relation to (i) an employee share or saving scheme or (ii) qualification or entitlements of shares, it is not necessary for the PDMR to provide a reasoned written request (a clearance from the issuer is still required although a single clearance can be given at the outset of the arrangement given that the arrangement is implemented by the issuer).

Rationale: Article 7(1)(b) of the Commission Delegated Regulation (EU) 2016/522 applies to all transactions for which Article 19(12) is being relied on to provide an exemption for conducting a transaction during a closed period, and not just to exceptional circumstances. Article 7(2) of the Delegated Regulation only applies to Article 19(12)(a)) and paragraph 156 of ESMA's Final Report provides that an issuer can permit dealings under Article 19(12)(b) without requiring a case-by-case assessment.

Q19. Must a PDMM or their PCA notify dealings by him in units or shares in a collective investment undertaking or portfolio of assets where the undertaking or portfolio invests in shares of the issuer in relation to which he or she is a PDMM?

A19. If the collective investment undertaking or portfolio of assets is one in respect of which (i) the PDMM or PCA has ascertained that exposure to the shares or debt instruments of the issuer does not exceed 20% of the total assets held by that collective investment undertaking or portfolio of assets at the time of dealing or (ii) the PDMM or PCA does not know, and could not reasonably know, the percentage of total assets represented by the issuer's share or debt instruments and there is no reason for the PDMM to believe that the 20% limit is exceeded, the transactions in the issuer's shares by the collective investment undertaking or portfolio of assets are excluded from the obligation to notify transactions under Article 19(1).

Rationale: Article 19 (1a) of MAR as inserted by the Benchmark Regulation and see paragraphs 145-146 ESMA Final Report.

Q20. Must a PDMM or PCA notify deals in the issuer's securities by a collective investment undertaking (such as UCITS, a NURS and an Alternative Investment Fund, including a quoted investment trust or company) or a portfolio of assets in which the PDMM or PCA holds units or shares?

A20. Transactions in shares or debt instruments or linked financial instruments by a collective investment undertaking in which the PDMM or PCA has invested do not need to be notified if the manager of the undertaking has full discretion and does not receive any instructions or suggestions on portfolio composition directly or indirectly from the investors in the collective investment undertaking.

Rationale: Article 19(7) of MAR as amended by the Benchmark Regulation.

Q21. Is an investment by a PDMM in a collective investment undertaking or portfolio of assets that is excluded from the notification obligations (by virtue of Article 19(1)(a) – as inserted by the Benchmark Regulation) prohibited during a MAR closed period?

A21. No.

Rationale: As noted above in Q3, there is no separate definition of "transaction" in Article 19(11) and therefore the provisions for the interpretation of "transaction" in Article 19(1) and 19(7) apply to Article 19(11). There is no policy reason why investments by a PDMM in funds/portfolios of assets that do not meet the threshold for notification should be subject to restrictions during a closed period. As noted above in Q3, transactions executed by the manager of such a collective investment undertaking on a fully discretionary basis would not be caught at all by the language of Article 19(11) as the PDMM is not itself conducting the transaction.

Q22. Can the manager of a collective investment undertaking or portfolio of assets in which a PDMM is invested deal during the MAR closed period?

A22. Yes, provided that the conditions set out in the answer to Q20 apply to that PDMM.

Rationale: This is not a transaction conducted by a PDMM.

Share Buy-Backs (Article 5)

Q23. Can an issuer operate a share buy-back programme which does not satisfy the conditions in Article 5 of EU MAR and the Level 2 Regulation?

A23. Provided that an issuer has disclosed all inside information at the relevant time, and the share buy-backs are conducted in a way which does not otherwise mislead or manipulate the market, own share buy-backs outside the Article 5 exemption will not constitute market abuse. Issuers may think it appropriate to observe the same restrictions on purchases of their own securities during MAR closed periods as

applied under the Listing Rules in force prior to MAR implementation, that is by doing so under a time-scheduled or independent broker-managed buy-back programme.

An investment company can purchase its own shares during a MAR closed period if it is satisfied that all inside information that the directors and the issuer may have has previously been notified to a RIS. In order to demonstrate this, investment companies should consider whether, prior to conducting any buy-backs during a MAR closed period, they should follow the practice previously required under the Listing Rules of making a regulatory announcement at the start of the MAR closed period or, if later before conducting any share buy-backs, that the issuer is satisfied that all inside information has previously been notified.

Rationale: Recital (12) of EU MAR states that “trading in own shares in buy-back programmes... which would not benefit from the exemptions under this Regulation shall not of itself be deemed to constitute market abuse”, so it is clear that the Article 5 exemption provides a safe harbour and is not prescriptive.

The safe harbour under Article 4 of the Level 2 Regulation does not apply to share buy-backs during a MAR closed period except where there is a time scheduled buy-back programme or it is lead managed by an investment firm or credit institution which makes its trading decisions independently of the issuer. This does not mean that share buy-backs cannot be undertaken during a MAR closed period outside the exemptions provided that the issuer does not have inside information and the share buy-back does not constitute market manipulation or mislead the market.

Q24. *Is stake-building permitted (by Article 9(5)) provided the only inside information the bidder has is (i) its intention to bid and (ii) its intention to stake-build?*

A24. Yes. This falls within Article 9(5) which refers to “its own knowledge that it has decided to acquire ... financial instruments” and is wide enough to include both the intention to make a bid and the intention to acquire shares through stake-building.

Rationale: See also Recital (31) which provides that “Acting on the basis of one’s own plans and strategies for trading should not be considered as using inside information”.

The exclusion of stake-building from Article 9(4) does not impact the scope of Article 9(5).

Disclosure (Article 17)

Q25. *What must an issuer do to comply with the Implementing Technical Standards (ITS) for public disclosure of inside information?*

A25. Where an announcement (for example an announcement about a transaction), includes some items that are inside information, even if it includes other information that is not, it is sufficient to include a general reference such as “This announcement contains inside information”. Where the announcement covers a number of clearly different matters that could have been the subject of separate announcements it would be appropriate to distinguish between those matters that include inside information and those that do not. However, it is important that inside information within the announcement is not concealed (ie buried in with large amounts of non-inside information).

Rationale: Article 1(b)(i) of the draft ITS requires that communications clearly identify that the information communicated is inside information. We consider that the general reference we have proposed will be sufficient to ensure investors are aware that the announcement contains inside information and to require greater specificity would be disproportionate.

Q26. *In an announcement containing inside information who should be identified as the person making the notification?*

A26. The individual who manages the release of the announcement (for example the company secretary) should be named.

Rationale: We consider this approach to be appropriate because it provides potentially useful contact information.

Q27. *How may an issuer comply with the requirement for inside information to be located “in an easily identifiable section of the [issuer’s] website”?*

A27. Issuers can post announcements of inside information on the section of their website that contains all regulatory announcements and do not need to establish a separate section, only containing announcements which include inside information.

Rationale: This is consistent with paragraphs 220 and 221 of the ESMA Final Report.

Q28. *How should an issuer notify inside information when an RIS is not open for business?*

A28. Following DTR 1.3.6G will ensure that DTR 6.3.4R is complied with when a RIS is not open, although this may not be appropriate when an issuer also has securities traded on venues in other jurisdictions

Rationale: Article 17(1) requires issuers to make inside information public as soon as possible and states that the issuer “shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council”. Article 2 of the ITS on publication of inside information further states that inside information must be disseminated to as wide a public as possible, free of charge simultaneously throughout the Union.

DTR 1.3.6 previously stated that when inside information is required to be notified via an RIS at a time when the RIS is not open for business, the out of hours method of releasing inside information specified in DTR 1.3.6 “must” be used. The retained guidance in DTR 1.3.6 from 3 July states that the out of hours methods “may” be used when the RIS is not open for business. This means that issuers can satisfy their obligation to make inside information public as soon as possible under Article 17 by using the out of hours methods set out in DTR 1.3.6 although this may not be appropriate when an issuer also has securities traded on venues in other jurisdictions. Issuers could instead wait for the RIS to open for business, but in that case an issuer would need to consider by reference to the individual circumstances (including whether or not the securities are traded on another venue which will be open for business before the RIS opens and how long it is before the RIS opens) whether waiting for the opening of the RIS would reasonably be regarded as making the information public as soon as possible.

Insider Lists (Article 18)

Q29. *Which individuals should be included on insider lists for advisers to issuers?*

A29. For advisers to issuers, staff need only be included on the insider lists if they meet two tests:

- performing tasks through which they have access to inside information on the issuer; and
- they are acting on behalf of or for the account of the issuer.

It is the deal teams and client-facing staff who generally should be included on the list, if they have access to inside information. Secretarial staff and other support staff who have access should also be included (although individuals with the ability to access IT systems but whose duties do not require them to access inside information do not need to be included unless they actually have accessed it). Senior management who receive management information or sit on review committees even if they are not involved in the transaction must be included.

Rationale: This test is substantially the same as under the Market Abuse Directive and see Market Watch 24 and CESR guidance.

Q30. How do issuers and their advisers complete the national identification number column in the Insider List templates in respect of British and other nationals who do not have national identification numbers?

A30. For UK nationals this can be left blank, as it is only required to be completed “if applicable”. For other nationals, who have a national identification number, that number should be included.

Rationale: UK citizens do not have national identification numbers so the requirement cannot apply.

Investment Recommendations (Article 20)

Q31. If a circular contains a voting recommendation by the board of an issuer, as required by the Listing Rules, does this constitute an “investment recommendation” for the purposes of Article 20 of EU MAR?

A31. A voting recommendation in the form required under the Listing Rules is not an “investment recommendation” or “information recommending or suggesting an investment strategy” for the purposes of EU MAR and so falls outside the requirements of Article 20.

Rationale: Communications between a Board and shareholders are subject to legal duties and responsibilities and are not within the scope of “persons other than those referred to in point (i) of Article 1(34)(ii). Also a decision to vote is not an “investment decision” for the purposes of Article 1(34)(ii). See also Q6 of the Takeovers Q&A.

Q32. Will the directors’ recommendation of a takeover offer be treated as “an investment recommendation or other information recommending or suggesting an investment strategy” under Article 20?

A32. No. Article 20 is not intended to capture directors’ recommendations on a takeover, whether effected by way of a contractual offer or a scheme of arrangement. This is the same whether the consideration is cash or bidder shares, or includes a mix and match. Neither should the independent adviser’s opinion to the target company board be treated as falling within Article 20.

Rationale: Such recommendations are made in the context of the specific relationship/duties existing between directors and shareholders and are subject to the specific regime and requirements set out in the Takeover Code. See also Q30 in Part 1 of these Q&As.

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APPENDIX

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