

BSF Insights

Polling Data and
Market Abuse: the
need for market
participants to
tread carefully

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I. OVERVIEW

With a UK general election called for 12 December 2019, this is a vital time to consider the use and abuse of polling data. The Financial Conduct Authority (“FCA”) considers that polling data can, in certain circumstances, be inside information for the purpose of the Market Abuse Regulation 596/2014 (“MAR”) and has recently drawn attention to this by creating a new page on its website dealing with this issue.¹

We have considered the risks facing market participants collating, sharing or trading on the basis of such information, and how they can ensure best practice and reduce the risk of infringing the insider dealing prohibition in MAR and other applicable rules.

SPEED READ

- UK legislation governing the publication of polling data is of relatively limited scope (only preventing the publication of “exit polls” relating to how individuals have actually voted – not how they intend to vote).
- However, all aggregated and anonymised polling data made available before a poll is closed – not just exit polls – could be capable of constituting inside information under MAR.
- So individuals and firms collecting or receiving polling data that is relevant to financial markets cannot make certain investment decisions on the basis of that data.
- Even where particular investment activity (such as FX spot trading) is not covered by MAR, the FCA’s Principles for Business and Statements of Principle for approved persons probably also limit trading based on polling data.
- Note: MAR applies to everyone, not just those regulated by the FCA.

BACKGROUND

Market abuse in the context of polling data has become an area of increased focus by the FCA and the Treasury Committee in recent years, following concerns raised after the June 2016 referendum on the United Kingdom’s membership of the European Union (the “Brexit Referendum”). In particular, it was reported that prior to

and on the day of the Brexit Referendum, hedge funds commissioned private polls which gave them a greater insight into the likely result than they would have had with regard solely to publicly available data.²

There is no clear-cut prohibition on individuals or firms generating, commissioning or otherwise obtaining polling data on a private basis. Indeed, Andrew Bailey, Chief Executive of the FCA, has publicly stated that “if there is a public policy desire to prevent polling information being provided to selected parties such as trading firms before polls close, market abuse regulations do not achieve this”.³ However, there may be a risk of market abuse being committed if (i) such polling data constitutes inside information and (ii) any decisions to trade in financial instrument are made based upon such data.

Whilst there are strict provisions under English law prohibiting the publication of polling data before an election has concluded (under s.66A Representation of the People Act 1983 (“RPA”)), the circumstances in which this provision applies are relatively limited.

In practice, MAR is more likely to prohibit an individual or firm’s conduct with respect to trading on the basis of polling data; however, it is important to consider s.66A RPA briefly in order to understand what sort of polling data can be shared (and how) without breaching domestic electoral legislation, before considering whether trading on the basis of that polling data might amount to market abuse under MAR.

¹ Polling and Market Abuse Regulation, Financial Conduct Authority (September 3, 2019), <https://www.fca.org.uk/markets/market-abuse/polling-and-market-abuse-regulation>

² Cam Simpson, Gavin Finch, and Kit Chellel, The Brexit Short: How Hedge Funds Used Private Polls to Make Millions, Bloomberg (June 25, 2018), <https://www.bloomberg.com/news/features/2018-06-25/brexit-big-short-how-pollsters-helped-hedge-funds-beat-the-crash>

³ Letter to The Rt. Hon Nicky Morgan MP, Treasury Committee (July 18, 2019), <https://www.parliament.uk/documents/commons-committees/treasury/Correspondence/2017-19/Chief-Executive-Financial-Conduct-Authority-to-Chair-re-private-polling.pdf>

II. RELEVANT PROVISIONS

s.66A RPA

S.66A(1) RPA prohibits a person from publishing any of the following, before the poll (i.e. public voting for an election) has closed:

“(a) any statement relating to the way in which voters have voted at the election where that statement is (or might reasonably be taken to be) based on information given by voters after they have voted, or

(b) any forecast as to the result of the election which is (or might reasonably be taken to be) based on information so given.”

This provision has application not only on the day of the election itself when polling stations are open, but also during the prior weeks in which it is possible for individuals to have voted by post. Crucially, the prohibition in s.66A only relates to statements or forecasts which are *“(or might reasonably be taken to be) based on information given by voters after they have voted”* (emphasis added). Polls relating to such information are commonly known as “Exit Polls” (and are referred to as such in this article).

S.66A RPA is perhaps more notable for what it does not cover:

- First, s.66A does not prohibit the publication of statements or forecasts based on information given by individuals who have not yet voted, about how they intend to vote in the future. This type of poll (“Opinion Poll”) is regularly published in the run-up to elections by polling firms, in newspapers and others places.
- Second, s.66A only makes it an offence for a person to “publish” the statements or forecasts described in s.66A(1). The term “publish” is defined in s.66A(4) as *“mak[ing] available to the public at large, or any section of the public, in whatever form and by whatever means”*.

The definition of “publish” therefore means that it is unlikely to be an offence under the RPA if polling companies share information with one or a small number of recipients on a limited basis (even if it relates to how individuals have actually voted while a poll is open – i.e. Exit Polls).

In practice, the restrictions in s.66A are more likely to affect those firms who compile opinion polls, often referred to as “pollsters” (e.g. YouGov, Opinium and Ipsos MORI). However, it should be noted that if an individual or firm were to commission an Exit Poll privately, it would still need to take care with respect to how it shares that Exit Poll (as well as any other statements or forecasts derived from such Exit Poll or its underlying data). The initial transmission of such data by a pollster to a private investor should be less problematic (it has been reported that hedge funds previously clubbed together on a syndicated basis to purchase polling data directly from pollsters), but investors should ensure that they themselves do not share that

data onwards with any other individuals or firms without taking legal advice as to whether such action would contravene s.66A RPA or any other applicable laws. Care should also be taken before circulating private polling data internally within an organisation, particularly at larger financial institutions.

Even if s.66A liability does not arise for an investor, the results of (and raw data behind) privately commissioned polls (whether Opinion Polls or Exit Polls) may nevertheless constitute inside information under market abuse laws, even if they have been prepared and shared on a limited basis, so care must be taken as to how such polling data is used by an investor.

MAR

MAR contains four main civil offences relating to market abuse:⁴

- Engaging or attempting to engage in insider dealing (Article 14(a) MAR);
- Recommending that another person, or inducing another person to, engage in insider dealing (Article 14(b) MAR);
- Unlawfully disclosing inside information (Article 14(c) MAR); and
- Engaging in market manipulation (Article 15 MAR).

MAR applies to all individuals and firms, regardless of whether they are regulated by the FCA. Insider dealing, which entails trading on the basis of inside information, is the FCA’s primary concern in the context of polling data.⁵ This could occur, for example, if an investor obtains privately commissioned polling data during the day that an election takes place and trades in financial instruments on the basis of that information ahead of Exit Polls being published when the polls have closed (typically at 10pm).

MAR does not expressly include polling data within the definition of “inside information”, so it will always require a specific analysis of the facts to determine if such data amounts to inside information. MAR defines inside information as

“information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments” (Article 7(1)(a))

Information of a Precise Nature

There is a good chance that most polling data could constitute “information of a precise nature”. Although it may be argued that an

⁴ A related criminal market abuse regime exists under the Criminal Justice Act 1993.

⁵ Defined in Article 8(1) MAR as being “where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates”; and/or “[t]he use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information”.

exit poll based on a few thousand respondents (in aggregated and anonymised form) is in no way precise enough to indicate the likely outcome of any election, it is possible that sophisticated investors will be commissioning polling data that (i) is based on a sufficiently larger or representative pool of respondents and/or (ii) falls to be assessed alongside any other set(s) of polling data held by that investor, such that their data could amount to information of a precise nature.

Relating to one or more issuers or financial instruments

It is unlikely that polling data would relate directly or indirectly “to one or more issuers” (i.e. issuers of listed securities) other than in the case of government bonds.⁶ In practice, it is more likely to relate, indirectly, to one or more “financial instruments”. The definition of “financial instruments” in MAR directs readers to the term as defined in MiFID II⁷ and does not include currencies, the exchange rates between them or financial indices (e.g. FTSE 100, FTSE 250) in their own right. However, it does cover more common instruments such as transferable securities, money market instruments, units in collective investment schemes and financial contracts for difference (known as CFDs). Moreover, the term “financial instruments” also encompasses various types of options, futures, swaps, forward rates and derivatives, including those relating to currencies, financial indices and commodities. This means that the following are likely to be classified as financial instruments, the trading of which falls within the market abuse regime (such list being non-exhaustive and by way of example only):

- FX options, futures, swaps, forward rates and derivatives;
- Options and similar products which reference financial indices (e.g. a FTSE 100 Index Option); and
- Options and similar products which reference commodities (e.g. gold futures).

It is therefore possible that any hedges or speculative trades which reference currencies (e.g. sterling or euro), stock market indices or commodities could fall within the definition of financial instruments for the purpose of MAR.

Significant effect on price

The publication of Exit Polls in domestic elections has not historically resulted in a significant effect on financial markets, particularly as Opinion Polls are published regularly during the weeks and days leading up to any election. However, the Exit Polls published after the Brexit Referendum in June 2016 illustrated the considerable impact that surprising poll results can have if the result defies expectations.⁸ So it is certainly possible that private polling data which varies in substance from publicly available polling data could, if made public, have a significant effect on the price of financial instruments to which it indirectly relates. In reality, such data would need to show a trend or result that is quite unexpected, such as the gap between two parties drastically shrinking, or reversing so that a party previously in second

place is predicted to get the greatest share of the vote, for example.

Ultimately, any call as to whether polling data amounts to inside information will require a detailed consideration of all the facts and circumstances, as well as a reasoned legal analysis.

FCA Principles

Even if polling data does not constitute inside information, regulated firms and approved persons should be mindful of their obligations under the FCA's principles for business, including the obligation to observe proper standards of market conduct (Principle 5 for firms and Statement of Principle 3 for approved persons). Firms should also pay due regard to the interests of customers and treat them fairly (Principle 6).⁹

CONCLUSION

Firms and individuals who obtain (or are offered the opportunity to obtain) private polling data should:

- Consider whether that data might constitute inside information and therefore restrict them from trading;
- Once in possession of such polling data, take legal advice if in doubt as to whether MAR (and to a lesser extent, the RPA) might be engaged;
- Ensure that any private polling data is kept confidential (unless it is necessary to make that data public – i.e. “cleansing” – in order to trade, although regard must be had to the restriction on publication under s.66A RPA before doing so); and
- Always be mindful of the FCA’s principles for business, to the extent that they apply.



MATT GETZ
Partner, London
mgetz@bsfllp.com



MICHAEL JACOBS
Associate, London
mjacobs@bsfllp.com

⁶ Conceivably, polling data could relate to an issuer indirectly if, for instance, a listed company had made known to the public that it intends to conduct its business in a particular way depending on the outcome of an election (e.g. move some or all of its operations onshore or offshore if a particular party were to form a government), but it is suggested that situations like this would be relatively rare and fact-specific.

⁷ Section C of Annex 1, Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).

⁸ In the hours after polling closed on 23 June 2016, the value of the pound dropped by over 10% against the dollar, whereas the price of gold has gained as much as 7% at one point.

⁹ For example, even if trading on the basis of private polling data did not contravene MAR, but had been done in a way that was detrimental to a firm’s clients, such conduct could, in certain circumstances, be the subject of further investigation and ultimately enforcement by the FCA.