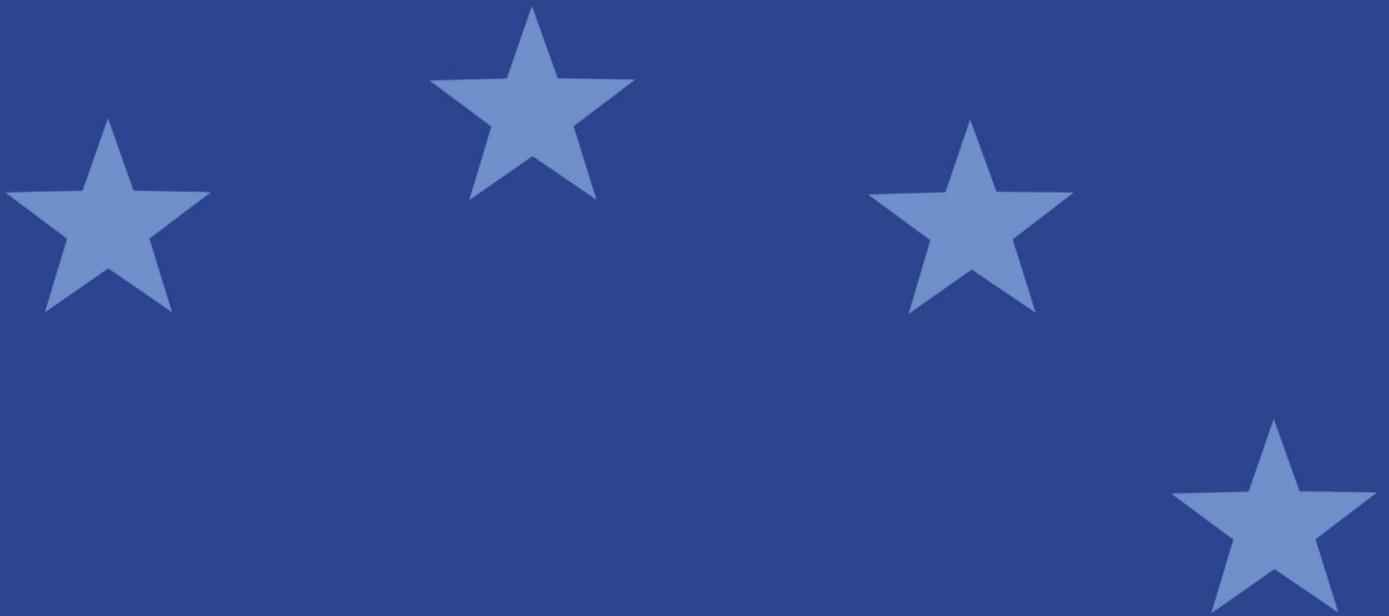




European Securities and  
Markets Authority

# MAR Review report





European Securities and  
Markets Authority

23 September 2020  
ESMA70-156-2391

## Table of Contents

Executive Summary .....	10
1. Introduction .....	13
2. Scope of MAR .....	14
2.1. Spot FX contracts .....	14
2.1.1. Legal Framework .....	14
2.1.2. Feedback to the consultation.....	15
2.1.3. Additional evidence gathered by ESMA.....	19
2.1.4. ESMA’s assessment and recommendations.....	27
2.2. Scope of application of the benchmark provisions .....	29
2.2.1. Legal framework.....	29
2.2.2. Feedback to the consultation.....	31
2.2.2.1. Definition of benchmark in MAR vs. definition of benchmark in BMR .....	31
2.2.2.2. Sanctions against (attempted) benchmark manipulation and powers of NCAs....	32
2.2.2.3. Powers of competent authorities.....	33
2.2.2.4. Administrative sanctions and other administrative measures .....	34
2.2.3. ESMA’s assessment and recommendations.....	34
2.2.3.1. Definition of benchmark in MAR vs. definition of benchmark in BMR .....	35
2.2.3.2. Sanctions against (attempted) benchmark manipulation and powers of NCAs....	36
2.2.3.3. Powers of competent authorities.....	37
2.2.3.4. Administrative sanctions and other administrative measures .....	38
3. Article 5 MAR - Buy-back programmes (BBPs) .....	39
3.1. Legal Framework.....	39
3.2. Feedback to the consultation .....	40
3.2.1. Scope of the reporting obligation.....	40
3.2.2. Simplification of the reports for BBPs .....	41
3.2.3. Transparency of transactions related to BBPs.....	42
3.3. ESMA’s assessment and recommendations .....	42
3.3.1. Scope of the reporting obligation.....	42
3.3.2. Simplification of the reports for BBPs .....	43
3.3.3. Transparency of transactions related to BBPs.....	44
4. Article 7 of MAR – Definition of “inside information” .....	44
4.1. Legal Framework.....	45

4.2.	Feedback to the Consultation .....	47
4.2.1.	Definition of inside information and its effectiveness in preventing market abuse ...	47
4.2.2.	Inside information for commodity derivatives .....	50
4.2.3.	Definition of inside information with respect to “front running” conduct .....	51
4.2.4.	Pre-hedging.....	52
4.3.	ESMA’s assessment and recommendations .....	55
4.3.1.	Definition of inside information and its effectiveness in preventing market abuse ...	55
4.3.2.	Inside information for commodity derivatives .....	57
4.3.3.	Definition of inside information with respect to “front running” .....	58
4.3.4.	Pre-hedging.....	59
5.	Article 17 MAR - Delayed disclosure of inside information .....	60
5.1	Legal framework.....	61
5.2	Feedback to the Consultation .....	62
5.2.1	Effectiveness of the mechanism to delay the disclosure of inside information .	62
5.3	ESMA’s assessment and recommendations.....	69
6.	Article 11 MAR - Market soundings .....	73
6.1.	Legal Framework .....	73
6.2.	Feedback to the consultation .....	75
6.2.1.	Enforceability of market soundings .....	75
6.2.2.	Definition of market sounding and difference with other forms of interactions with potential counterparties .....	76
6.2.3.	Simplification of the market sounding procedures and requirements .....	78
6.3.	ESMA’s assessment and recommendations .....	80
6.3.1.	Enforceability of market soundings.....	80
6.3.2.	Definition of market sounding and difference with other forms of interactions with potential counterparties .....	81
6.3.3.	Simplification of the market sounding procedures and requirements .....	82
7.	Article 18 MAR - Insider list .....	83
7.1.	Legal framework .....	84
7.1.1.	Usefulness of insider lists .....	84
7.1.2.	Content of the insider lists: Actual access versus potential access to inside information .....	84
7.1.3.	Content of the insider lists: Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists.....	84
7.1.4.	Content of the insider list: the role of the permanent insider section .....	85

7.2.	Feedback to consultation .....	85
7.2.1.	Usefulness of insider lists .....	85
7.2.2.	Additional evidence gathered by ESMA on the usefulness of insider lists.....	86
7.2.3.	Content of the insider lists: Actual access versus potential access to inside information .....	87
7.2.4.	Content of the insider lists: Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists.....	88
7.2.5.	Content of the insider list: the role of the permanent insider section .....	90
7.2.6.	Reduction of the administrative burden for issuers regarding insider lists.....	91
7.3.	ESMA's assessment and recommendations .....	93
7.3.1.	Usefulness of insider lists .....	93
7.3.2.	Content of the insider lists: Actual access versus potential access to inside information .....	93
7.3.3.	Content of the insider lists: further clarification of which persons should be subject to the obligation to draw up and maintain insider lists.....	96
7.3.4.	Content of the insider list: the role of the permanent insider section .....	98
7.3.5.	Reduction of the administrative burden for issuers regarding insider lists.....	99
8.	Article 19 of MAR – Managers' transactions .....	101
8.1.	Legal framework .....	102
8.2.	Feedback to the Consultation .....	104
8.2.1.	Appropriateness of thresholds and transactions to be notified once the threshold is reached 104	
8.2.1.1.	Initial threshold and notification of subsequent transactions.....	104
8.2.1.2.	Level of the thresholds set out in Article 19(1a)(a) and (b) of MAR .....	106
8.2.2.	Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11).....	106
8.2.3.	Announcement of financial reports which the issuer is obliged to make public .....	107
8.2.4.	Persons required to comply with the closed period.....	108
8.2.5.	Exemptions to the application of the closed period requirement .....	108
8.3.	ESMA's assessment and recommendation.....	110
8.3.1.	Appropriateness of thresholds and transactions to be notified once the threshold is reached 110	
8.3.1.1.	Initial threshold and notification of subsequent transactions.....	110
8.3.1.2.	Level of the thresholds set out in Article 19(1a)(a) and (b) of MAR .....	111
8.3.2.	Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11).....	112

8.3.3.	Announcement of financial reports which the issuer is obliged to make public .....	116
8.3.4.	Persons required to comply with the closed period.....	116
8.3.5.	Exemptions to the application of the closed period requirement .....	117
9.	MAR and collective investment undertakings (CIUs) .....	118
9.1.	Legal framework .....	118
9.1.1.	Introduction: on the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers .....	118
9.1.2.	Application of the PDMR obligations in the case of CIUs.....	118
9.1.3.	Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved.....	119
9.1.4.	Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved .....	120
9.2.	Feedback to the consultation .....	120
9.2.1.	On the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers .....	120
9.2.2.	Application of the PDMR obligations in the case of CIUs.....	121
9.2.3.	Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved.....	123
9.2.4.	Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved .....	124
9.3.	ESMA's assessment and recommendation .....	124
9.3.1.	Introduction: on the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers .....	124
9.3.2.	Application of the PDMR obligations in the case of CIUs.....	125
9.3.3.	Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved.....	126
9.3.4.	Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved .....	127
10.	Competent Authorities, market surveillance and cooperation.....	128
10.1.	Establishment of an EU framework for cross-market order book surveillance.....	128
10.1.1.	Legal Framework .....	128
10.1.2.	Feedback to the consultation.....	130
10.1.2.1.	Standardisation and harmonisation of order book data .....	130
10.1.2.2.	Possible compulsory reporting of order book data to NCAs .....	132
10.1.3.	ESMA's assessment and recommendations.....	132
10.2.	Cum/ex and multiple withholding tax reclaim schemes .....	134

10.2.1. Dividend arbitrage and WHT reclaim schemes.....	134
10.2.2. Current legislative framework and potential amendment to MAR.....	136
10.2.3. Feedback to the consultation.....	137
10.2.4. ESMA’s assessment and recommendations.....	138
11. Sanctions and measures .....	141
11.1. Appropriateness of introducing common rules on the need for all MSs to provide administrative sanctions for insider dealing and market manipulation.....	141
11.1.1. Legal framework.....	142
11.1.2. Feedback to the consultation.....	143
11.1.3. Additional evidence gathered by ESMA.....	143
11.1.4. ESMA’s assessment and recommendations.....	145
11.2. Cross border enforcement of sanctions .....	146
11.2.1. Legal Framework .....	146
11.2.2. Feedback to the consultation.....	148
11.2.3. ESMA’s assessment and recommendations.....	149
11.3. Other related issues: record-keeping requirement for NCAs.....	150
11.3.1. Legal framework.....	150
11.3.2. Feedback to consultation.....	150
11.3.3. ESMA’s views and recommendations.....	151
Annexes .....	152
Annex 1- Summary of responses to the Consultation Paper .....	152
Annex 2- Advice of the Securities and Markets Stakeholder Group .....	234
Annex 3- European Commission’s mandate on the MAR Review .....	252
Annex 4.- Mapping exercise on the administrative and criminal sanctions imposed under Articles 14 and 15 of MAR .....	258

## Acronyms and definitions used

ACER	Agency for the Cooperation of Energy Regulators
AIF	Alternative Investment Fund
AIFMD	Alternative Investment Fund Managers Directive - Directive 2011/61/EU of the European Parliament and of the Council

BBP	Buy-Back Programme
BMR	European Benchmarks Regulation - Regulation (EU) 2016/1011 of the European Parliament and of the Council
BRRD	Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
CBA	Cost-Benefit Analysis
CDS	Credit Default Swap
CFTC	Commodity Futures Trading Commission
CIU	Collective Investment Undertaking
CP	Consultation Paper
CRD	Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRR	Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms
EAMP	Emission Allowance Market Participant
EC	European Commission
ESMA	European Securities and Markets Authority
ETF	Exchange-Traded Fund
EU	European Union
EuSEF	European Social Entrepreneurship Fund
EuVECA	European Venture Capital Fund
FEMR	Fair and Effective Markets Review
FX	Foreign Exchange
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
IAAS	International Auditing and Assurance Standards
IR	Interest Rate
ISIN	International Securities Identification Number
ISO	International Organization for Standardization
IT	Information Technology
LEI	Legal Entity Identifier

MAD	Market Abuse Directive - Directive 2003/6/EC of the European Parliament and of the Council repealed by Market Abuse Regulation (MAR)
MAR	Market Abuse Regulation – Regulation 596/2014 of the European Parliament and of the Council
MIC	Market Identifier Code
MIFID II	Markets in Financial Instruments Directive II – Directive 2014/65/EU of the European Parliament and the Council
MIFIR	Markets in Financial Instruments Regulation – Regulation (EU) 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
MTN	Medium-Term Note
NCA	National Competent Authority
OTC	Over-the-Counter
OTF	Organised Trading Facility
PDMR	Person Discharging Managerial Responsibilities
PRIN	Principles for Business
Q&A	Questions and Answers
REMIT	Regulation (EU) 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency
RTS	Regulatory Technical Standards
SMSG	Securities and Markets Stakeholder Group
STOR	Suspicious Transaction and Order Reports
TD	Transparency Directive
TFEU	Treaty on the Functioning of the European Union
ToTV	Traded on a trading venue
TREM	Transaction Reporting Exchange Mechanism
UCITSD	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
XML	Extensible Markup Language
WHT	Withholding tax

---

## Executive Summary

### Reasons for publication

Article 38 of MAR requires the European Commission (EC) to present a report to the European Parliament and the Council to assess various provisions of MAR. In light of this requirement, the EC addressed a formal request for technical advice to ESMA<sup>1</sup>. This Final Report originates from the EC's mandate to ESMA, and it follows the CP on the same topic published in October 2019. It covers three types of topics:

- Topics originally included in Article 38 of MAR, i.e. the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation; the definition of inside information; the appropriateness of the trading prohibition for persons discharging managerial responsibilities (PDMRs) and the appropriateness on the level of certain thresholds for the notification of managers' transactions; the possibility of establishing a cross-market order book surveillance framework and the scope of the benchmark provisions.
- A set of connected topics arising from the EC's mandate on the scope of MAR, that includes buy-back programmes, the delayed disclosure of inside information, the usefulness of insider lists; different aspects of PDMR notification requirements; and cross-border enforcement of sanctions.
- Issues closely linked to some of the above-mentioned topics, raised by ESMA.

The report builds upon the extensive feedback received from market participants representatives in reply to the CP and also integrates the advice received from the Securities and Markets Stakeholder Group (SMSG).

### Contents

Section 2 deals with the scope of MAR, concluding to further analyse at a later point in time whether the scope of MAR should be extended to spot FX contracts once the Global FX Code has been revised and analysing the issues related to benchmark provisions in MAR. Section 3 contains proposals to improve the reporting and transparency obligations derived from buy-back programmes (BBPs) not only addressing the EC's mandate *stricto sensu*, but also revising other related obligations, proposing to change the reporting obligation for issuers to reduce the amount of information and ensuring that issuers only report to one NCA in cases of multiple-listings. Sections 4, 5, 6 and 7 address inside information from different angles: the definition itself, the delayed disclosure of inside information, a revision of the protections created by the market soundings regime and the reassessment of the usefulness and user-friendliness of insider lists. As regards inside information, the Final Report deals with the definition applicable to financial instruments, to commodity derivatives

---

---

and to front running and includes considerations on pre-hedging practices. No amendments are proposed for the definition of inside information applicable to financial instruments and commodity derivatives, as they allow for adequate protection of investors and of market integrity, and ESMA stands ready to issue guidance on several aspects of the definitions and concrete scenarios on which clarifications were sought. It is recommended to amend the definition of front running, in order to broaden the scope of the relevant persons and cover also orders conveyed by persons other than clients. As regards pre-hedging, the Final Report identifies both areas for further guidance and factors which may be considered when assessing if a specific pre-hedging conduct poses risks of market abuse and of violation of conduct rules.

As regards the delayed disclosure of inside information, having assessed whether the conditions to delay disclosure are sufficiently clear, the Final Report does not propose amending them. ESMA commits nevertheless to reviewing the Guidelines on the delay in the disclosure of inside information. Proposals contained in the CP concerning the introduction of further requirements linked to delayed disclosure were dropped, while a few consensual amendments to Article 17(5) of MAR are being proposed.

As regards market soundings, Section 6 deals with the enforceability of market soundings and the relevant definition, and with certain simplification of the market sounding procedures and requirements.

Section 7 addresses insider lists from different angles: ESMA concludes that insider lists remain a key element to investigate possible market abuse cases, provides clarification on the individuals who should be included in them and on the individuals who should elaborate their own insider lists; ESMA also concludes that the permanent insider section should remain an option available for those who want to make use of it and introduces other proposals to reduce the administrative burden that insider lists entail.

Section 8 assesses the MAR thresholds and requirements for PDMRs and the scope of application of the trading prohibitions. Among other things, this section focuses on the closed period and on possible further exemptions for consideration by the EC. The Final Report recommends keeping the thresholds currently provided by MAR for the notification of managers' transactions and proposes to insert further exemptions to the restriction from conducting transactions in the 'closed period'. The extension of the closed period to closely associated persons and to issuers was dropped as considered too burdensome compared to the benefit it could entail.

Section 9 contains different proposals to clarify the MAR obligations applicable to collective investment undertakings in relation to PDMRs, the obligation to disclose inside information and insider lists.

---

<sup>1</sup> Formal request to ESMA for technical advice on the report to be submitted by the Commission under Article 38 of Regulation (EU) No 596/2014 on Market Abuse, available at the following link: [https://www.esma.europa.eu/sites/default/files/library/esma\\_art\\_38\\_mar\\_mandate.pdf](https://www.esma.europa.eu/sites/default/files/library/esma_art_38_mar_mandate.pdf).

---

Sections 10 and 11 refer to three different angles of market surveillance by national competent authorities: the possibility of establishing a pan-European cross-market order book surveillance framework, the possible ways to address multiple withholding tax reclaim schemes involving financial markets, the issues related to the lack of administrative sanctions, but only criminal offences, in certain jurisdictions and issues related to the cross border enforcement of sanctions.

Finally, the Report addresses the maximum retention period of personal data by NCAs.

### **Next Steps**

This report is submitted to the EC and is expected to feed into the review report of MAR. ESMA stands ready to provide further technical assistance to develop the legislative amendments suggested in the report.

ESMA also makes stakeholders aware of the publication of its Consultation Paper on the MiFIR review in relation to the obligations to report transactions and reference data. That Consultation Paper addresses the coexistence of Article 4 of MAR and Article 27 of MiFIR and proposes to align the text of Article 27 of MiFIR with that of Article 4 of MAR and contemplates the possible deletion of Article 4 of MAR. The Consultation Paper is available on the ESMA website<sup>2</sup>. In the consultation paper, ESMA is also proposing to add a new reporting flag for BBP transactions. As indicated in the Report, this proposal might eventually have an impact in the long term on the obligations prescribed in Article 5(3) of MAR.

---

<sup>2</sup> <https://www.esma.europa.eu/document/cp-mifid-ii-mifir-review-report>

## 1. Introduction

1. MAR requires the EC to present a report to the European Parliament and the Council on at least the following areas: the appropriateness for introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation (where a prior ESMA's mapping is necessary); the definition of inside information; the appropriateness of trading prohibitions for PDMRs (and also on the thresholds foreseen where the issuer's shares or debt form part of a collective investment undertaking or provide exposure to a portfolio of assets); the possibility for establishing a Union framework for cross-market order book surveillance in relation to market abuse; and the scope of the benchmark provisions.
2. Additionally, the EC mandate includes a set of additional elements addressed in this CP: whether spot FX contracts should be covered by MAR; the scope of the reporting obligations under the exemption for BBPs; the effectiveness of the mechanism to delay disclosure of inside information; whether the regime for PDMRs should be applied to collective investment undertakings; the appropriateness of the thresholds to notify PDMR transactions; and the cross-border enforcement of sanctions.
3. ESMA identified several other topics closely linked to those mentioned above that should be addressed jointly, such as the transparency of transactions related to a buy-back programme, clarifications on the financial stability delay for credit or financial institutions, the content of the insider lists and the permanent insider section, the exemptions to the closed period regime for PDMRs, the disclosure of inside information and the extension of insider lists for CIUs admitted to trading or traded on a trading venue.
4. ESMA also considered whether and how to propose to the Commission to review MAR in relation to multiple withholding tax reclaim schemes, reported by the media in relation to the existence in some EU Member States of alleged large-scale tax frauds known as "Cum/Ex" schemes, later followed by the European Parliament Resolution 2018/2900 of November 2018 asking "*EBA and ESMA to conduct an inquiry on the basis of Article 22(4) of the respective ESAs Regulation*".
5. A CP was published by ESMA on 3 October 2019 (ESMA70-156-1459<sup>3</sup>), and the consultation period lasted until end November 2019. ESMA received 97 responses from a wide constituency, including credit institutions, asset management, issuers, legal and accountancy firms and trading venues. This Final Report takes into account the replies received to the consultation, as well as advice received from the SMSG.

---

<sup>3</sup> Available at this link: [https://www.esma.europa.eu/sites/default/files/library/mar\\_review\\_-\\_cp.pdf](https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf).

## 2. Scope of MAR

### 2.1. Spot FX contracts

#### Mandate from the Commission

whether **spot FX contracts** should be covered by MAR

The scope of application of MAR as defined by its Article 2 does not include foreign exchange spot transactions. Given the size of the spot FX market, the Commission would appreciate ESMA's input on whether there is a need for that market to be covered by the market abuse regime. In its assessment, ESMA should give due regard to whether national competent authorities ('NCAs') have the necessary regulatory tools to effectively and efficiently supervise and sanction market abuse on spot FX markets and whether extending the scope of MAR to these markets would prove to be the most appropriate way of remedying supervisory gaps, if any exist. To that effect ESMA is encouraged to analyse and take into account the particularities of the spot FX market and how well these would mesh with the MAR framework.

#### 2.1.1. Legal Framework

6. The scope of MAR is set out in Article 2(1), applying mostly to financial instruments admitted to trading or traded on a trading venue. For certain limited provisions, Article 2(2) of MAR extends the application to spot commodity contracts and certain financial instruments that might impact the price of a spot commodity contract.
7. Therefore, the references in Article 2(3) and (4) to 'transaction', 'order', 'behaviour', 'actions' and 'omissions' should be understood as referring only to those instruments (e.g. a transaction in an instrument referred to in Article 2(1) or (2)) and cannot be interpreted in a way that would result in extending the scope of MAR to instruments which the legislation did not intend to capture.
8. As opposed to spot commodity contracts, MAR does not introduce any specific reference to spot FX contracts. This is consistent with the identification of spot FX contracts (including certain derivatives) as non-financial instruments in Article 10(1)(a) of Commission Delegated Regulation (EU) 2017/565. Consequently, spot FX contracts currently are out of the scope of MiFID II/MiFIR and MAR, and out of the supervisory scope of NCAs.
9. In preparing the CP, ESMA analysed the above-mentioned legal framework and provided arguments in favour and against the extension of the scope of MAR to spot FX. Furthermore, ESMA identified the regulatory changes that expanding the scope of MAR to the spot FX market may impose regarding MAR and MiFID II/MiFIR. ESMA

asked to market participants if they supported or not the extension and if they envisaged the need of other regulatory changes in the case of the extension.

### **2.1.2. Feedback to the consultation**

10. A large majority of respondents expressed a preference against the extension of the scope, only a few respondents were in favour, and a third group of respondents recommended to evaluate the extension at a later point in time, once further experience with respect to the FX Global Code of Conduct ('the Code') has been gathered.

11. The arguments provided against the extension of MAR to spot FX contracts can be summarised as follows:

- The breadth of the Spot FX market may lead to unintended consequences:
- Consequences to the "real economy": FX transactions are in many situations merely a consequence of another financial or business transactions (e.g. purchase of a good, payments, etc.). Therefore, the disturbance of this market could potentially affect other areas of the economy and not only the banking and financial industry. Consequently, due to the wide breadth of the spot FX market and its global nature, the impact for market participants and the structure of EU FX market will be significant.
- Fragmentation of a global market: The inclusion of spot FX under MAR would break the global harmonisation of the regulation of the FX global market with 56% of transactions carried out on a cross-border basis, incentivising firms to relocate their spot FX trading activities to other non-EU jurisdictions and creating the conditions for regulatory arbitrage.

12. The inclusion of spot FX under MAR would not pass a Cost-Benefit Analysis:

- The extension of MAR provisions related to the market manipulation offence would require firms in the scope to record and perform surveillance on all quotes, orders and transactions (including modifications, updates and cancellations), mostly derived from the extension of MiFID II requirements.
- The analysis of this data would be extremely challenging due to its size and would nonetheless provide a complex and incomplete market picture that would be of limited benefit for regulators.

13. Legal problems derived from the extension of MAR to spot FX contracts:

- MAR definitions: The inclusion of spot FX under the scope of MAR for inside information has implications that should be clarified such as (i) who could be considered as the issuer (ii) which parameters should be taken into

account when publishing inside information (iii) which entities should be exempted from the requirements of MAR.

- Amendment of MiFID II/MiFIR: The extension of MAR to spot FX contracts implies amending the scope of MiFID II/MiFIR. In these participants' view, any change to MiFID II/R should form part of a wider MiFID/R review and not be decided upon under review of any other regulation, such as MAR.

14. Furthermore, the inclusion of spot FX contracts in the definition of financial instruments in MiFID II/MiFIR would imply to:

- extend the onerous licencing regime designed primarily for “true” financial service providers to a wider range of market participants active in the spot FX market;
- develop additional exemptions for certain transactions;
- extend the transaction reporting regime which requires the adjustment of the 65 fields currently required besides the need to collect personal data and the need to extend and adapt the identification system of financial instruments defined by the ISIN and provided by ANNA-DSB;
- extend the pre- and post-trade transparency regime and the definition of the ToTV concept;
- extend the set of rules related to organisational and operational requirements for the organisation and operation of trading venues;
- the identification on how to provide best execution in such a global market.

15. These respondents noted that spot FX are already included to a certain extent in MAR through the definition of benchmark (Article 3(1)(29) of MAR) which results in their coverage for “benchmark manipulation”.

16. A number of responses also warned about undertaking unilateral EU initiatives in this global market where the FX Global Code of Conduct is in the process of being adopted by most of the industry and currently under review.

17. However, it is worth noting that these respondents also acknowledged that:

- The Code itself does not impose legal or regulatory obligations on market participants, nor substitutes regulation. The Code is intended to supplement any and all local laws.
- There is a relationship between spot FX and the FX derivatives with spot FX contracts as underlier.

- Any regulatory oversight of spot FX contracts from a market abuse perspective should take place after the settlement phase, as occurs with the current EU oversight of FX derivatives. This request is due to the fast-paced nature and short tenor of the spot FX market.

18. The responses against extending MAR to spot FX contracts provided a number of alternative ways forward:

- Better clarify which aspects of the spot FX market are of interest in relation to the market abuse risk.
- Wait for the implementation and review of the Code which is in the process of being adopted by most of the industry and currently under review.
- Promote adherence to the Code and/or give it the status of “Professional Standard”.
- Include a “comply or explain” requirement in existing EU legislation (e.g. MiFID II, CRR) for authorised entities, as a way of achieving the policy goal of improving the conduct within the spot FX markets.
- Incorporate the main principles enshrined in the Code through either recital language or as an Annex in the existing MAR to lend statutory status to those principles.

19. The arguments presented in favour of extending MAR to spot FX contracts can be summarised as follows:

- The Code does not suffice to identify, punish and prevent misconduct. In the view of these respondents nothing less than criminal sanctions could achieve that, and this cannot be reached through the Code but through an extension of MAR to spot FX contracts using the articulation developed by the Code. The Code is similar to the FICC Market’s Standard Boards standards across the domain of financial instruments and investment products.

Along the same line, preliminary statements from the Committee in charge of the Code; (from here GFXC), note that the Code complements the same objectives as MAR but that best practice does not replace the criminal perimeter.

- The previous argument has to be analysed in a context where non-authorised firms provide the bulk of liquidity: the price making function in the spot segment of the main 20 currencies has substantially moved away from the EU banks domain to that of specialist technology firms who may not be authorised as investment firms. The liquidity pool is provided by specialist technical non-bank market makers with limited permissions in the EU (6

non-bank firms provide the bulk of global spot electronic low latency liquidity for major FX pairs).

- Data challenge is not a real case: the storing and monitoring of a huge number of orders cannot be considered as a justified challenge not to include spot FX contracts under the scope of MAR since it is not a material negative case for trading venues, which already store and monitor orders and trades on a daily basis around the clock and around the globe.
  - Notwithstanding their previous arguments, it is worth noting that these respondents also recommended a careful delineation of the contracts that should be considered within the scope of MAR. In particular, these respondents suggested basing the regulatory perimeter of MAR on the nature of the activity performed in the EU rather than on the MiFID perimeter of the instrument or on the nature of the permissions held under regional supervision: contracts for commercial purposes, forward payment and funding trades should be regulated as such, but not under MiFID as investments.
20. In other words, for the supporting responses the scope of MAR should not directly align to that of MiFID but it should go wider to encompass the different purposes of the transactions (hedging, payments, funding) and extend the perimeter of risks covered (e.g. capital requirement regulation, funding and post-trading process). In this way FX forwards up to 12-month terms should be exempted from MiFID but regulated as payments or as securities financing transactions. However, MAR should apply to all cases, where MiFID should not.
21. These responses also recommended leveraging on the articulation developed by the Code.
22. The third group of responses does not consider it appropriate to extend MAR at this point in time, while stressing the importance and the wide implementation of the FX Global Code in the FX market.
23. On that basis, these responses recommend ESMA to wait for the revision of the Code which is expected over the course of 2020. One of these respondents underlined the necessity to wait for the revision of the Code, since at an initial stage there was limited involvement from the buy-side. The increasing adherence and use of the Code by market participants from the buy-side should positively contribute to improve its content and foster its use further.

### 2.1.3. Additional evidence gathered by ESMA

#### National competent authorities (NCAs)

24. ESMA undertook a fact-finding exercise to determine whether there were national pieces of legislation under which market abuse in spot FX markets could be enforced. The outcome of that fact-finding exercise is that currently, only the national legislative framework of the United Kingdom enables the relevant authority to act against misconduct of authorised firms in their regulated activities and their ‘ancillary activities’ carried out ‘in connection with’ or ‘held out for the purposes of’ regulated activities, like can be the case for spot FX activities. Other than that, the responses only indicate that in certain jurisdictions entities not registered under MiFID II willing to operate in the spot FX market have to register with the national bank for anti-money laundering purposes.
25. If MAR were expanded to spot FX contracts and it were decided to apply a similar surveillance regime to the one currently imposed on financial instruments, NCAs should receive and process information on transactions and should have the capacity to obtain information on orders regarding spot FX contracts as envisaged under Articles 25 and 26 of MiFIR, in order to perform monitoring and market surveillance for market abuse purposes.
26. Given the sheer number of orders and transactions generated in the spot FX market, ESMA notes the significant costs that such extension would entail both for NCAs and market participants.

#### The regulatory gap: MAR vs. the FX Global Code

27. As far as the Code is concerned, it contains 55 principles and covers areas such as Ethics, Transparency, Governance and Information sharing.
28. However, it does not impose legal or regulatory obligations on FX market participants, but it serves to supplement local laws, rules and regulation by identifying and specifying global good practices and processes.
29. ESMA understands that, at least, the misconducts represented in Articles 8, 10 and 12 of MAR may affect spot FX market in a similar way as for financial instruments. In order to better understand the degree to which MAR would be covered by the principles of the Code, it is important to further analyse Articles 8, 10 and 12 of MAR and the FX Global Code:
  - Article 8 of MAR regulates insider dealing, i.e. the abuse of inside information. In particular, Article 8(1) specifies that insider dealing *arises 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. The 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, shall also be considered insider dealing.*

Article 7(1)(d) of MAR clarifies that *for persons charged with the execution of orders concerning financial instruments* the definition of inside information comprises, among others, *information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, 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, the price of related spot commodity contracts, or on the price of related derivative financial instruments.*

Whereas the Code does not specifically identify insider dealing as such, it refers to the obligation of firms to operate in an ethical and professional manner to promote the fairness and efficiency of the FX market<sup>4</sup>, including the recommendation to market participants to eliminate conflicts of interest or, if this is not reasonably possible, effectively manage them so as to promote fair treatment of their Clients and other Market Participants, up to and including abstaining from undertaking the relevant activity or action due to the conflict of interests.

- Article 10 of MAR regulates that unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duty. The Code addresses the issue of the disclosure of inside information in its principles 19 to 23<sup>5</sup> on information sharing by setting standards that broadly coincide with those set out in MAR, including establishing information barriers (for example, physical segregation of certain departments and/or electronic segregation).
- Article 12(1)(c) of MAR regulates information-based manipulation, which consists in the dissemination of false or misleading information *as to the supply of, demand for, or price of, a financial instrument, a related spot*

---

<sup>4</sup> Principle 1: Market Participants should strive for the highest ethical standards.  
Principle 2: Market Participants should strive for the highest professional standards.  
Principle 3: Market Participants should identify and address conflicts of interest.

<sup>5</sup> Principle 19: Market Participants should clearly and effectively identify and appropriately limit access to Confidential Information.  
Principle 20: Market Participants should not disclose Confidential Information to external parties, except under specific circumstances.  
Principle 21: Market Participants should communicate in a manner that is clear, accurate, professional, and not misleading.  
Principle 22: Market Participants should communicate Market Colour appropriately and without compromising Confidential Information.  
Principle 23: Market Participants should provide personnel with clear guidance on approved modes and channels of communication.

*commodity contract or an auctioned product based on emission allowances or secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.*

The Code does not specifically identify this type of practices, despite it can be interpreted that they are indirectly addressed by means of principles 20 and 21 on information sharing<sup>6</sup>.

- Article 12(1)(a) and (b) of MAR regulates trade-based manipulation which consists in:
  - i. placing an order to trade or any other behaviour which (i) gives, or is likely to give, false or misleading signals to the market, i.e. misleading transactions (ii) secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level, i.e. price positioning;
  - ii. entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments [...] which employs a fictitious device or any other form of deception or contrivance.

The Code addresses this type of conducts in its principle 12 on execution, where it indicates that “market participants should not request transactions, create orders, or provide prices with the intent of disrupting market functioning or hindering the price discovery process”.

30. The table below compares Article 12 of MAR with the principles in the Code that might correspond to it.

---

<sup>6</sup> Principle 21: Market Participants should communicate in a manner that is clear, accurate, professional, and not misleading.  
Principle 22: Market Participants should communicate Market Colour appropriately and without compromising Confidential Information.

**TABLE 1 – COMPARISON OF ARTICLE 12 OF MAR AND THE CODE**

Article 12 of MAR - Market Manipulation	Global FX Code Principles				
	Execution	Information Sharing	Risk and Compliance	Ethics	Governance
<p>1(a) entering into a transaction, placing an order to trade or any other behaviour which:</p> <p>(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or</p> <p>(ii) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level;</p> <p>unless the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour have been carried out for legitimate reasons, and conform with an accepted market practice as established in accordance with Article 13;</p>	<p>Principle 12: Market Participants should not request transactions, create orders, or provide prices with the intent of disrupting market functioning or hindering the price discovery process.</p>		<p>Principle 36: Market Participants should keep a timely, consistent, and accurate record of their market activity to facilitate appropriate levels of transparency and auditability and have processes in place designed to prevent unauthorised transactions.</p> <p>Principle 39: Market Participants should generate a timely and accurate record of transactions undertaken to enable effective monitoring and auditability.</p>	<p>Principle 3: Market Participants should identify and address conflicts of interest.</p>	<p>Principle 7: Market Participants should have appropriate policies and procedures to handle and respond to potentially improper practices and behaviours effectively.</p>
<p>1(b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances, which employs a fictitious device or any other form of deception or contrivance;</p>					
<p>1(c) disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a</p>		<p>Principle 19: Market Participants should clearly and effectively identify and appropriately limit access to Confidential Information.</p>			

<p><i>financial instrument, a related spot commodity contract or an auctioned product based on emission allowances or secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading;</i></p>		<p><i>Principle 20: Market Participants should not disclose Confidential Information to external parties, except under specific circumstances.</i></p>			
<p><i>1(d) transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark.</i></p>		<p><i>Principle 21: Market Participants should communicate in a manner that is clear, accurate, professional, and not misleading.</i></p> <p><i>Principle 22: Market Participants should communicate Market Colour appropriately and without compromising Confidential Information.</i></p>			
<p><i>2(a) the conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument, related spot commodity contracts or auctioned products based on emission allowances which has, or is likely to have, the effect of fixing, directly or indirectly, purchase or sale prices or creates, or is likely to create, other unfair trading conditions;</i></p>					
<p><i>2(b) the buying or selling of financial instruments, at the opening or closing of the market, which has or is likely to have the effect of misleading investors acting on the basis of the prices displayed, including the opening or closing prices;</i></p>					
<p><i>2(c) the placing of orders to a trading venue, including any cancellation or modification thereof, by any available means of trading, including by electronic means, such as algorithmic and high-</i></p>					

<p>frequency trading strategies, and which has one of the effects referred to in paragraph 1(a) or (b), by:</p> <p>(i) disrupting or delaying the functioning of the trading system of the trading venue or being likely to do so;</p> <p>(ii) making it more difficult for other persons to identify genuine orders on the trading system of the trading venue or being likely to do so, including by entering orders which result in the overloading or destabilisation of the order book; or</p> <p>(iii) creating or being likely to create a false or misleading signal about the supply of, or demand for, or price of, a financial instrument, in particular by entering orders to initiate or exacerbate a trend;</p>					
<p>2(d) the taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument, related spot commodity contract or an auctioned product based on emission allowances (or indirectly about its issuer) while having previously taken positions on that financial instrument, a related spot commodity contract or an auctioned product based on emission allowances and profiting subsequently from the impact of the opinions voiced on the price of that instrument, related spot commodity contract or an auctioned product based on emission allowances, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way;</p>		<p>Principle 19: Market Participants should clearly and effectively identify and appropriately limit access to Confidential Information.</p> <p>Principle 20: Market Participants should not disclose Confidential Information to external parties, except under specific circumstances.</p> <p>Principle 21: Market Participants should communicate in a manner that is clear, accurate, professional, and not misleading.</p> <p>Principle 22: Market Participants should communicate Market Colour appropriately and without compromising Confidential Information.</p> <p>Principle 23: Market Participants should provide personnel with clear guidance on approved</p>			

		<i>modes and channels of communication.</i>			
<p><i>2(e) the buying or selling on the secondary market of emission allowances or related derivatives prior to the auction held pursuant to Regulation (EU) No 1031/2010 with the effect of fixing the auction clearing price for the auctioned products at an abnormal or artificial level or misleading bidders bidding in the auctions.</i></p>					

### The Australian case

31. On top of the above, ESMA analysed at the regulatory regime applied to spot FX contracts in Australia since the Australian Securities and Investments Commission (ASIC) has been very active in the surveillance and enforcement of conduct in the FX market<sup>7</sup>.
32. There are a number of provisions of the Corporations Act 2001 (Corporations Act) and the Australian Securities and Investments Commission Act 2001 (ASIC Act) that may be relevant to conduct issues in the spot FX market. These include:
- the obligations of Australian financial services (AFS) licensees<sup>8</sup>;
  - market misconduct and other prohibited conduct relating to financial products and financial services; and
  - unconscionable conduct and misleading or deceptive conduct<sup>9</sup>.
33. It has to be noted that spot FX are considered financial instruments in the Australian market laws<sup>10</sup> and they are subject to the same regulation from ASIC's perspective as any other derivative product (e.g. FX forward agreements, interest rates, swaps, etc.).
34. The market integrity provisions, which cover market manipulation<sup>11</sup>, insider trading<sup>12</sup> and other market misconducts, may apply to the spot FX market in the following circumstances:
- individuals and/or entities may engage in insider trading if they take a proprietary position or trade on a personal account while in possession of confidential information about large, potentially market-moving orders;
  - individuals and/or entities may engage in market manipulation if they trade with the purpose of affecting the setting of a benchmark rate, or if they place orders in the market to buy when they want to sell or vice versa (commonly described as 'spoofing'), including where it is done for the purpose of enticing a more favourable price from a platform provider; and

---

<sup>7</sup> [Redefining conduct in FX Markets: A speech by Commissioner Cathie Armour at the ACI Redefining Conduct in FX Markets Seminar, Sydney, 14 August 2019.](#)

<sup>8</sup> [Corporations Act 2001](#) - Section 912A provides for the general obligations of financial services licensee.

<sup>9</sup> [Report 525 – Promoting better behaviour: Spot FX \(May 2017\)](#) page 7

<sup>10</sup> [Corporations Act 2001](#) - Section 764A defines the specific things that are financial products and (1)(k) includes "a foreign exchange contract that is not: (i) a derivative (derivatives are covered by paragraph (c)); or (ii) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately".

<sup>11</sup> [Corporations Act 2001](#) - Section 1041A provides for the definition of market manipulation.

<sup>12</sup> [Corporations Act 2001](#) - Section 1043A provides for the prohibited conduct by person in possession of inside information.

- entities may breach their obligations as an AFS licensee if they fail to have in place adequate systems and controls to prevent, detect and respond to inappropriate conduct by their employees.<sup>13</sup>
35. Contravention of these provisions gives rise to a range of administrative, civil and criminal consequences for individuals and/or entities<sup>14</sup>.
36. If the design of the market laws means essentially that the same provisions apply to spot FX as to other products, the differences in product and market become apparent in the practical application of the laws. In this context, since 2014 ASIC has undertaken investigations into the conduct of certain Australian financial institutions in the spot FX market, both within Australia and overseas. Their focus has been on the institutions' compliance with their obligations under Australian law, particularly as AFS licensees. In progressing their investigations, they worked with other regulatory agencies both domestically and internationally. Furthermore, they examined large amounts of material, including trading data, phone recordings, emails and chat messages, as well as policies and training and performance documents. They conducted voluntary interviews and compulsory examinations of numerous individuals, including spot FX traders, spot FX salespersons, and individuals with a supervisory role, up to senior management level, in Australia and overseas.<sup>15</sup>
37. As far as the FX Global Code of Conduct is concerned, the Code is under the Australian Codes Recognition Scheme thus, the Australian regulator can undertake enforcement activities in case the regulators become aware of activities of financial intermediaries (credit institutions and investment firms) that would not fulfil the Code principles.

#### **2.1.4. ESMA's assessment and recommendations**

38. From the analysis above, ESMA concludes that there might be a regulatory gap in the area of spot FX contracts, due to the absence of a regulatory coverage in the EU with respect of misconducts carried out in these markets, together with the fact that the Code, by its own nature, is not enforceable.
39. ESMA also notes that, despite the diverging views, most market participants recommend postponing the decision on whether to extend the scope of MAR to spot FX in order to have a better view on the effects of a longer application of the Code as well as the outcome of its review (in principle, due in 2020).
40. Furthermore, market participants agree with ESMA regarding the structural changes needed in case of extension of the scope of MAR to spot FX contracts. In particular, regarding the definition of the necessary systems and controls, transparency requirements, conduct requirements, and reporting obligations under MiFID II/MiFIR as

---

<sup>13</sup> [Report 525 – Promoting better behaviour: Spot FX \(May 2017\)](#) page 7.

<sup>14</sup> [Report 525 – Promoting better behaviour: Spot FX \(May 2017\)](#) page 7.

<sup>15</sup> [Report 525 – Promoting better behaviour: Spot FX \(May 2017\)](#) page 8.

well as the need of adjusting key concepts of MAR, such as the definition of the ‘issuer’ for spot FX contracts, which parameters should be taken into account to identify and publish ‘inside information’ or which should be the entities exempted from the requirements of MAR.

41. Moreover, the FX spot market is global and involves many venues and actors, mostly operating OTC. Consequently, ESMA agrees that in considering any further extension of the scope of MAR it would be desirable to have an adequate degree of coordination between the EU and other jurisdictions.
42. In that context, consideration should be given to whether the current framework under Article 26 of MAR, which requires competent authorities of Member States, where necessary, to conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information and the enforcement of obligations in third countries, would suffice in case it were decided to extend the scope of MAR to spot FX contracts.
43. Therefore, in finalising its position, ESMA has specifically considered the following factors:
  - the size of the spot FX market, which represents roughly 1/3 of the whole FX market<sup>16</sup>;
  - the global nature of the spot FX market and its peculiarities;
  - the fact that currently only the UK enables the relevant NCA to act against misconduct of authorised firms in relation to spot FX markets;
  - the lack of enforceability of the Code, that is not sufficient in isolation to fully regulate the spot FX market and more specifically potential misconducts on it;
  - the progresses made under the Code in the spot FX markets since 2015, and the involvement of central banks and an increasing number of market participants (in particular from the buy-side) in its elaboration and review;
  - the widespread agreement about the fact that a ‘mechanical’ extension of MAR may not be possible, not only because a non-negligible number of concepts would need to be revised in the context of spot FX markets but also because, depending on the degree of ambition of the future supervision on these markets, it would require at least, a revision of MiFID II and MiFIR as well; and

---

<sup>16</sup> [ESMA Consultation Paper on MAR review \(ESMA70-156-1459\)](#)

- the request from market participants to undertake a sound cost-benefit analysis before deciding on a future EU regulatory framework due to the structural changes that it would imply.

44. On that basis, ESMA concludes that it is appropriate to further analyse the suitability of setting-up an EU regulatory regime on market abuse on FX spot contracts, taking into account the FX Global Code of Conduct currently under revision. However, the involvement of central banks, which extensively contributed to the definition of the Code, should be ensured in the definition of such regulatory regime for spot FX markets in the EU. Last but not least, considering the global nature of this market, global coordination with the other main jurisdictions in developing such regulatory framework should be ensured.

## 2.2. Scope of application of the benchmark provisions

### Mandate from the Commission:

Scope of application of the benchmark provisions

#### 2.2.1. Legal framework

45. MAR contains several references to benchmarks and importantly the prohibition to manipulate the calculation of benchmarks<sup>17</sup>.
46. Two years after the publication of MAR in the Official Journal a new, dedicated EU Regulation was finalised and published: Regulation (EU) 2016/1011 (Benchmarks Regulation or BMR<sup>18</sup>). The ultimate scope of BMR is to regulate any aspect related to the provision of benchmarks to ensure the accuracy, robustness and integrity of benchmarks and of the benchmark determination process.
47. BMR therefore covers in relation to administrators of benchmarks, inter alia: governance and conflict of interest requirements, oversight function requirements, record keeping requirements, obligations related to input data and methodology, code of conduct and requirements for contributors to be defined by administrators. BMR also introduced new requirements for EU supervised entities that use benchmarks, as well as new requirements for so-called supervised contributors: hence it does not limit itself to obligations relating to the administration of benchmarks.

---

<sup>17</sup> Other EU laws dealt with certain aspects related to benchmarks before the Benchmarks Regulation (Regulation (EU) 2016/1011): Directive 2014/65/EU contains certain requirements with respect to the reliability of benchmarks used to price a listed financial instrument. Directive 2003/71/EC contains certain requirements on benchmarks used by issuers. Directive 2009/65/EC contains certain requirements on the use of benchmarks by undertakings for collective investment in transferable securities (UCITS). Regulation (EU) No 1227/2011 contains certain provisions which prohibit the manipulation of benchmarks that are used for wholesale energy product.

<sup>18</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1011>

48. BMR includes also specific regimes if a benchmark falls under certain categories of benchmark. Regulated data benchmarks are defined in Article 17 of BMR and lighter requirements apply to them, as the co-legislators considered them as less prone to manipulation (see Recital 32 of BMR). Annex I of BMR includes additional requirements for benchmarks that fall under the definition of interest rate benchmarks (Article 18 of BMR). For commodity benchmarks (as defined in Article 19 of BMR) the specific requirements laid down in Annex II should apply instead of the requirements in Title II of BMR (Article 4 to 16 of BMR), unless the commodity benchmark is a regulated-data benchmark, is based on submissions by contributors the majority of which are supervised entities, or is a critical benchmark and the underlying asset is gold, silver or platinum.
49. Article 38(e) of MAR states that the report on the application of MAR should assess the scope of application of the benchmark provisions in MAR. In order to do so, in the Consultation Paper (CP) on the MAR review reference was made in this section to the new regulatory framework ruling benchmarks, i.e. BMR, as a thorough understanding of the interplay between the two regulatory framework is necessary to fulfil the mandate in Article 38(b) of MAR.
50. As already mentioned in the CP on the MAR review, the main reasons why provisions related to benchmarks were introduced in MAR are included in Recital 44 of MAR, which explains that: *“(...) specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. (...) It is necessary to complement the general prohibition of market manipulation by prohibiting the manipulation of the benchmark itself and the transmission of false or misleading information, provision of false or misleading inputs, or any other action that manipulates the calculation of a benchmark, where that calculation is broadly defined to include the receipt and evaluation of all data which relates to the calculation of that benchmark and include in particular trimmed data, and including the benchmark’s methodology, whether algorithmic or judgement-based in whole or in part”*.
51. In relation to the prohibition of (attempted) manipulation of benchmarks in MAR, Article 2(1) determining the scope of MAR generally states that MAR applies to *“behaviour in relation to benchmarks”*. The term behaviour is not specified further in MAR and is used again in Article 12(1)(d), which states that market manipulation should comprise: *“transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark”*.
52. It is important to note that the prohibition to engage in or attempt to engage in benchmark manipulation is not included in BMR. Therefore, the two Regulations can be considered complementary, with MAR dealing with the core prohibition of (attempting) benchmark manipulation while BMR covering virtually every aspect related

to benchmarks provisions and calculation as well as benchmarks' use by supervised entities.

53. This is confirmed by the reference to MAR made in Article 14 of BMR “*Reporting of infringements*”. This Article requires administrators of benchmarks:

- (i) to establish systems and controls to ensure the integrity of input data to identify and report to the NCA any conduct that may involve manipulation or attempted manipulation of a benchmark under MAR;
- (ii) to monitor input data and contributors to notify the NCA and provide all relevant information where the administrator suspects that, in relation to a benchmark, any conduct has taken place that may involve manipulation or attempted manipulation of the benchmark under MAR, including collusion to do so (administrators of non-significant benchmarks may choose not to apply this second point).

54. These provisions of BMR make reference to manipulation or attempted manipulation of a benchmark under MAR and not under BMR because BMR does not include an explicit provision dealing with manipulation of benchmarks.

55. This highlights that the two regulatory frameworks are complementary because the ultimate scope of MAR in relation to benchmarks, the prohibition to engage in or attempt to engage in benchmark manipulation, is not covered by the BMR as it was already covered by an existing EU Regulation.

56. To be noted that the “Revised ESAs Regulation” text<sup>19</sup> requires ESMA to develop new draft technical standards specifying the characteristics of the systems and controls referred to in Article 14(1) of BMR (and other four set of draft technical standards). ESMA has issued a Consultation Paper on these BMR draft standards in March 2020<sup>20</sup> and should submit these draft technical standards to the European Commission by October 2020.

## **2.2.2. Feedback to the consultation**

### **2.2.2.1. Definition of benchmark in MAR vs. definition of benchmark in BMR**

57. The CP on the MAR review included a section comparing the definition of benchmark in MAR with the one in BMR (section 3.2.2 of the CP). The conclusions of this section were that the two definitions of benchmark in MAR and BMR appear to cover approximately the same universe of benchmarks, and that any possible change in MAR in relation to benchmarks should be coordinated and coherent with the outcome of the

---

<sup>19</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2175&from=EN>

<sup>20</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-1464\\_consultation\\_paper\\_benchmarks\\_rts.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-1464_consultation_paper_benchmarks_rts.pdf)

BMR review, which is still pending. At the end of the section, the CP was asking for feedback to respondents on the analysis of the two definitions (question 3).

58. A general comment made in reply to this question is that the CP was not mentioning the category of commodity benchmarks, as defined in Article 19 of the BMR. When a benchmark meets the definition of Article 19 of BMR, its administrator is subject to the requirements laid down in Annex II of BMR instead of the requirements in Title II of the BMR (Article 4 to Article 16). Some respondents argued that the administrators of this category of benchmarks should be excluded from all the proposals included in the CP.
59. Another general comment made by respondents to this question is that benchmark manipulation should be removed from the scope of MAR so as to have a separate manipulation regime in the BMR framework (which is not the case today).
60. In relation to the analysis of the two definitions, the majority of respondents agreed with the outcome of ESMA's analysis. Many of them stated that the definitions of benchmarks provided by MAR and BMR are sufficiently convergent thus their difference does not raise a risk of circumvention of the two Regulations. Almost half of respondents, with different nuances, supported the full alignment of the two definitions but also acknowledged that, with the BMR review on-going, any modification of the MAR definition of benchmark should wait for the final outcome of the BMR review.

#### **2.2.2.2. Sanctions against (attempted) benchmark manipulation and powers of NCAs**

61. Section 3.2.3 of the CP was dedicated to sanctions against (attempted) benchmark manipulation and powers of NCAs under Article 30(2) of MAR. The text of the CP suggested to add in Article 30 of MAR, and particularly in points (d), (e), (f) and (g) thereof, reference to administrators of benchmarks as defined in BMR. Similarly, a second suggestion was to add in the same Article of MAR reference to supervised contributors as defined in BMR.
62. Many respondents to the question attached to this section of the CP (Question 4) agreed on the proposed amendment, highlighting that administrators and supervised contributors to benchmarks are able to manipulate benchmarks, so they should also be subject to MAR sanctions. One market participant suggested that, should the amendment be made, ESMA should clarify whether the amended Article 30 includes recognized and endorsed third country administrators and their legal representatives and endorsing entities
63. Others expressed their concerns about the proposals of the CP because it may create overlapping sanction provisions with those sanctions already included in the BMR framework. Similarly, two respondents mentioned that benchmark administrators who exclusively offer regulated data benchmarks should not be included in the provision in order to avoid double regulation.

64. Some respondents also argued that administrators of, and supervised contributors to, commodity benchmarks subject to Annex II of BMR should not be covered by Article 30 of MAR. Regarding administrators of commodity benchmarks subject to Annex II of BMR, these respondents argued that these administrators are price reporting agencies. Price reporting agencies are editorial entities whose journalists produce the commodity price assessments used as benchmarks. Accordingly, any administrative sanctions and other administrative measures should be fully consistent with established safeguards for journalism. Regarding supervised contributors to commodity benchmarks subject to Annex II of BMR, some respondents argued that one of the most important differences between Title II and Annex II regimes is that Annex II does not impose obligations on supervised contributors. Hence, BMR Title II Article 15 (Code of Conduct) and Title II Article 16 (governance and control requirements for supervised contributors) do not apply to contributors to commodity benchmarks subject to Annex II of BMR. In conclusion, these respondents argued that the BMR imposes no obligations over supervised contributors to commodity benchmarks subject to Annex II of BMR, and extending regulation to contributors to such benchmarks could introduce risks into benchmark processes and a chilling effect on submissions.

#### **2.2.2.3. Powers of competent authorities**

65. In relation to Q5 of the CP, asking whether Article 23(2)(g) of MAR on the powers of competent authorities should also make reference to administrators of benchmarks and supervised contributors, the majority of the respondents replied positively, supporting the proposal by ESMA. Other respondents were of the view that MAR should not be extended to regulate the benchmark regime and also suggested removing benchmarks from the scope of MAR and have a benchmark regime solely under BMR.

66. In addition, some respondents raised the issue of the application of these additional powers to the different regimes in the BMR and in particular, commodity benchmark administrators according to Article 19 of the BMR for whom Annex II of the BMR applies. These respondents highlighted that the BMR provisions relating to the retention and disclosure of records are only contained in Article 8 of Title II of the BMR. Therefore, administrators that are subject to Annex II of the BMR instead of Title II are not subject to the record keeping requirements of Article 8 of the BMR and therefore should not be included in the scope of Article 23(2)(g) of MAR, which allows NCAs to require existing recordings of telephone conversations, electronic communications or data traffic records held.

67. Two respondents further stressed that that Article 23(2)(g) of MAR should also include reference to third country administrators that obtained recognition or endorsement of their benchmark according to the BMR.

#### **2.2.2.4. Administrative sanctions and other administrative measures**

68. To the question on whether Article 30 of MAR points (e), (f) and (g) should also refer to submitters within supervised contributors and assessors within administrators of commodity benchmarks, respondents expressed different views on the proposed amendments. While some respondents supported ESMA's proposal to refer to submitters within supervised contributors and assessors within administrators of commodity benchmarks, they however highlighted some concerns in relation to additional amendments of MAR regarding the definitions of submitters and assessors.
69. Some respondents, as in the previous questions, reiterated the view that benchmarks should be out of MAR scope and a sole regime within BMR should be created. Others further stated the fact that Article 30 should not be amended since assessors are journalists who are independent of the market they cover and should not be treated as financial services professionals.
70. In addition, many respondents did not support this proposal and they raised a general point. They argued that since Article 30(2) refers to people with management power, it is therefore questionable whether a submitter or assessor should be included in the prohibition as a submitter or an assessor is not generally part of the senior management.

### **2.2.3. ESMA's assessment and recommendations**

71. In relation to the general comments referring to commodity benchmarks, ESMA acknowledges that BMR includes specific regimes depending on the nature of the benchmarks. Under these BMR specific regimes different, additional or reduced requirements apply. BMR includes regimes for: regulated data benchmarks (defined in Article 17 of BMR), interest rate benchmarks (defined in Article 18 of BMR) and commodity benchmarks (defined in Article 18 of BMR). Reference to these regimes is made also in the section "legal framework" at the beginning of this chapter dedicated to benchmarks. While the CP was not making explicit reference to specific classes of benchmarks, the intention of ESMA was to cover all of them with the proposal included in the CP.
72. Another recurring comments by market participants was the suggestions to delete references to benchmark under MAR and includes a provision dealing with the prohibition to manipulate benchmarks in BMR. ESMA considers that benchmarks manipulation should stay in MAR as a form of market manipulation, because MAR is

the appropriate regime to deals with offences of this kind<sup>21</sup>. In MAR market abuse is a concept that encompasses unlawful behaviour in the financial markets and consist of insider dealing, unlawful disclosure of inside information and market manipulation. As such, MAR is functional to other “sectorial” regulatory frameworks, notably the MiFID framework and BMR as well. To be noted also that the definition of benchmark in MAR is cross-referred by the Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)<sup>22</sup>, imposing the introduction by all Member States of criminal sanctions for at least serious market abuse offences (including benchmark manipulation) and ensuring the effective implementation of EU policy on fighting market abuse.

73. A case of benchmark manipulation under MAR is likely also to result in a breach of one or more provisions of BMR. For instance, if there is a benchmark manipulation case which involves a supervised contributor, this entity should be sanctioned for manipulation on MAR basis. In addition, for the same infringement, that entity can also be sanctioned for not complying with the code of conduct, as required by Article 15 of BMR, as well as for breaching the governance and control requirements for supervised contributors, which are defined in Article 16 of the BMR. This theoretical example shows how the two regulatory frameworks are interlinked and how NCAs have to take into account both regimes. On this ground, ESMA invites the European Commission to consider the interaction between MAR and BMR if any change is introduced to one of the two regimes in relation to the sanctioning powers of NCAs.

#### **2.2.3.1. Definition of benchmark in MAR vs. definition of benchmark in BMR**

74. The outcome of the analysis on this topic included in the CP on the MAR review was that the scope of the two definitions appears to be broadly the same, and there was no need to modify the MAR definition of benchmarks. This position was reinforced also by the fact that a BMR review by the European Commission is on-going, hence the BMR framework may be subject to changes and fully aligning the two definitions before knowing the outcome of the BMR review could be counterproductive.
75. Because the feedback to this section were supportive of the proposal, and market participants did not highlighted any risk of market abuse / benchmarks manipulation stemming from the minor difference between the two definition (as detailed in section 3.2.2 of the CP on MAR review), ESMA is not advising any change in the definition of benchmark under MAR.

---

<sup>21</sup> Under MAR, the maximum administrative pecuniary sanctions applicable to (attempted) manipulation of benchmarks should be at least: for natural persons EUR 5 000 000, and for legal person EUR 15 000 000 or 15 % of the total annual turnover of the legal person. The values included in MAR are higher than the administrative pecuniary sanctions included in BMR (which, for instance, in relation to legal person include maximum administrative pecuniary sanctions of at least EUR 1 000 000 or 10 % of its total annual turnover).

<sup>22</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0057>

### 2.2.3.2. Sanctions against (attempted) benchmark manipulation and powers of NCAs

76. As explained in the CP, the administrative sanctions and measures that NCAs should be able to impose against (attempted) manipulation of benchmarks are included in Article 30(2) of MAR. Points (d), (e), (f) and (g) of this Article refer to investment firms and to persons working within investment firms and comprise:

*“(d) withdrawal or suspension of the authorisation of an investment firm;*

*(e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;*

*(f) in the event of repeated infringements of Article 14 or 15, a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;*

*(g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;”*

77. In relation to (attempted) manipulation of benchmarks, the reference to investment firms does not capture administrators of benchmarks and contributors of input data, unless they are investment firms (but often investment firms are users of benchmarks, not providers / administrators). This is understandable because, at the time MAR was drafted, the concept of administrators of benchmarks and contributors to benchmark were not yet defined in EU law, as they were introduced by BMR in 2016.

78. The CP was arguing that, to make points (d), (e), (f) and (g) of Article 30(2) more effective vis-à-vis the prohibition to manipulate benchmark it could be argued that they should refer also to administrators of benchmarks (defined in Article 3(1)(6) of BMR) and supervised contributors to benchmark (defined in Article 3(1)(10) of BMR).

79. Considering the feedback received, ESMA still believes that reference to administrators and supervised contributors should be made in points (d), (e), (f) and (g) of Article 30(2) of MAR.

80. ESMA believes that a specific carve out of administrators of commodity benchmarks from Article 30(2) is not necessary, or otherwise it would not be possible to impose the sanctions included in Article 30 of MAR to those administrators in case of manipulation of their benchmarks. The NCA should instead be able to impose sanctions equally to all types of benchmark administrators when they have manipulated one of their benchmarks or attempted to do so. This power should not distinguish between the types of benchmarks provided as all of them can be manipulated. It should also be

noted that it is not the intention of this proposal to affect the special status that administrators of commodity benchmarks have under BMR. In relation to benchmarks dealing with the energy markets covered by Regulation (EU) No 1227/2011 (REMIT<sup>23</sup>), the European Commission may engage with ACER to ensure consistency between the two Regulations also with reference to administrators of energy market benchmarks.

81. In relation to 3<sup>rd</sup> country administrators, ESMA would like to point out that the goal of Article 30 is to go after the persons responsible for the manipulation, which can be located also outside of the EU. In those cases, cooperation with 3<sup>rd</sup> country relevant authorities is necessary.
82. Therefore, ESMA is advising the European Commission to include reference to administrator of benchmarks (as defined in Article 3(1)(6) of BMR) and to supervised contributors (as defined in Article 3(1)(10) of BMR) in points (d), (e), (f) and (g) of Article 30(2) of MAR.
83. In particular, in point (d) reference can be made to both withdrawal or suspension of the registration under BMR of a benchmark administrator. For supervised contributors, point (d) can refer to the withdrawal or suspension of supervised contributors from their role as contributors. In points (e), (f) and (g), the terms administrators (of benchmarks) and supervised contributors should be added to the already existing term investment firms.
84. It is possible that an infringement of MAR by a benchmark administrator would relate to a control failure covered by the BMR, where the action of withdrawal or suspension of authorisation or registration can be taken by competent authorities under Article 26 of BMR. Therefore, if Article 30 is modified, the European Commission is invited to pay attention also to the interplay with the similar provisions within BMR.

### **2.2.3.3. Powers of competent authorities**

85. As stated in the CP, Article 23 of MAR does not refer to administrators of benchmarks or supervised contributors. In particular, Article 23(2)(g) states that NCAs have the power “*to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions.*” This power would improve its effectiveness vis-à-vis (attempted) market manipulation if reference is made also to administrators of benchmarks or supervised contributors, because otherwise there is a risk that these types of market entities, and in particular benchmark administrators, are not covered by the powers of NCAs<sup>24</sup> under MAR.

---

<sup>23</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1227>

<sup>24</sup> To be noted that a similar provision in BMR (Article 41(1)(f) of BMR) makes reference to supervised entities as defined in BMR (Article 3(1)(17)).

86. As mentioned above, MAR includes a whole set of rules to prevent market manipulation including illicit behaviour. ESMA therefore is of the opinion that the two regulatory frameworks, MAR and BMR, can coexist as they are complementary and focus on different elements. ESMA suggests to maintain the proposal in the CP. Indeed, it is appropriate to include reference to administrators in Article 23(2)(g) of MAR, so that NCAs have the possibility to require the above listed information to administrators also in relation to manipulations of benchmarks.
87. ESMA further is of the opinion that third country administrators that have obtained recognition or endorsement should also be subject to this provision, as MAR framework focuses on prosecuting the entities engaging in market manipulation, wherever located.
88. Commodity benchmarks administrators that are subject to Annex II of BMR should not be excluded from the proposed reference to benchmark administrators in Article 23(2)(g). The NCA should be able to use its powers under Article 23(2)(g) vis-à-vis all types of benchmark administrators because all types of benchmarks can be manipulated, as said also in relation to Article 30(2) of MAR (see previous section).
89. ESMA therefore does not support the exclusion of these administrators from the provisions of Article 23(2)(g) of MAR. To be noted that this proposal does not affect the special regime to which commodity benchmark administrators are subject under BMR.

#### **2.2.3.4. Administrative sanctions and other administrative measures**

90. BMR introduces also the concepts of “submitter” and “assessor” (Article 3(1)(11) and (12) of BMR, respectively). A submitter is a person employed by a contributor for the purpose of contributing input data to an administrator, while an assessor is an employee of an administrator of a commodity benchmark responsible for applying a methodology or judgement to input data and other information to reach an assessment about the price of a certain commodity. The definition of submitter is covered by the one of supervised contributors, while the definition of assessor is covered by the one of administrators of benchmarks.
91. As stated in the CP, it is likely that often submitters within a supervised contributor are not persons discharging managerial responsibilities within the same supervised contributors. Likewise, an assessor within an administrator of commodity benchmarks is not always classifiable also as a person discharging managerial responsibilities within the same administrator of commodity benchmarks.
92. In the CP, ESMA was proposing to add references to submitters within supervised contributors and assessors within administrators of commodity benchmarks in points (e), (f) and (g) of Article 30(2) of MAR on administrative sanctions and other administrative measures. Following the feedback received in the consultation, ESMA suggests not to include the proposal contained in the CP in the final report because submitters and assessors would be already covered by the references to contributors

and administrators that ESMA recommends to include in points (e), (f) and (g) of Article 30(2) of MAR.

93. As highlighted by some respondents, the “person discharging managerial responsibilities or any other natural person who is held responsible for the infringement” is a sentence already present in points (e), (f) and (g) of Article 30(2) of MAR. If an assessor or a submitter is considered responsible for the infringement, these points can therefore be applied against him/her, even if s/he is not discharging managerial responsibilities. So, the current text of Article 30(2) of MAR together with the suggestions made by ESMA to include reference to (all types of) administrators and to supervised contributors are considered appropriate to cover all possible situations, without the need to add specific reference to assessors or submitters.

### 3. Article 5 MAR - Buy-back programmes (BBPs)

#### **Mandate from the Commission:**

##### Scope of reporting obligations under the exemption for buyback programmes

Under Article 5(3), in order for its buyback programme to benefit from the exemption from application of certain provisions of MAR, the issuer must report each transaction relating to the buy-back programme not only to the NCAs of the trading venues on which the shares are admitted to trading but also to those of each trading venue where they are traded. This reporting obligation is reiterated in the Commission Delegated Regulation (EU) 2016/1052, which lays down technical standards for the conditions applicable to buy-back programmes. Since issuers are not necessarily aware of their shares being traded on a certain venue, full compliance with the reporting requirements might prove to be challenging for the issuers. In light of that consideration, the Commission would like ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

#### 3.1. Legal Framework

94. According to Article 5(3) of MAR, in order for its Buy-Back Programme (BBP) to benefit from the exemption from application of certain provisions of MAR, the issuer shall report to the NCA of the trading venue on which the shares have been admitted to trading or are traded each transaction relating to the BBP, including information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of MiFIR and subsequently disclose the trades to the public.
95. Article 2(2) of Regulation (EU) 2016/1052, provides that the issuer shall report to the NCA of each trading venue on which the shares are admitted to trading or are traded no later than by the end of the seventh daily market session following the date of the

execution of the transaction, all the transactions relating to the BBP, in a detailed form and in an aggregated form. The aggregated form shall indicate the aggregated volume and the weighted average price per day and per trading venue.

96. Some MTF or regulated market operators permit trading of financial instruments in their trading venues at the initiative of market participants willing to trade them, without the request, approval or acquiescence of the issuer. In those cases, since issuers may not necessarily be aware of their shares being traded on a certain venue, full compliance with the reporting requirements in Article 5 of MAR might be challenging for them.
97. ESMA understands that the EC has requested ESMA to reflect on the scope of the reporting obligation under Article 5(3) of MAR (i.e. to which NCAs issuers must report) and not on the content of the information to be reported or on the content of the information to be disclosed to the public.
98. However, in light of the experience gained since the entry into force of MAR, ESMA believes that the review of MAR is also an opportunity to reflect on the merit of modifying the content of the information that issuers must report under Article 5(3) and on the information that has to be published under Article 5(1)(b) of MAR.
99. Therefore, ESMA's report on Article 5(3) of MAR is intending to address both the scope of the reporting obligation, as requested by the EC, and the content of the information to be reported.

## **3.2. Feedback to the consultation**

100. The Commission asked ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) of MAR and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

### **3.2.1. Scope of the reporting obligation**

101. In the CP, ESMA asked stakeholders' views on the merit to modify the reporting mechanism under Article 5(3) of MAR and which of the following three options they would favour:
  - Option 1: No modification of the reporting mechanisms for BBPs;
  - Option 2: Reporting to the NCAs of the jurisdictions where the issuer requested admission to trading or, where relevant, approved trading;
  - Option 3: Reporting to the NCA of the most relevant market in terms of liquidity under Article 26(1) of MiFIR. This NCA would, upon request, forward the information to the NCAs of the trading venues where the shares

are admitted to trading, as well as the NCAs of the trading venues where the shares are traded.

102. All respondents to the questions agreed that the current reporting mechanism was too burdensome for issuers and that it should be simplified.
103. Respondents expressed mixed views with some respondents expressing their preference for Option 3, as proposed by ESMA, and some respondents favouring Option 2.
104. Respondents that expressed their preference for Option 2 explained that, even if Option 3 seemed less burdensome than Option 2, in practice it might not be the case because the market which is the most relevant in terms of liquidity might change over time and issuers would have to report to a different CA. Also, according to some of these respondents, issuers do not always know what market is the most relevant in terms of liquidity for their shares.
105. Finally, some respondents suggested that the CAs to which information is reported should be the same NCA that the issuers notify under Article 17 of MAR in the case of delay of disclosure.

### **3.2.2. Simplification of the reports for BBPs**

106. ESMA took advantage of the consultation to get the views of market participants on a simplification of the information that issuers must report to CAs under Article 5(3) of MAR.
107. ESMA suggested to remove information under Article 25(1) and (2) of MiFIR from the reporting obligation of Article 5(3) of MAR because CAs can already access this information via investment firms under MiFIR. Respondents to the consultation unanimously agreed with ESMA's proposal.
108. With respect to information under Article 26 of MiFIR, ESMA explained in the CP that there was value in maintaining the requirement for issuers to send directly to the relevant NCA the transaction reports related to BBPs because the current transaction reporting system does not allow CAs to identify easily BBPs. At the same time, ESMA pointed out that part of the information submitted under Article 26(3) of MiFIR and Commission Delegated Regulation (EU) 2017/590 was irrelevant for the purpose of Article 5(3) of MAR.
109. Therefore, ESMA consulted on a harmonised list of fields that investment firms should report to issuers, and issuers to CAs when complying with Article 5(3) of MiFIR. The list of fields was:
  - field 3: trading venue transaction identification code;

- field 4: executing entity LEI;
  - field 7: buyer identification code;
  - field 12: buyer decision maker code LEI;
  - field 28: trading date time;
  - field 30: quantity;
  - field 33: price;
  - field 34: price currency;
  - field 36: venue (MIC code); and
  - field 41: instrument identification code (ISIN)
110. All respondents concurred with ESMA's view that the list of information to be reported to CAs under Article 5(3) could be reduced and streamlined. Several respondents suggested to remove from the list fields 3 and 12 which according to them were not necessary.

### **3.2.3. Transparency of transactions related to BBPs**

111. Finally, ESMA asked stakeholders whether they would find useful that issuers published data on BBP trades in aggregated format with the aggregated volume and the weighted average price paid for the shares in each trading session.
112. Most of the respondents agreed that issuers should publish the aggregated volume and the weighted average price paid for the shares in each trading session.

## **3.3. ESMA's assessment and recommendations**

### **3.3.1. Scope of the reporting obligation**

113. First, ESMA reminds stakeholders that information on the most relevant market in terms of liquidity is available on ESMA's website for all shares. Therefore, ESMA disagrees that the identification of the NCA of the market the most relevant in terms of liquidity can be a problem for some issuers under Option 3.
114. ESMA agrees that under Option 3, issuers would have to report to a different NCA if the most relevant market in terms of liquidity changes, but issuers would only need to report to one NCA. Moreover, these changes are not frequent, thereby limiting the risk of reporting to a different CA. Furthermore, ESMA notes that such

counterargument holds for Option 2, because in that case issuers have to report to all the NCAs of the jurisdictions where they requested admission to trading.

115. As regards the suggestion made by few respondents to request issuers to send information on BBPs to the NCA identified pursuant to Article 17 of MAR for the purpose of delayed disclosure, ESMA is of the view that this proposal would not result in a simplification of the reporting mechanism. Indeed, the NCA identified under Article 17 of MAR may not be the NCA of the most relevant market in terms of liquidity, which is, in most instances, the market where BBPs are carried out. This means that under this approach, the NCA that receives information on BBPs may not have any interest in receiving it, and other CAs that may want to have access to this information would not know to which NCA they have to request it.
116. Therefore, ESMA remains convinced that Option 3 is the best option and recommends the EC to modify Article 5(3) of MAR by requesting issuers to report information on BBP transactions the NCA of the market the most relevant in terms of liquidity for their shares. This information should include BBPs transactions carried out in all trading venues and not only the BBP transactions that have taken place in the trading venues located in the jurisdiction of the NCA the most relevant in terms of liquidity.
117. To facilitate the identification of the NCA of the market the most relevant in terms of liquidity, ESMA recommends that the information on BBP transactions that investment firms send to issuers for onward submission to the NCA should also include the name of the relevant CA.
118. For cases where the market the most relevant in terms of liquidity changes, provisions could be added, either to the Level 1 or Level 2 text, to specify the procedure issuers would have to follow when reporting to a new CA.

### **3.3.2. Simplification of the reports for BBPs**

119. Based on the overall support from respondents, ESMA recommends to streamline the information that issuers must report to CAs under Article 5(3) of MAR. First, the reference to Article 25(1) and (2) of MiFIR should be removed from Article 5(3). Secondly, issuers should not report to CAs all the information under Article 26(3) of MiFIR because a large amount of this information is not relevant for BBPs and the list of information should be reduced to a selection of information that can be easily provided to the issuer by the investment firm in charge of the execution of BBP transactions.
120. The information reported by issuers to CAs could be specified in the Level 2 text and could include the following fields:

- field 3: trading venue transaction identification code;

- field 4: executing entity LEI;
- field 7: buyer identification code;
- field 28: trading date time;
- field 30: quantity;
- field 33: price;
- field 34: price currency;
- field 36: venue (MIC code); and
- field 41: instrument identification code (ISIN)

121. At the time of the publication of this Report, ESMA is also consulting on the MiFIR review report on the obligations to report transactions and reference data. In this consultation paper, ESMA is proposing to add a new reporting flag for BBP transactions. This new reporting flag should have the benefit of facilitating the identification of BBP transactions by NCAs, eventually rendering the reporting of issuers to NCAs under Article 5(3) of MAR superfluous. However, ESMA considers that it is necessary to ensure the effectiveness of this new BBP flag in the transaction reports before recommending the deletion of Article 5(3) of MAR since that effectiveness would heavily rely on the effective transmission of BBP information by investment firms. As a consequence, ESMA stands ready to reassess the necessity to maintain the reporting obligation under Article 5(3) of MAR in a context where a BBP flag would be operational in the transaction reporting regime.

### **3.3.3. Transparency of transactions related to BBPs**

122. In light of the feedback received and the support from stakeholders for the proposal, ESMA recommends the Commission to amend Article 5(1)(b) of MAR by requesting issuers to only disclose to the public, for each trading venue, the aggregated volumes traded and the weighted average price paid for the shares in each trading session.

## **4. Article 7 of MAR – Definition of “inside information”**

### **Mandate from the Commission**

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements: (...) Whether the definition of **inside information** is sufficient to cover all information relevant for competent authorities to effectively combat market abuse.

## 4.1. Legal Framework

123. Article 38 of MAR requires the Commission to assess whether the definition of inside information is sufficient to cover all information relevant for NCAs to effectively combat market abuse.

124. Such definition is contained in Article 7 of MAR, which distinguishes four distinct sub-sets of inside information: the first one (Article 7(1)(a) of MAR<sup>25</sup>) concerns financial instruments, the second one (Article 7(1)(b) of MAR<sup>26</sup>) commodity derivatives, and the third one (Article 7(1)(c) of MAR<sup>27</sup>) emission allowances or auctioned products based on them. In addition, Article 7(1)(d) of MAR<sup>28</sup> clarifies the scope of inside information for persons charged with the execution of orders concerning financial instruments.

125. In a nutshell, all inside information, irrespective of whether it concerns financial instruments, commodity derivatives, emission allowances or persons charged with the execution of orders has to be:

- of a precise nature; Article 7(2) clarifies that the information is of a precise nature if it *“indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances”*<sup>29</sup>.
- not public, and

---

<sup>25</sup> “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”.

<sup>26</sup> “In relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets”.

<sup>27</sup> “In relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments”.

<sup>28</sup> “For persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client’s pending orders in financial instruments, which is of a precise nature, 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, the price of related spot commodity contracts, or on the price of related derivative financial instruments”.

<sup>29</sup> The same paragraph also specifies that “in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.” In addition, Article 7(3) of MAR provides that an “intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article”.

- likely, if it were made public, to have a significant effect on the relevant prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances (as identified in Article 7(1) of MAR). As regards the likelihood to have a significant effect on the above prices, it concerns information a reasonable investor would be likely to use as part of the basis of his or her investment decisions<sup>30</sup>.

126. With reference to the inside information in relation to commodity derivatives, MAR refers to information concerning directly or indirectly one or more commodity derivatives or the related spot commodity contract. In addition, consistently with the previous text under MAD, MAR provides that the inside information has to be reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets. In this respect, Recital (20) of MAR contains two examples of relevant legal provisions and market rules, contracts or customs: (i) REMIT, and (ii) the Joint Organisations Database Initiative database for oil.

127. Article 7(1)(c) of MAR extended the definition of inside information contained in MAD to include information concerning emission allowances and auctioned products based on them, provided that such information abides by the abovementioned confidentiality and preciseness requirements, together with the likelihood to have a significant effect on the prices of the instruments or of related derivative financial instruments.

128. Finally, as indicated above, Article 7(1)(d) provides that “for persons charged with the execution of orders concerning financial instruments”, inside information “also means information conveyed by a client and relating to the client’s pending orders in financial instruments, which is of a precise nature, 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, the price of related spot commodity contracts, or on the price of related derivative financial instruments.” The latter case identifies the relevant meaning of financial information for the market abuse practice known as “front running”, consisting of one party, mainly a broker or a person charged of executing orders, that, being aware of a forthcoming order or transaction on a financial instrument, uses such information by acquiring or disposing of relevant financial instruments ahead of the relevant order or transaction.

---

<sup>30</sup> For emission allowances, the information is considered of inside nature only if the participant in the emission allowances market exceeds the thresholds identified by Article 17(2) of MAR and by Article 5 of the Commission Delegated Regulation (EU) 2016/522, of 6 million tonnes a year of carbon dioxide equivalent or, where they carry out combustion activities, 2430 MW of rated thermal input.

- Finally, MAR included in the definition of inside information points which have been dealt with by the jurisprudence of the European Court of Justice. For instance, MAR provided more details with reference to the precision of inside information<sup>31</sup>.

## 4.2. Feedback to the Consultation

### 4.2.1. Definition of inside information and its effectiveness in preventing market abuse

129. In the Consultation Paper, ESMA considered that there was not an exhaustive track record of shortcomings or application problems linked to the definition of inside information, and therefore encouraged market participants to provide their views on the effectiveness of the definition of inside information for the purposes of preventing market abuse.
130. Most respondents consider that amendments to the definition of inside information could create legal uncertainty and instability. Among them, some respondents deem that the definition is working properly and is therefore sufficient to combat market abuse, since it is sufficiently broad to allow for flexibility in capturing market abuse behaviours. As regards whether the current definition of Article 7 is adequate to combat market abuse, most of the respondents confirmed that they did not identify behaviours which could constitute market abuse and would not be covered by the definition of inside information.
131. Other respondents, however, noted that the broadness of the definition comes at a cost and results in some elements of the text being unclear, and requested ESMA to issue guidance on number of elements.
132. Guidance was requested on, *inter alia*:
- a. Precise nature of the inside information  

The wording of Article 7(2), that defines the information as precise if it “indicates a set of circumstances which exists of which may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur” raised several questions, including:
  - b. Criteria, as the minimum probability percentage, to identify circumstances or events which may reasonably be expected to come into existence or occur

---

<sup>31</sup> Among others, the case Markus Gelll v Daimler, Case C/19/11.

- c. Clarifications on when an information may be considered precise with reference to specific scenarios, as:
- i. Information subject to approval by competent corporate bodies, before such approval occurs (for instance, impairment triggers to be approved by the Board, financial information – in relation to which some respondents consider that MAR conflicts with the Transparency Directive, which requests to publish interim financial reports at set times –, profit warnings for the period preceding the definitive corporate decision, business plans, forecast estimates, dividend policy of issuers);
  - ii. Cases in which it may be complex to determine when the information becomes precise, as per internal or external investigations, board changes, disputes on key contracts, declining financial performance not within the sphere of insolvency, transactions as M&A or joint ventures, types of information as the requests for quotes;
- d. Intermediate steps

Guidance was requested, *inter alia*, on the relationship between the probability of the final result and that of the intermediate steps.

Guidance on specific scenarios was also sought, as per the investments made by real estate funds, which may concern operations taking place at different stages of a process (e.g. real estate sales may be subject to several phases of negotiations, depending on the progress made in the project's development). In addition to this, guidance for the relevance of intermediate steps was sought also on the scenarios mentioned above under preciseness of the information.

- e. Price sensitive information

Guidance was requested on number of topics related to the price sensitive nature of inside information. Among other things, clarifications were requested on how the reasonable investor test and the significant effect on price work together, if both need to coexist, or if only the second one is sufficient to define the information as an inside one.

Also clarifications on the fact that the assessment has an *ex ante* nature, and that *ex post* elements should not be considered, were requested.

One respondent requested to clarify that the significant effect on the price should be considered as a mid and long-term effect rather than a short-term speculative effect.

With reference to specific scenarios, clarifications were requested on the fact that issuers have to evaluate price effects on instruments issued by themselves, not on derivatives issued by third parties, and on the price effect of corporate events on derivatives.

In addition, some respondents requested to clarify criteria to assess if the information has significant effect on the price in the context of debt issuance and debt instruments in general, considering that typically debt instruments are less liquid than equity.

f. Selective disclosure

Several respondents expressed concerns on selective disclosure to analysts and brokers in conference calls, meetings with significant shareholders and corporate access events. Guidance was requested to make sure that, apart from cases in which issuers try to address incorrect statements by analysts, they should refrain from disclosing inside information and where it happens should follow up with immediate dissemination to the market. Also guidance on the intragroup circulation of inside information was requested, and between directors and main shareholders.

g. The moment in which the information may be considered as public

In certain cases it is difficult to understand if a given information is public or not, and guidance on specific scenarios was requested. Such cases include loan documents posted to public sites of loan data, information coming from sources other than the issuer (for instance, the ruling made public by a court), information published on social media.

133. As indicated above, most respondents consider that either the definition of inside information is adequate, or some guidance would be helpful. A minority of respondents, proposed amendments to Article 7 of MAR, both on some of the areas on which also guidance was requested (for instance, on the intermediate steps, on the preciseness of the information and selective disclosure, price-sensitive nature of the information and related assessment criteria) and on further points, including requests to: (i) distinguish the inside information relevant for insider dealing (under Article 8 of MAR) from that relevant for the disclosure obligations (under Article 17 of MAR). The latter could be limited to information concerning circumstances which exist and events which have occurred; (ii) eliminate the definition of inside information on emission allowances to include only a cross-reference to REMIT, which would already cover the relevant aspects of inside information on emission allowances, together with the request to increase the threshold provided by Article 5 of the Commission Delegated Regulation (EU) No 2016/522 (6 million tonnes a year of carbon dioxide equivalent or 2.430 MW of rated thermal input), which are currently at group level, making them as entity-level ones.

#### 4.2.2. Inside information for commodity derivatives

134. In the Consultation Paper, ESMA asked for views on: (i) the effects of the difference between the definition of inside information for commodity derivatives and for financial instruments (as the first one covers only the information which is also required or expected to be published), and (ii) the appropriateness or need of such difference, to assess whether the further requirement for the inside information on commodity derivatives to be expected or required to be published should be clarified. ESMA acknowledged that such further requirement was to recognise that commodity producers may hold proprietary information relating to their commercial activity which would otherwise be viewed as inside information under the general definition on inside information for financial instruments, and could therefore facilitate commodity producers by entering into commodity derivatives to hedge and therefore reduce the risk to their commercial activities. At the same time, ESMA considered that such different bar could lead to discrepancies between the treatment of listed versus non-listed commodity producers.
135. Most of the respondents indicated that the definition included in Article 7(1)(b) of MAR is appropriate for inside information concerning commodity derivatives, as it recognises the structural difference between information on an issuer of securities and a commodity derivative contract or the underlying commodity to this contract. The application of the general definition of inside information on financial instruments would risk to substantially limit the hedging activity carried out by commodity producers, thereby resulting in higher costs.
136. In reply to the CP's question concerning whether the definition of inside information applicable to financial instruments could be extended to commodity derivatives, a significant majority of respondents considers that the structural differences between securities markets and commodity derivatives markets justify the specific definition of inside information for commodity derivatives and do not envisage to align it to Article 7(1)(a) of MAR. Even though the preferred option is to keep the current definition of Article 7(1)(b) of MAR, should the definition applicable to financial instruments be extended to commodity derivatives, a new safe harbour for persons in possession of inside information placing orders or entering into transactions for the purposes of hedging should be created. The safe harbour would however not change the fact that a much wider range of information would become "inside information" and therefore any person dealing in commodity derivatives would need to have systems in place to identify and process it.
137. Few respondents touched upon the discrepancies as regards treatment of inside information between listed and non-listed commodity producers. One respondent noted that anomalous outcomes were not experienced, since information relating to a company is rarely material to the price of a commodity and hence relevant as inside information for commodity derivatives. Another respondent noted that there is information that a non-listed commodity producer would have to disclose as inside information (in relation to commodity derivatives) which a listed firm would not have to

disclose (in relation to bonds / shares), where the information relates to the commodity derivative, and not to the commodity producer. With reference to the commodity derivative, the disclosure may concern information about the issuer that might have an effect on the price of securities issued by that issuer, and also information about the underlying commodities. Such information could include information about global trading, political situations in relevant countries, key refinery outages, as well as information on the firm's own trading strategy. Since the scope of inside information in relation to commodity derivatives is potentially so much wider, it is appropriate to limit it to information that can reasonably be expected to be monitored and disclosed.

138. Few respondents suggested amendments to the definition of inside information concerning commodity derivatives. Among them, some proposed to analyse the possibility of introducing a cross reference to the inside information definition in REMIT for wholesale energy market participants, as REMIT already sufficiently covers the emission allowances, power and gas markets. Hence, according to these respondents MAR creates an additional layer of complexity and legal insecurity for wholesale energy market participants that are already subject to REMIT (without obvious benefits). Since wholesale energy market participants are active in both physical and financial markets, it would be appropriate to have one comprehensive market abuse framework covering both relevant physical and financial instruments which should be constructed on the basis of the same principles and policies. Information that is not (including own trading strategy and plans) inside information under REMIT, should not constitute inside information under MAR neither.

#### **4.2.3. Definition of inside information with respect to “front running” conduct**

139. The CP indicated that the front running conduct, as designed in Article 7(1)(d) of MAR, is applicable to natural and legal persons charged with the execution of orders, and explicitly includes in the inside information the information on pending orders, where it is of a precise nature and likely to have significant effect on the prices of the relevant financial instruments, related spot commodity contracts or derivatives. However, Article 7(1)(d) does not apply to other categories of persons that may be aware of a future relevant order (e.g., directors of an issuer, the issuer itself, institutional investors, etc.). Even though Article 7(1)(a) could include such further categories of persons, and MiFID II/ MiFIR conduct and investor protection rules apply to front-running behaviour, ESMA consulted market participants on possible changes to be made to Article 7(1)(d) to include further cases and to whether specific conditions should be added to cover front-running on financial instruments which have an illiquid market.

140. Most of the respondents consider that no amendment is needed to the definition of Article 7(1)(d) of MAR. Namely, the front-running cases which are not falling within Article 7(1)(d), either because the behaviour is held by persons other than those charged with the execution of transactions or because the element of the significant

effect on the price is missing, may be covered by conduct rules under the MiFID II / MiFIR and UCITS frameworks.

141. Some respondents proposed to amend the definition in order to broaden the scope of the relevant subjects to include further functions within investment firms, or all persons aware of information concerning pending orders (provided that the orders meet the inside-information criteria). Some respondents consider that the front-running conduct should not include individuals within the issuer. One respondent considers it appropriate to extend the front-running conduct to cater for all persons involved in the pre-trade lifecycle, research analysts and persons involved in internal committees dealing with investment strategies and investment activities, and all persons with access to aggregated information, such as advisors and brokers, as well as persons in support functions (e.g. IT, compliance), where they have access to pre-trade information. Few respondents proposed to amend the definition by deleting the reference to the significant effect on the price, as it does not allow to consider a number of front running behaviours.

142. As regards possible amendments concerning illiquid instruments, no specific ones were proposed. For illiquid instruments, the client should at least be informed on the conditions of execution of their orders, since front running in illiquid markets may cause the potential profits for the market abuser to be higher and the potential losses for the unaware investor to be larger. Nevertheless, the criterion to be considered is whether the information on which front running is based has the potential to meaningfully affect prices in a financial instrument, not necessarily volume.

#### **4.2.4. Pre-hedging**

143. The CP indicated that some NCAs have received STORs from market participants on pre-hedging behaviours. The CP described that, on the one hand pre-hedging entails a risk-management profile, since it takes place when a broker acting as principal undertakes a transaction in anticipation of a client order in order to manage the risk associated with those client trades. On the other hand, pre-hedging may be relevant for insider dealing if a broker were to use the information received from the client to trade on for its own account, including potentially trading against the client.

144. The CP considered also that pre-hedging may present the risk of distorting competition and harming the client's interests in cases of competition between brokers (competitive requests for quote). In such cases, pre-hedging may affect the market price of the relevant financial instrument and have consequences on the price that other competing firms show to the client before the conclusion of the request for quote.

145. Pre-hedging also entails risks around managing conflicts of interest between the firm and their client, client order handling rules around fair execution of client orders, and best execution rules.

146. In light of this, ESMA identified both risks affecting the market and the clients, and requested market participants to express their views on market abuse and/or conduct risks potentially arising from pre-hedging behaviours, on the need for related systems and controls for firms, on any benefits arising from pre-hedging behaviours for firms, clients and functioning of the market, and on the types of financial instruments subject to pre-hedging behaviours.
147. Mixed views were expressed on the usefulness of pre-hedging and on the risks related to this practice. The responses showed opposite attitudes towards pre-hedging: (i) certain respondents consider that pre-hedging entails market abuse risks and that it may mainly benefit the brokers, whereas (ii) other respondents consider pre-hedging as a common and usual practice, which proves useful especially for illiquid instruments. Risks linked to market abuse would be limited to cases of brokers trading against the clients.
148. Among the respondents that tend to consider pre-hedging as market abuse prone and not beneficial for investors or clients, the following was noted:
- a. Pre-hedging has the potential to create market abuse risks, since buy-side RFQ information is often inside information, also considering that trading venues that make use of the RFQ facility typically make them visible at the time of the request to the market makers who have been asked to respond to the RFQ. Consequently, these specific requests cannot be deemed to be public at the time of receipt and will only become public once the quote(s) by the market maker(s) provided in response to the RFQ have been made pre-trade transparent under the rules of the venue.  
  
RFQs for a two-sided quote are unlikely to be precise and would hence not constitute inside information.
  - b. Trading based upon an RFQ can constitute insider dealing and there are conduct risks stemming from the fact that pre-hedging essentially places the proprietary interest of the broker ahead of the de facto client. A concern for several respondents is that there may be information leakage during the RFQ process, since market makers may take advantage of the investor's price requests in order to make trading profits and, in the process, move prices against the investor.
149. Several respondents also questioned the 'benefits to investors' as prices can be improved where risk is hedged, some of them consider, on the contrary, that it is detrimental, especially where coupled with the risks of information leakage and the cumulating multiple price impacts of all RFQs.
150. With reference to the systems and controls that buy-side firms can put in place to address market abuse linked to pre-hedging, they should avoid submitting RFQs to multiple brokers and concealing potential trading intentions by asking for two-way

prices. At the same time, brokers should regulate the flow of information between the sales and trading areas, so that the sales' person could only communicate to the trader in an RFQ a limited set of information.

151. Some respondents agree on cases, identified by one of them, in which pre-hedging would be admissible<sup>32</sup>. According to some respondents, pre-hedging should only be permitted where the market maker has taken on actual risk. This occurs only when the trade has been agreed. Namely, the market maker does not take on actual risk either at the point when the RFQ requestor sends the RFQ or at the point when the market maker responds with a quote. Some respondents consider that it is not justified to hedge after a market maker submits a firm quote but before the trade has been agreed (i.e. the moment in which the market maker takes the risk). The effect of permitting pre-hedging prior to the counterparty actually agreeing the trade is to worsen the price that the counterparty ultimately receives as it means every other market maker updates its price based on the action taken by the market maker who is pre-hedging.
152. Other respondents consider that pre-hedging behaviours should not typically affect the market price or pose risks of insider dealing, since (i) MiFID II already contains provisions that should prevent negative impact on the client and should manage potential conflict of interests raised by the practice, and (ii) RFQs do not often meet the definition of inside information for lack of the precision requirement, since it cannot be reasonably expected that the client will actually deal on the basis of the quote. Respondents also stressed that pre-hedging is an important function for the smooth operation of financial markets. It benefits clients by allowing brokers to provide increased liquidity to their clients and the expected quality of execution.
153. The main risks linked to pre hedging behaviours are: (i) the conduct risk and (ii) the potential prejudice for the client in case of competitive RFQs, which could show an over-demand to the market and are more likely to have an impact on the price that could be negative for the client. On the other hand, precisely thanks to pre-hedging, the firm can reduce its risk and therefore offer a better price for the client. By doing so, it helps to achieve its best execution duties. Transparency towards clients is also needed. Therefore, the main risks linked to pre-hedging could be mitigated through

---

<sup>32</sup> See the reply to the Consultation Paper by FIA European Principal Traders Association (FIA EPTA), available at <https://www.esma.europa.eu/press-news/consultations/consultation-mar-review>, reply to question No 22. The cases identified include the following: (i) where the market participant agrees with the counterparty to trade at a stated reference price on the basis that the market participant is allowed to hedge in advance of the calculation of that price; (ii) where following an agreed understanding with a counterparty the market participant indicates that he will trade at a particular price or better if they are allowed to pre-hedge; (iii) where a third country exchange permits pre-hedging and the activity is done in conformance with their rules and relates only to orders in contracts traded on that exchange; (iv) where following the receipt of an RFQ the market maker continues to update quotes in line with moves in the displayed market quotes but not based on the information that they have received, (v) where following receipt of an RFQ which they fill the market maker is free to trade notwithstanding the fact that the trade may not be public as yet; (vi) where following receipt of an RFQ a market maker widens out their quote or pulls their quote to protect themselves against persons who may misuse the information, (vii) where following the receipt of a RFQ a market maker is notified that the order has been filled elsewhere the market maker is free to update their prices to reflect the information even though that trade may not have been published; (viii) Where following receipt of an RFQ which is not immediately filled by the market maker a reasonable period of time has passed by such that the counterparty has had a reasonable opportunity to execute the order the market maker is free to update their prices to reflect the information, (ix) where following the receipt of an RFQ which is not immediately filled by the market maker, the market maker receives a RFQ with the opposite direction to the first RFQ, the market maker may improve its price for the second RFQ and may deal whilst having knowledge of the first RFQ...

transparency towards the clients and RFQs in two directions. Some respondents recognise though that there may be a risk of insider dealing, if a broker were to use the information received from the client to trade on its own account, including potentially trading against the client, or when pre-hedging potential operations for liquid assets (where pre-hedging would not be needed). In this respect, some respondents, though acknowledging that in the case of the broker trading against the client there may be risks of insider dealing, deem that the current MAR framework is appropriate to deal with it.

154. Also, respondents identified different pre-hedging functions and features depending on the relevant markets.
155. Several market participants asked ESMA to issue guidance on what is MAR-compliant in relation to pre-hedging and which behaviours could constitute 'front-running'.
156. Guidance was also requested on procedural aspects concerning the pre-hedging, as setting out the records needed for the pre-hedging, transparency as regards pre-hedging arrangements by brokers to their clients, and internal policies within the market makers.
157. On the other hand, some respondents deem that number of industry codes and guidelines have been issued which address acceptable practices in this area.
158. With reference to the types of financial instruments subject to pre-hedging behaviours, respondents provided diverging views. Some consider that pre-hedging tends to be limited to fixed income instruments traded on RFQ markets, such as bonds (to which best execution requirements do not apply), several respondents consider that pre-hedging is not specific to a subset of financial instruments.

### **4.3. ESMA's assessment and recommendations**

#### **4.3.1. Definition of inside information and its effectiveness in preventing market abuse**

159. The replies provided by market participants to the CP overall confirm that the definition of inside information designed by Article 7 of MAR is sufficiently broad to combat market abuse cases. ESMA agrees on this point and considers that the current definition allows for adequate protection of investors and of market integrity, since it strikes a good balance between being sufficiently comprehensive to cater for a variety of market abuse behaviours, and sufficiently prescriptive to enable market participants, in most cases, to identify when information becomes inside information.

160. As indicated above, a minority of respondents to the CP recommended amending certain provisions of Article 7. ESMA deems that changes to the definition of inside information could result in the following:
- The definition of inside information is at the core of the market abuse regime and on it depend further requirements within MAR (from the insider dealing definition to disclosure obligations etc.). Any changes to the definition would risk increasing, rather than reducing, legal uncertainty.
  - In light of the connections between the definition and the other obligations under MAR, unintended consequences could derive from its amendments and any change to the definition would need to be carefully assessed and tested.
161. The proposals for amendment presented by respondents aimed, in general, at narrowing down the definition, in order to diminish certain interpretative uncertainty. In this respect, a more detailed or prescriptive definition could result in a reduced protection for investors, as the scope of conducts constituting market abuse would be limited, and consequently reduce also market confidence.
162. Weighting the information received from NCAs and market participants on the functioning of the current definition against the risks arising from amending it, ESMA recommends the Commission to leave the definition of inside information in Article 7 unchanged – with the exception of one amendment proposed for Article 7(1)(d) of MAR, as explained in Section 4.3.3 below.
163. As regards the inside information on emission allowances, certain respondents requested to delete it and substitute it with a cross-reference to REMIT. In this respect, ESMA reiterates its views expressed in the Final MAR Technical Standard Report<sup>33</sup>. The characteristics of inside information included in MAR are not exactly the same as the ones included in REMIT. According to Article 7(1)(c) of MAR, information can only be considered inside information, in particular (among other conditions), “*if it were made public, would be likely to have a significant effect on the prices*” of ‘emission allowances or auctioned products based thereon’ while REMIT defines that the relevant effect has to be assessed on “the prices of wholesale energy products”. Not all REMIT inside information fulfils the criteria to be classified as MAR inside information, and also not all MAR inside information related to the emission allowances or auctioned products based thereon is inside information according to REMIT. Inside information published under REMIT usually is, among other, supply-demand information required by internal energy market rules, or information on capacity and use of energy infrastructures, typically expected and non-expected outages (such as non-availability of a power plant). Most of the time it is an availability-type of information, normally updated frequently, related to networks, generation and consumption facilities. Another

---

<sup>33</sup> ESMA/2015/1455, available here [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455\\_-\\_final\\_report\\_mar\\_ts.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf).

difference between the two Regulations results from the fact that there are market participants in the wholesale energy markets (covered by REMIT) that are not market participants in the emission allowance markets and vice versa (e.g. industrial combustion activities, such as steel making, are covered by MAR but not by REMIT).

164. On the contrary, several respondents highlighted that the definition of inside information poses interpretative challenges, which do not always allow issuers to draw a line between the what is and what is not inside information. This may have multiple consequences, which span from increased compliance costs – including also consultants’ fees – to the risk that issuers either qualify the information as being inside information when in doubt, or on the contrary postpone or avoid such classification (see also section 5 below on the further challenges linked to the conditions of application of the delayed disclosure of inside information).
165. Clarifications were sought both on the general interpretation of certain paragraphs of Article 7 of MAR (for instance, as regards intermediate steps, or the level of certainty needed to consider the information as precise), and on concrete scenarios.
166. ESMA considers that, among the elements identified by market participants, several of them would deserve some clarifications or guidance. This would from one side benefit issuers and market participants and on the other side also ensure that a consistent interpretation to certain requirements is given at EU level.
167. Clarifications were requested on several topics which deserve thorough analysis to avoid adopting interpretations or recommending practices which could have unintended consequences. In this respect, ESMA stands ready to issue guidance on the definition of inside information under MAR. As a first step, ESMA considers that guidance on specific scenarios (for instance, financial reporting) may provide a better assistance to issuers, as it could enhance clarity on concrete and recurring issues they face.

#### **4.3.2. Inside information for commodity derivatives**

168. As indicated in Section 4.2.2 above, ESMA understands that for most of the respondents the definition of inside information on commodity derivatives adequately mirrors the characteristics of the commodity versus financial market. Extending the definition of Article 7(1)(a) of MAR to commodity derivatives *tout court* would harm commodity producers’ commercial activities as it would substantially limit their hedging ability.
169. ESMA concurs with the views expressed by majority of the respondents, that aligning the definition of inside information for commodity derivatives to the one for financial instruments would not consider the structural differences between issuers and commodity producers and result in higher costs for the latter.

170. As regards respondents that requested to cross-refer to REMIT for wholesale energy producers, ESMA refers to the considerations on the differences between MAR and REMIT included in Section 4.3.1 above.

#### 4.3.3. Definition of inside information with respect to “front running”

171. The responses to the CP indicate that the definition should be amended in order to broaden the scope of the relevant subjects relevant for front-running behaviours. In addition, the definition of Article 7(1)(a) is not entirely applicable as in the front-running case the information concerns pending orders by third parties (clients) and Article 7(1)(a) deals with information concerning, directly or indirectly, issuers or financial instruments.
172. ESMA concurs with respondents' views that the application of front running conduct only to persons charged with the execution of orders is too limited. In this respect, having considered possible options to broaden the scope of the relevant subjects ESMA considers that one reasonable alternative would be to: (i) eliminate in Article 7(1)(d) the words “*for persons charged with the execution of orders concerning financial instruments, it also means*”. In this way, the definition would not be limited to the case of persons specifically executing the orders, as it would also include other categories of persons that may be aware of a future relevant order (e.g., directors of an issuer, the issuer itself, institutional investors, etc.); (ii) considering behaviours observed by NCAs, extend it to cover also the information on orders conveyed by persons other than clients, as for instance orders known by virtue of management of a proprietary account or a fund. This proposed amendment would allow the application of the definition also for those cases in which there is not a client – broker relationship but the inside information is known by virtue of employment.
173. In light of the proposed amendments, the definition would read as follows: “*information conveyed by a client **or a proprietary account or a managed fund** and relating to ~~the client’s~~ pending orders in financial instruments, which is of a precise nature, 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, the price of related spot commodity contracts, or on the price of related derivative financial instruments*”.
174. ESMA does not recommend deleting the reference to the significant effect on the price, as suggested by some respondents. On the one hand, this would allow the application of front-running to those cases in which smaller orders are concerned, but on the other hand, the element of the significant effect on the price is central in the definition of inside information. By taking it out, there is the risk that behaviours without a relevant impact could be subject to the heavy sanctioning regime designed by MAR, which does not seem to be in line with the proportionality criterion.

175. As indicated in the CP, where the front-running conduct does not meet the standards identified by MAR, it may nevertheless be relevant for the purposes of MiFID II / MiFIR and UCITSD based conduct rules.

#### 4.3.4. Pre-hedging

176. The replies to the CP indicate that there is no common view on the effects of pre-hedging on the market, on the benefits for investors, and on the possibility that pre-hedging may in certain cases result in market abuse behaviours or anyway be harmful for the markets. Also, depending on the financial instrument for which the RFQ is presented, conduct rules under MiFID II may not apply.
177. The variety of replies received and fundamentally diverging opinions on whether pre-hedging should be allowed or not and may or not add value for markets, are an indication that it is not possible to state, *tout court*, if pre-hedging is a legitimate behaviour or not. In this framework, multiple respondents requested ESMA to identify criteria to help market participants identify when pre-hedging is allowed, which level of transparency the clients may expect and which procedural arrangements should be put in place by the broker.
178. ESMA deems that guidance is needed in this area and stands ready in assisting the EC on this. The clarifications requested on pre-hedging deserve thorough analysis and study to avoid adopting interpretations or recommending practices which could have unintended consequences and could legitimate harmful practices. ESMA is therefore mentioning in this Final Report the main points that it would like to further develop in a more comprehensive guidance on pre-hedging.
179. First, ESMA agrees that pre-hedging should constitute a risk-management tool for the broker, to contain the exposure deriving from possible orders for which an RFQ has been submitted and should be designed to benefit the client in connection with the relevant orders and any resulting transactions. This implies that the same risk-management attitude and the intended benefit for the client should be traceable in the behaviour of the broker, that should not pre-hedge for speculative purposes.
180. Second, the respondents informed ESMA that pre-hedging concerns any types of financial instruments, but in this respect, several respondents indicated that pre-hedging is needed for RFQs concerning illiquid instruments, and ESMA deems that this point deserves further assessment.
181. Third, ESMA considers that, as per the front-running behaviour, also for the pre-hedging the features to be considered concern both compliance with MAR and with conduct rules under MiFID II. ESMA also intends to further consider pre-hedging in the broader context of the optimisation of orders in market makers' and brokers' strategy, of the rules of the specific markets concerned and taking into account the consequences of pre-hedging activities on the markets.

182. ESMA has already identified some factors to consider when assessing if a specific pre-hedging conduct poses risks of market abuse and of violation of conduct rules. Among other things, it may be considered whether (i) there is a clear mandate from the client requesting the broker to pre-hedge, (ii) the client has been made aware of and consented to pre-hedging activities being carried out. In this respect, ESMA deems that the broker should inform the client *ex ante* and on a case by case basis that his/her position may be pre-hedged. In addition, (iii) the benefit of any pre-hedging is passed to the client, (iv) the person carrying out the pre-hedging takes reasonable steps to minimize the impact of the activity on the market, and (v) the person carrying out the pre-hedging has provided information *ex post* to the client on how pre-hedging undertaken has impacted on the execution of their transaction. As indicated above, ESMA intends to issue further guidance on pre-hedging conducts, which would consider the points mentioned in the above paragraphs together with factors to take into account when assessing market abuse and conduct violation risks.

## 5. Article 17 MAR - Delayed disclosure of inside information

### Mandate from the Commission

Advice on non-mandatory elements of the report

Effectiveness of the mechanism to delay disclosure of inside information

Currently the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4). Possibly reflecting a diverging approach to treatment of inside information across Member States, the Commission has received indications that relying on the mechanism of delaying disclosure of inside information is used to a varying extent across jurisdictions in the Union. It would appear that, while in some Member States issuers rely on this mechanism regularly, issuers of others use it on an exceptional basis. Therefore, for the Commission to better understand whether this tool needs to be calibrated, ESMA should gather information on the usage of this mechanism across Member States and identify points of divergence in its application, if any. Furthermore, the Commission would like ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism. Finally, to gain a complete picture of the use of this mechanism, ESMA should provide information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, as provided in the third subparagraph of Article 17(4). In this latter case,

the Commission would like to receive information on how many such requests have been submitted by those NCAs.

## 5.1 Legal framework

183. Article 17(1) of MAR provides that an issuer<sup>34</sup> has to inform the public as soon as possible of inside information which directly concerns it. Such information has to be made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Article 17(2) of MAR sets forth the disclosure obligation for emission allowances market participants<sup>35</sup>.

184. The definition of inside information is contained in Article 7 of MAR (see above section 4). On its basis, issuers in possession of an information of a precise nature, relating directly or indirectly to the issuer itself or to its financial instruments, which is not public and which, if made public, would be likely to have a significant effect on the prices of the financial instruments or derivative financial instruments, are obliged to disclose it “as soon as possible”.

185. Article 17(4) of MAR allows issuers and emission allowance market participants to delay on their own responsibility the disclosure of inside information provided that all the three conditions below are met:

(a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

(b) delay of disclosure is not likely to mislead the public; and

---

<sup>34</sup> Namely, “issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State”. In other words, issuers whose financial instruments are traded without their approval of the admission to trading or trading are not subject to the obligation of Article 17(1) of MAR.

<sup>35</sup> Article 17(2) provides that “An emission allowance market participant shall publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business, including aviation activities as specified in Annex I to Directive 2003/87/EC or installations within the meaning of Article 3(e) of that Directive which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part. With regard to installations, such disclosure shall include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations.

The first subparagraph shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent and, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold.

The Commission shall be empowered to adopt delegated acts in accordance with Article 35 establishing a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input for the purposes of the application of the exemption provided for in the second subparagraph of this paragraph”. The CP mainly focusses on the obligation to disclose inside information applicable to issuers, pursuant to Article 17(1) of MAR.

In this respect, see ESMA Questions and Answers on the Market Abuse Regulation, questions and answers Q.11.2 and Q.11.3, available at this link <https://www.esma.europa.eu/document/qa-market-abuse-regulation>.

(c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information<sup>36</sup>.

186. In terms of procedure, Article 17(4) of MAR requires the issuer or emission allowance market participant to inform the relevant NCA that the disclosure was delayed immediately after such disclosure occurred.

187. The issuer / emission allowance market participant must also provide a written explanation of how the three conditions listed above were met, unless the relevant Member State opted to require that the record of the explanation can be provided only upon request of the competent NCA.

188. The provisions on disclosure of inside information and related delay require issuers and emission allowance market participants to perform an assessment – which can be of a complex nature – of where certain information they possess meets the requirement of inside information. A further assessment is required where the issuer or emission allowance market participant envisages to delay the disclosure<sup>37</sup> of such information, and Article 17(4) of MAR underlines that such “second” assessment is performed under the responsibility of the issuer or emission allowance market participant.

189. In this respect, Article 30(1) of MAR requires Member States to grant NCAs power to take appropriate administrative sanctions and measures in relation to – among others - the infringements of Article 17(1) and (4) of MAR.

## 5.2 Feedback to the Consultation

### 5.2.1 Effectiveness of the mechanism to delay the disclosure of inside information

#### 5.2.1.1 Assessment of whether the conditions for the delay of the disclosure of inside information are sufficiently clear for issuers

190. The CP dealt with several points pertaining to the delayed disclosure of inside information, ranging from the general market participants’ feeling as regards its application, to whether further controls are needed, to the specific discipline for financial institutions. In addition, the CP referred to requests contained in the mandate by the Commission, on which ESMA was still gathering information.

---

<sup>36</sup> Article 17(4) provides that where the inside information arises in the framework of a protracted process occurring in stages, that is intended to result in a particular circumstance or event, the above conditions apply to delay the disclosure of inside information relating to such process.

<sup>37</sup> Article 17(1) and (2) provided for different timing for the publication of the inside information, respectively for issuers, that have to disclose it “as soon as possible” and for emission allowance market participants, that have to disclose it effectively and in a timely manner.

191. With reference to the latter, the mandate from the Commission requested ESMA to perform an analysis on how the delay of inside information disclosure is applied. Such request originated from indications received by the Commission that the delay of disclosure of inside information is used to a varying extent across jurisdictions in the Union. In particular, the Commission requested ESMA to (i) gather information on the usage of the delay mechanism designed by Article 17(4) of MAR across Member States and identify points of divergence in its application, if any; (ii) assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism, and (iii) gather information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, together with the indication of how many requests have been submitted by the relevant NCAs.
192. As regards the use of the delayed disclosure of inside information across the EU, from July 2016 to June 2019 approximately 14,000 cases of use of delayed disclosure of inside information pursuant to Article 17(4) were recorded by NCAs. The number increased each year, going from approximately 1,500 cases in the period July to December 2016, to 4,000 cases in 2017, 5,000 in 2018 and 3,500 in the first half of 2019. Significant discrepancies were noticed across Member States.
193. Certain NCAs that received few notifications indicated that the low number of cases was due to the practice of holding meetings with issuers, in which information on delayed disclosure would be provided, or that systems to receive the information from issuers were being deployed during part of the period for which data were gathered.
194. As regards delayed disclosure cases pursuant to Article 17(5) of MAR, overall less than 15 cases were recorded by three NCAs between July 2016 and June 2019.
195. The Commission also asked ESMA to gather information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, together with the indication of how many requests have been submitted by the relevant NCAs. The following Member States used such option: Austria, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom<sup>38</sup>. The number of requests for explanations addressed to the issuers varies among jurisdictions. Certain NCAs request an explanation when it is needed for reviews or investigations which they are conducting, and others focus on general compliance with disclosure of inside information as soon as possible – for which the correct use of the delay is a sort of a sub-category.
196. The Commission also requested ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively

---

<sup>38</sup> The data covers the period until end June 2019.

rely on that mechanism. In this respect, in addition to the CP, ESMA also requested NCAs to provide their views on the point.

197. Most NCAs consider that the conditions to delay disclosure of inside information are well framed and sufficiently clear, and several NCAs noted that they did not receive specific clarification requests from issuers. At the same time, certain NCAs consider that the assessment of the conditions to delay disclosure may be difficult for issuer. For instance, assessment of 'legitimate interest' may prove difficult, as well as the determination of whether the delay may be misleading the public, and also the confidentiality requirement may pose interpretation issues in case of rumours (to understand when they are sufficiently precise and related to the inside information). Certain NCAs already proceeded to issue guidelines aiming at providing more clarity on when information becomes inside information and on the consequent possibility to delay disclosure.
198. The CP requested market participants to indicate if conditions to delay disclosure of inside information work well and to provide examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.
199. With reference to the first point, respondents expressed mixed views. Several stakeholders reported that the current regime generally works well, whereas others identified number of points on which concerns were expressed or clarifications sought. With reference to the examples of difficulties encountered, market participants highlighted relevant instances, which are broadly consistent with the difficulties encountered on the definition of inside information. Namely:
200. Clarifications were requested on the scope of the legitimate interests to delay disclosure, and whether it is compatible with the case of inside information concerning a completed process, as in the case of a contract entered into and already signed, or in that of formal resignation by a CEO.
201. Clarifications were requested on Article 17(4), first subparagraph, letter (b) of MAR, which provides that the delay of disclosure does not have to be likely to mislead the public. Respondents noted that, given that inside information, by definition, is expected to have a significant influence on trading decisions by investors, the meaning of letter (b) should be further explained. Few respondents proposed deleting such condition.
202. Specific cases in which respondents encountered difficulties in the application of letter (b) are planned M&A transactions, where legitimate interests to delay the disclosure may exist, but meeting the condition that the delay is not misleading the public is particularly difficult. A further case is that of expected decisions by public authorities, where issuers may receive reasonably precise indications of the likelihood of a positive or negative decision. Should that information constitute inside information, the application of Article 17(4)(b) to delay its disclosure would be problematic.

203. Clarifications were also requested on the fact that, in order for rumors to trigger the obligation to disclose inside information, they should be new, sufficiently precise, persistent and have an impact on the price of the financial instruments. Lacking such conditions, respondents requested to clarify that they may avail themselves of a no-comment policy.
204. Certain clarifications which were already requested on the definition of inside information were also considered as relevant for the delayed disclosure, mainly concerning when information is to be considered as inside information for processes which take place in different stages, or which require the approval of several bodies within an issuer (as negotiations over complex transactions, drafting of financial reports, especially in case of deviations from market expectations).
205. Clarifications were requested on the obligation to disclose the inside information “as soon as possible”, with particular reference to disclosure outside market hours (i.e. the night or weekend could be used by issuers to further evaluate the inside nature of the information).
206. Amendments or clarifications on ESMA’s guidelines on delayed disclosure were requested as regards:
- The fact that the delay mechanism should be considered as a logical counterweight of the current definition of inside information and is not exceptional (as hinted at by ESMA’s guidelines);
  - The explanations on legitimate interest to delay disclosure, which should be broadened;
  - Further developing the Guidelines to include different types of issuers and cover a broader set of circumstances in which delayed disclosure would be admitted, since overall the conditions that must be met in order to delay the disclosure are considered as burdensome.
207. A further general point raised by several respondents both with reference to the definition of inside information and to the delayed disclosure is that the concept of inside information applies for the purposes of market abuse prohibition and for the disclosure obligations. With reference to the disclosure obligation, the use of a single definition risks forcing publication at an early stage. In light of this, some respondents suggested distinguishing between a definition of inside information for the purposes of market abuse prohibition, and a more ‘advanced’ notion of inside information, typically linked to a higher degree of certainty of the information, triggering the disclosure obligation (see above Section 4.2.1).
208. Finally, requests were received to amend Article 17 of MAR to: (i) apply the regime for SME growth markets issuers on the notification to the NCA of the delayed disclosure. Such regime provides, among other things, that the explanation to the NCA

concerning the delay has to be provided only upon request; (ii) specify, as regards the condition of Article 17(4)(c) of MAR, that the issuer is either able to ensure the confidentiality of the information (which is the current content of Article 17(4)(c) of MAR) or also reasonably expects the confidentiality of such information.

#### **5.2.1.2 Relevance of internal controls for the identification, handling and disclosure of inside information**

209. The CP considered that issuers need to have in place effective arrangements, systems and procedures for the identification, handling and disclosure of inside information. Such controls help ensuring that issuers are properly identifying information which requires disclosure and properly considering whether that information should be disclosed. Market participants were therefore consulted to provide views on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information, and to provide examples of cases in which the identification of when an information became “inside information” was problematic.

210. The majority of respondents mentioned that issuers already have established, *de facto*, systems and controls to identify inside information and process it in accordance with MAR. Further requirements on that point would not be likely to constitute a value added to the established practices and may somehow be superfluous, and they should not therefore be added to MAR. Along the same line, most of the respondents leveraged on the fact that MAR has already resulted in a complex regulation with heavy bureaucratic and burdensome procedures and introducing explicit requirements for identifying, handling and disclosing inside information would only create additional burden.

211. A minority of respondents supported the inclusion of control requirements on identification and processing of inside information in MAR, as this would contribute to making the internal identification and evaluation processes more robust.

212. As regards examples of case in which the identification of when an information became “inside information” was problematic, respondents singled out areas and scenarios consistent with those for which clarifications on the notion of inside information had been requested, including the preparation of financial reports, forecasts – and amendments thereto –, protracted processes as M&A transactions, takeover bids, public procurement processes, board succession processes and planning, judgements and approvals/rejections from authorities and amendments to the issuer's business strategy.

#### **5.2.1.3 Notification to NCAs of the delay of disclosure of information which has lost its inside information nature**

213. The CP considered that the notification of the delay of disclosure of inside information, where the relevant information loses its inside nature following the decision

to delay the disclosure, would enable NCAs to better identify possible cases of insider dealing, by shedding light also on potential attempted insider dealing conducts occurred in the period in which the information was inside information. In light of this, market participants were requested to provide their views on whether to insert in MAR the requirement to notify NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

214. Almost all respondents consider that there should not be any obligation to notify NCAs of the delay of disclosure of inside information, when this information loses its inside nature, for the following reasons:

- It would add further administrative burdens on issuers while the NCAs have already at their disposal tools to detect abusive behaviours;
- It would risk increasing the confusion on the notion of inside information;
- It would entail compliance costs outweighing the potential benefits;
- It would create conflicting incentives for the issuer – e.g. on the one hand the issuer should assume the existence of an inside information rather early in the project and decide on a delay and, on the other hand, the same issuer would have to notify the NCA even of failed projects, exposing itself to the NCA's scrutiny, thereby being disincentivized to assume an inside information early on.

215. A minority of respondents supported the proposal and few others noted that, in order not to impose an additional administrative burden on issuers and the NCA, NCAs could be given the choice of implementing this requirement if they considered it beneficial depending on the characteristics of their markets.

## **5.2.2 Issues specifically related to credit institutions or financial institutions**

### **5.2.2.1 Financial stability delay**

216. The financial stability delayed disclosure under Article 17(5) of MAR is applicable where the issuer is a credit or financial institution, which means that the relevant entity has to meet two conditions: (i) issue or propose to issue financial instruments, and (ii) be a credit or financial institution. ESMA consulted market participants on whether the current wording of Article 17(5) should be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution. ESMA also requested market participants to provide examples of difficulties encountered in the assessment of the conditions for the delay.

217. Most of respondents agreed with ESMA's proposal to include in Article 17(5) of MAR the case of a listed issuer (which is not credit or financial institution) controlling a listed or non-listed credit or financial institution.

218. However, one respondent, although supporting ESMA's proposal, noted that there is no definition of control in MAR, and that depending on the definition of control, the issue at stake might not be limited only to listed issuers controlling a credit or financial institution.

219. Finally, one other stakeholder mentioned that in view of such amendment to Article 17(5) of MAR, it would be necessary to decide which entity should be required to apply to the supervisory authority for the consent to delay the disclosure of inside information.

#### **5.2.2.2 The obligation to disclose inside information under Article 17 MAR and its interaction with the regulatory framework regarding the prudential obligations of credit institutions and investment firms**

220. The CP also referred to ESMA's analysis, together with other European institutions, on the interaction between the obligation to disclose inside information under MAR and other requirements set out in the regulatory framework for credit institutions and investment firms, with particular reference to any issues emerging from the interpretation of the obligations to disclose inside information under MAR versus other obligations arising from Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD), Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (CRR), and Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD). In this framework, the CP requested market participants to indicate if they had encountered issues in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD.

221. Overall, most respondents did not identify issues as regards the application of MAR and the abovementioned other legislation to credit institutions and investment firms. A potential conflict between MAR and BRRD was identified as regards notification and communication obligations of institutions and authorities in a resolution scenario. In such case, clarifications on which between BRRD and MAR should prevail were requested.

## 5.3 ESMA's assessment and recommendations

### 5.3.1 Effectiveness of the mechanism to delay the disclosure of inside information

#### 5.3.1.1 Assessment of whether the conditions for the delay of the disclosure of inside information are sufficiently clear for issuers

222. The replies provided by market participants to the CP and by NCAs on the use of the delayed disclosure (Article 17(4)) indicate that the mechanism is overall perceived as working, even though there is room for clarifications.
223. At the same time, as explained in Section 5.2.1 above, significant discrepancies were noticed across Member States in the numbers of notifications of delayed disclosure cases. This may be an indication that compliance with Article 17(1) of MAR is not standardised across Europe and that issuers need to invest in appropriate procedures, systems and control to comply with Article 17(1) and 17(4) of MAR.
224. In particular, few respondents requested to amend Article 17(4), and at the same time few respondents consider that in general terms the framework of the delayed disclosure is clear and the regime is appropriate, without the need for further clarifications. Most respondents identified areas which deserve clarifications and several among them requested to review the ESMA guidelines on delayed disclosure.
225. ESMA deems that the regime of delayed disclosure of inside information is by nature intimately interconnected to the definition of inside information. Any clarification provided on the latter has an impact on when the information has to be considered as inside information, and therefore on the possibility to delay its disclosure. In light of this, the guidance that ESMA stands ready to provide on the definition of inside information should also be beneficial for issuers' considerations on whether disclosure may be delayed. For instance, clarifications on inside information concerning intermediate steps of protracted processes and financial statements is likely to have effects on the use of delayed disclosures in these two cases.
226. ESMA deems that no amendments to the conditions to delay disclosure of inside information are necessary. As indicated above, few respondents requested to amend the condition that the delay should not be likely to mislead the public and others requested to broaden the condition on keeping the information confidential (extending it to cases in which the issuer reasonably expects that the information is confidential). ESMA believes that both conditions, in their current wording of Article 17(4) of MAR, are reasonable and aligned with the overall market abuse regime. Amending or deleting any of them would result in a major change of the market abuse regime and risk opening loopholes, thereby increasing legal uncertainty.

227. As a consequence, ESMA does not recommend to amend the conditions to delay disclosure of inside information in Article 17(4).
228. At the same time, ESMA agrees that, similarly to the definition of inside information, the conditions to delay disclosure pose interpretative challenges, which may result in issuers having little clarity on whether they may in certain cases avail themselves of such delay. In light of this and considering the outcome of the consultation, ESMA is keen to consider a revision of its guidelines, in order to provide further clarity on the conditions that need to be met to delay disclosure of inside information and provide further practical examples in which disclosure may be delayed. In addition to the conditions of Article 17(4) of MAR, ESMA also deems that clarifications may be beneficial on other aspects linked to the delayed disclosure, as the reference to disclosing the information 'as soon as possible' contained in Article 17(1) of MAR. A further area where ESMA stands ready to provide guidance is that of rumors, to ensure that a common reading is given.
229. ESMA counts that further clarity on such conditions, coupled with a more structured guidance on the definition of inside information, would also help going towards a more uniform application of the delay across European issuers, since, as indicated above, the data on the delays notified to the NCAs does not suggest an even use of Article 17(4) in the European territory.
230. ESMA also intends to keep on monitoring with the NCAs their receipt of notifications of delayed disclosure to further understand the reasons underlying the different notification numbers received across Member States.

#### **5.3.1.2 Relevance of internal controls for the identification, handling and disclosure of inside information**

231. Respondents to the consultation stressed that there is no need for an explicit requirement in MAR concerning the establishment of appropriate systems and controls for the identification, handling and disclosure of inside information. These are in any case already needed – and in place – to enable issuers to categorise the information and identify when it becomes inside information.
232. Based on the results of the consultation, ESMA further discussed with the NCAs on their experience concerning the systems and controls deployed by issuers to manage inside information. In light of the consultation and of the further discussion with NCAs, ESMA concluded that no recommendation to amend Article 17 of MAR to add the abovementioned requirements is needed.
233. ESMA deems that MAR already clearly requests to comply with the obligation to disclose inside information as soon as possible. The systems and controls to identify, handle and disclose inside information are needed for each issuer to be able to assess if and when certain information becomes inside information. Lacking such systems and

controls, it is likely that an issuer would not be able to categorise the information as inside and may not be able to abide by the related obligations under MAR.

234. While adding a stand-alone requirement in MAR is considered as not needed, since it would be propaedeutic to compliance with the main obligation included in Article 17(1) of MAR, ESMA intends to stress the importance of establishing such systems and controls and monitoring their effectiveness. As indicated in the CP, based on its size, sector of activity and specific features, each issuer should tailor the relevant controls to its business and structure. Especially when considering delaying the disclosure, it is fundamental to have robust processes to handle and manage the inside information and to thoroughly assess the presence of the conditions enabling such delay. In other words, ESMA believes that issuers that do not have in place effective arrangements, systems, procedures or other types of controls for the identification, handling and disclosure of inside information are highly likely to breach their obligation to disclose inside information as soon as possible.

235. In this respect, the low number of notifications of delayed disclosure cases may be an indication that there is a need for issuers to invest in appropriate procedures, systems and controls in order to comply with Article 17(1) and 17(4) of MAR.

#### **5.3.1.3 Notification to NCAs of the delay of disclosure of information which has lost its inside information nature**

236. The replies to the CP indicate that the notification to NCAs of inside information for which disclosure was delayed and which subsequently lost its inside information nature may result in further confusion for issuers and increased compliance costs.

237. ESMA further considered this point, trying to strike the appropriate balance between the possibility for NCAs to avail themselves of tools helping them detect cases of market abuse and containing administrative burdens for issuers. In light of this further exercise, ESMA came to the conclusion that it is not necessary to recommend to the Commission the introduction in MAR of a new requirement obliging issuers to notify NCAs of information which has lost its inside nature and for which disclosure was initially delayed.

238. The market surveillance activity allows NCAs to gather the necessary elements concerning possible cases of insider dealing or attempted insider dealing covering the period in which the relevant information constituted inside information and its disclosure was delayed. In this respect, ESMA also notes that in several instances the delay of disclosure has to be interrupted since the relevant issuer is not able anymore to ensure the confidentiality of the information.

## 5.3.2 Issues specifically related to credit institutions or financial institutions

### 5.3.2.1 Financial stability delay

239. As indicated above, the consultation touched upon two points linked to the financial stability delay.
240. As regards the first point, respondents agree with extending Article 17(5) to the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.
241. Most of respondents agreed with ESMA's proposal to include in Article 17(5) of MAR the case of a listed issuer (which is not credit or financial institution) controlling a listed or non-listed credit or financial institution. ESMA concurs with this view and recommends to revise the wording of Article 17(5) of MAR to include the case of an issuer that is a parent undertaking of a listed or non-listed credit institution or financial institution, provided that the conditions set forth in the following subparagraphs of Article 17(5) of MAR are met.
242. As indicated above, certain respondents highlighted that the remit of the suggested amendment is going to be depending on the concept of 'control' to be used. In this respect, ESMA refers to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC may be used. Namely, the Directive refers to 'parent undertakings' and 'subsidiary undertakings' (see Article 2(9) and (10) and Article 22) for the purposes of consolidated financial statements. The 'parent undertaking' is already included in Article 17(2) of MAR, with reference to the emission allowances market participants. In light of this, ESMA considers that the same reference could be used for the proposed amendments in Article 17(5) of MAR<sup>39</sup>.
243. ESMA also deems that, in case of an issuer that is a parent company of a listed credit institution or financial institution, the obligation to disclose information, as well as the decision to delay such disclosure and ensure that the related assessment is performed, pertains to the undertaking that is impacted by the relevant inside information. Should both undertakings be impacted, each of them would be obliged to disclose such information (or should comply with the conditions to benefit from Article 17(5)).

---

<sup>39</sup> See Q&As 11.2 and 11.3 in the ESMA Questions and Answers on market abuse, available at this link [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

### 5.3.2.2 The obligation to disclose inside information under Article 17 MAR and its interaction with the regulatory framework regarding the prudential obligations of credit institutions and investment firms

244. With reference to the interaction between the obligation to disclose inside information under MAR and other requirements set out in the regulatory framework for credit institutions and investment firms, as indicated above, no major points were raised in the consultation. Considering the relevance of this topic, ESMA is conducting further research together with other European authorities, in order to assess if further guidance to market participants is needed.

## 6. Article 11 MAR - Market soundings

### 6.1. Legal Framework

245. The definition of market sounding is contained in Article 11(1) of MAR, stipulating that a “market sounding comprises 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”.

246. To be a market sounding such communication of information should be carried out by i) an issuer, ii) a secondary offeror of financial instruments (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), iii) an EAMP or iv) a third party acting on behalf or on account of the above persons.

247. Additionally, according to Article 11(2) of MAR, disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company should also constitute market sounding, provided that:

- (a) the information is necessary to enable the security holder to form an opinion on their willingness to offer the securities;
- (b) the willingness of the security holder is reasonably required for the decision to make the takeover bid or merger.

248. Recital (33) of MAR provides three examples of market sounding:

- a) a sell-side firm has been in discussions with an issuer on a potential transaction, and it has decided to gauge potential investor interest to determine the terms that will make up a transaction;

- b) where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; and
  - c) where the sell-side firm is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors.
249. According to MAR, unlawful disclosure of inside information arises “where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties” (Article 10(1) of MAR).
250. As explained in Recital (34) of MAR, “conducting market soundings may require disclosure to potential investors of inside information”.
251. When a Disclosing Market Participant (DMP) carries out a market sounding following the relevant requirements, it will be protected from the allegation of unlawful disclosure of inside information, without having to actively demonstrate that they have acted in the normal exercise of an employment, profession or duty.
252. More precisely, Article 11(4) of MAR stipulates that “for the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person’s employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article”.
253. Recital (32) of MAR highlights that “the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse”.
254. On the same line, Recital (35) of MAR clarifies that “There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information, but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against the unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation [...]”.
255. Therefore, ESMA is of the view that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11 and when they do so, they can benefit from the described protection.
256. This is in line with CDR 2016/960 (whereby a number of requirements are imposed on DMPs regardless of whether inside information is expected to be disclosed in the course of the sounding), but it is also coherent with one of the main goals that led to the introduction of the market sounding regime, i.e. ensuring the possibility for

NCAAs to obtain a full audit trail on a process which is by nature at risk of unlawful disclosure of inside information.

257. In addition, Article 30(1) of MAR stipulates, among other things, that “Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements: [...]” [emphasis added].

258. Through that provision, while the Co-Legislators intended to create a minimum level of harmonisation as regards administrative sanctions and other administrative measures to be provided by Member States with respect to the infringements of the Articles referred to in point (a) of Article 30 of MAR, it also gave Member States the opportunity to include additional administrative sanctions and administrative measures other than the ones that are required as a minimum.

259. Therefore, Member States can adopt, via national law, measures aimed at sanctioning the violation of the requirements laid down in Article 11 of MAR, without prejudice to any additional sanction where unlawful disclosure of inside information has been committed.

## **6.2. Feedback to the consultation**

### **6.2.1. Enforceability of market soundings**

260. ESMA has been made aware of a different reading whereby the market sounding regime and the relevant requirements would be a mere option for DMPs to benefit from the protection from the allegation of unlawful disclosure of inside information.

261. Therefore, in the CP ESMA asked the market participants whether in their views any change in the formulation of current Article 11 of MAR may be done in order to:

- (a) clarify the obligatory nature of the requirements currently contained in Article 11 of MAR, i.e. whenever a behaviour meets the definition of market sounding the relevant obligations apply;
- (b) confirm the fact that DMPs carrying out market soundings in accordance with the relevant requirements should be granted full protection against the allegation of unlawfully disclosing of inside information;
- (c) to foster harmonisation and a level playing field across the EU, ensure that administrative sanctions for not complying with the market sounding regime are established by MAR, without prejudice to any further sanction whenever the conduct constitutes market abuse.

262. Vast majority of the respondents disagreed with ESMA proposal.
263. The majority of the respondents pointed out that any such change to Article 11 of MAR would not represent a mere clarification but rather a change in the market sounding regime. This confirmed that ESMA's concerns over different readings were founded.
264. Many respondents highlighted that a compulsory market sounding regime is too burdensome and disproportionate for market participants and deters DMPs from carrying out the soundings. As a result, they would welcome a proposal to amend Article 11 of MAR to make the whole market sounding regime as a mere option for DMPs to benefit from the protection from the allegation of unlawful disclosure of inside information.
265. On the contrary, some other respondents agreed with ESMA's reading and would welcome any additional clarification in that respect.
266. Other respondents did welcome clarifications but stressed that the obligatory nature of market soundings would make sense only in presence of inside information being disclosed, and overall called for a simplified procedure for both DMPs and persons receiving market soundings.
267. A respondent pointed out the difficulty to enforce the market sounding regime in the case of not requested nor approved trading of third country financial instruments on EU trading venues and reported that some NCAs are already applying a pragmatic approach to those scenarios.
268. Lastly, the vast majority of the respondents did not agree with the proposal to foster harmonisation across the EU by providing for administrative sanctions to be expressly added to MAR for not complying with Art. 11, rather than leaving it to each Member State's discretion as in current formulation of MAR.
269. As a general comment, ESMA notes the little number of DMPs that have directly responded to the consultation, even though DMPs may have channelled their responses through their most relevant associations.

### **6.2.2. Definition of market sounding and difference with other forms of interactions with potential counterparties**

270. The current definition of market soundings is broad and seems to cover a wide range of interactions, e.g. it could also include the cases where the DMP has engaged in interactions aimed at directly offering a deal or a transaction to one or more potential contractual counterparties.
271. In the CP, ESMA asked market participants whether some limitation to the definition of market sounding should be introduced, e.g. excluding certain types of

transactions, or whether additional clarification on the scope of the definition of market sounding should be provided.

272. In particular, current reference in the definition to “prior to the announcement of a transaction” relates to the public disclosure of the terms of the transaction that were previously subject to the sounding, excluding from that moment the application of the relevant regime. ESMA asked market participants whether such reference in the definition is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement.

273. Additionally, in the CP ESMA asked market participants to receive information describing the various stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transactions, and their views as to which stages the market soundings regime should apply, depending on the extent of the risk of inside information being unlawfully disclosed.

274. Vast majority of the respondents pointed out that current definition of market sounding is too broad, and some limitation should be introduced. Among them those who would favour making the market sounding regime as an option to avail themselves of the protection.

275. Those respondents suggested the following limitation to the current definition:

- Excluding certain types of transaction from the scope, e.g. Euro private placement of bonds (Euro PP), M&As or block trades;
- Excluding communications of information in order to offer a deal or a transaction to one or more potential counterparties (i.e. negotiation is not market sounding);
- Restricting the market sounding regime to entities providing investment services;
- limited the scope to market soundings where inside information is shared;
- clarifying that market sounding refers to transactions involving financial instruments, i.e. transactions involving only tangible assets (e.g. gas transaction) should be excluded.

276. Additionally, some market participants called for further guidance on the terms “transaction announcement”, “acting on the issuer’s behalf” and “gauge the interest”.

277. On the contrary, a few market participants suggested not limiting the definition of market sounding as markets need flexibility in the definition of market soundings, and a clarification would make the regime more complicated.

278. As to the reference “prior to the announcement of a transaction”, some respondents consider it appropriate and would not suggest removing, whilst some others warned that changes may potentially lead to uncertainty in the application.

279. Other respondents were of the view that the definition of market soundings should be amended to also cover those communications of information not followed by any specific announcement.

### **6.2.3. Simplification of the market sounding procedures and requirements**

280. Current formulation of Article 11 of MAR, in conjunction with the provisions set out in CDR 2016/960, provide for a series of requirements and specific procedures to be followed by DMPs while carrying out a market sounding.

281. In the CP, ESMA asked market participants if and how some of the above requirements and procedures may be simplified while ensuring an adequate level of audit trail for the NCAs to be able to effectively investigate any potential abuse.

282. For example, DMPs are currently under the obligation to use recorded telephone lines only where they have access to such lines and the persons receiving the market sounding have given their consent to the recording of the conversation. Where that is not the case, the alternative is a complex procedure for the DMP to draw up and the person receiving the sounding to agree or amend minutes of the exchange of information.

283. Given that recording facilities are of common use for commercial purposes and due to compliance with other legislative requirements, ESMA asked market participants’ for their views on whether the use of recording facilities should be simply made compulsory for all soundings.

284. Another example mentioned in the CP is the cleansing procedure, how that impacts the persons receiving the market soundings and any potential ways to make it simpler, with particular reference to parked or failed transactions.

285. In that sense, the CP suggested that an increased number of persons that expressed their wish not to receive the market soundings (included in the relevant list set out in Article 4(2) of CDR 2016/960) may be seen as an indicator of an excessive burden of the regime for those persons receiving the market soundings.

286. According to the respondents, the requirements and the procedures to carry out a market sounding proved to be difficult, mainly for the following reasons:

- the procedures prescribed in Art.11 focus on satisfying detailed formal requirements rather than applying sound judgment and due care;
- asymmetric interpretations of the market sounding definition from DMPs and potential investors;
- the regime should not apply to Euro PP transactions, early looks meeting and M&A transactions;
- the reference to persons receiving the market soundings encompasses a very wide variety of different investors ranging from large buy-side firms, who may be frequent recipients of market soundings, to investors who have only a very limited number of publicly traded investments and therefore will be very infrequent recipients of market soundings. Many of the proposed market sounding rules would not be appropriate for market players with infrequent access to publicly traded securities.

287. Overall, some respondents warned that current complex and burdensome procedures and requirements could cause potential investors' reluctance from being sounded.

288. According to the respondents, simplification or improvement of the current requirements and procedure may be achieved in the following ways:

- limiting the market sounding regime to the cases where inside information is disclosed or, alternatively, simplifying the record keeping requirements, especially where non inside information is disclosed;
- simplifying the cleansing procedure, seen by some respondents as one of the most problematic part of the sounding regime;
- allowing persons receiving the market sounding to rely on the assessments made by the DMP, without being burdened with the duty to make an independent assessment;
- allowing for more flexibility in the use of recorded telephones lines as written minutes taking should be sufficient;
- publishing standard scripts covering different situations in order to avoid each DMP coming up with its own script when contacting investors;
- removing the need for the written minutes to be signed by DMP and person receiving the sounding;
- clarifying that where a potential investor has received a market sounding, follow-up conversations can be viewed as part of the sounding;

## 6.3. ESMA's assessment and recommendations

### 6.3.1. Enforceability of market soundings

289. As explained in detail in the previous sub sections, ESMA is of the view that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11 and when they do so, they can benefit from the protection from the allegation to have unlawfully disclosed inside information.
290. Despite the majority of the respondents to the CP pointed out that a compulsory market sounding regime is too burdensome and disproportionate for market participants and would welcome a proposal to make it a mere option for DMPs to benefit from the protection, ESMA remains of the view that current compulsory market sounding regime should not be changed.
291. A compulsory market sounding regime is essential to ensure an adequate level of audit trail for the NCAs to be able to effectively investigate any potential abuse.
292. Given the high risk that during a market sounding inside information is passed on to potential investors, making the market sounding regime optional would limit the NCA's intelligence capacity in all those cases where DMPs may have willingly or inadvertently disclosed inside information to potential investors, or where DMPs may have wrongly assessed the disclosed information as non-inside information.
293. ESMA is of the view that, without an express obligation, the offered protection from the allegation of unlawful disclosure of inside information cannot be per se a sufficient incentive for DMPs to follow the market sounding requirements on a voluntary basis.
294. Additionally, in the absence of a compulsory procedure to be followed during a market sounding, different investors may not receive the same level of information, with the obvious consequences in terms of selective disclosures that without the relevant record keeping obligation may go undetected. Moreover, the requirements under the market sounding regime may also be seen as an incentive to a proper management of inside information by DMPs.
295. In any case, ESMA is of the view that a clarification may be opportune as the responses to the CP have highlighted that some market participants retain a different reading as to the compulsory nature of market sounding regime currently contained in Article 11 of MAR.
296. Therefore, ESMA recommends the Commission to amend current Article 11 of MAR to make clearer that the requirements therein contained represent an obligation for DMPs carrying out a sounding and that when they do so in compliance with the relevant prescriptions, they will benefit from the protection from the allegation of having unlawfully disclosed inside information.

297. Lastly, despite the vast majority of the respondents did not agree with the proposal to foster harmonisation across the EU by providing for administrative sanctions for not complying with Art. 11 of MAR to be expressly added to MAR, ESMA is of the view that a level playing field cannot be achieved without full harmonisation also in that respect.

298. Therefore, ESMA recommends the Commission to amend MAR to expressly introduce a sanction for violations of the market sounding requirements and procedures, without prejudice to any additional sanction in all those cases where unlawful disclosure of inside information has been committed.

299. Lastly, ESMA recommends that the obligation for the persons receiving the market soundings to carry out their own assessment as to whether they are in possession or cease to be in possession of inside information should be in any case maintained.

### **6.3.2. Definition of market sounding and difference with other forms of interactions with potential counterparties**

300. In the CP, ESMA highlighted that current definition of market soundings is broad and seems to cover a wide range of interactions, e.g. it could also include the cases where the DMP has engaged in interactions aimed at directly offering a deal or a transaction to one or more potential contractual counterparties.

301. ESMA took note that some respondents to the CP called for a limitation of current definition, proposing the exclusion of certain types of transaction from the scope of the market sounding regime, singling out Euro private placement of bonds, M&As or block trades. ESMA also acknowledged that other respondents suggested modifying the definition to only include interactions where inside information is disclosed to potential investors.

302. However, ESMA remains unconvinced of the arguments for certain types of transactions to be excluded, and sees risks connected to any change to the current definition as it may end up reducing the scope and opening for a circumvention of the market sounding regime.

303. Additionally, ESMA would like to remind that one of the purposes of the rules and procedure set out for carrying out a market sounding is to encourage such activity by offering DMPs a protection from the allegation of unlawful disclosure of inside information, without them having to actively demonstrate that they have acted in the normal exercise of an employment, a profession or duties. Therefore, one should bear in mind that any change in the definition of market sounding may have implications on the scope of the whole regime and in turn on the scope of the relevant protection.

304. Additionally, a broad definition presents the advantage of adapting to different typologies of soundings and different practices across the EU, while a narrower definition may leave some practices out of scope.
305. Moreover, ESMA recalled that the recently adopted SME listing package explicitly sets out that “communication of information to those qualified investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of bonds by an issuer that has financial instruments admitted to trading on a trading venue, or by a third party acting on its behalf or account, shall not constitute a market sounding”.
306. With particular reference to the reference “*prior to the announcement of a transaction*” contained in the definition of market soundings, ESMA acknowledged that some respondents consider it appropriate and would not suggest removing, whilst some others were of the view that it should be amended to also cover those communications of information not followed by any specific announcement.
307. ESMA is of the view that the scope of Article 11 should also apply in those cases where a transaction is not eventually announced, as the presence of an announcement does not really impact the nature of the soundings and therefore should not be reflected in the definition.
308. Therefore, ESMA is proposing to the Commission to amend the reference “*prior to the announcement of a transaction*” in the definition of market soundings by turning into “*prior to the announcement of a transaction, if any*”, so to include in the scope of the definition also those cases where eventually the transaction does not materialise and therefore is not announced.

### **6.3.3. Simplification of the market sounding procedures and requirements**

309. ESMA took note of some respondents’ concerns about the fact that too complex and burdensome procedures and requirements could dissuade DMPs from carrying out market soundings and cause potential investors’ reluctance from being sounded.
310. ESMA is aware of the importance of market soundings and agrees that the procedures and the requirements for carrying out market soundings could be simplified.
311. As explained above, ESMA believes that the requirements contained in Article 11 of MAR should continue representing an obligation for DMPs irrespective of whether or not inside information is disclosed during the market sounding.
312. However, in relation to those soundings where NO inside information is passed on, ESMA recommends the Commission that Article 11 of MAR should be amended to clarify that Article 11(5) letters a) to d) and Article 11(6) of MAR should not apply.

313. Differently, in relation to soundings where inside information is passed on, ESMA recommends the Commission to:
- a. amend Article 11 of MAR to clarify that the requirement to cleanse contained in Article 11(6) of MAR could be waived wherever the transaction is publicly announced.
  - b. amend the Regulation (EU) 2016/960 to clarify that where recording facilities are not available, written minutes of the sounding agreed and exchanged via email or other electronic means between DMP and person receiving the sounding should suffice, with no need to have a more formal exchange of signatures.
  - c. amend the Regulation (EU) 2016/960 to clarify that the requirement to repeat reminders of the wall crossing requirements could be removed for follow up calls after the initial one.
314. Lastly, in relation to all types of market soundings (both involving and not involving disclosure of inside information), ESMA recommends the Commission to modify Article 11(11) of MAR to allow ESMA to amend its own Guidelines by introducing recommendations to persons receiving the market soundings that are modulated on the nature of those persons (e.g. differentiating between natural and legal persons, regulated and non-regulated entities, SMEs and large cap issuers).

## 7. Article 18 MAR - Insider list

### **Mandate from the Commission:**

Usefulness of insider lists drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse

In relation to the above point, the Commission would in particular like to know to what extent NCAs rely on insider lists within the meaning of Article 18 in investigating instances of market abuse. To that end, the Commission would appreciate if ESMA, in providing its answer, gathers information on the following:

- number of requests to receive insider lists addressed by the NCAs to issuers
- whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so the breakdown of requests pertaining to one or the other
- how instrumental insider lists are in completing investigations initiated by NCAs.

## 7.1. Legal framework

### 7.1.1. Usefulness of insider lists

315. Article 18 of MAR establishes the obligation of issuers and any person acting on their behalf or on their account to draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information. That list, that has to be promptly updated, must be provided to the NCA upon request. Issuers shall take all reasonable steps to ensure that persons included in the list acknowledge in writing the legal and regulatory duties entailed, including the sanctions applicable to insider dealing and unlawful disclosure of inside information.

### 7.1.2. Content of the insider lists: Actual access versus potential access to inside information

316. ESMA noted in the CP that insider lists should only include persons who effectively accessed a piece of inside information, and not those who could have done that. Such conclusion was based on recital (57) of MAR that indicates that insider lists must contain persons who “gained access” to inside information and Commission Implementing Regulation (EU) 2016/347 that requires specifying the ‘date and time at which a person obtained access to inside information’ and the same in case the person ceased to have access to inside information’.

317. ESMA indicated in the CP that some issuers currently include in their insider lists persons who, due to the position within the issuer/external service provider or due to any other engagement with them, could have accessed that information even if they never did that in practice, in line with the interpretation of certain NCAs. ESMA recognised that that approach might facilitate the task of the issuer/service provider when drafting the insiders list and provides an immediate overview of all the potential suspects in an investigation, while it may also lead to an ‘inflation’ in the number of persons included and it eventually might reduce the usefulness of the insider list.

318. At the same time, ESMA also acknowledged that including only persons who have effectively accessed a piece of inside information in the insider list might require that issuers and firms have in place systems and controls to be certain about that.

### 7.1.3. Content of the insider lists: Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists

319. The previous version of Article 18(1) of MAR referred to the obligation of “*the issuer or any person acting on their behalf or on their account*” to draw up and maintain an insider list. That formulation has been amended by Regulation (EU) 2019/225 amending MAR and the Prospectus Regulation as regards the promotion of the use of

SME growth markets, making clear that the obligation to keep insider lists affects as well persons acting on behalf or on account of the issuer, in line with ESMA's prior Q&A<sup>40</sup>.

#### **7.1.4. Content of the insider list: the role of the permanent insider section**

320. Commission Implementing Regulation (EU) 2016/347 introduced the permanent insider section of the insider list as an option to avoid replicating the personal details of those permanent insiders in each event-based insider list<sup>41</sup>. The purpose of that section is described in recital (4) of Commission Implementing Regulation (EU) 2016/347: "*to avoid multiple entries in respect of the same individuals in different sections of the insider lists*", i.e. to avoid replicating the personal details in each event-based insider list.

## **7.2. Feedback to consultation**

### **7.2.1. Usefulness of insider lists**

321. ESMA noted in the CP that insider lists serve different purposes: they contribute to protect market integrity by allowing NCAs to identify who has access to inside information and by stating the specific date and time on which a piece of information became inside information and also the date and time when the relevant persons gained access<sup>42</sup> to it. Additionally, insider lists should be helpful for issuers to manage the flows and confidentiality of inside information<sup>43</sup>.

322. ESMA's preliminary view was that the insider list is a key tool for investigating possible market abuse infringements and requested the views of market participants.

323. Most responses agreed with ESMA's preliminary assessment regarding the usefulness of insider lists. Some of them insisted on the benefits that insider lists provide in relation to the establishment of warnings when employees request pre-approval of personal account dealing trades, on the investigation of alerts following an employee trading warning, to help checking if there has been an improper wall crossing and/or if the need-to-know basis principle had been complied with.

324. However, several of the responses received (including some of those within the group of responses supportive of the usefulness of insider lists) identified two main drawbacks in the current regulatory framework for insider lists: too much information is currently required and the conflict that exists between the requirements imposed by

---

<sup>41</sup> Article 2(2) second paragraph of Commission Implementing Regulation (EU) 2016/347. This is also reflected in the [ESMA Final Report on draft technical standards on the Market Abuse Regulation](#) (section 8.3.4)

<sup>42</sup> Recital (56) and (57) of MAR

<sup>43</sup> Recital (57) of MAR

Commission Implementing Regulation 2016/347 on the format of insider lists and Regulation (EU) 2016/679 on personal data protection<sup>44</sup>.

325. Several responses requested specific regimes for small debt issuers (in particular for those that trade exclusively their own bonds on an MTF) and for financial intermediaries.

### **7.2.2. Additional evidence gathered by ESMA on the usefulness of insider lists**

326. Following the request from the EC to gather information on the number of requests to receive insider lists addressed by the NCAs to issuers, ESMA launched an internal questionnaire for NCAs setting as observation period from July 2016 to the end of June 2019.

327. ESMA notes that twenty-four NCAs replied having requested insider lists over the observation period. From the responding NCAs, only two of them report not having made any such request since the entry into application of MAR. It is worth noting that other two authorities report requesting or encouraging the systematic submission by issuers of their insider lists. These systematic requests have not been counted as part of the 'ad hoc' requests for insider lists.

328. In terms of number of requests made, NCAs report having made no less than 1388 requests for inside information since July 2016 to end of June 2019. There is a wide range of responses: for instance, whereas some authorities do not report any request for insider lists in 2018, one authority made almost one hundred over the same time period.

329. However, such figure does not reflect accurately the actual number of requests issued by NCAs, for the following reasons:

- Firstly, two authorities do not keep records of the exact number of insider lists requests made but indicate that they request them regularly as part of their market abuse investigations.
- Additionally, one NCA indicates that insider lists are also requested by another economic crime authority, from which they cannot provide the number of requests made.
- Finally, one authority reports having sent 49 requests to external service providers, not issuers, over the observation period. This number has not been aggregated to the overall number above.

---

<sup>44</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

330. The EC also requested ESMA to gather information on whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so, the breakdown of requests pertaining to one or the other.

331. The responses to the questionnaire show more dispersion: whereas most NCAs report requesting systematically or mostly the permanent insider section and the event-based insider lists at the same time (12), nine authorities report requesting mostly or only event-based lists (10), while two NCAs report requesting systematically or mostly the permanent insider section. Several authorities did not provide input in this area.

332. Regarding the third leg of the EC's mandate on insider lists (i.e. how instrumental insider lists are in completing investigations initiated by NCA), NCAs still consider insider lists as critical in completing their investigations, as advanced in the CP.

### **7.2.3. Content of the insider lists: Actual access versus potential access to inside information**

333. Firstly, ESMA requested the views of market participants on how to make the insider list regime more effective.

334. Most of the responses received proposed amending the existing regime, either at level 1 or at level 2 while some respondents opposed to modify the existing text.

335. The respondents proposed the following amendments to Article 18 of MAR:

- On the issue of effective versus potential access to inside information, some responses agreed with clarifying in level 1 that the insider list should only include those persons who effectively gained access to inside information, whilst others considered that it may not be possible (or excessively burdensome) to identify each individual who effectively accessed a piece of inside information. Other respondents supported coming back to the pre-MAR regime or otherwise granting freedom to the issuer to determine who should be included in the insider list.
  - a. Specifying in MAR the obligation of external service providers to provide the necessary data to the issuer to comply with the issuer's obligations regarding insider list.
- Modifying the regime for long term service providers (e.g. auditors) who, instead of creating an event-based lists on an 'ad hoc' basis, should create a sole list per engagement with the issuer.
- Exempting emission allowance market participants from the obligation to elaborate insider lists, based on the limited amount of inside information

they generated, since, in these respondents' view, non-public information from EAMPs is less relevant than macroeconomic data.

- Some responses to other questions in the CP requested clarification on the point in time where the insider list should be elaborated: when the inside information is generated or when the disclosure of a piece of inside information is delayed.

336. The responses suggesting amendments to Commission Implementing Regulation 2016/347 elaborated around two main topics:

- Reducing the amount of information required, and in particular the information that could be sensitive from the perspective of the GDPR; and
- The permanent insider section was perceived as a problem for a significant number of these respondents.

337. Secondly, ESMA asked market participants to elaborate on the changes and systems and controls that would need to be in place to be able to provide, within a short timescale at the request of the NCA, an insider list identifying the persons who had effectively accessed a piece of inside information.

338. The responses received unanimously rejected the idea on similar arguments:

- The technical challenges and costs derived from the identification of the individuals who had actually accessed the information, including that it is impossible to track the moment when someone has read a document; and
- The impact of those costs on small cap companies.

#### **7.2.4. Content of the insider lists: Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists**

339. ESMA also noted in the CP that the scope of Article 18(1)(a) of MAR encompasses not only persons working for the issuer under a contract of employment but also persons performing tasks through which they have access to inside information, without requiring having any other specific relationship with the issuer<sup>45</sup>. From that perspective, ESMA considered that auditors and notaries should be included in the insider list of the issuer if they have had access to inside information.

340. In the CP, ESMA requested the views of market participants on whether the obligation to draw up and maintain insider lists should be explicitly expanded to other persons performing tasks through which they have access to inside information, even

---

<sup>45</sup> See Recital (57) of MAR.

if they do not act on behalf or on the account of the issuer. The two examples identified by ESMA were auditors and notaries but asked whether there might be other cases worth mentioning.

341. Most of the responses received opposed to the proposal to explicitly expand the scope of the obligation to draw up and maintain insider lists to persons performing tasks through which they have access to inside information. Only a minority of responses supported the extension with certain caveats.

342. The arguments against the extension of the scope of Article 18 of MAR were:

- Auditors and notaries are already included in the issuer's insider list when they have access to inside information and are bound by non-disclosure agreements or non-disclosure obligations, professional secrecy and deontological or other similar regulatory prohibitions. Forcing them to elaborate and maintain their own insider lists would only imply an additional administrative burden and additional IT investments that might imply higher costs for customers and compromise certain business models.
- An extensive interpretation of Article 18 of MAR would extend these obligations to contractual counterparties and the counterparty's advisors, or to market participants that deal in financial instruments of the issuer (e.g. buy-side firms), leading in certain cases to an extra-territorial application of the obligation to maintain an insider list. Given the existing difficulties in gathering this information due to data protection obligations, such extension would not improve the effectiveness of insider lists.
- Such extension would imply, in practice, watering down the core obligation of the issuer, i.e. maintaining inside information confidential: since those other persons would have to elaborate their own insider lists, the issuer may feel comfortable with sharing inside information with a wider population than before.
- One response, focusing on the case of auditors, noted that the identification of inside information corresponds to the issuer, and other individuals (and more specifically auditors) cannot make that assessment. The only exception to this principle is where the piece of inside information comes from the activity of the auditor itself (e.g. from an audit objection). This respondent considered appropriate that the insider list contains a section where all the auditing team members are represented.
- Along the same line, some responses considered that persons acting on behalf or on the account of the issuer should only be obliged to establish their own insider lists when the issuer determined to them, not only that a piece of inside information exists, but also that the disclosure of that inside information has been delayed.

343. Those who supported the expansion of Article 18 of MAR noted that some Member States already require that, while some supportive responses recommended differentiating between auditors commissioned by the issuer and auditors appointed by the relevant supervisory authority.

344. The responses identified other cases that might fall under the same category as auditors and notaries and generally expressed against their inclusion in the scope of Article 18 of MAR:

- Counterparties to a transaction and the counterparty's advisors;
- Public authorities (e.g. tax, competition, environment, banking authorities) including courts; in particular, individuals, bodies and authorities regulated in the bankruptcy law and the restructuring law such as creditor committee, bailiff, court experts and the like.

#### **7.2.5. Content of the insider list: the role of the permanent insider section**

345. ESMA identified in the CP several behaviours that do not fit within the obligations set out in MAR:

- Using the permanent insider section as a substitute of the event-based insider lists.
- As a side-effect of that, an 'inflation' in the persons included in those lists had been detected, beyond the expectations set out in recital (4) of Commission Implementing Regulation (EU) 2016/347.

346. ESMA requested the views of market participants on the usefulness of the permanent insider section as such with a view to amend level 1 or level 2 if necessary.

347. A slight majority of responses supported the existence of the permanent insider section. However, it is worth noting that seven responses that did not consider the permanent insider section as useful in general did not propose to abolish that option, since it was widely used by companies that only had to include there a small group of individuals.

348. However, the supportive responses of the permanent insider section of the insider list, considered that:

- The description made by ESMA in the CP about the persons who should be included in that list was too narrow and proposed including in the list other individuals or bodies, like the executive board and the board of directors and the compliance staff.
- On the contrary, other responses suggested mirroring the approach to the permanent insider section that appears for insider lists in Regulation (EU)

2019/2115 as regards the promotion of SME growth markets, which refers to 'persons who, due to the nature of their function or position within the issuer, have regular access to inside information' to provide clarity in this respect.

- Some responses requested further guidance about the persons of bodies that should be included in the permanent insider lists.

349. From the responses who were against the existence of the permanent insider section of the insider lists, nine responses did not consider useful to maintain the possibility to elaborate the permanent insider section.

### **7.2.6. Reduction of the administrative burden for issuers regarding insider lists**

350. ESMA proposed in the CP that the issuer should only include one contact natural person for each legal person acting on its behalf or on its account having access to inside information and each one of those legal persons should include in their own insiders list the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. one contact person per external provider).

351. ESMA received significant feedback that almost unanimously supported its preliminary view. Some of these responses noted that this was already regular practice in several EU jurisdictions.

352. Nonetheless, some respondents considered that the legal obligation to keep an insider list remains with the issuer and does not affect to external service providers, probably referring to the previous wording of Article 18 of MAR. For these respondents, external service providers should only keep written records of the persons who have access to a piece of inside information. Another answer considered necessary clarifying in MAR the obligation of external service providers to provide information for these purposes, i.e. to make such provision a statutory obligation, and therefore compulsory for them according to the data protection regulation.

353. From the supportive answers, several responses noted that the external service providers of the issuer should have the similar capacity with respect to their own insider lists (i.e. they should be able to include one natural contact person as well per legal person performing services for them).

354. ESMA also consulted market participants about any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail.

355. The responses proposed reducing insider lists to the identification of the relevant person, the specific date and time on which a piece of information became

inside information and the date and time on which the relevant person gained access to that piece of inside information. Other respondents supported gathering information as well about work phone, work email and reason for becoming an insider. Many of these responses also considered unnecessary the national ID number.

356. Other respondents raised the following points for potential reduction of the administrative burden that insider lists entail:

- Allowing personal data to be stored separately and provided to the national competent authority upon request;
- Acknowledgement of the validity of alternative systems currently used by issuers and investment firms to detect and register persons with access to inside info as insider lists;
- Clarifying that the acknowledgement in writing of the legal and regulatory duties entailed by the inclusion in the insider list under Article 18(2) of MAR can be made by email or any other IT means;
- Provision of information between issuers and external service providers:
  - a. If external service providers were to keep their own insider list, MAR should include the legal obligation of the issuer to notify those service providers when a piece of inside information is qualified as such, so that they can fulfil their legal obligations. In connection with this, it was noted that the timing for elaboration the insider list of external service providers should be specified.
  - b. Several responses referred to the necessity of establishing a legal obligation of persons acting on behalf or on the account of the issuer to provide the issuer with the relevant information about their own insider lists when established by the legislation, and in particular, when requested by the national competent authority; and
  - c. Decoupling the issuer's responsibilities from the responsibility of the persons working on its behalf or on its account (for instance, one respondent requested specifying in MAR that, if after two attempts the external service provider has not provided the data, the issuer is no longer responsible).

- Permitting the issuer to update its own insider list within “a reasonable period of time”.

## **7.3. ESMA’s assessment and recommendations**

### **7.3.1. Usefulness of insider lists**

357. On the basis of the evidence gathered, ESMA concludes that insider lists remain a key tool in market abuse investigations undertaken by NCAs and, accordingly, is widely used by them.
358. Therefore, and also considering the above mentioned positive feedback received (whereby insider lists also contribute to make informed decisions in relation to personal account dealing trades, to investigate alerts following an employee trading warning, to check possible wall crossing and/or inappropriate disclosure), ESMA concludes that the insider list is not only a key tool for investigating possible market abuse infringements but also provides other benefits in relation to the management of inside information for issuers.
359. ESMA also notes that the permanent insider section of the lists is a tool effectively used by a significant number of NCAs.
360. Accordingly, ESMA recommends to maintain the insider lists regime in MAR, with the amendments described in the following sections.

### **7.3.2. Content of the insider lists: Actual access versus potential access to inside information**

361. ESMA remains of the view that insider lists should represent the persons who effectively accessed a piece of inside information. ESMA also agrees with the views expressed by some market participants indicating that issuers and other relevant persons should already have those systems and controls as part of their regular processes.
362. To that end, issuers and their external service providers should have in place proportionate systems and controls to identify which individuals became aware of a piece of inside information.
363. At the same time, ESMA also acknowledges the comments received in relation to the costs and administrative burden that setting up systems and controls to provide certainty in this respect would impose on the persons obliged to maintain insider lists, in particular taking into account the wide range of issuers and external service providers that are subject to this obligation.

364. From that perspective, ESMA concludes that issuers and persons acting on their behalf or on their account (and in due course, persons performing tasks for the issuer through which they got access to inside information) should include in their respective insider lists the persons who, to the best of their knowledge, have effectively accessed a piece of inside information.
365. Where issuers and persons acting on their behalf or on their account are in doubt about the effective access of one or several individuals after the application of the systems and controls currently in place, ESMA considers the inclusion of persons who could potentially have accessed a piece of inside information in the insider lists as acceptable.
366. ESMA understands that this clarification does not require amendments to the current legislative text and in line with that, does not consider necessary amending the current legislative framework in this respect. At the same time, ESMA considers it is useful to insert a clarification along these lines in a recital of MAR.
367. ESMA also notes the difficulties identified in the responses to the CP by issuers and their service providers when gathering personal data, which may be more burdensome in the case of involving non-EU jurisdictions.
368. ESMA agrees that persons acting on behalf or on the account of the issuer must provide the necessary data to the issuer to fulfil the issuer's obligations regarding insider list. However, ESMA notes that the regulatory framework of this obligation has changed after the entry into application of Regulation (EU) 2019/2115 as regards the promotion of the use of SME growth markets. The new text of Article 18(1)(c) of MAR specifies that issuers and any person acting on their behalf or on their account shall each "provide the insider list to the competent authority as soon as possible upon its request". As a consequence, the issuer does not have to centralise the different insider lists but NCAs may make different requests to the issuer and to the external service providers of their own insider lists on the basis of the information collected in the issuer's insider list.
369. Moreover, ESMA is proposing in a separate section of this Final Report that MAR should be amended to permit the issuer to include only the details of a natural person for each legal person acting on its behalf or on its account having access to inside information and each one of those legal persons should include in their own insiders list the natural persons or one contact of a natural person for legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. they can include one contact person per external provider).
370. This implies that Article 18 of MAR should be amended to clarify that the responsibility of the issuer strictly refers to the inclusion in its insider list of the following persons having access to inside information: persons working for it under a contract of

employment, its external service providers and, when the external service providers are legal persons, one contact natural person for each external service provider.

371. Accordingly, Article 18 of MAR should specify that the persons acting on behalf or on the account of the issuer (and in due course, persons performing tasks for the issuer), when they have had access to a specific piece of inside information, are responsible for including in their own insider lists those persons working for them under a contract of employment, their own external service providers and, when the external service providers are legal persons, one contact natural person for each of them, when those had access to the piece of inside information at their turn.
372. ESMA considers that, under the new framework, the identification of the legal persons and the natural persons acting as a contact is key for the adequate use of insider lists. To achieve that, ESMA concludes that Article 18 of MAR should specify the obligation of persons acting on behalf or on the account of the issuer (and in due course, persons performing tasks for the issuer [please next section for the clarification of “persons performing tasks for the issuer”]) to provide and keep updated the contact details of the natural person acting as contact with the issuer to ensure that, for instance, the contact person changes of job, the contact details of its replacement are promptly contacted.
373. ESMA did not find sufficient evidence to establish a ‘softened’ regime for long-term service providers (such as auditors) or to exempt emission allowance market participants from the insider list obligations.
374. Some respondents raised the need to clarify when insider lists should be prepared: when a piece of inside information is generated or when its disclosure is delayed. ESMA notes that responses to other questions in the CP refer to different interpretations across Europe on this issue.
375. ESMA considers that the obligation to elaborate an insider list appears as soon as a piece of inside information exists, regardless whether the information is published immediately or not.
376. ESMA does not consider that there is an interdependency between the obligation to disclose inside information in Article 17 of MAR and the obligation to draw up and update an insider list in Article 18 of MAR. In fact, the purpose of Article 18 is not only the investigation (on an ex post basis) of potential cases of market abuse but also the management by the issuer of flows of inside information.<sup>46</sup> Since inside information has necessarily to be generated before its disclosure, there does not seem to be a waiver of the obligation to prepare an insider list based on the disclosure of the piece of inside information shortly after its appearance.

---

<sup>46</sup> Recitals 56 and 57 of MAR.

377. ESMA also understands that this interpretation is consistent with its MAR Q&A<sup>47</sup> (ESMA70-145-111) where it is clarified that, regardless of the fact that a piece of information has lost the price sensitiveness that qualified it as inside information, *‘given that the information had been inside information for a certain period of time, the issuer had to comply with all relevant obligations relating to the drawing up and updating of insider lists’*.

378. Regarding the amount of information to be kept in the insider lists, this issue is tackled in one of the following sections.

379. The references to the permanent insider section will also be addressed in the relevant section.

### **7.3.3. Content of the insider lists: further clarification of which persons should be subject to the obligation to draw up and maintain insider lists**

380. ESMA agrees with the respondents who indicated that all external service providers are already bound by non-disclosure agreements or obligations, professional secrecy and deontological or other similar regulatory prohibitions.

381. However, the role of insider lists is mainly to enable NCAs to investigate possible market abuse cases (recitals (56) and (57) of MAR). From that perspective, when inside information is spread across several persons, those persons should be obliged to keep a record of the additional individuals who got access to that piece of inside information.

382. In addition, if MAR is amended as proposed by ESMA (i.e. allowing the issuer to include only one contact of a natural person for each legal person acting on its behalf or on its account having access to inside information) and Article 18(1) is not explicitly extended to persons performing tasks for the issuer, it could be interpreted that potentially wide groups of individuals performing tasks for the issuer, but not necessarily acting on its behalf or on its account, are exempted from this obligation.

383. Moreover, ESMA considers that extending clearly this obligation to persons performing tasks for the issuer should also contribute to make these individuals aware of the importance of an adequate management of the flow of inside information and thereby help them to manage their confidentiality duties, as established in recital (57) of MAR.

384. ESMA notes that neither the performance of tasks for the issuer nor “acting on behalf or on the account of the issuer” are terms defined in MAR.

---

<sup>47</sup> Q&A 5.2, [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf)

385. For these purposes, ESMA considers relevant to differentiate who should be considered as “persons acting on behalf or on the account” of the issuer from those who would be performing tasks for the issuer.
386. ESMA addressed the concept of “persons acting on behalf or on the account” of the issuer in its Final Report on the Technical Standards on the Market Abuse Regulation<sup>48</sup> in the context of market soundings, but not for insider lists. In line with its previous Report, ESMA considers that, for these purposes, “persons acting on behalf or on the account” of the issuer refers to persons engaged in a fiduciary relationship with the issuer whereby they act as its agents under its written or oral mandate.
387. ESMA understands that any person providing any other professional service to the issuer (directly or through other persons) even if it is not acting as the agent of the issuer should be considered as “performing a task for the issuer” and therefore, subject to the obligation to draw up and maintain its own insider list if this person gets access to a piece of inside information.
388. Despite the fact that it is not possible to establish a closed-end list of cases that would fall under this category, ESMA understands that the following persons who act independently from the issuer could qualify as performing tasks for the issuer: auditors (appointed by the issuer); notaries; consultants; credit institutions and financial intermediaries involved in financing relevant deals or in the offering of the issuer’s financial instruments; and financial intermediaries acting under the rules of a trading venue in an independent role (this latter category could include liquidity providers, specialists or firms assisting a company through the admission process and are responsible for assessing the appropriateness of a company seeking admission).
389. ESMA also agrees with the responses received indicating that MAR should specifically contemplate the obligation of the issuers to inform the persons performing tasks for them (and also to those acting on their behalf or on their account) when they qualify a piece of information as inside information, to enable them to establish their own lists.
390. ESMA also notes that the obligation to elaborate insider lists is intrinsically linked to the existence of a collective of individuals having access to a piece of inside information: for example, natural persons performing tasks through which they have access to inside information but not sharing them with anybody else inside or outside their organisation should be included in the issuer’s insider list (or in the list of the persons acting on its behalf or on its account or performing tasks for the issuer, as appropriate), but should not be forced to keep and maintain their own insider lists.
391. Therefore, ESMA remains of the view that any person accessing inside information due to a professional relationship with the issuer, that has been informed by the issuer that it got access to a piece of inside information and has shared that

---

<sup>48</sup> [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455 - final report mar ts.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf); paragraph 66

information with other persons should be subject to the obligation to draw up and maintain insider lists.

392. As a consequence, ESMA considers that the reference to “persons acting on behalf or on the account of the issuer” in Article 18(1) of MAR could be complemented by a reference to external service providers, with the addition of “or otherwise performing tasks for the issuer, through which they got access to a piece of inside information and shared it with other persons”. That reference could be completed with a recital clarifying that such a reference encompasses the performance of any professional services for the issuer, directly or indirectly or for persons acting on its behalf or on its account, including the activities performed by auditors, notaries and the other categories mentioned above<sup>49</sup>.

#### **7.3.4. Content of the insider list: the role of the permanent insider section**

393. ESMA notes that most of the responses received to the CP support maintaining the capacity of issuers to establish a permanent insider section in their insider lists if they so wish.

394. ESMA reiterates that the permanent insider section of the insider list is an option, not an obligation, introduced in Commission Implementing Regulation (EU) 2016/347 to avoid multiple entries in respect of the same individuals in different sections of the insider lists. Along with that, not having the permanent insider section does not entail any administrative sanction, if the event-based insider lists have been adequately filled. ESMA also notes that most of the responses to the CP received demonstrate a correct understanding of this circumstance.

395. Finally, ESMA agrees with the views expressed by some responses indicating that in certain cases the universe of persons that could be included in the permanent insider section may be broader than the list included in the CP.

396. Nonetheless, ESMA remains of the view that the permanent insider section should only include a limited group of individuals and should under no circumstances substitute the event-based insider list.

397. However, it is not possible to establish a closed-end list of individuals that could be included in that section, leaving it to the judgement of the relevant market participants the determination of the specific individuals to be included in that section. Again, ESMA wishes to remark that the core requirement is to ensure that the event-based insider lists are properly filled.

---

<sup>49</sup> Consultants; credit institutions and financial intermediaries involved in financing relevant deals or in the offering of the issuer's financial instruments; and financial intermediaries acting under the rules of a trading venue in an independent role.

398. On that basis, ESMA does not consider necessary amending the regulatory framework with respect to the permanent insider section.

### **7.3.5. Reduction of the administrative burden for issuers regarding insider lists**

399. The first core element coming from the consultation is the proposal to include only one natural person per external service provider having access to inside information. Based on the feedback received, ESMA recommends revising Article 18 of MAR:

- to permit the issuer to include only one natural contact person per legal person acting on its behalf or on its account (or performing tasks for the issuer) through which they got access to inside information.
- to permit that persons acting on behalf or on the account of the issuer (or performing tasks for the issuer through which they got access to inside information) should be allowed to include in their own insiders list only one contact person per external provider.

400. ESMA also understands that this proposal should indirectly address the request from some respondents to make compulsory the provision of information by the external service providers to the issuer in relation to the insider list and cross-refers to the previous sections.

401. The second key element arising from this proposal was the request from market participants to reduce the information requested in Commission Implementing Regulation (EU) 2016/347.

402. ESMA acknowledges the overall request from respondents to reduce the number of fields in the template set out in Commission Implementing Regulation (EU) 2016/347. However, ESMA concludes that:

- most of the responses received did not question the minimum number of fields foreseen in Article 18(3) of MAR and therefore, a revision of level 1 does not seem necessary.
- ESMA also understands that the arguments presented in the CP<sup>50</sup> remain valid and does not intend to revise the fields set out in Commission Implementing Regulation (EU) 2016/347.

---

<sup>50</sup> First, the absence of phone numbers, addresses and identification number would undermine severely the usefulness of this tool. In particular, the absence of identification numbers would impede the automatization of this data, impacting directly the capacity of NCAs to carry out adequate investigations; Secondly, this data remains necessary in the course of market abuse investigations. Therefore, their absence in the insider lists would delay and increase the administrative burden both for issuers

403. Some respondents have requested personal data to be stored separately and provided to the national competent authority upon request or the recognition of the validity of alternative systems currently used by issuers and investment firms to detect and register persons with access to inside information as insider lists. ESMA concludes that:

- There is no legal obstacle for storing personal data separately as long as the issuer and persons acting on its behalf or on its account (and in due course, those performing tasks for it) have the capacity to build up the insider list according to the requirements in Commission Implementing Regulation (EU) 2016/347 upon request of the NCAs.
- Market participants have the capacity to determine the means or the format used to store the data as long as they can immediately generate the insider list according to the legal requirements when requested by the NCA.

404. ESMA understands that these clarifications, together with the reduction of persons from whom personal data has to be collected should also alleviate the concerns expressed in relation the GDPR requirements.

405. ESMA recommends substituting the words “in writing” by “in a durable medium” in Article 18(2) of MAR, noting that this term should be interpreted according to Article 4(1)(62) of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

406. ESMA agrees with the responses indicating that the issuer cannot be held responsible when the relevant individuals do not want to acknowledge their obligations according to Article 18(2) of MAR, but also understands that the original text of MAR already addressed this point when indicating that “the issuer (and/or) any person acting on their behalf or on their account shall take all *reasonable* steps...”. Nonetheless, ESMA suggests revising the text of Article 18(2) of MAR to decouple these obligations:

- issuers and persons acting on its behalf or on its account (and in due course persons performing tasks for the issuer) should request in a durable medium the acknowledgment of their legal and regulatory duties from the persons included in the insider lists; and

---

and NCAs. Finally, ESMA also notes as well that Regulation (EU) 2019/2115 as regards the promotion of the use of SME growth markets has indirectly created a requirement on insider lists for non-SME issuers, by establishing in the new Article 18(6) of MAR that the format for insider lists for certain SME issuers “shall be proportionate and represent a lighter administrative burden compared to the format of insider lists referred to in paragraph 9”. This has to be taken into account in any further revision of Commission Implementing Regulation (EU) 2016/347 since, at the time of finalising this report, the revision of insider lists for SMEs is still ongoing.

See as well [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2061\\_mifid\\_ii\\_consultation\\_paper\\_on\\_sme\\_gms\\_under\\_mifid\\_ii\\_and\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2061_mifid_ii_consultation_paper_on_sme_gms_under_mifid_ii_and_mar.pdf); paragraphs 124 to 146.

- persons included in the insider list should have the obligation to acknowledge immediately in a durable medium their legal and regulatory duties.

407. Finally, some responses requested permitting the issuer to update its own insider list within “a reasonable period of time”. ESMA understands that despite the current text of MAR purposefully avoids setting strict time limits, given the wide range of circumstances that may arise, the time horizon for that should be very limited, i.e. simultaneous to the identification of a piece of inside information as such.

408. In line with that, ESMA reminds stakeholders that template 1 of Annex I of Commission Implementing Regulation (EU) 2016/347 already specifies that the date and time of creation of a section of the insider list corresponds to the date and time when the inside information was identified. ESMA remains of the view that the existing approach is correct and does not propose revising the regulatory framework in this respect.

409. In terms of timing to fulfil the obligation to draw up and maintain insider lists, ESMA understands that there should be no difference between the issuer and its external service providers and agents as all of them should draw up and update their respective insider lists ‘promptly’: the only difference between them should be a practical one, since the obligation of the persons acting on behalf or on account of the issuer (and in due course, of the persons performing tasks for the issuer) should be triggered, at the latest, by the issuer’s notification about the qualification of a piece of information as inside information. ESMA also understands that such notification should be made using a durable medium.

## 8. Article 19 of MAR – Managers’ transactions

### **Mandate from the Commission**

#### Advice on the mandatory elements of the report

Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply.

#### Advice on non-mandatory elements of the report

#### Appropriateness of certain aspects of the requirement to notify **managers’ transactions**

Regarding the above point, the Commission seeks ESMA’s input on the following two aspects of that requirement:

- i. level of thresholds

Currently the threshold that triggers the notification obligation is set to EUR 5 000, with the possibility for NCAs to raise it to EUR 20 000. The Commission would welcome ESMA's analysis on whether these thresholds are appropriate to ensure a high level of market transparency and integrity without creating a disproportionate compliance burden for managers and issuers.

- ii. transactions to be notified once the threshold is reached

Under Article 19, after the relevant threshold has been reached, managers and issuers have to notify and disclose all subsequent transactions, regardless of the size of the individual transactions. The Commission seeks ESMA's advice and assessment on whether this reporting methodology is most appropriate to capture relevant transaction data and whether it strikes the right balance between a high level market transparency and a proportionate compliance burden.

## 8.1. Legal framework

410. Article 19 of MAR provides for preventive measures against market abuse and, more specifically, insider dealing, concerning persons discharging managerial responsibilities (PDMRs) and persons closely associated with them<sup>51</sup>. Such measures range from notification of transactions carried out on financial instruments of the relevant issuer to the prohibition to conduct transactions on such instruments in certain defined periods.

411. In particular, Article 19(8) of MAR provides that PDMRs have to notify the issuer and the NCA when in a calendar year they reach the threshold of € 5,000, to be calculated by adding the value of the transactions conducted, without netting them. The notifications concern, as regards issuers, transactions conducted by PDMRs or persons closely associated with them on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto, and, as regards EAMPs, transactions conducted by PDMRs or persons closely

---

<sup>51</sup> As defined in Article 3, first paragraph, points (25) and (26) of MAR. Namely, 'person discharging managerial responsibilities' means a person within an issuer, an emission allowance market participant or another entity referred to in Article 19(10), who is: (a) a member of the administrative, management or supervisory body of that entity; or (b) a senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity; (26) 'person closely associated' means: (a) a spouse, or a partner considered to be equivalent to a spouse in accordance with national law; (b) a dependent child, in accordance with national law; (c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or (d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c), or which is directly or indirectly controlled by such a person, or which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person;

associated with them on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto.

412. In addition to the € 5,000 threshold, Article 19(9) of MAR provides that NCAs may decide to increase the threshold to € 20,000. In such a case, the NCA has to inform ESMA of its decision and the related justification, with specific reference to market conditions to adopt the higher threshold<sup>52</sup>. Five NCAs availed themselves of the increased threshold, namely the Danish Finanstilsynet, the French Autorité des Marchés Financiers, the Italian Commissione Nazionale per le Società e la Borsa, the Spanish Comisión Nacional del Mercado de Valores and the German BaFin. Those NCAs indicated that, on the basis of the relevant markets they supervise, increasing the threshold to € 20,000 Euro would strike the right balance between transparency and administrative burdens for PDMRs<sup>53</sup>.
413. Article 19(1a)(a) of MAR sets a different threshold for the notification of managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets. In particular, no notification obligation applies where the financial instrument concerned by the relevant transaction is a unit or share in a collective investment undertaking in which the exposure to the issuer's shares or debt instruments does not exceed 20% of the assets held by the collective investment undertaking.
414. Article 19(1a)(b) provides that the notification obligation does not apply to transactions concerning financial instruments which have exposure to a portfolio of assets in which the exposure to the issuer's shares or debt instruments does not exceed 20% of the portfolio's assets.
415. Paragraph 19(1a) was inserted by Regulation (EU) 2016/1011 concerning benchmarks, which became applicable on 1 January 2018. Recital 72 of the same Regulation explains that there are a variety of financial instruments linked to shares and debt instruments of a given issuer (which are relevant for the purposes of the PDMRs' and closely associated persons' notifications). Such financial instruments include units in collective investment undertakings, structured products or financial instruments embedding a derivative that provides exposure to the performance of shares or debt instruments issued by an issuer. The identified "de minimis" threshold allows to identify those transactions which, by providing an exposure of 20 % or less to the issuer's shares or debt instruments, are considered as not relevant.
416. In addition to the notification obligations, which are further specified in paragraphs 2, 3, 5, 6, 7, 10 of Article 19 of MAR, the latter contains also prohibitions

---

<sup>52</sup> See the document List of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons, 13 February 2019, ESMA70-145-1020, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-145-1020\\_-\\_list\\_of\\_thresholds\\_increased\\_pursuant\\_to\\_mar\\_article\\_199.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-1020_-_list_of_thresholds_increased_pursuant_to_mar_article_199.pdf).

<sup>53</sup> The reasons provided by the NCAs are available in the document List of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons.

on trading. In particular, Article 19(11) of MAR provides that a PDMR shall not conduct transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement<sup>54</sup> of an interim financial report or a year-end report which the issuer is obliged to make public according to: (a) the rules of the trading venue where the issuer's shares are admitted to trading; or (b) national law. Article 30(1) of MAR sets forth the requirement for Member States to impose administrative sanctions for violations of the obligation not to carry out transactions in the closed period.

417. Article 19(12) of MAR provides that an issuer may allow a PDMR to trade on its own account or for the account of a third party during a closed period either: (a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or (b) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

## 8.2. Feedback to the Consultation

### 8.2.1. Appropriateness of thresholds and transactions to be notified once the threshold is reached

#### 8.2.1.1. Initial threshold and notification of subsequent transactions

418. The Commission requested ESMA to: (i) assess if the current threshold for the notification obligation, of € 5,000, is adequate, or whether it creates a disproportionate burden for managers and issuers, and (ii) provide advice on whether the fact that, once the threshold is reached, each subsequent transaction has to be notified to the relevant NCA strikes the right balance between a high level market transparency and a proportionate compliance burden. In light of the above, the CP requested market participants if the minimum reporting threshold had to be increased, or if other criteria to base the reporting threshold should be identified, whether NCAs should keep the option of a higher threshold and whether the framework concerning the subsequent notifications should be changed.

---

<sup>54</sup> In its Q&As on MAR, ESMA provided clarifications on the meaning of «announcement» of the interim or year-end financial results, for which ESMA clarified that it is (i) the public statement whereby the issuer announces the information included in an interim or a year-end financial report that the issuer is obliged to make public, and (ii) for the year-end financial report, the public statement whereby the issuer announces, in advance to the publication of the final year-end report, the preliminary financial results agreed by the management body of the issuer and that will be included in that report. However, this applies only if *“the disclosed preliminary financial results contain all the key information relating to the financial figures expected to be included in the year-end report. In the event the information announced in such way changes after its publication, this will not trigger another closed period but should be addressed in accordance with Article 17 of MAR”*. See Q7.2 and A7.2, in Questions and Answers on the Market Abuse Regulation (MAR), ESMA70-145-111, Version 14, Last updated on 29 March 2019, page 20, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

419. Most respondents considered that the current threshold of € 5,000 is too low and is at the origin of the disclosure of not meaningful transactions. Many among them are of the opinion that € 20,000 would constitute an acceptable compromise between information to the public and reporting transactions of a certain relevance.
420. Majority of respondents prefers a harmonized notification threshold across Europe, as it would facilitate issuers active in more than one Member State. Some others believe that the option for NCAs to keep a higher threshold should be maintained as it would cater for national markets' features.
421. With reference to the consultation on alternative criteria to set the notification threshold, a minority of respondents did not suggest any. Others proposed the following ones: (i) tranches schemes, with notifications performed each time a hard threshold is reached (in other words, the current criterion of the threshold for the first notification in a given year would be applied also to the subsequent notifications); (ii) market capitalisation and the type of trading venue where the financial instruments are traded could be used as parameters leading to different notification thresholds. Some considered that, with a uniform EU definition of small medium enterprises, specific thresholds for the notifications applicable to these companies would be appropriate.
422. As regards alternative criteria on which the subsequent notifications could be based, several respondents did not identify any of them, while others proposed the following criteria: (i) notifying only dealings which are above a certain threshold (i.e. without summing the amount of dealings that are below such threshold); (ii) establishing a mechanism based on 'resetting the counter' each time the threshold is exceeded (i.e. after each disclosed transaction), in contrast to 'resetting the counter' once a year. Among the responses, it was also suggested to substitute the transaction notification system with a new disclosure method that would provide updated data on the stake that PDMRs have within the issuer.
423. In addition to the specific points on the thresholds, several respondents expressed their views on aspects of Article 19 of MAR which were not specifically brought in consultation. Among them, respondents provided indications on possible amendments to the scope of the transactions subject to the notification obligations and to the prohibition to trade in the closed period. Respondents indicated that transactions which do not imply an active investment decision – such as donations or inheritances received and automatic conversion of financial instruments – should not be subject to the notification obligations. Few respondents proposed to carry out the notification obligations on an aggregated basis, at specified intervals of time, especially for certain transactions which also do not require an active investment decision.
424. Clarifications on pragmatic aspects of the notifications were also requested, as, for instance, the moment in which share issues or stock options have to be notified.
425. General comments on the need to simplify the discipline on managers' transactions were also submitted. Among other things, certain respondents observed

that some NCAs require additional information with respect to that requested under the Commission Delegated Regulation (EU) No 2016/523, therefore further harmonisation is needed, while others noted that the inclusion of closely associated persons in the notification obligations is too burdensome for the benefits it provides to investors, and also the obligation for issuers to keep lists of closely associated persons proves burdensome as regards the updates to the list and data protection issues.

#### **8.2.1.2. Level of the thresholds set out in Article 19(1a)(a) and (b) of MAR**

426. As regards the threshold of Article 19(1a)(a) and (b), based on the mandate by the Commission, the CP requested market participants to provide advice on the level of such thresholds, with a view to assessing whether that level is appropriate or should be adjusted.

427. The respondents considered it appropriate. However, many among them noted that a similar 20% threshold should be also added for the closed period (Article 19(11)). In other words, they request that if the conditions of Article 19(1a) are met the provision of closed period should not apply. For instance, if a PDMR has invested in a fund in which exposure to issuer's shares or debt instruments does not exceed 20%, the closed period should not apply.

#### **8.2.2. Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11)**

428. The Commission's mandate, in line with Article 38 of MAR, requested ESMA to assess the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11), with a view to identifying whether there are any further circumstances under which the prohibition should apply.

429. The CP requested market participants to highlight elements of Article 19(11) of MAR, if any, which could be amended, as well as alternatives to the closed period.

430. Approximately one third of the respondents does not consider that Article 19(11) of MAR should be amended.

431. The remaining two thirds proposed number of amendments, including:

- As mentioned in the previous sub-section, the exclusion from the closed period of transactions executed under a discretionary asset management mandate. In this case, market respondents consider that the PDMR would have no possibility to influence the asset manager and to make any autonomous investment decision;
- For the case of employees' savings schemes, eliminate the authorisation by the issuer;

- The exclusion from the closed period of dealings by a PDMR in conjunction with certain corporate events in which a PDMR is not treated differently than any other shareholder, for example when (i) subscribing (or undertaking to subscribe) for the PDMR's pro rata share in a rights issue or (ii) accepting (or undertaking to accept) a public takeover offer;
- The exclusion from the closed period of the trading in company securities by an independent third party on behalf of a PDMR, such as on the basis of a discretionary trading mandate entered into before the closed period;
- Repealing Article 19(11), since PDMRs who are aware of inside information are already included in the insider list. Such inclusions allow NCAs to monitor any insider dealing conduct by PDMRs;
- Requesting that the possibility to trade during a closed period, provided by Article 19(12) of MAR, is granted by the NCAs instead of the issuer, to guarantee a consistent application of such exemptions.

### **8.2.3. Announcement of financial reports which the issuer is obliged to make public**

432. The CP requested market participants to indicate if the current framework to identify the closed period is working well or if clarifications are sought. Namely, the relevant 30 calendar days are calculated from the 'announcement' of the interim or year-end financial results which the issuer is obliged to make public according to rules of the trading venue or national law. In this respect, ESMA published a Q&A to provide some clarity on the notion of announcement<sup>55</sup>.

433. Little less than half respondents consider that the current framework for the identification of the closed period is sufficiently clear in its practical application, especially following ESMA's clarification provided in the Q&As.

434. On the contrary, majority of respondents believe that clarification on the closed period framework are needed with reference to diverging approaches and market practices across EU. For instance, the publication of reports concerning the first and third quarters is compulsory only on the basis of rules of certain trading venues, thereby creating a discrepancy. Also, another point on which clarifications were sought is whether preliminary financial results or estimates on the results are to be considered as interim financial reports.

---

<sup>55</sup> See Question and Answer 7.2, available at this link [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

#### **8.2.4. Persons required to comply with the closed period**

435. The requirement not to carry out transactions in the closed period applies only to PDMRs, that are also subject to administrative (and potentially to criminal) sanctions and measures for the breach of Article 19(11). The CP requested market participants to provide their views on extending the application of the closed period to issuers and to persons closely associated with PDMRs. Namely, the issuer is by definition at all times aware of the inside information, and would therefore be in a position which, from a substantial standpoint, is at least equivalent to the PDMRs'. Moreover, notwithstanding the reference to 'indirect' transactions, Article 19(11) does not cover transactions carried out by the closely associated person, taking advantage of inside information gathered from the PDMR (i.e. those cases in which the PDMR is not conducting the transactions indirectly through a closely associated person).
436. Almost all respondents did not support the extension of the requirement of Article 19(11) of MAR to issuers and persons closely associated with PDMRs, since:
- The current drafting of Article 19 of MAR already creates preventive measures for insider dealing conducts, as it captures transactions conducted by PDMRs acting on their own account and on account of a third party. The provision should also be coupled with Article 8(4)(a) of MAR for trading resulting from PDMRs' recommendations to closely associated persons, and with Article 14(c), prohibiting the unlawful disclosure of inside information;
  - The extension would suppose a disproportionate burden for issuers and PDMRs and could be a source of financial distress and volatility associated to a potential more limited number of issuing windows within a year, or concentration of all issuers in a narrow market time-frame.
437. Only one respondent supported the extension to both issuers and closely associated persons, whereas two respondents recognised a desirability of extending the requirement to closely associated persons.

#### **8.2.5. Exemptions to the application of the closed period requirement**

438. The CP requested market participants to indicate if further scenarios, currently not explicitly covered by the criteria under Article 19(12)(b), should be added to the exemptions. ESMA noted that there is a limited set of circumstances in which transactions may be carried out in the closed period, which mainly depend on "external" factors such as the presence of exceptional circumstances or the characteristics of the transactions. ESMA also requested market participants if the immediate sale of financial instruments other than shares should be included in the exemption.

439. With reference to the second point, majority of respondents supported the proposal to extend the 'immediate sale' provided by Article 19(12)(a) of MAR to financial instruments other than shares.
440. With reference to further possible criteria resulting in further cases of exemptions, most participants identified interpretation issues regarding Article 9 of the Commission Delegated Regulation 2016/522 that should be solved before assessing whether further criteria should be considered.
441. For instance, some respondents mentioned that it should be clarified that trading taking place in the closed period means that the decision to trade is made within the closed period. Article 9(3) of MAR supports this reading as it refers to obligations resulting from order placed or agreement concluded before the person concerned possessed inside information.
442. Several respondents requested the amendment of the exemption for employees' schemes, to include all types of transactions and instruments other than shares and to cover also the case of directors receiving or reinvesting their consideration in shares of the issuer, or the instance of directors reinvesting the dividends received (the latter was requested since Article 19(12) refers to employees' share or savings schemes. Respondents requested to consider that the recipients and the value of employees' schemes cannot be univocally determined when the plan is approved.
443. Other proposals for the exemption concerned transactions in which financial instruments are transferred between accounts owned by a PDMR, and cases in which the prohibition to conduct transactions in the closed period would lead to a loss of rights such as inheritance, receipt of gift or subscribers' rights.
444. Finally, few participants proposed extending the exemption to the cases of persons forced to sell financial instruments in order to be able to pay required taxes.
445. Also, clarifications on the financial instruments in scope was requested. Namely, certain NCAs consider that Article 19(11) applies to shares or debt instruments traded or admitted to trading and derivatives or other financial instruments relating thereto. Other NCAs read Article 19(11) as applicable to any financial instruments issued by an issuer, where the latter has requested or approved the trading of any (i.e. not all) of its financial instruments.

## **8.3. ESMA's assessment and recommendation**

### **8.3.1. Appropriateness of thresholds and transactions to be notified once the threshold is reached**

#### **8.3.1.1. Initial threshold and notification of subsequent transactions**

446. As indicated above, most respondents to the Consultation considered that the current threshold of € 5,000 is too low and results in not meaningful transactions being disclosed. Many among them are of the opinion that a threshold of € 20,000 would constitute an acceptable compromise between information to the public and reporting transactions of a certain relevance.
447. At the same time, the majority of respondents prefer a harmonized notification threshold across Europe, as it would facilitate issuers active in more than one Member State.
448. ESMA has considered the replies received to the CP and compared them with the supervisory experience of NCAs. In particular, most NCAs noted that, while the € 5,000 threshold is perceived as not meaningful by market participants, it allows to capture a high number of transactions by PDMRs and closely associated persons. The threshold of € 20,000, which certain NCAs already apply as an option, does not suit a number of Member States, for which it is too high and would result in few notifications which would not provide investors a fair picture of PDMRs' transactions into issuers' financial instruments.
449. ESMA appreciates that keeping a low threshold results in an overall more demanding notification process, however, on balance, the notifications threshold should also be able to mirror transactions occurring in each Member State, and in this respect NCAs of the Member States are best placed to assess whether the current threshold is meaningful.
450. In light of the above, ESMA recommends the Commission to keep the current notification threshold of € 5,000. ESMA is of the opinion that the optional € 20,000 threshold should be maintained to differentiate those markets for which the previous one is less meaningful.
451. As regards the subsequent notifications, as indicated in the previous section, some alternative criteria were proposed, including subordinating the subsequent notification to reaching a hard threshold or decoupling the calculation of the transactions' value from the calendar year. ESMA has considered such criteria and analysed the consequences of their application for PDMRs. The criterion of fixing single hard thresholds for the subsequent notification has the merit of reducing the overall number of notifications to be performed. At the same time, ESMA considers that it results in a more burdensome method for PDMRs and issuers, since controls would be

needed to make sure that each time that the threshold is exceeded the notification is carried out.

452. In light of the above, ESMA believes that the current thresholds are appropriate and also the reporting methodology for subsequent transactions strikes the right balance between a high-level market transparency and a proportionate compliance burden. ESMA does not therefore recommend the Commission to amend Article 19(8) and (9) of MAR.

453. As indicated in the section on feedback to the consultation, ESMA received some requests for clarifications on pragmatic aspects of the notifications, on which ESMA intends to issue guidance to the public.

454. Moreover, several respondents had expressed views on aspects of Article 19 of MAR which were not specifically brought in consultation, including the request to simplify the discipline concerning closely associated persons. ESMA considered whether to recommend amendments the regime concerning closely associated persons. On balance, notwithstanding the burden for issuers and PDMRs, ESMA considers that both the application of notification obligations to the closely associated persons and the obligation for issuers to keep lists of closely associated persons provide relevant information to NCAs, which justifies leaving such requirements in place.

#### **8.3.1.2. Level of the thresholds set out in Article 19(1a)(a) and (b) of MAR**

455. As regards the threshold of Article 19(1a)(a) and (b), both NCAs and respondents to the consultation consider that the threshold is appropriate.

456. In the CP, ESMA had already expressed initial considerations by NCAs on the fact that the 20% threshold is functioning well, no indications from market participants were received that it is not adequate. In addition, ESMA had observed that as regards Article 19(1a)(a), the 20% threshold is consistent with the general rules concerning diversification of investments applicable to UCITS (see Articles 52 to 56 of UCITSD<sup>56</sup>).

457. The feedback to the consultation has confirmed that the threshold of Article 19(1a)(a) and (b) is appropriate. As indicated in the section on the feedback to consultation (section 8.2.1.2), respondents noted that if the conditions of Article 19(1a) are met, the provision of closed period contained in Article 19(11) should not apply. For instance, the closed period trading prohibition should not apply if a PDMM has invested in a fund in which the exposure to issuer's shares or debt instruments does not exceed 20%. In this respect, ESMA notes that the prohibition from trading before announcements of financial statements contained in Article 19(11) of MAR has been established to avoid that PDMRs trade in the sensitive period prior to the

---

<sup>56</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast).

announcement of financial reports. On the contrary, Article 19(1a) captures transactions for which the financial instruments of the issuer have a certain minimum weight, to avoid that insignificant transactions are reported to the regulators and to the public. Considering the different function of the two provisions, ESMA does not consider that PDMRs should be allowed to trade, during the closed periods, in financial instruments which have an exposure to financial instruments of the issuer, even if this exposure might be very low, i.e. not more than 20%). The amendment proposed by some stakeholders would also create a discrepancy with respect to shares, debt instruments and other financial instruments mentioned in Article 19(1) of MAR.

458. With reference to the thresholds of Article 19(1a)(a) and (b) of MAR, considering the feedback to the consultation and the arguments already included in the CP, ESMA is not recommending the Commission, for the purposes of the report of Article 38 of MAR, to amend it.

### **8.3.2. Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11)**

459. Article 19(11) constitutes an advanced measure to protect against potential insider dealing conducts in the very sensitive thirty days preceding the publication of certain financial reports. ESMA has considered this provision trying to balance the benefits brought by the mentioned advanced protection with the limitations that the provision causes to PDMRs, and also taking into account that Articles 14 and 15 of MAR, respectively on insider trading and market manipulation, apply in any case.

460. As indicated in the section on feedback statement, the prohibition to trade may apply for a relevant part of a year, depending on national law and trading venues rules. Article 19(12) of MAR already provides for certain exemptions to the prohibition to trade, linked to circumstances which may require the immediate disposal of shares or to employees' schemes and transactions which do not imply a change in the beneficial ownership of the shares.

461. The Commission's mandate, in line with Article 38 of MAR, requested ESMA to assess the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11), with a view to identifying whether there are any further circumstances under which the prohibition should apply.

462. Based on the consultation and discussions occurred with NCAs concerning the application of Article 19(11), ESMA deems that no further circumstances need to be included in the prohibition. On the contrary, ESMA considers as relevant the contribution by market participants concerning further cases of possibly exempted conducts from the closed period.

463. Article 19(12) of MAR provides that employee shares or saving schemes, qualifications or entitlement of shares, transactions where the beneficial interest in the relevant security does not change may be exempted by the issuer in light of the

characteristics of the trading. Article 9 of the Commission Delegated Regulation No 2016/522 describes such characteristics, which include the lack of discretionary decision by the manager or the use of inside information to influence the award of financial instruments or amendments of the original participation conditions to such schemes. For the transfers without change of beneficial owner, the transfer between accounts of the PDMR does not have to result in changes to the price of the financial instrument.

464. Certain market participants requested that for employees' shares or savings schemes the authorisation by the issuer should be eliminated. ESMA believes that the explanations from the PDMR to the issuer and the evaluation by the latter are important steps and should therefore not be amended. Namely, the authorisation by the issuer acts as a safeguard in further assessing that the conditions laid out in the Delegated Regulation No 2016/522 are satisfied. ESMA deems that such control should not be assigned only to the PDMR, since he or she might have an interest in carrying out the relevant transaction, whereas the issuer should be a guarantee of a more impartial assessment.

465. As indicated above, several respondents requested to review the exemption for employees' schemes.

- First, Article 19(12) letter (b) of MAR refers to “the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change”. The wording does not clearly include cases in which the employee schemes or the entitlement covers instruments other than shares. In addition, it does not cover the case of directors receiving or reinvesting their consideration in shares of the issuer, or the instance of directors reinvesting the dividends received. ESMA does not see reasons for which the exemption of letter (b) of Article 19(12) should not be extended to cover financial instruments other than shares. Also, ESMA considers that where an arrangement is entered into outside a closed period concerning shares or dividends reinvestments, and provided that the arrangement is irrevocable and may not be amended, the PDMR may continue to acquire shares in the closed period, without amending or cancelling the participation to the arrangement.
- Furthermore, transactions executed under a discretionary asset management mandate are not excluded from the closed period trading prohibition. As indicated above, requests to include these transactions among the exempted ones were put forward by respondents to the consultation.

In this respect, Article 19(7), third subparagraph, of MAR stipulates that the notification obligations do not apply to transactions executed by managers of a collective investment undertaking in which the PDMR has invested, where the manager of the collective investment undertaking operates with full discretion,

which excludes the manager receiving any instructions or suggestions on portfolio composition directly or indirectly from investors in that collective investment undertaking. Also considering such provision, ESMA believes that the same rationale may apply to exempt from the closed period discretionary asset management mandates, provided that certain conditions confirming the full discretion of the asset manager apply. Namely, ESMA deems that, in order for such transactions to be exempted: (i) the mandate to the asset manager has to be entered into outside of the closed period and is not revoked during the closed period and (ii) the notifications by the PDMR in accordance to article 19(1) of MAR specify that the transactions were executed by an independent third party in the context of a discretionary asset management mandate.

- At the same time, there are certain further transactions which are not clearly included in the exemption, which in ESMA's view could be added. Reference is made to transactions resulting from corporate actions which grant PDMRs an equivalent treatment to that of other shareholders, and to transactions where no investment decision is taken by the PDMR.
  - a. As regards the first category, examples may include the adhesion to a takeover bid or to a share capital increase, or subscription of shares arising from stock splits, mergers, rights issues, spin-offs. ESMA stands ready to elaborate further and assist the Commission to identify further cases of transactions which may be exempted.

Where the abovementioned corporate actions have been approved by the issuer's relevant board and authorised by the shareholders, transactions occurring in the close period should be allowed, provided that there is no inside information relating to the corporate action to be published within the relevant closed period. The rationale for exempting such transactions is that the corporate actions affect the issuer's capital structure and it would be unfair to prohibit PDMRs' participation. Besides, as regards SME issuers, where PDMRs are significant shareholders, such participation is decisive for the future of the company.

ESMA expects that, since the PDMR needs to obtain the authorisation from the issuer pursuant to Article 19(12) of MAR, such authorisation would not be denied on the basis of a conflict of interests between the issuer and the PDMR.

- b. The second type of transactions includes the acceptance of inheritances. In addition, the acceptance of gifts or donations, could also be eligible for an exemption in the closed period.

- c. Finally, the exemption should cover the exercise of options, futures or other derivatives when the main terms of the transaction (including price and volume) were agreed outside the close period.

466. In light of the foregoing, ESMA recommends the Commission to:

- leave Article 19(11) unchanged, and
- amend Article 19(12) in order to:
  - a. Broaden the text of Article 19(12)(b), by including among the exempted employees' schemes those concerning financial instruments other than shares and also by covering the qualification or entitlement of instruments other than shares;
  - b. Allow the acquisition of financial instruments of the issuer based on shares or dividends reinvestments arrangements, provided that such arrangements were entered into outside of a closed period, are irrevocable and may not be amended, and the PDMR may not amend or cancel his or her participation to such arrangements;
  - c. Exempt from the closed period trading prohibition the discretionary asset management mandates, provided that: (i) the mandate to the asset manager was entered into outside of the closed period and is not revoked during the closed period, and (ii) any notifications by the PDMR in accordance to article 19(1) of MAR specify that the transactions were executed by an independent third party in the context of a discretionary asset management mandate;
  - d. Include among the exemptions transactions resulting from corporate actions approved by the relevant body within the issuer and the shareholders, and provided that PDMRs are not the addressees of an advantageous treatment if compared to other shareholders and also there is no inside information concerning the relevant corporate action during the closed period. ESMA stands ready to further elaborate the list of potential transactions which may be exempted.
  - e. Include among the exempted transactions the acceptance of inheritances and the acceptance of gifts or donations.
  - f. Include among the exempted transactions the exercise of options, futures or other derivatives when the main terms of the transaction (including price and volume) were agreed outside the closed period.

467. ESMA stands ready to assist the Commission also as regards the amendments which may be needed to the Level 2 regulations. Finally, ESMA is of the opinion that

the authorisation of the transactions by the issuer provided for under Article 19(12) should not be lifted.

### **8.3.3. Announcement of financial reports which the issuer is obliged to make public**

468. As indicated above, clarifications on the closed period were requested by the respondents to the consultation, and further convergence is considered of use across European markets in order to have an overall comparable duration of closed periods. At the same time, few respondents highlighted problems on the calculation of the closed period. In other words, market participants are able to easily identify the start and end of closed periods, even if some argued for a more consistent duration of such period and a definition at European level.

469. In light of the above, ESMA is not recommending amendments on the criteria to identify the closed periods.

### **8.3.4. Persons required to comply with the closed period**

470. ESMA has carefully considered the replies received from market participants, together with the target and function of the prohibition to trade during closed periods.

471. As indicated in the feedback to the CP, most respondents did not support the extension of the requirement of Article 19(11) of MAR to issuers and persons closely associated with PDMRs. ESMA notes that the lack of support is mainly motivated by the fact that Article 19(11) provides a further layer of protection of market integrity, which builds up on the protection awarded by Articles 14 and 15 of MAR. In light of this, such advanced protective measure, which entails some limitations for its addressees, should be limited to those categories that may more easily commit market abuse and therefore harm market integrity. Also, the consequences of applying closed period to a new category of addressees has to be evaluated against the impact of the prohibition to trade and should be recommended only where the benefit of the application of the closed period is clear.

472. With reference to the case of issuers, ESMA deems that they constitute a category that, by definition, has at all time proximity with the inside information. Therefore, it would be a relevant category to which the closed period obligation could be extended. However, ESMA also considers the effect that the application of the closed period may have on issuers' refinancing ability. On balance, the benefit of the application of the closed period to issuers, considering that Articles 14 and 15 apply to legal persons, does not justify the risks linked to the prohibition to carry out transactions – potentially up to four months a year.

473. With reference to the case of closely associated persons, ESMA has concluded that the extension of the closed period is too burdensome and carries a limited advantage. Namely, while Articles 14 and 15 of MAR apply to closely associated

persons, it should also be considered that Article 19(11) of MAR applies to transactions conducted by PDMRs on their own account or for the account of a third party, directly or indirectly. As indicated in the CP, Article 19(11) does not cover transactions carried out by the closely associated person, taking advantage of inside information gathered from the PDMR (i.e. those cases in which the PDMR is not conducting the transactions indirectly through a closely associated person). However, in such cases, 14(c) of MAR should act as a relevant disincentive for the unlawful disclosure by the PDMR of inside information, and at the same time the closely associated person could be responsible of insider dealing.

474. Furthermore, the extension of the closed period to closely associated persons would place burdens on the PDMRs, to make sure that they correctly identify the closely associated persons at all times, and on the issuers, that would have to provide communications on the closed period start and end dates to them. In light of the above, ESMA is therefore not minded recommending the Commission to extend the closed period to issuers and closely associated persons.

### **8.3.5. Exemptions to the application of the closed period requirement**

475. The CP requested market participants to indicate if further scenarios, currently not explicitly covered by the criteria under Article 19(12)(b), should be added to the exemptions. ESMA noted that there is a limited set of circumstances in which transactions may be carried out in the closed period, which mainly depend on “external” factors such as the presence of exceptional circumstances or the characteristics of the transactions. ESMA also requested market participants if the immediate sale of financial instruments other than shares should be included in the exemption.

476. With reference to the second point, majority of respondents supported the proposal to extend the ‘immediate sale’ provided by Article 19(12)(a) of MAR to financial instruments other than shares. ESMA had already supported such option in its CP, and thereby recommends the Commission to include in the exemption financial instruments other than shares.

477. With reference to the further possible cases of exemption, proposal to the Commission to extend such cases are included in Section 8.3.2 above.

478. As regards the requested clarifications, ESMA stands ready to issue guidance on relevant aspects of Article 19(11), including the financial instruments in scope of Article 19(11) and whether the decision to trade or the actual transaction has to take place in the closed period.

## 9. MAR and collective investment undertakings (CIUs)

### 9.1. Legal framework

#### 9.1.1. Introduction: on the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers

479. In the CP, ESMA noted that, as financial instruments according to MiFID II (Section C of Annex I), CIUs are within the scope of MAR in accordance with Article 2 of MAR<sup>57</sup> and also that a CIU, even without legal personality, can be considered as a MAR ‘issuer’<sup>58</sup> under the current legislative framework.

480. ESMA recognised in the CP not only that some of the MAR obligations for issuers did not seem intended to cover CIUs, but also the existence of elements making the application of MAR to CIUs more difficult vis-à-vis other issuers. For instance, the specificities of CIUs in terms of investment strategies and the fact that many of these CIUs are traded at their net asset value (both for CIUs with and without personality) can be mentioned in this regard.

#### 9.1.2. Application of the PDMR obligations in the case of CIUs

##### **Mandate from the Commission:**

The definition of PDMR might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds without a legal personality. The same logic applies to investment funds with a legal personality managed externally. In light of these considerations, the Commission would like ESMA to assess whether there is a need for the managers of management companies to be covered by the requirement to disclose their transactions and how to best adapt the scope of that requirement to ensure a level regulatory playing field between different management structures of investment firms (external vs internal management) while preserving the effective attainment of the policy objective pursued by Article 19.

---

<sup>57</sup> Article 2 MAR: This Regulation applies to the following:

(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

(b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;

(c) financial instruments traded on an OTF;

(d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

<sup>58</sup> Article 3(1)(21) of MAR.

481. Article 19 of MAR introduces a set of requirements with respect to PDMRs and closely associated persons, the most important<sup>59</sup> being:

- An obligation of PDMRs and closely associated persons to notify all personal transactions related to shares or debt instruments of the issuer above certain thresholds<sup>60</sup> to the issuer and the CA;
- An obligation of the issuer to ensure that the notifications of transactions are made public promptly;
- A ban of personal transactions related to shares or debt instruments of the issuer 30 days before the announcement of an interim financial report or a year-end report that the issuer has to make public; and
- The capacity of the issuer to waive the prohibition of personal transactions in pre-determined cases.

### **9.1.3. Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

482. Article 17 of MAR provides that issuers who have requested or approved the admission to trading of their financial instruments on a trading venue shall make public inside information. The issuer may only delay such disclosure where the conditions set out in Articles 17(4) or (5) of MAR are met.

483. According to Article 3(1)(21) of MAR, an issuer means a legal entity governed by private or public law, which issues or proposes to issue financial instruments, the issuer being, in the case of depository receipts representing financial instruments, the issuer of the financial instruments represented.

484. ESMA understands that the disclosure obligations laid down in Article 17 of MAR apply to all types of issuers as defined under Article 3(1)(21) of MAR for which they, or a person acting on their behalf, have requested admission to trading or approved trading of their financial instruments on a regulated market, an MTF or an OTF.

485. In that context, ESMA clarified in a Q&A that under the current legislative framework, the disclosure obligation of Article 17 of MAR also applies to financial instruments admitted to trading or traded on a trading venue issued by a CIU without

---

<sup>59</sup> The other obligations under Article 19 are:

- a. Obligation of the issuer to notify PDMRs about their obligations under Article 19 of MAR;
- b. Obligation of PDMRs to notify their closely associated persons about their obligations under Article 19 of MAR;
- c. Obligation of issuers to elaborate a list of PDMRs and closely associated persons;

<sup>60</sup> 5,000 euros. In France, Denmark and Italy the threshold is 20,000 euros.

legal personality<sup>61</sup>, which is considered for these purposes as the ‘issuer’. ESMA also clarified that the management company of the CIU could be held responsible for a potential infringement of the CIU’s obligation to disclose inside information under Article 17 of MAR. ESMA noted in the CP that such clarification does not seem necessary with respect to CIUs with legal personality admitted to trading or traded on a trading venue, which are equally within the scope of MAR and subject to the disclosure obligations of Article 17.

486. ESMA also specified the cases where inside information may arise for CIUs admitted to trading or traded on a trading venue<sup>62</sup>.

#### **9.1.4. Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

487. Following the amendment introduced by Regulation (EU) 2019/2115 as regards the promotion of the use of SME growth markets, Article 18(1) of MAR establishes the obligation of the issuer and any person acting on its behalf or on its account to draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies.

## **9.2. Feedback to the consultation**

### **9.2.1. On the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers**

488. As a preliminary point, ESMA requested the views of market participants on whether there was a genuine need for MAR to explicitly include or exclude these entities, not only with respect to PDMR obligations, as requested in the Commission’s mandate, but also addressing other interlinkages between CIUs (and their management companies ) and MAR.

489. The feedback received by ESMA was limited.

490. Most respondents were against extending the general MAR regime to CIUs admitted to trading or trading on a trading venue considering that for rarely observed instances of market abuse, management companies<sup>63</sup>, CIUs (and ultimately investors) would bear a severe (and costly) administrative burden. These responses highlighted the low risk of market abuse that these CIUs present: most of them trade at their NAV

---

<sup>61</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf) see Q&As 5(6)

<sup>62</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf) see Q&A 5(7)

<sup>63</sup> All the references in the text to ‘management companies’ apply to alternative investment fund managers (AIFMs) as well.

or close to their NAV (which is subject to daily disclosure and transparency of the calculation method), the market price is not determined by managerial decisions but by the price of underlying assets over which the management company does not have control.

491. Respondents also noted the independence between the management company and the CIUs managed (i.e. bad news on the management company do not necessarily result in a decrease in the value of the CIU) and warned against a risk of re-localisation outside of the EU if MAR were extended to CIUs.
492. Some of the responses considered that the UCITS Directive and AIFMD already addressed conducts such as fraud, insider offences, front-running and prevent trading strategies based on predicting market movements (market timing) in the CIUs' investment policy and establish reporting obligations to facilitate supervision. Along the same argument, two respondents noted that CIUs admitted to trading or traded on a trading venue were exempted from the Transparency Directive and that transactions in CIUs were excluded from MAR reporting requirements (Article 19(1a) and (7) of MAR).

### **9.2.2. Application of the PDMR obligations in the case of CIUs**

493. In the CP, ESMA presented a preliminary analysis of the pros and cons of the extension of PDMR obligations to the management companies of CIUs admitted to trading or traded on a trading venue. In particular, ESMA compared the PDMR obligations of MAR to the obligations on personal transactions laid down in the UCITS Directive and the AIFMD, highlighting the different goals of these pieces of legislation.
494. ESMA's preliminary conclusion was that there were grounds to extend the PDMR regime to CIUs admitted to trading or traded on a trading venue, requesting the views of market participants about the transactions that should be covered in that case.
495. The limited feedback received to this question was consistent with the answers provided to the previous question, since most responses rejected the application of the PDMR obligations to CIUs admitted to trading or traded on a trading venue and their management companies.
496. Respondents reiterated the comments already made (i.e. low risk of market abuse since managerial decisions do not alter the trading price, which is at or close to the NAV; existence of a specific regime in the UCITS Directive and AIFMD that overlap or even exceed the MAR PDMR obligations, especially taking into account national supplementing legislations; accordingly, extending MAR to CIUs would not be in line with a cost-benefit analysis).
497. One response considered that extending MAR to management companies would be contradictory with other pieces of EU regulation that incentivise the alignment of interest between unit holders/shareholders and management companies.

498. In the CP, ESMA also requested the views of market participants on the identification of the individuals that should be subject to these obligations, taking into account the comparison between the PDMR definition in Article 3(1)(25) of MAR with the identification of ‘relevant persons’ under Article 3(3) of Commission Directive 2010/43/EU<sup>64</sup>.
499. As part of the analysis, ESMA asked stakeholders whether PDMR obligations should also be extended to depositaries of CIUs and/or other entities performing tasks for the CIUs under delegation.
500. A majority of respondents were of the view that PDMR obligations should not apply to the managers of management companies of CIUs admitted to trading or traded on a trading venue and their management companies reiterating the arguments described above.
501. Moreover, according to some respondents, the concept of ‘relevant person’ could mean that other CIUs managed by the same management company could be considered ‘as closely associated persons’ and would be prevented from investing in the units/shares of the CIUs in question.
502. No stakeholders supported the proposal to extend the PDMR obligations to depositaries, but a couple of respondents agreed that, in the case of ETFs, the relevant employees of authorised participants could be covered by the PDMR obligations.
503. Finally, ESMA noted that a strict reading of Article 19(1)(a) of MAR makes it difficult to apply the PDMR obligations to CIUs issuing units and not shares and asked the views of market participants about this possible unlevel playing field.
504. The replies to the question on the possible amendment of Article 19(1)(a) of MAR to explicitly mention ‘units’ were split. Half of the responses supported ESMA’s proposal, whereas the other half, while agreeing with ESMA’s approach to this topic (whereby MAR should not create an unlevel playing field between CIUs with and without legal personality), remained of the view that PDMR obligations should not be applied to CIUs admitted to trading or traded on a trading venue.
505. One of these respondents warned against extending the scope of MAR to ‘units’ considering that it would create an unlevel playing field with CIUs not admitted to trading or trading on a trading venue and would also jeopardise the listing/trading of CIUs which might not take place due to the additional administrative burden that MAR entails.

---

<sup>64</sup> Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company

### **9.2.3. Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

506. ESMA explained in the CP that the preparatory analysis carried out for the Q&A had revealed that in some Member States it was difficult to enforce these obligations due to the lack of a legal personality of the issuer.
507. In the CP, ESMA asked stakeholders' views on the need for amending Article 17 of MAR to ensure the disclosure of inside information for CIUs without legal personality along the following lines:
508. Specifying that the obligations set out with respect to issuers also apply to CIUs without legal personality *for which a management company acting on their behalf* has requested or approved admission to trading of their financial instrument in a regulated market or an MTF in a Member State or, in the case of an instrument only traded on an MTF has approved trading of their financial instruments on an MTF; and
509. Specifying that the management company of the CIU is responsible for ensuring compliance with Article 17 of MAR even when the management company has delegated the execution of certain functions to third party entities such as asset managers.
510. ESMA was also keen to know the views of market participants about the need to consider CIUs differently in this respect and if necessary, who should be responsible for discharging the obligation to disclose information given that it is possible that not in all cases management companies receive all inside information.
511. The limited number of responses received expressed mixed views on this topic. Some respondents agreed with ESMA and saw merit in clarifying that in the case of CIUs, the management company should be responsible for disclosing inside information while few respondents believed that CIUs were already subject to stringent rules on disclosure of information under the AIFMD and the UCITS Directive.
512. For some of these respondents, any change in relation to the disclosure of information should be included in the UCITS Directive or AIFMD and not in MAR. One respondent also felt that the clarification provided by ESMA in the Q&A was sufficient and that no further clarification in the Level 1 was necessary. Another respondent reiterated the view presented in previous responses: as a matter of principle, it is not possible that inside information is generated in CIUs traded at or close to their NAV.
513. ESMA did not receive any feedback in relation to the need to consider CIUs differently or in relation to who should be responsible for discharging the obligation to disclose information where management companies do not receive all inside information.

#### **9.2.4. Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

514. In the CP, ESMA's preliminary view was that the current MAR provisions on insider lists equally apply to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved and that there is no need to further amend Article 18 of MAR in this respect.
515. ESMA asked stakeholders' views to apply specifically the obligation to elaborate insider lists to CIUs admitted to traded or traded on a trading venue.
516. Most respondents that replied to this question agreed with ESMA's preliminary assessment and were of the view that there was no need to have further clarification on how insider lists must be established for CIUs admitted to trading or traded on a trading venue.
517. Some respondents insisted in maintaining CIUs out of the scope of insider lists because of the existing provisions in the UCITS Directive and AIFMD and due to the impossibility to generate inside information for CIUs traded at or close to the NAV, in particular, open-ended CIUs.

### **9.3. ESMA's assessment and recommendation**

#### **9.3.1. Introduction: on the possible differentiation of CIUs admitted to trading or traded on a trading venue from other issuers**

518. ESMA takes note that most of the responses received indicated that the characteristics of CIUs admitted to trading or trading on a trading venue render the occurrence of market abuse unlikely, and therefore, maintaining them under the scope of MAR would not be justified comparing costs over benefits.
519. However, ESMA notes that, as regards the disclosure of inside information and the maintenance of insider lists, the costs of complying with MAR are linked to the existence of inside information. Therefore, in a context of limited instances of inside information, the costs to be borne by CIUs admitted to trading or traded on a trading venue (and ultimately, by investors) should be limited.
520. The previous argument is becoming more relevant when considering that ESMA has already identified potential cases of inside information in relation to CIUs voluntarily

admitted to trading or traded on a trading venue in its Q&A 5.7 of its Questions and Answers document on MAR<sup>65</sup>.

521. As a consequence, exempting CIUs admitted to trading or traded on a trading venue from their MAR obligations as issuers could create an objective risk for other market participants if inside information were generated, in the absence of an obligation to disclose it under EU or national law.
522. ESMA's Q&A 5.6 on MAR also clarifies that the obligation to publicly disclose inside information under Article 17 of MAR is different from any other disclosure obligations arising from the UCITS Directive and the AIFMD, as it strictly refers to cases involving 'inside information' (as defined in Article 7 of MAR) that directly concerns the issuer.
523. Along the same line, ESMA notes that the exemption in the Transparency Directive for CIUs is justified by the obligation for CIUs to issue periodical reports under the UCITS Directive and AIFMD. However, these reports cannot be considered as overlapping with or covering the same set of information as the obligation to disclose inside information under MAR.
524. As a consequence, ESMA remains of the view that CIUs admitted to trading or traded on a trading venue are issuers and, beyond the clarifications to be provided below with respect to who should discharge the disclosure obligations, there are no compelling arguments to exempt them from the scope of MAR.

### **9.3.2. Application of the PDMR obligations in the case of CIUs**

525. ESMA recognises that the reasons for which the PDMR obligations have been developed do not fit the nature and the functioning of CIUs and the role of the managers of their management companies in the case of externally managed CIUs.
526. The rationale behind the PDMR regime in shares and debt instruments of issuers, is that these transactions constitute a valuable source of information for the market in terms of price formation, prevent market abuse and facilitate NCAs' supervision.
527. ESMA agrees that in the case of CIUs admitted to trading or traded on a trading venue, managers and other relevant persons within the management companies may not have influence on the value of the CIUs. Indeed, CIUs are managed according to a predefined investment policy disclosed to the market. Furthermore, the value of CIUs admitted to trading or traded on a trading venue is linked to the NAV of the CIUs which is based on the value of its underlying assets. Therefore, the disclosure to the public of

---

<sup>65</sup> Questions and Answers on the Market Abuse Regulation, available in [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf)

PDMR transactions within the management company of the CIU does not have an impact on the price formation of the shares and units of the CIUs.

528. Regarding the risk of market abuse of personal transactions, the UCITS Directive and AIFMD already address this issue. According to Article 13(1)(a)(iii) of Directive 2010/43/EU and Article 63(1)(a)(i) of Regulation 231/2013, management companies shall establish, implement and maintain adequate arrangements to prohibit persons who are involved in activities that may give rise to a conflict of interest from entering into personal transactions, where the transaction could be based on inside information. Also, according to Article 13(2)(b) of Directive 2010/43/EU and Article 63(1) of Regulation 231/2013, management companies shall be informed of any personal transaction entered into by a relevant person.

529. Therefore, ESMA concludes that the risks created by personal transactions of PDMRs for CIUs admitted to trading or traded on a trading venue are adequately addressed by the relevant sectorial legislations.

530. Hence, ESMA believes that there is no need for the managers of management companies of CIUs admitted to trading or traded on a trading venue without legal personality (i.e. externally managed) and for those with legal personality but externally managed to be covered by the PDMR obligations.

531. ESMA notes that under the current MAR regime, self-managed CIUs admitted to trading or traded on a trading venue are subject to the entire MAR regime, including PDMR obligations. For consistency purposes and to ensure the level playing field between the different types of CIUs, ESMA considers that MAR should include a specific reference excluding self-managed CIUs from the PDMR obligations.

### **9.3.3. Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

532. As highlighted above, ESMA already issued a Q&A to clarify that, in the case of CIUs without a legal personality for which the admission to trading or the trading of its financial instruments has been requested or approved, the management company of the CIUs could be held responsible for a potential infringement of the CIU's obligation to disclose inside information under Article 17 of MAR.

533. Despite the limited feedback received, ESMA remains of the view that Article 17 of MAR should be amended to clarify that in the case of CIUs without legal personality, the management company of the CIUs should be held responsible for disclosing inside information.

534. This clarification would ensure legal certainty and convergence of application, in particular in Member States where, in the absence of a legal provision specifying that the management company is liable under MAR for the disclosure of inside information

of CIUs without legal personality admitted to trading or traded on a trading venue, Article 17 of MAR is difficult to enforce with respect to CIUs without legal personality admitted to trading or traded on a trading venue.

535. As initially stated in the CP, ESMA considers that any amendment of MAR should aim at ensuring a level playing field between the different types of CIUs, regardless the different type of CIUs concerned and whether they have legal personality or not.

536. ESMA acknowledges that the CP only consulted about the liability of management companies of CIUs without legal personality. However, amending MAR only for CIUs without legal personality would create a different treatment for CIUs with legal personality that are externally managed.

537. To prevent such different treatment, ESMA considers necessary that the management company of these externally managed CIUs with legal personality admitted to trading or traded on a trading venue should also be held responsible for disclosing inside information, where it arises. ESMA also reiterates the comments made above in relation to the costs that this clarification would entail, since compliance costs should only arise where inside information exists, but not otherwise.

538. Despite that no feedback has been provided on this specific issue, ESMA also recommends specifying in MAR that, when the management company has delegated the execution of certain functions to third party entities such as asset managers, these entities are responsible for reporting immediately to the management company any information that might be of relevance in terms of the possible existence of inside information.

#### **9.3.4. Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

539. ESMA acknowledges the feedback received from stakeholders according to which there is no need to clarify who is responsible for developing the insider list in the case of CIUs. However, ESMA sees merit in ensuring consistency between the obligation for the management company of CIUs to disclose inside information and its obligation to develop insider lists.

540. Therefore, ESMA recommends including a recital in MAR to clarify that the management company of the CIUs admitted to trading or traded on a trading venue should be responsible for drawing up and maintaining the insider list of the issuer, where necessary.

541. Such recital could also clarify that, where the management company has delegated the execution of certain functions related to a CIU admitted to trading or traded on a trading venue to third party entities (such as asset managers, depositaries,

accountants, etc...), these third party entities, as any other person acting on behalf or on the account of an issuer, should be explicitly captured by the obligation to draw up and maintain their own insider lists where inside information exists.

542. Finally, ESMA reiterates the conclusion reached above in relation to the costs that this clarification would entail, since compliance costs should only arise where a piece inside information exists, but not otherwise.

## 10. Competent Authorities, market surveillance and cooperation

### 10.1. Establishment of an EU framework for cross-market order book surveillance

#### Mandate from the Commission

Advice on mandatory elements of the report

- possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for such a framework

With respect to this point, the Commission would like ESMA to formulate its recommendations having particular regard to the transaction reporting obligation under Article 26 of Regulation (EU) No 600/2014 and how data reported to national competent authorities pursuant to that obligation can help in designing such a framework.

#### 10.1.1. Legal Framework

543. Article 38 of MAR requires the Commission to assess the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for the framework.

544. As of today, NCAs monitor order book data to detect and investigate potential cases of market abuse, including when the suspicious trading activity has taken place in another EU jurisdiction, within the regulatory framework set out in Articles 25 of MiFIR (establishing the record-keeping obligations of order book data for trading venues) and 25 of MAR (for the cooperation and exchange of data between NCAs).

545. Namely, as regards orders, Article 25(2) of MiFIR and the Commission Delegated Regulation (EU) 2017/580<sup>66</sup> (RTS 24) provide for an obligation to maintain

---

<sup>66</sup> Commission Delegated Regulation (EU) 2017/580<sup>66</sup> of 24 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the maintenance of relevant data relating to orders in financial instruments.

records of any order received by trading venues, for a period of at least five years. The records have to be maintained by each relevant trading venue and are at the disposal of the NCAs. The content of the records to be maintained by each trading venue is harmonised, in accordance with RTS 24<sup>67</sup>. Although the regulation prescribes standards and formats of the individual order details to be used when providing the relevant order data to the competent authority, it does not require the trading venues to comply with a common technical template or message when they send data to NCAs (as does Article 26(9)(a) of MiFIR with reference to transaction data).

546. NCAs may as a matter of fact opt for: (i) *ad hoc* requests to trading venues, where they need to get data on specific cases, or (ii) on the basis of the powers granted to NCAs under Article 23 of MAR or of Article 25(2) of MiFIR, request each supervised trading venue to submit their records on orders with a periodicity set by the NCA. *Ad hoc* requests may also be addressed to trading venues subject to the supervision of other NCAs, where the orders concern, *inter alia*, financial instruments admitted to trading on a regulated market, or for which a request for admission to trading on such market has been made, or which are traded on an MTF or an OTF or for which a request for admission to trading has been made on an MTF operating within the NCA's jurisdiction (on the basis of Article 22 of MAR, which identifies the competent authorities for market abuse cases).

547. As mentioned above, order data gathered by trading venues has to be provided in a consistent format, which includes identification codes of the members or participants that transmitted the orders, of the order itself, the date and time the order was transmitted, the characteristics of the order, including the type of order, the limit price if applicable, the validity period, any specific order instructions, details of any modification, cancellation, partial or full execution of the order and the agency or principal capacity. RTS 24 provides further details on the applicable data provision standards and formats.

548. ESMA clarified that, for orders that trading venues have to keep at the disposal of the NCA pursuant to Article 25(2) of MiFIR, the reference to "orders" includes those that are active, inactive, suspended, implicit and rerouted as well as order modifications, cancellations and rejections, firm and indicative quotes<sup>68</sup>.

549. In summary:

- order data maintained by different trading venues is maintained in a decentralised manner by each trading venue respectively;

---

<sup>67</sup> Commission Delegated Regulation (EU) 2017/580

<sup>68</sup> See ESMA Guidelines Transaction reporting, order record keeping and clock synchronisation under MiFID II of 10 October 2016 (ESMA/2016/1452), page 222, available at [https://www.esma.europa.eu/sites/default/files/library/2016-1452\\_guidelines\\_mifid\\_ii\\_transaction\\_reporting.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf).

- the content of the order details maintained by each trading venue is harmonised under a defined set of data fields but there is no common technical template/message for data provision; and
- NCAs can access such data upon request addressed to the relevant trading venue. The order book data is collected by means of these requests, which may concern the order book data relevant for a specific case or broader requests on the order book data of a trading venue, for periods established by the relevant NCA.

550. Order book data is exchanged, where appropriate, between NCAs on the basis of Article 25 of MAR where such exchange is necessary to get a full view of the order book in relation to the trading activity in one or several financial instruments.

551. For the purposes of this CP, considering that Article 38 of MAR refers to a cross-market order book for market surveillance, reference is made to the obligation to maintain records applicable to trading venues only, and not to investment firms. With reference to the latter, Article 25(1) of MiFIR and the Commission Delegated Regulation (EU) 2017/565<sup>69</sup> set forth the relevant obligations, which are overall consistent with those concerning trading venues.

## **10.1.2. Feedback to the consultation**

### **10.1.2.1. Standardisation and harmonisation of order book data**

552. In the CP, ESMA explained that the framework designed by Articles 25 of MiFIR and 25 of MAR is diversely used by NCAs. Some NCAs undertake ongoing requests for order book data for the sake of detecting potential cases of market abuse and exchange regularly that data with other concerned NCAs. Other NCAs – especially where the financial instruments they supervise are mostly traded in domestic markets – request order book data from the trading venues they supervise and from other NCAs in the framework of the investigation of specific market abuse cases. NCAs may also use the suspicious transactions and orders reporting provided by Article 16 of MAR as a further channel to uncover potential market abuse cases.

553. ESMA considered that there is a wide range of possibilities regarding how the technical arrangements for an enhanced European framework for monitoring order book data may look like. In this respect, ESMA identified as a pre-requisite for any cross-market order book surveillance framework within the EU the need to harmonise the format in which trading venues transmit their order book data to NCAs and consulted market participants on this point.

---

<sup>69</sup> See Article 74 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

554. Namely, ESMA proposed to: (i) revise the current regulatory framework designed by Article 25(2) of MiFIR to ensure that trading venues record and report order book data in an electronic and machine-readable format and using a common template, using the ISO 20022 methodology<sup>70</sup> and XML templates, (ii) design appropriate validation systems to ensure data quality.
555. Most of the respondents to the CP agree with the harmonisation of the templates and of the standards and with ensuring order book data quality, and several among them agree with the proposed use of the ISO 20022 standard and the XML templates, whereas few others proposed to use other formats. One respondent noted that, provided that no NCAs ask for deviations from the agreed standard, the standardisation and harmonisation of order data would be welcome, as it would avoid that trading venues have to comply with diverging national standards. A further respondent also note that the standardisation would help commodity trading firms and could reduce the cost of market abuse surveillance.
556. Several respondents, while agreeing with the overall harmonisation of reporting formats, expressed concerns on standardisation costs, and on the fact that either trading venues or market participants would be the final addressees of such costs, and requested to perform cost-benefit analysis ahead of proceeding with standardisation requirements.
557. As regards the entities concerned by the standardisation, several respondents requested that also systematic internalisers are concerned by the measures.
558. Several respondents also advocated for a transition phase ahead of the full implementation of the standardisation, to give trading venues some time to adapt to the new regime.
559. As regards data quality and the related validation, some respondents asked to provide for a limited time-period in which the check of the reported data may be performed.
560. A number of respondents disagrees with the standardisation and harmonisation proposal for reasons mainly linked to the related costs, which could not be proportionate to the benefit brought by the measure, unless a cost-benefit analysis is performed and indicates that it would be overall advantageous. Further than to the cost issue, other respondents consider that the proposed standardisation would entail major changes throughout the industry and therefore would also need medium/long term for its implementation.

---

<sup>70</sup> ISO 20022 is the ISO-approved standardisations methodology for financial messages and data sets, and it is already used for transaction data. It is syntax-independent but includes a set of XML design rules to convert the message model into XML schemas, whenever the use of the ISO 20022 XML-based syntax is preferred. The use of XML templates in accordance with ISO 20022 methodology would provide a significantly higher degree of data standardisation in comparison to the current situation, under which each trading venue retains – and provides to NCAs - order book data on the basis of individual standards and without common templates.

561. In addition, NCAs already use mechanisms to perform their market surveillance, which concern also order data. Even though regulators' ability to monitor the market may be enhanced, this should be done through perfecting such already existing mechanisms, in order not to impose further costs.

#### **10.1.2.2. Possible compulsory reporting of order book data to NCAs**

562. In addition to the standardisation point, the CP asked market participants to provide their views on the mandatory reporting of order book data as a possible means to enhancing the EU surveillance framework of cross-market order book. In that respect, ESMA consulted the public also on whether trading venues could identify means to limit the costs and impact of a mandatory reporting of order data.

563. Most respondents, among which a number of trading venues, advocated for maintaining the current framework, considering that the mandatory reporting would not be proportionate as it imposes costs both on NCAs and on trading venues. The costs would be linked to the IT investments needed and to the big volumes of order data to manage.

564. Very few respondents were in favour of the proposal, among which trading venues that are already reporting order data on the basis of daily requests to certain NCAs.

565. Respondents, both in favour and against the proposal, indicated that intraday reporting of order data is not possible, whereas the T+1 timeline may be considered.

566. As regards ways to limit the impact of the mandatory reporting on trading venues, most respondents reiterated their concerns on the reporting itself and noted that where it is limited to a subset of instruments, trading venues would be in the worst-case scenario, since they would have to maintain mechanism for record keeping and for reporting responding to different criteria. Hence, the inclusion of all financial instruments would prove more efficient than that of a subset. Finally, one respondent noted that quote driven securities as securitized derivatives have high numbers of order events, therefore excluding them from the mandatory order book reporting would eliminate 50-60% of all order events.

#### **10.1.3. ESMA's assessment and recommendations**

567. ESMA considers that, on the one hand, NCAs are already using order data for their market surveillance activity and gather such data through requests to the trading venues. NCAs find that, as of the date of this report, it is not difficult for them to request order book data.

568. ESMA has carefully taken into account the replies provided to the CP and the concerns expressed on the mandatory reporting and does not consider this as a necessary step for the time being.

569. Nonetheless, ESMA deems that a reinforced cooperation framework to facilitate exchange of order book data between NCAs whose markets are more interconnected would be appropriate. In line with Article 25(2) of MiFIR, according to which ESMA should facilitate and coordinate access by NCAs to order book data, ESMA intends to work to enhance the exchange of order book data between NCAs, especially where it is most needed, with the aim of improving the overall efficiency of market surveillance.

570. ESMA finds that the recording (and subsequent reporting upon request) of order book data in an electronic and machine-readable form and in a common XML template, in accordance with the ISO 20022 methodology:

- Be beneficial for NCAs, that could more easily analyse order data requested to any trading venue in the EU, thereby contributing to a more effective markets surveillance and also to costs-saving; in this respect, ESMA notes that, as also highlighted by certain respondents, also systematic internalisers, in addition to the trading venues, should be concerned;
- Allow trading venues to use the same recording and reporting system with any NCA in the EU, avoiding costs linked to compliance with diverging national standards, and
- Align the standardisation of order book data to that of transaction data, thereby ensuring a more consistent treatment of the two categories.

571. As regards the design of appropriate validation systems to ensure order data quality, ESMA considers that, on the basis of the experience of transaction reporting, it is fundamental that the standardised data may abide by defined quality standards, in order to ensure that such information may be readily used and relied upon by NCAs.

572. ESMA notes that the introduction of standardisation requirements for the messages and the validation of the data would imply: (i) amendments in Article 25 of MiFIR, which currently only provides for details to be collected, but does not envisage the abovementioned standardisation of order data for recording purposes; (ii) subsequent amendments in level II Regulations, to mirror the standardisation of the messages and provide for validation requirements. Given the need to amend the legal framework, the time for establishing the abovementioned standardisation should not be underestimated, considering also the possible need of transition or testing periods before the go-live.

573. ESMA therefore recommends to the Commission to review the current regulatory framework to ensure that trading venues and systematic internalisers record and report order book data in an electronic and machine-readable form and in a common XML template in accordance with the ISO 20022 methodology.

574. It is important to highlight that significant further work on the specification of the standardisation of the templates and validation will be necessary should the

Commission and co-legislators opt for the implementation of ESMA's recommendation. A granular assessment of the necessary changes to the legal framework would also be needed and ESMA stands ready to provide further technical advice in this area.

575. Should the Commission agree with the above, ESMA considers that the implementation of the standardisation of order data and of the measures to ensure data quality is a first step for the future assessment of whether, on the basis of the evolution of markets and of supervisory practices, mandatory reporting of order data to NCAs is appropriate. As of the date of this report, however, ESMA does not consider appropriate recommending the establishment of a mandatory reporting for order book data.

## **10.2. Cum/ex and multiple withholding tax reclaim schemes**

### **10.2.1. Dividend arbitrage and WHT reclaim schemes**

576. Dividend arbitrage strategies have existed for many years in EU financial markets and can involve the placement of shares in alternative tax jurisdictions around dividend dates, with the aim of minimising the relevant tax on dividends.

577. Therefore, dividend arbitrage strategies often require the establishment of an equity position cum-dividend in a tax-favourable jurisdiction. That equity position needs to be later 'unwound', i.e. returned to their original less favourable jurisdiction.

578. Those strategies are often structured in a way that an investor lends or sells its shares to a borrower/buyer domiciled in a country that has a lower dividend tax rate, so as to minimise the taxes paid on such dividend. The borrower/buyer receives the dividend paid out by the issuer of the share and then returns it to the lender/seller, minus the dividend tax and a percentage – or "cut" – negotiated between the two counterparties.

579. However, achieving a dividend arbitrage is not the main objective of some schemes.

580. When issuers distribute dividends, the tax law of some Member States provides for a withholding tax (WHT) on the dividends distributed to be withheld by the issuer. In some jurisdictions the tax law provides for a tax certificate to be issued (often by the shareholder's custodian bank) and, in cases where the shareholder is not a tax subject in the State of distribution of the dividend, it can be later claimed back in the form of a reimbursement from the tax authorities.

581. In some schemes, the real intention is indeed not to pursue a basic form of dividend arbitrage, but rather to obtain multiple refunds of taxes to multiple persons, with only one (or none) of them having actually received the dividend distributed and paid the relevant WHT. In some cases, potentially no persons have actually received

any dividend, and both the trading and WHT reclaims are wholly based on fictitious shares.

582. Typologies vary and may involve various forms of so-called Cum/Ex or Cum/Cum trading. It should be noted that, in the absence of a unique definition, semantically Cum/Cum and Cum/Ex merely refer to the dates of the trade which establishes a position (always cum-dividend) and the dates of eventual delivery, settlement, unwinding or financing of that trade (either cum-dividend or ex-dividend). All the other elements of the scheme, including the instrument used (shares, stock loans, options/ forwards/ futures, ETFs, ADRs, etc.), the number of participants, the existence of shares, the jurisdiction of participants, and the legitimacy of requests to tax refunds may vary in each case.

583. Further to some of such schemes being exposed by a journalistic investigation reported by the media in October 2018, the European Parliament adopted the Resolution 2018/2900 (RSP) of 29 November 2018, requesting ESMA to conduct an inquiry into those schemes.

584. In July 2019, ESMA has responded to the EP resolution with a Report on preliminary findings on multiple WHT reclaim schemes<sup>71</sup>, while ESMA's inquiry was still in progress.

585. On the basis of the European Parliament Resolution, ESMA launched a formal inquiry under Article 22(4) of the ESMA Regulation concerning Cum/Ex, Cum/Cum and WHT reclaim schemes.

586. At the end of its inquiry, ESMA in parallel publishes the Final Report on Cum/Ex, Cum/Cum and withholding tax reclaim schemes<sup>72</sup> to inform the EP of the additional elements which emerged during the inquiry and provided a deeper and updated analysis of the subject matter (hereinafter the "ESMA's Final Report on cum/ex").

587. In ESMA's Final Report on cum/ex, ESMA offers an EU-wide updated picture of the structure and distribution of WHT schemes from the securities regulators' perspective, with a view of identifying gaps, best practices and potential solutions to detect and prevent multiple WHT reclaim schemes.

588. In the same document, ESMA also reports the experience of NCAs regarding their market surveillance activities with respect to such schemes and carries out an enhanced legal analysis about the possibilities and limits for NCAs to exchange information with tax authorities.

---

<sup>71</sup> ESMA's report on preliminary findings on multiple WHT reclaim schemes can be found [here](#).

<sup>72</sup> ESMA's Final Report on Cum/Ex, Cum/Cum and withholding tax reclaim schemes can be found [here](#).

## 10.2.2. Current legislative framework and potential amendment to MAR

589. Dividend arbitrage, in its most basic form, i.e. trading actual shares in such a way as to place these shares in a favourable tax jurisdiction, to then obtain a tax refund on tax which was actually paid, is not necessarily fraud. The wider and different discussion as to whether it is tax evasion or tax avoidance and whether this is an illegal practice under the tax law of each Member State is not for ESMA to assess.
590. ESMA's analysis focused on any scheme which involves transactions<sup>73</sup> aimed at creating the paperwork (incl. tax certificates) which allows persons to obtain tax refunds on dividend tax which was not paid, and which may represent fraud under national legislation.
591. ESMA's analysis has shown that multiple WHT reclaim schemes do not typically involve violations of MAR and therefore they are not straightforwardly detected by traditional monitoring systems that NCAs have conceived and calibrated to that specific purpose.
592. Even where detected, the NCAs do not have a legal basis deriving from EU legislation to resort to any of the MAR investigative powers to continue investigating the schemes further than in relation of potential violations of MAR. ESMA's Final Report on Cum/Ex highlights that those NCAs that currently investigate multiple WHT reclaim schemes can do so as they have been granted an extended remit in that sense under their national legislation.
593. Although those schemes have no direct connections with market abuse, ESMA considers that such schemes may have negative impacts on the integrity of the financial markets. Market integrity may be seen as not limited to the prevention of market abuse, but rather encompassing the fair and safe operation of markets, the trust and confidence in the market and its reputation, so that investors and market participants can have confidence and be sufficiently protected.
594. Any practice exclusively aimed at obtaining a financial gain connected to a WHT reclaim may be seen as incompatible with market integrity in a wider sense.
595. Additionally, ESMA's legal analysis contained in the Report on preliminary findings on multiple WHT reclaim schemes highlighted that NCAs are not currently allowed under the MAR, MiFID II and MiFIR regimes to transmit to tax authorities information regarding STORs received from other NCAs within their usual cooperation

---

<sup>73</sup> According to ESMA's report typologies vary and may and some schemes may combine a mixture of Cum/Cum and Cum/Ex trading and may even involve Ex/Ex financing.

systems and TREM data for other purposes than the ones for which the information was obtained.

596. Although closer cooperation with tax authorities seems appropriate in order to better supervise financial markets in respect of the schemes described above, ESMA noted in the CP that any exchange of information with tax authorities must be done under a clear legal basis and has to bear in mind the internationally accepted standards in the field of cooperation and information exchange amongst securities regulators.

597. In order to mitigate that concern and not to impair the cooperation with third countries' securities regulators, the proposal included in the CP concerned the possibility to cooperate and exchange of information across the EU only.

598. Overall, ESMA in the CP publicly consulted on the possibility to amend MAR in order to:

a) overcome the identified EU regulatory gap and give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation.

Therefore, whenever an NCA suspects that a regulated entity's unfair behaviour may represent a threat to the integrity of the financial markets (e.g. in the case of multiple WHT reclaim scheme), it would be able to further and closer examine it using the traditional market surveillance tools, the transaction reporting data under MiFIR and the other appropriate investigative tools under MAR. Where an NCA concludes that those unfair behaviours represent a threat to the integrity of the financial markets, it would be given the power to request the regulated entity to cease such an activity and issue adequate sanctions;

b) grant the NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU.

### **10.2.3. Feedback to the consultation**

599. In the CP ESMA asked market participants their views regarding the proposed amendments to MAR.

600. Most of the respondents were against the proposals illustrated in the CP, whereas only a small minority of respondents seemed to support them.

601. An argument at the base of opposition to any of the MAR amendments proposed is that the market abuse framework is already very strict and articulated, and the addition of non-essential provisions on withholding tax reclaims would not bring any useful advantage to the markets participants but merely add complexity to the framework.

602. Another general argument used to oppose both of ESMA's proposals illustrated in the CP is that WHT schemes remain a tax issue, that should be addressed through an amendment to the relevant legislative framework rather than the financial sector's regulations.

603. With particular regard to the proposal illustrated in paragraph 317 (a) of the CP to *"give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation"*, the great majority of respondents were opposed for the following reasons:

- granting NCAs an extended remit to investigate and sanction unfair behaviours may involve a series of unintended consequences that would require deeper consideration;
- concepts such as "unfair behaviours" or "threat to the market integrity" are difficult to specify and characterised by intrinsic vagueness. This may involve a high level of uncertainty and give NCAs a disproportionate discretionary power in classifying a given behaviour as illicit.

604. Some support was expressed to the proposal to grant NCAs the possibility to cooperate and share information with tax authorities upon request across the EU illustrated in paragraph 317 b) of the CP but overall the majority opposed such proposals.

#### **10.2.4. ESMA's assessment and recommendations**

##### *Extension of NCAs' remit to investigate and sanction unfair behaviours beyond market abuse*

605. With respect to the proposal to amend MAR in order to *"overcome the identified EU regulatory gap and give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation"* described under paragraph 317(a) of the CP, ESMA agrees with the respondents to the consultation about the difficulties to define and specify concepts such as "unfair behaviours" or "threat to the market integrity". The lack of clarity over what may be or may be not considered "unfair behaviours" or "threat to the market integrity" may end up negatively affecting market functioning and disincentivise trading given the lack of legal certainty for market operators.

606. Additionally, as pointed out in ESMA's Final Report on cum/ex, ESMA is of the view that WHT schemes remain mainly a tax-related issue, for which most NCAs do not currently have a sufficient expertise. Therefore, even in presence of an adequate legislative change to give them an extended remit, it would take time for the NCAs' to acquire such expertise, limiting any ambition to address the issue in the short term.

607. Moreover, unlike any potential legislative change in the relevant WHT legislative framework, any extension of the remit for NCAs would not directly prevent WHT schemes from being perpetrated, but rather only contribute to their detection and prosecution *post facto*, once identified by the NCA's surveillance systems.
608. Furthermore, it should be highlighted that any legislative enhancement of the NCAs' remit would require an adequate increase in the NCAs' resources, with limited synergies with their set of core supervisory activities.
609. Finally, it is unclear whether entrusting the NCAs with additional tasks outside their core supervisory activity represents the most efficient way to address the problem. In that sense, other legislative interventions may achieve a more efficient result, e.g. introducing measures to prevent fraudulent WHT schemes from occurring in the first place or increasing information sharing and cooperation between NCAs and other law enforcement bodies, within which each supervisory entity could contribute to the common objective by leveraging on their specific and consolidated areas of expertise.
610. In light of the above, ESMA does not suggest amending MAR to expand NCAs' remit to investigate and sanction unfair behaviours carried out by regulated entities, beyond insider dealing and market manipulation.

#### *Enhanced Cooperation between tax authorities and NCAs*

611. With respect to the proposal to "*grant the NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU*" illustrated in paragraph 317 (b) of the CP, it should firstly be noted that ESMA's Final Report on Cum/Ex shows that enhanced cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes.
612. The legal analysis contained in ESMA's Final Report on Cum/Ex confirmed that NCAs are not currently allowed under the MAR, MiFID II and MiFIR regimes to transmit to tax authorities information regarding STORs received from other NCAs and TREM data.
613. More specifically, with respect to STORs received from another NCA, the analysis concluded that Articles 16, 25 and 27 of MAR have to be interpreted in the context of MAR, thereby taking into consideration the purpose of prevention and detection of market abuse, without any possibility to extend the application of such provisions for tax fraud detection purposes.
614. The same is relevant in the context of the framework of MiFID II and MiFIR regarding data exchanged between NCAs via TREM.
615. In the same context, ESMA has assessed whether or not NCAs could transmit data obtained in the context of national supervisory activities to the tax authorities

located in the same Member State for possible detection of tax infringement. In this respect, both the MAR and MiFID II frameworks leave the choice to Member States as to whether NCAs are to be permitted to provide data to another authority located in the same Member State.

616. As any exchange of information between authorities must be done under a clear legal basis, in the absence of which such information exchange cannot take place, any attempt to foster cross sectoral supervisory cooperation is likely to require a legislative change.
617. ESMA's inquiry also shows that WHT schemes are never confined within the borders of a given Member State, hence the importance of international cooperation and information exchange.
618. Furthermore, ESMA is of the view that cross agency cooperation is key in pursuing WHT schemes, as cross competences in different areas of expertise is of essence to understand the schemes, detect and prosecute them.
619. Despite being of the view that enhanced cross agency and international cooperation is overall a valuable step forward in this field, ESMA is aware that such proposal would not be in itself the perfect solution to the issue of WHT schemes, as the nature of WHT schemes makes them a global phenomenon often taking place beyond the boundaries of the European Union.
620. Internationally accepted standards in the field of cooperation and information exchange amongst NCAs and third country authorities, currently do not allow for onward sharing of information to tax authorities and would not be affected by the proposed change. Therefore, the major drawback of ESMA's proposal would be that it would only affect the subset of WHT schemes taking place within the EU through EU regulated firms.
621. In that sense, removing the legal limitations to the information exchange between NCAs and tax authorities in relation to EU obtained information without any change in the internationally accepted standards in the field of cooperation may also introduce incentives for market participants to involve third-country firms and trading venues. Market participants may see the EU regulated firms and trading venues more transparent vis-à-vis tax authorities, and prefer involving third-country entities, which may ultimately put EU firms and trading venues at a competitive disadvantage.
622. The magnitude of this is not easily quantifiable, but it is likely to apply not only to perpetrators of WHT schemes, but also in relation to all those firms proposing borderline practices where the fiscal element is a key component in the decision on how to structure a transaction. Still ESMA believes that competition on this ground should not be incentivised.

623. Finally, it should be noted that, unlike any potential legislative change in the relevant WHT legislative framework, any legislative change to enhance cooperation and information sharing between NCAs and tax authorities would not directly prevent WHT schemes from being perpetrated, but rather only contribute to their detection and prosecution from an ex post perspective.

624. In light of the above, considering the above advantages and drawbacks, ESMA recommends the EU Commission to pursue a legislative change to:

- remove the legal limitations for NCAs to exchange with tax authorities the information obtained through cooperation and information exchange mechanisms from other NCAs within the EU;
- provide a common legal basis for the exchange with the tax authorities of the information directly received by the NCA within its national supervisory activity.

625. For a more in-depth analysis of the issue and the ESMA proposals please also confer the Final Report on Cum/Ex<sup>74</sup>.

## 11. Sanctions and measures

### 11.1. Appropriateness of introducing common rules on the need for all MSs to provide administrative sanctions for insider dealing and market manipulation

#### **Mandate from the Commission:**

Appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation

In relation to the above point and pursuant to the second paragraph of Article 38, the Commission notes that ESMA is required to undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of MAR, of the application of such criminal sanctions within Member States. Any data made available under Article 33(1) and (2) are also to be included in that exercise. Following the mandate in Article 38(1)(a) of MAR, the Commission has requested ESMA's views on the "appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation".

---

<sup>74</sup> ESMA's Final Report on Cum/Ex, Cum/Cum and withholding tax reclaim schemes can be found [here](#).

### 11.1.1. Legal framework

626. Article 30 of MAR requires Member States to grant NCAs the power to take administrative sanctions and other administrative measures on at least infringements referring to the following provisions of MAR:

- a) Prohibition of insider dealing and unlawful disclosure of inside information (Article 14 MAR);
- b) Prohibition of market manipulation (Article 15 MAR);
- c) Obligation to detect suspicious transactions and the related reporting to NCAs pursuant to Article 16(1) and (2) MAR;
- d) Publication of inside information by the issuer (Article 17(1), (2), (4) and (5), and (8) MAR);
- e) Drawing up, maintaining and submitting to the NCA upon request insider lists (Article 18(1) to (6) MAR);
- f) Managers' transactions (Article 19(1), (2), (3), (5), (6), (7) and (11) MAR);
- g) Investment recommendations (Article 20(1) MAR); and
- h) Failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2) MAR.

627. Article 30(1), second subparagraph, of MAR provides that Member States could decide not to lay down rules for administrative sanctions where the infringements referred to in the same provision were already subject to criminal sanctions in their national law by 3 July 2016.

628. Such option was exercised by Denmark, Finland, Germany, Ireland and Poland as follows: (i) in Denmark there are criminal sanctions for the infringements of Articles 14, 15, 16(1) and (2), 17(1), (2) to (5), (7), (8), 18(1) to (6), 19(1) and (2), (5), (7), 19(11) and Article 20(1) of MAR; (ii) in Finland there are criminal offences for infringements of Article 14, 15 and 17 of MAR; (iii) in Germany there are criminal offences for infringements of Article 14 and 15 of MAR – where committed intentionally and, for Article 15, if the infringement leads to an influence on the market price of the respective financial instrument -; (iv) in Ireland there is a criminal offence for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR, and (v) in Poland there are criminal offences for infringements of Article 14, 15, and for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR.

629. In the absence of more compelling evidence, ESMA's preliminary view was that there is no need to modify Article 30(1) of MAR and requested the views of market participants on this.

### **11.1.2. Feedback to the consultation**

630. Sixteen out of 31 responses received considered that there is no need to amend Article 30(1) MAR. However, some of them pointed out that many operators of trading venues still have their own rules on market manipulation and can impose fines based on their own market rules.
631. Four respondents, on the contrary, believed that the administrative sanctions/measures on market manipulation should be harmonized across the EU, in order to reduce the risk of regulatory arbitrage and to facilitate the cross-border enforcement. However, granting powers of intervention to the NCAs should be strictly limited by valid and concrete mentioned reasons and not be granted solely on the ground of vague legal terms or general clauses.
632. In the context of MAR sanctions, four respondents noted that the sanction regime in MAR seems tailored to larger companies: many listed companies are SMEs and their capitalisation is smaller than the amount of possible sanctions. The respondents suggested reviewing the regime bearing in mind that the maximum administrative sanctions should be related to the size of companies (in case of legal persons) and to the level of managers' compensation (in case of natural persons).
633. Eight respondents from one jurisdiction asked from ESMA clear guidance on how the sanction fees should be calculated. Market operators from this jurisdiction complained about the very strict interpretation of MAR adopted by its NCA, where apparently, the amount of sanctions imposed under MAR is the highest in Europe.

### **11.1.3. Additional evidence gathered by ESMA**

634. ESMA notes that Article 38(a) of MAR (and the EC's mandate, accordingly) only refers to the sanctions in relation to insider dealing and market manipulation. As indicated above, three relevant Member States have exercised their discretion for a wider range of sanctions than Article 14 and 15. Moreover, Ireland has only exercised its discretion with respect to the failure to cooperate with an investigation, inspection or with a request. Therefore, an eventual amendment regarding Article 14 and 15 of MAR would not be relevant for Ireland, as it would not affect the other MAR sanctions subject to criminal sanctions in Denmark, Finland and Poland.
635. Accordingly, ESMA has carried out the mapping exercise of the application of the administrative and criminal sanctions under Articles 14 and 15 of MAR collating the data provided by NCAs under Article 33 of MAR in relation to 2017, 2018 and 2019.
636. The responses regarding the criminal sanctions imposed over the reporting period show certain dispersion: whereas three authorities (FIN-FSA, CBI and KNF) do not report any criminal sanction over the reporting period, Finanstilsynet (DK) and BaFIN report the existence of a significant number of MAR criminal sanctions.

637. The responses provided by NCAs in relation to the administrative sanctions imposed on insider dealing and market manipulation over the reporting period are similarly disperse. Overall, it can be concluded that a relatively low number of administrative sanctions have been imposed. No general upward or downward trend can be identified since the entry into application of MAR with great divergences between NCAs.
638. In principle, ESMA does not deem possible to compare the number of criminal sanctions with the administrative sanctions imposed since there are a number of factors to be considered, such as the different characteristics of each Member State's financial market, the quantity and quality of the Suspicious Orders and Transactions received by NCAs, and the intrinsic difficulty to demonstrate market abuse, which entails extensive investigations.
639. In this respect, ESMA reiterates the comments made in its 2019 Annual Report on Administrative and Criminal Sanctions under MAR<sup>75</sup>: "since MAR has been applicable for a limited period of time, and considering that market abuse cases require extensive investigations, the number of sanctions and other measures (...) did not provide a fair representation of the market abuse activities performed in that time-span by NCAs and by other relevant national authorities. As a matter of fact, parallel sanctions based on the Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>6</sup> (MAD), which was repealed by MAR, were also being issued during 2018".
640. In this regard, it is noted that Finanstilsynet (DK) reports that, in the case of criminal sanctions, the data gathering can be even more demanding than for the administrative procedure.
641. However, it is worth noting the high number of criminal sanctions imposed in Germany under Article 14 and 15 of MAR that seem to play against an interpretation whereby criminal sanctions are, as a matter of principle, less effective than administrative sanctions.
642. ESMA also prepared an internal questionnaire asking the NCAs of the jurisdictions where the discretion foreseen in Article 30(1) of MAR had been used about any specific difficulty identified on the enforcement of these sanctions and whether, in their opinion, administrative sanctions would have delivered better results.
643. Three of these NCAs did not identify any specific difficulty in the enforcement of MAR criminal sanctions, one noted that sometimes it was difficult to gather enough evidence to proceed with a criminal trial whereas another one reported not having experience in enforcing or contributing to enforce MAR criminal sanctions.

---

<sup>75</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2005\\_mar\\_article\\_33\\_report\\_sanctions.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2005_mar_article_33_report_sanctions.pdf)

644. Three of these NCAs acknowledged that administrative sanctions could deliver better results in terms of timeliness or effectiveness. However, one of these NCAs also considered that the reputational impact of criminal sanctions in their jurisdiction implies a significant deterrent that probably compensates any possible loss of effectiveness.

645. These results confirm the outcome of the preliminary fact-finding carried out by ESMA on the practical experience gathered by the NCAs of the jurisdictions that exercised that discretion that were described in the CP<sup>76</sup>.

646. When ESMA requested their views on the necessity of eliminating this discretion from MAR, the majority of NCAs (including most of those jurisdictions where the discretion had been exercised) supported maintaining the status quo.

#### **11.1.4. ESMA's assessment and recommendations**

647. ESMA considers that the evidence gathered and the responses to the CP do not permit identifying an urgent need for amending Article 30(1) of MAR in relation to the discretion of Member States to impose criminal instead of administrative sanctions.

648. In relation to the comments made regarding the level of the administrative sanctions, ESMA disagrees with those who consider that the level of the MAR sanctions is tailored to large companies:

- MAR establishes a minimum common denominator as regards the maximum administrative pecuniary sanctions for both natural and legal persons (Article 30(2)(i) and (j) of MAR), that Member States may raise if they consider it appropriate.
- However, MAR does not oblige NCAs to impose those maximum administrative sanctions. On the contrary, MAR does oblige NCAs to take into account all relevant circumstances when determining the type and level of administrative sanctions, in particular “the financial strength of the person responsible for the infringement, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person” (Article

---

<sup>76</sup> Firstly, none of those authorities reported major problems when implementing criminal instead of administrative sanctions other than longer delays in the effective enforcement derived from the need to engage with external public bodies (police, public prosecutor...).

There is no unanimity either between those authorities on whether they consider necessary amending Article 30(1) second paragraph of MAR: two authorities were clearly in favour of maintaining the status quo (one authority considers that having only criminal sanctions is positive for certain types of market abuse, and other authority reports that moving to a system where administrative sanctions were available in all cases would infringe their Constitutional law and their system of separation of powers) whereas two other authorities are inclined to move into a system where administrative sanctions are available to all NCAs. Similarly, there is no unanimity between the other NCAs having the whole range of administrative sanctions available: two authorities consider necessary further harmonisation in this respect, whilst one authority considers this an internal matter that does not require further harmonisation.

31(1)(c) of MAR) and sanctions other than pecuniary can be imposed if considered appropriate by the NCA<sup>77</sup>.

649. Therefore, the existence of a minimum common denominator of the maximum administrative sanctions does not lead to conclude that those sanctions are only addressing big issuers but only ensures a minimum playing field across Europe for the most serious infringements.

## 11.2. Cross border enforcement of sanctions

### Mandate from the Commission:

(g) Cross-border enforcement of sanctions

The Commission would like ESMA to gather information on whether NCAs encounter difficulties in the recognition and enforcement of financial penalties imposed under MAR in cases with a cross-border element. Examples of such cases could include situations where the sanctioned person is a resident or has its registered seat in another Member State or when that person leaves the Member State of the sanctioning NCA without paying the fine. To better understand and assess the nature and the breadth of the problems NCAs may face, as well as potential ways of addressing them, the Commission would like ESMA to conduct an analysis of legal obstacles to the recognition and enforcement of financial penalties, if any. In doing so, it is encouraged to take into account in particular the following:

- i. number of financial penalties imposed by NCAs vis-à-vis non-residents and how successful the NCAs were in enforcing them;
- ii. whether the interpretation given to the Council Framework Decision 2005/214/JHA in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties;
- iii. whether under the current legislative framework there are tools that might be used to facilitate the cooperation between NCAs in order to address the issue and what role ESMA could play in this process

### 11.2.1. Legal Framework

650. In its mandate, the Commission requested ESMA to gather information on the cross-border enforcement of financial penalties, and to assess the nature and breadth of problems that NCAs may face when enforcing penalties with cross-border elements.

---

<sup>77</sup> See recital (71) of MAR.

In this respect, the Commission specifically asked ESMA whether the interpretation given to the Council Framework Decision 2005/214/JHA<sup>78</sup> ('the Framework Decision') in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties.

651. To this aim, ESMA recalls that the Framework Decision deals with the principle of mutual recognition of financial penalties within the EU. Namely, it endeavours to facilitate the recovery of financial penalties imposed by judicial or administrative authorities in a Member State in the other Member State where the natural or legal person against whom the financial penalty was issued has property or income, resides or, in the case of legal persons, has its registered seat<sup>79</sup>.
652. The Framework Decision was interpreted by the European Court of Justice (ECJ) in the judgement on the Baláž case (C-60/12), which addressing some of the key terms of the Framework Decision: '*court having jurisdiction in particular in criminal matters*' and the necessary '*opportunity to have a case tried before a court having jurisdiction in particular in criminal matters*'.
653. In doing that, the ECJ specified that the term cannot be interpreted on the basis of national laws but needs a uniform reading (and consequent application) at EU level, taking into account a number of factors established in settled case-law to consider a body as a 'court' (such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*<sup>80</sup>, whether it applies rules of law and whether it is independent). The ECJ also raised the different interpretation across Member States of the term '*jurisdiction in criminal matters*'.
654. Finally, on the necessary '*opportunity to have a case tried before a court having jurisdiction in particular in criminal matters*', the ECJ considered that a prior administrative phase may be required, depending on the specific features of the judicial systems of the Member States. However, the ECJ further considered that access to a court having jurisdiction in criminal matters, within the meaning of the Framework Decision, must not be made subject to conditions which make such access impossible or excessively difficult<sup>81</sup>.

---

<sup>78</sup> Council Framework Decision 2005/214 of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

<sup>79</sup> In order to do this, the Framework Decision requires the opportunity to have the case tried by a court, that there has to be a final decision requiring a financial penalty to be paid by a natural or legal person, sets forth the formalities for such cooperation and determines which Member State should accrue the resources obtained from the execution, subject to further agreement between Member States.

<sup>80</sup> *Inter partes* proceedings are lawsuits in which all interested parties have been served with adequate notices and are given a reasonable opportunity to attend and to be heard. When the judgment is given, all the parties are bound by the result.

<sup>81</sup> Specifically on the question on the interpretation of Article 1(a)(iii) "*a court having jurisdiction in particular in criminal matters*", the ECJ ruled that the court having jurisdiction within the meaning of the article in question must apply a procedure which satisfies

655. Regarding the MAR provisions, ESMA notes that cross-border enforcement of sanctions is referenced to in Article 25(5) MAR, which in the context of the NCAs' obligation to cooperate foresees that "*competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions*".

656. This provision is further developed by Article 9 of Commission Implementing Regulation (EU) No 2018/292<sup>82</sup> establishing the procedures for assistance in recovery of pecuniary sanctions.

### **11.2.2. Feedback to the consultation**

657. Pursuant to the Commission's mandate, ESMA gathered information from NCAs on the cross-border enforcement of financial penalties in cases with a cross-border element. In conducting this exercise, ESMA focused on the experience of NCAs related to enforcement proceedings against non-residents (natural or legal persons) and obstacles faced by NCAs when enforcing penalties in another Member States under MAR in the timeframe between 3 July 2016 and 1 July 2019.

658. NCAs reported that sanctions imposed vis a vis non-residents in the period analysed were limited and did not request cooperation with other NCAs.

659. With respect to the enforcement activity, no case of denial of assistance to an NCA by another authority or by a national court was reported.

660. Consistently with the above, the Framework Decision was limitedly used.

661. Furthermore, the Baláž Case did not imply changes in NCAs' reading of the Framework Decision.

662. Certain NCAs reported that there could be legal uncertainties related to the application of the Council Framework Decision in respect to MAR administrative sanctions. Other NCAs, on the contrary, read the scope of application of the Framework Decision as covering all MAR sanctions, regardless of their administrative or criminal nature.

663. In addition to the discussion with NCAs, the CP asked market participants to share their views on this subject.

---

the essential characteristics of criminal procedure without, however, it being necessary for that court to have jurisdiction in criminal matters alone.

<sup>82</sup> Commission Implementing Regulation (EU) 2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse, *C/2018/1063, OJ L 55, 27.2.2018, p. 34–49*

664. The feedback collected was limited, and several respondents did not consider themselves in a position to comment on the subject.
665. Several market participants declared that, in their view, the current framework is adequate and permits NCAs to enforce sanctions on a cross border basis.
666. One respondent noted that (i) the Framework Decision is not meant to address financial services, and (ii) its transposition in national law may lead to differences across jurisdictions able to hinder effective enforcement.
667. Some respondents expressed in their replies support for an effective cross border enforcement of sanctions regime, while few others shared their concerns about the possibility of cross-border enforcement proceedings interfering with the national legal procedures, other legislations, or leading to cumbersome procedures involving different authorities.

### **11.2.3. ESMA's assessment and recommendations**

668. ESMA considered the possible use of the Framework Decision for cross border cases of MAR sanctions, taking into consideration the interpretation offered by the ECJ in the Baláž case. The outcome of such analysis provides both elements supporting the use of the Framework Decision to recover financial penalties under MAR and other ones for which clarifications of the Framework Decision would be necessary.
669. For instance, Recital 2 and Article 1(a)(iii) of the Framework Decision as interpreted in the Baláž case may support the application of the Framework Decision to administrative sanctions imposed by administrative authorities. At the same time, the Framework Decision does not explicitly mention the administrative infringements under MAR, and the Baláž case does not deal with them.
670. The existence of possible diverging interpretations on the use of the Framework Decision for the cross border enforcement of sanctions under MAR indicates that the current legal framework may be further clarified to ensure that administrative sanctions under MAR can be efficiently recovered by NCAs where they contain a cross-border element.
671. In light of this, ESMA considers that the current legal framework on cross-border enforcement of sanctions leaves room for improvement and to this aim ESMA recommends the Commission to consider changes to the current legal framework on cross-border enforcement of financial penalties issued under MAR.

## 11.3. Other related issues: record-keeping requirement for NCAs

### 11.3.1. Legal framework

672. Article 28 of MAR sets out a maximum period of five years for retaining personal data processed under MAR: “With regard to the processing of personal data within the framework of this Regulation, competent authorities shall carry out their tasks for the purposes of this Regulation in accordance with the national laws, regulations or administrative provisions transposing Directive 95/46/EC. With regard to the processing of personal data by ESMA within the framework of this Regulation, ESMA shall comply with the provisions of Regulation (EC) No 45/2001. Personal data shall be retained for a maximum period of five years.”

673. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data<sup>83</sup> (General Data Protection Regulation), has repealed Directive 95/46/EC.

674. Consistently with the previous Article 6(1)(e) of Directive 95/46/EC, Article 5(1)(e) of the GDPR determines that “personal data shall be (...) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (‘storage limitation’).”

675. In this regard, recital (39) of GDPR establishes that “Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the personal data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review”.

### 11.3.2. Feedback to consultation

676. This issue was not included in the CP as it only pertains to requirements addressed to NCAs.

---

<sup>83</sup> OJ L 119, 4.5.2016, p. 1–88

### 11.3.3. ESMA's views and recommendations

677. As previously described, the information provided repeatedly by NCAs for the purposes of the Annual Reports on MAR administrative and criminal sanctions and for this Report demonstrates that market abuse cases require extensive investigations that may take more than four years to be completed. This has led to a situation where parallel sanctions based on the MAD were also being issued during 2019.

678. However, the five years foreseen in Article 28 of MAR may not be enough, since the above-mentioned period can be extended for three or four additional years for the appeals procedure to be completed or the subsequent proceedings before the criminal authorities in criminal cases.

679. Taking into account that MAR applies as of July 2016, NCAs might lose their capacity to enforce MAR provisions in 2021 because they may not be able to retain the personal data collected for that purpose.

680. Moreover, ESMA notes that the reference to a five year deadline to retain personal data is inconsistent with other legal references and in particular with Article 78 of MiFID II that only determines that “*The processing of personal data collected in or for the exercise of the supervisory powers including investigatory powers in accordance with this Directive shall be carried out in accordance with national law implementing Directive 95/46/EC and with Regulation (EC) No 45/2001 where applicable*”. In this respect, it is unclear how could NCAs unbundle the data collected under the MAR and the transaction reporting data collected under Article MiFIR for the same purposes.

681. As a consequence, ESMA recommends deleting the five-year retention period from Article 28 of MAR to enable NCAs to set out retention periods that suffice to carry out their surveillance and enforcement duties.

## Annexes

### Annex 1- Summary of responses to the Consultation Paper

**Q1: Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.**

682. In total 52 market participants replied to this question. Three groups of respondents can be identified: (i) those not in favour of extending the scope of MAR to spot FX contracts (ii) those in favour and (iii) those not recommending the extension of MAR at this stage but to suggesting to re-assess this issue at a later point in time.

683. More specifically, 35 market participants were in support of some/all the arguments presented below:

- The breadth of the Spot FX market may lead to unintended consequences:
  - Consequences to the “real economy”: FX transactions are in many situations merely a consequence of another financial or business transactions (e.g. purchase of a good, payments, etc.), the disturbance of this market could potentially affect other areas not only in banking and the financial industry. The impact for market participants and the structure of EU FX market will be significant due to the wide breadth of the spot FX market, whose size is big, and diverse and global in nature.
  - Fragmentation of a global market: The FX market is a highly electronic market. However, most of the trading does not take place on multilateral trading systems but OTC. The inclusion of spot FX under MAR will break the global harmonisation of the regulation of the FX global market with 56% of transactions carried out on a cross-border basis. The introduction of this regulation in Europe, could incentivise firms to relocate their spot FX trading activities to other jurisdictions thus creating the conditions for a regulatory arbitrage.
- Cost-Benefit Analysis
  - The inclusion of spot FX under MAR does not pass the Cost-Benefit Analysis, since given the complex and yet incomplete market picture that reporting data is likely to provide, there will be limited benefits for regulators, mostly derived from the extension of MiFID II requirements and more

specifically to data processing challenges. The analysis of the data reported will be extremely challenging due to the size of the such data. In particular, the extension of the MAR provision related to the market manipulation offence require firms in scope to record and perform surveillance on all quotes, orders and transactions (including modifications, updates and cancellations). In turn, this results in the recoding and surveillance of quotes/orders updating up to 200 times per second per market participant on a major FX platform multiplied by the number of market participants multiplied by the number of currencies in which each may be offering pricing finally multiplied by the number of platforms electronically trading Spot FX.

- Legal problems derived from the extension of MAR to spot FX contracts
  - The inclusion of Spot FX under the scope of MAR for inside information has, among others, the following implications: (i) who could be considered as the issuer (ii) which parameters should be taken into account when publishing inside information (iii) which entities should be exempted from the requirements of MAR;
  - Respondents highlighted that the extension of MAR to spot FX contracts implies amending the scope of MiFID II/MiFIR. In their view, any change to MiFID/ MiFIR should form part of a wider MiFID/ MiFIR review and not be decided upon under review of any other regulation, such as MAR since the inclusion of spot FX contracts in the definition of financial instruments would imply (i) to extend the onerous licencing regime designed primarily for “true” financial service providers to a wider range of market participants active in the spot FX market (ii) develop additional exemptions for certain transactions that already present in MiFID II/MiFIR (ii) extending the transaction reporting regime which requires the adjustment of the 65 fields currently required besides the need to collect personal data and (iii) the need to extend and adapt the identification system of financial instruments defined by the ISIN and provided by ANNA-DSB (iv) extending the pre- and post-trade transparency regime and the definition of the ToTV concept (v) the extension of the set of rules related to organisational and operational requirements for the organisation and operation of trading venues (vi) the identification on how to provide best execution in such a global market;
  - Spot FX are already included to a certain extent in MAR through the definition of benchmark (Article 3(1)(29) of MAR) spot FX are covered for “benchmark manipulation”.
- The role of central banks
  - Respondents recommend preserving the traditional of role of central banks in the development of any structural changes to spot FX market, noting in particular the involvement to the FX Global Code of Conduct.

684. Despite these respondents do not consider appropriate extending MAR the majority of them stress the importance and the wide implementation of the FX Global Code in the FX market and, more than one third of the responses explicitly state that extending the scope of MAR is not appropriate at this point in time and ESMA should rather wait for the revision of the Code which is expected over the course of 2020. The Code similarly to MAR delimits the area from which the confidential information could arise, imposes measures to avoid misuse of confidential information, forces market participants to put in place appropriate processes to prevent and detect abusive, collusive or manipulative practices. The Code goes, in certain circumstances, beyond MAR, e.g. “the last look” practice.

685. Furthermore, it is worth noting that these respondents acknowledge that:

- The Code itself does not impose legal or regulatory obligations on market participants, nor does it substitute for regulation. The Code is intended to supplement any and all local laws. As example of enforcement, the FCA recognised on 26 June 2019 the Code as “FCA-recognised industry code”, compliance with which would indicate that the person is meeting their obligation to observe proper standards of market conduct.
- There is a relationship between spot FX and the FX derivatives with spot FX contracts as underlier.
- Any regulatory oversight of spot FX contracts from a market abuse perspective should take place after the settlement phase, as occurs with the current EU oversight of FX derivatives. This request is due to the fast-paced nature and short tenor of the spot FX market.
- A number of responses also warned about undertaking unilateral EU initiatives in this global market where the FX Global Code of Conduct is in the process of being adopted by most of the industry and currently under review.

686. Last but not least, alternatives opposed to the extension of MAR to spot FX contracts, were suggested to ESMA:

- Better clarify which aspects of the spot FX market are of interest in relation to the market abuse risk;
- Wait for the implementation and review of the Global FX Code;
- Promote adherence to the Code and/or give it the status of “Professional Standard”;

- Include a “comply or explain” requirement in existing EU legislation (e.g. MiFID II, CRR) for authorised entities, as a way of achieving the policy goal of improving the conduct within the spot FX markets;
- Incorporate the main principles enshrined in the Code through either recital language or as an Annex in the existing MAR to lend statutory status to those principles.

687. The remaining 17 respondents were split in (i) those providing arguments supporting the inclusion of spot FX contracts under the scope of MAR (3 respondents) and (ii) those that do not recommend extending the scope of MAR at this point in time but they suggest to wait until further experience with respect to the FX Global Code has been gathered (14 respondents). Nevertheless, all of them share one or more of the following arguments.

- The Code is not sufficient to identify, punish and prevent misconduct. Nothing less than criminal sanctions would suffice, and this cannot be reached through the Code. The Code articulates conduct requirements across the supervisory parameter, but all entirely within the legal parameter. The Code is similar to the FICC Market’s Standard Boards standards across the domain of financial instruments and investment products;
- Preliminary statements from the Global Foreign Exchange Committee (Committee in charge of the Code; from now GFXC) note that the Code complements the same objectives as MAR but that best practice does not replace the criminal parameter. Consequently, it is suggested extending FX spot under the MAR perimeter to facilitate the application of a consistent cross-border approach using the articulation developed by the Code;
- The price making function in the spot segment of the main 20 currencies has substantially moved away from the EU banks domain to that of specialist technology firms who may not be authorised as investment firms. The liquidity pool is provided by specialist technical non-bank market makers with limited permissions in the EU (6 non-bank firms provide the bulk of global spot electronic low latency liquidity for major FX pairs);
- Data challenge is not a real case: on balance, these respondents do not consider the storing and monitoring of orders is a material negative case for trading venues, all of whom store and monitor orders and trades on a daily basis around the clock and around the globe, and to whom on the spot segment there still appear to be limited barriers to entry.

688. However, it is worth noting that even the respondents in favour of extending the scope coincide with those against the extension of MAR to spot FX contracts in recommending a careful delineation of the contracts that should be considered within the scope of MAR. In particular, these respondents suggest that contracts for

commercial purposes, forward payment and funding trades should be regulated as such, but not under MiFID as investments. In other words, the scope of MAR should not directly align to that of MiFID but it can go wider to encompass the different purposes of the transactions (hedging, payments, funding) and extend the perimeter of risks covered (e.g. capital requirement regulation, funding and post-trading process);

689. In this way FX forwards up to 12m terms should be exempted from MiFID but regulated as payments or as SFTs. However, MAR should apply to all cases, where MiFID should not.

690. Furthermore, it also important to stress that 9 respondents, despite not providing explicitly arguments in favour of the extension of MAR to spot FX acknowledge that:

- There is a lack of binding measures to be adopted by all states and therefore, there is room for abusive behaviour or disorderly trading in other related markets or manipulation that could affect especially retail investors. Furthermore, the spot FX market lacks enforceable market integrity and transparency safeguards and NCAs cannot monitor the trading in this market because spot FX transactions are mainly bilateral and not reported, trading platforms are in different jurisdictions and nevertheless, are not in scope of NCA oversight;
- The spot FX market is particularly vulnerable to manipulative baiting/spoofing strategies which are covered by CDR 2016/522;
- A specific regulation for market abuse applied to spot FX contract would foster the shift of these transactions from OTC to lit venues where transparency and investor protection are a staple.

691. However, in their view it is not the right moment to extend the scope of MAR to spot FX and either conclude:

- that extending MAR and/or MiFID/R to Spot FX should be carefully assessed as it would involve costs to investors and would discourage their participation/the extension might not be necessary for MiFID/R; or
- to make more use of the Code (e.g. “comply or explain” requirement)/ see its effects; or
- due to the complexity of the spot FX market tackling the regulation of spot FX should be done separately from the MAR review, e.g. a targeted framework of statutory regulatory oversight of the spot FX markets developed by ESMA, European Commission, other public authorities in leading third country jurisdictions globally (this should also encourage trading on regulated platforms, implement fit-for-purpose trade reporting obligations, transaction reporting and market surveillance obligations); or

- wait for a couple of years after the implementation of the reformed Code and then evaluate if and how to supplement the Code with public policies derived from MAR or other areas of Financial Regulation.

692. Finally, also those respondents suggested alternatives opposed to the extension of MAR to spot FX contracts, namely:

- Leverage on the articulation developed by the Code;
- Predicate the regulatory perimeter on the nature of the activity performed in the EU rather than on the MiFID perimeter of the instrument or on the nature of the permissions held under regional supervision.

**Q2: Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

693. ESMA received 47 responses to this question. All but one agreed with ESMA's preliminary view regarding the need for structural regulatory changes as a preliminary step to apply MAR to spot FX and reiterated the arguments described in Q1 regarding the convenience of not extending MAR to spot FX contracts or waiting for the FX Global Code to be revised.

694. Ten of these responses highlighted the broad range of market participants in the spot FX market and noted that extending MAR (and MiFID II/MiFIR) requirements should be carefully assessed, since it might have a significant (and eventually discriminatory) impact for certain (non-financial) market participants.

695. Two other respondents underlined the importance of identifying clearly which spot FX contracts would be in the scope (because it might lead to an extra-territorial application of MAR) and which obligations should entail the extension of MAR (as described in the CP, the definition of 'inside information' could not be mechanically extended and would be difficult for market participants to identify a disclosable piece of inside information) in case MAR were extended to spot FX contracts.

696. Responses identified as structural regulatory changes required amending the MiFID II/MiFIR framework (in terms of record-keeping, transaction reporting, transparency requirements, systems and controls and so forth). Only one of these responses elaborated further on the amendments that in their view would be necessary to make the extension of MAR to spot FX effective:

- exchange control regulations;
- additional reporting obligations with respect to management of FX positions and international wire transfers (on top of the transaction reporting regime);
- extending supervision to the FX positions of large corporations;

- coordinate any supervisory measures with other regulators around the globe.

697. One association questioned the description of the spot FX market made by ESMA and therefore, the precautions described for extending the MAR regime to this market. In particular, it noted that the vast amount of trading on spot FX markets takes place through trading venues which act as price making mechanism, used as a reference for OTC trades. This point in particular was also made by two other responses. The appearance of non-authorized consolidated tape providers for the spot FX market that are executable at low latency (and the risks that their activity entails) confirms in their view the need for scoping these contracts into MAR. The same association also questioned the complexity of data storage and management derived from the MiFID II/MAR requirements.

698. Finally, several responses insisted on the importance of preserving the role of central banks on the control of their own currencies and their necessary involvement in the assessment of any structural change in the spot FX regulatory framework. Furthermore, responses highlighted the global nature of the spot FX market and noted again the risks of fragmentation of the market, de-localisation, etc.

**Q3: Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?**

699. 20 of the respondents agree with ESMA's analysis, and within the same a large number of respondents (15) also fully support the alignment between MAR and BMR with respect to definitions and sanctions and in general to strengthen the coordination between MAR and BMR. Respondents supporting the proposal also pointed out that:

- such alignment should be done once the review of BMR is completed;
- the definition of benchmark should be strictly identical in both regulations;
- before amending the definition of benchmark in MAR, it would be appropriate to have a significant number of indices that are benchmarks for the purpose of BMR but not MAR.

700. Two respondents who agree with ESMA's analysis are of the view that it should be deleted in MAR all the references to market manipulation of benchmarks and to include the prohibition to engage in or attempt to engage in benchmark manipulation (including sanctions) in the BMR, in order to have a standalone benchmark manipulation regime within the BMR.

701. 11 respondents, while some of them also agreeing with ESMA's analysis, believe that the definitions of benchmarks provided by MAR and BMR are sufficiently convergent thus do not raise a market abuse risk.

**Q4: Do you agree that the Article 30 of MAR “Administrative sanctions and other administrative measures” should also make reference to administrators of benchmarks and supervised contributors?**

702. Respondents expressed different views on ESMA’s proposal.
703. A number of respondents (AIM, BBVA, CLLS, CNMV advisory committee, KBC, Spanish Banking Association, The Investment Association) agreed on the proposed amendment, highlighting that administrators and supervised contributors to benchmarks are able to manipulate benchmarks, so they should also be subject to MAR sanctions.
704. However, some of the supportive entities stressed the following points:
- The inclusion of administrators of benchmarks and supervised contributors within MAR should be carefully considered in order to avoid an overlapping of sanction provisions. In this regard one respondents (LSEG) further suggested to streamline the administrative and pecuniary sanctions by making a reference to the BMR sanctions;
  - Two respondents (EEX Group and ICE) mentioned that benchmark administrators who exclusively offer regulated data benchmarks should not be included in the provision in order to avoid double regulation.
  - One entity (CLLS) suggested that, should the amendment be made, ESMA shall clarify whether the amended Article 30 includes recognized and endorsed third country administrators and their legal representatives and endorsing entities;
  - One survey’s participants (Nordic Financial Unions) stressed that MAR Article 3 (Definitions) needs to be amended to firstly define the concept of these two categories (i.e. administrator and supervised contributors) based on BMR.
705. On the other hand, a consistent part of the respondents expressed their disagreement with ESMA’s proposal (CMCE, Dutch Banking Association, EFAMA, EVIA, Finance Denmark, ICIS, NSA, Price Reporting Agency, SSDA). These participants shared similar views highlighting that administrators and contributors are covered by the provisions of Annex II of the BMR and therefore any changes might lead to inconsistency with BMR. In parallel, they noted that MAR is not the appropriate legislation to achieve that goal and therefore it is suggested (Finance Denmark, NSA) waiting for the upcoming BMR review for implementing such change.
706. A similar view is shared by BME and LME which also suggested removing benchmarks from the scope of MAR and have a separate manipulation regime in the BMR.

707. In conclusion, FIA ISDA seemed to support ESMA's proposal but reported not to be able to take a clear position without seeing the actual wording of the article. Other respondents (AMAFI, Euronext) referred to Question 3.

**Q5: Do you agree that the Article 23 of MAR “Powers of competent authorities” point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?**

708. The majority of the respondents (14) believes that Article 23 MAR should be extended to administrators and supervised contributors to benchmarks.

709. 11 respondents, on the contrary, are of the view that MAR should not be extended to regulate the benchmark regime and also suggest removing benchmarks from the scope of MAR and have a benchmark regime solely under BMR.

**Q6: Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?**

710. Respondents expressed different views on the proposed amendment, as already observed in their responses to Q4.

711. A consistent part of the respondents (AIMA, BBVA, CLLS, EEX Group, ICE, Spanish Banking Association, The Investment Association) supported ESMA's proposal to make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks.

712. However, although supporting the above-mentioned ESMA's proposal, some entities showed the following minor concerns:

- in relation to Article 30 point (g), one respondent did not see ground for the inclusion of a blanket ban on “dealing on own account”;
- one survey's participants (Nordic Financial Unions) stressed that MAR Article 3 (Definitions) needs to be amended to firstly define the concept of these two categories (i.e. administrator and supervised contributors) based on BMR.

713. On the other hand, a part of the respondents does not fully agree with ESMA's proposed amendments. Those entities highlighted the following points:

- FIA and ISDA raised a general point stating that since Art. 30(2) refers to people with management power and it is therefore questionable whether a submitter or assessor (or any other ordinary employee) should be included in the prohibition. A similar view is also shared by other respondents

(CMCE, EVIA, Finance Denmark, GFMA, ICIS, LSEG, NSA) which therefore reported not to agree with the proposed amendment;

- Other respondents (CMCE, ICIS, Price Reporting Agency) also added that ESMA's proposal does not take into account BMR Annex II and it is inconsistent with it (i.e. in the case of submitters, this proposal would be inconsistent with the BMR's Annex II for commodity benchmarks, which imposes no obligations on supervised contributors);
- There appears to be strong consensus on the fact that Article 30 should not be amended since assessors are journalists who are independent of the market they cover and should not be treated as financial services professionals;
- LME reiterated its view for which benchmarks should be out of MAR scope and a sole regime within BMR should be created.

714. Other respondents did not support the proposal without mentioning any particular reasons (NVB, KBC).

**Q7: Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.**

715. 50 respondents replied to this question. All respondents to the question agreed that the current reporting mechanism was too burdensome for issuers and that it should be simplified.

716. A couple of respondents took advantage of the consultation to state that the BBP safe harbour should be expanded to other instruments such as debt instruments.

**Q8: If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.**

717. Respondents expressed mixed views with 13 respondents expressing their preference for Option 3 as proposed by ESMA and 18 respondents favouring Option 2.

718. Respondents that expressed a preference for Option 2 explained that even if Option 3 seemed less burdensome than Option 2, because there is only one reporting CA, in practice it will be different because issuers will have to keep track of the market with the most liquidity and change the NCA they report to as the market with most liquidity changes. Therefore Option 3 would be less straightforward than Option 2 with potentially multiple CAs but CAs that issuers can easily identify.

719. Some respondents suggested that the CAs to which information is reported should be the same NCA that the issuers notify under Article 17 of MAR in the case of delay of disclosure.

**Q9: Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.**

720. Respondents unanimously agreed with ESMA's assessment and proposal to remove the reporting obligation for issuers of information referred to Article 25(1) and (2) of MiFIR.

**Q10: Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.**

721. Most of respondents agreed that the number of information to be reported by issuers under Article 5(3) should be reduced and they welcomed the proposal made by ESMA and made some proposal for deleting some of the fields. In particular, a number of respondents suggested to delete fields 3 and 12 from the lists because this information is not essential for CAs in the context of Article 5(3) of MAR.

**Q11: Do you agree with ESMA's preliminary view?**

722. ESMA received 38 responses to this question. The vast majority of respondents agreed with ESMA's view that it would be useful if issuers published some aggregated information on BBP trades and in particular aggregated volume traded and the weighted average price paid for the shares in each trading session.

**Q12: Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.**

723. ESMA received 27 responses to this question. The responses coincided with the views expressed in the previous question.

**Q13: Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?**

724. ESMA received 68 replies to this question. Most respondents consider that the definition contained in Article 7 of MAR works properly and that amendments to the definition could create legal uncertainty.

725. At the same time, several respondents noted that the definition is open to broad interpretations, resulting in risks of: (i) premature disclosure, as information may be published too early and at incomplete stages (considering that certain respondents deem that the option to delay disclosure is not a safe counterweight); (ii) blocking transactions (e.g. capital increases, bond issuances), difficulties in the execution of employee participation schemes and leading to burdensome compliance efforts that

are considered as not justified in early stages of processes. Some respondents also noted that, given the application of MAR to a broad range of financial instruments, including those listed on MTFs and OTFs, there is a risk of attracting less companies to EU capital markets – and that, for MTFs, issuers may choose analogous venues located out of the EU –, as a result of the burden and costs resulting from MAR to issuers and investors.

726. Number of respondents proposed amendments impacting the definition of inside information. Other than the case of inside information for emission allowances, such amendments concern mainly the second, third or fourth paragraph of Article 7 of MAR.

727. Namely, the following amendments were proposed:

- Distinction between inside information relevant for insider dealing and that relevant for the / disclosure obligations:

Few respondents requested to introduce the two-stages inside information (i.e. that relevant for the insider dealing and that relevant for disclosure of inside information).

In this framework, one respondent proposed to narrow the scope of Article 17 down to limit it to the disclosure of inside information for events or circumstances that have occurred, even if not formalised. Along the same line, one respondent proposed to keep the definition of inside information and add that of price-sensitive information, as referring only to circumstances which exist and events which have occurred.

- Debt issuances – Limitation of the relevant scope of inside information where it refers to debt issuances, considering only the inside information that would directly influence the debt issuers' ability to meet the repayment obligations of the debt issuance. In the opinion of the proponent, this amendment would help reduce the compliance costs, especially for SMEs.

- Emission allowances:

A number of respondents consider that Article 7(1)(c) should be amended to include only a cross reference to REMIT, since the duplication of the definition of inside information does not help and the definition contained in REMIT covers everything already.

There were several requests to increase the thresholds to be considered EAMP, applying the existing ones at the level of single power plants or entities – not at group level.

- Introducing a safe harbour in MAR to cover the circulation of intragroup information, for instance between directors and main shareholders by taking organisational measures and ensuring appropriate confidentiality.
- Selective disclosure: amend MAR in order to set out how to disseminate information to analysts, institutional investors, without proceeding to a wider disclosure. A respondent proposed to follow the model of the US Regulation Fair Disclosure.
- Removal of the reference to the “*significant effect on price*” from Article 7(1), in order to leave only the criterion of the reasonable investor (one respondent).
- One respondent requested to add a protection, similar to the current recital 15 of MAR, to cover issuers’ *bona fide* judgments on the precise nature of the information (since there is the risk that an ex post check by the NCAs would not consider issuers’ *bona fide*), when applying Articles 17 and 18 of MAR.
- Deletion of paragraphs 7(2) and 7(3) of MAR, since they mirror the *Geltl v Daimler* judgment, but are difficult to apply to situations different from that underlying that judgment. Another respondent proposes to delete paragraphs 7(2) and 7(4), since even though they aim at clarifying the nature of inside information, they pose more questions than those they solve.

728. Guidance was requested on the following items:

- The scope of MAR as regards the related financial instruments covered by Article 2(1)(d).
- Clarification that, for future events, the “*may reasonably be expected*” means that they are “*more likely than not to occur*”.
- In general terms, for SMEs, that often need to recur to advisors to determine if information is inside information or not, the application of MAR entailed increased costs. The issuance of guidance by ESMA on the application of MAR, having SMEs in mind, could help reduce such burden.
- With reference to the interaction between Articles 7 and 17 of MAR, one respondent requested to clarify how the definition of inside information, i.e. information directly or indirectly related to an issuer, relates to the obligation under Article 17 of MAR to disclose inside information that only directly concerns the issuer.
- Strict liability under MAR – few respondents raised that it is not clear if a reasonable interpretation made by a person of whether a certain information

is inside information is relevant for the purposes of being sanctioned under MAR.

- Sequence of events – issues were identified as regards the drafting of financial reports and when the draft of the report becomes inside information.
- Some respondents consider that for investment companies with mostly listed assets the financial reports are not likely to constitute inside information.
- Precise nature of the information.
  - a. Some respondents have issues with the reference to the set of circumstances/events which may reasonably be expected to exist or occur and would like to get indications on the minimum probability rate to be considered.
  - b. One of the respondents identified as a difficult area that of impairment triggers identified, requiring companies to consider writing down the value of assets, which requires Board approval.
  - c. Several respondents identified as areas in which the identification of precise information is complex the following: internal or external investigations, board changes, disputes on key contracts, declining financial performance not within the sphere of insolvency, transactions as M&A or joint ventures, financial information, ESG/corporate governance failings.
  - d. Several respondents consider that for periodic financial information there is a contrast between the periodicity of publication of financial reports provided for in the Transparency Directive and MAR, that requires to disclose inside information as soon as possible. MAR should - apart from the case of profit warnings – not cause premature disclosure of financial information.
  - e. With reference to profit warnings, one respondent requests to clarify if in the period of time between the first discussions of the management and the completion of the analysis of the situation carried out with advisors, i.e. before reaching a conclusion on whether impairments should be considered, the information is inside information.
  - f. Some respondents requested to clarify if the precision requirement exists when the direction the stock price will take cannot be anticipated.

- Intermediate steps
  - a. Some respondents requested to clarify which is the relationship between probability of the final result and probability of the intermediate steps (one respondent suggested a probability-magnitude test, and another one suggested to clarify which is the minimum percentage of likelihood needed), and another one proposed to clarify that the criterion to be used is that of “reasonable certainty” that the final event will materialise, or the “extreme likelihood”.
  - b. Two respondents, representing real estate funds, mentioned difficulties stemming from the fact that the investments made by real estate funds may concern (and be influenced by) operations that may take place at different stages of a process (e.g. real estate sales may be subject to several phases of negotiations, depending on the progress made in the project’s development). In light of this, the respondents ask ESMA to provide more precise indications about the case considered in Article 7, paragraph 3 of MAR.
  - c. One respondent proposed amendments to Recital (16) and Article 7(3) MAR to clarify that an intermediate step should by itself qualify as inside information in exceptional circumstances only, i.e. when, irrespective of the final stage, the intermediate step itself satisfies the criteria of inside information.
- Price sensitivity:
  - a. Some respondents also asked ESMA to clarify that the assessment of the price sensitivity should be made ex ante (since NCAs use also ex post elements to verify the assessment made by the relevant persons).
  - b. One respondent requested to clarify if the requirements of the likelihood of the significant effect on the price contained in paragraph 1 and that of the consideration of the information by a reasonable investor need to coexist, or if only the second one is sufficient to define the information as an inside one.
  - c. One respondent indicated that BaFin clarified that a certain profit, also small, would suffice, and clarified also that a reasonable investor could take into account irrational behaviours of other investors, and asked ESMA to issue guidance on this point.
  - d. Linked to the previous point, another respondent considers that reasonable investors should be understood as rational investors that assess information generally with a view on the (long-term) fundamental value of a financial instrument. The respondent considers that the

reasonable investors cannot be requested to anticipate irrational market reactions or even itself act (partly) in an irrational manner. The respondent asks hence to clarify that the issuer can assume investors acting rationally and adjusting to changes in the fundamental value of the issuer. An amendment to Recital 14 of MAR, adding that “Reasonable investors are expected to act in a rational manner: as a rule investors assess information with the view to changes of the fundamental value of a financial instrument” would solve the issue.

- e. Two respondents requested to clarify that issuers have to evaluate price effects on instruments issued by themselves, not on derivatives issued by third parties. Article 7 of MAR could as a matter of fact be read as if even information that has no price effect on the (underlying) instrument of the issuer (i.e. share or bond) could qualify as inside information if it has only an effect “the prices of related derivative financial instruments” (see Article 7(1) MAR, last sentence). One respondent proposes to delete the words “or on the price of related derivative financial instrument” from Article 7(1)(a).
  - f. Some respondents requested to clarify the criteria to consider for assessing if the information has significant effect on the price in the context of debt issuance and debt instruments in general, considering that typically debt instruments are less liquid than equity.
  - g. With reference to the same point, one respondent requested clarifications on the price sensitivity of the inaugural transactions for issuers that do not have any listed securities, as by definition there would be no impact on other instruments, but the price of comparable instruments could be affected.
  - h. A further respondent requested to clarify that the significant effect on the price should be considered as a mid and long-term effect rather than a short-term speculative effect.
  - i. Having noticed inconsistencies in the disclosure policy concerning dividends, two respondents requested to reiterate, as already done by CESR in 2012, that the dividend policy of the issuers needs to be clear and changes should be timely communicated, as it has a relevant impact on the related derivatives.
- Guidance on information that can affect the price formation of equity derivatives: one respondent noted that corporate event timings as sales releases, annual general meeting, data releases, conference presentations, corporate actions as dividends, stock split, launch of rights issue, launch of new products and information on the possible structure of corporate actions have an influence on derivatives (for instance moving the annual general

meeting that approves the dividends could imply that it falls within a different option's expiry). ESMA is requested to issue guidance to inform issuers of the effects that the corporate events have on derivatives, and also to ask to announce relevant and foreseeable corporate actions out of market times (the respondent noted that ETF issuers released relevant information intraday, in certain cases with processing errors, or with inconsistent releases).

- Selective disclosure to analysts and broker conference calls, meetings with significant shareholders and corporate access events – guidance should be issued to make sure that, apart from cases in which issuers try to address incorrect statements by analysts, they should refrain from disclosing inside information and where it happens should follow up with immediate dissemination to the market. Legislative amendments in line with the US Regulation Fair Disclosure would allow to address the problem of selective disclosure.
- Public information: in certain cases it is difficult to understand if a given information is public or not, and guidance on that would be appreciated. Some examples provided by respondents include:
  - a. loan documents, i.e. establishing if term sheets posted to the public sites of loan data sites are considered inside information with respect to a relevant issuer.
  - b. information coming from sources other than the issuer, for instance, the ruling of a court, which is made public by the court. Guidance is welcome on whether it has to be considered inside information until the issuer makes its public announcement (and if the issuer is obliged to disclose the information which has already been disclosed by a public body).
  - c. Guidance from ESMA should confirm that a firm would not be construed to be trading on the basis of inside information if it trades immediately after the public release of the cleansing statement where the broader market may not have had sufficient time to digest that information.
- Modalities of disclosure: some respondents noted that some market participants include inside information statements on all announcements, even where there is no apparent inside information – they may then have to comply with additional requirements (e.g. insider list), whereby increasing their administrative burden and risk.
- Clarifications concerning specific types of information:

- a. Several respondents asked if the name of a business counterparty in a negotiation constitutes inside information or not;
  - b. Requests for quote – one respondent requested further clarification on whether RFQ should be considered equivalent to an order for the purposes of MAR (further considerations on this are in the replies to question No 22);
  - c. Proprietary data – one respondent requested to issue guidance to clarify that proprietary data do not coincide with inside information, as they are exclusively internal, are not disclosed to third parties and may therefore be used by the issuers without committing market abuse;
  - d. Forward-looking statements – few respondents asked to clarify if the forward-looking statements may constitute inside information, noticing also diverging approaches on the topic among NCAs. Namely, CONSOB stated in a consultation paper that business plans may be inside information as their disclosure is likely to have a significant effect on the prices of issuer’s financial instruments and estimates from commentators or institutions according to recital 28 of MAR can be considered inside information. The AMF, under the previous MAD regime, noted that the information contained in Forward-looking statements, other than the financial information on the first year covered, is not be precise enough to be considered inside information. In this respect, ESMA is requested to clarify if third persons receiving the information must be added to a specific section of the Insider lists, for how long, if Articles 9 and 4 of MAR would apply, and to clarify, if in a bonds placement Forward-looking statements are disclosed to the subscribers of the notes, whether the bondholders would be able to freely trade the financial instruments.
  - e. One respondent proposed to have an open catalogue of the most recurring types of inside information.
  - f. Several respondents raised that for dually listed companies, in light of different interpretations among authorities it is difficult to identify inside information
- One respondent requests ESMA to clarify that the guidelines on the delayed disclosure should include as a case in which the delay is allowed that of legal and judicial proceedings. Namely, to avoid misleading effects on the market, issuers should be allowed to disclose information on such proceedings only when these are over.

**Q14: Do market participants consider that the definition of inside information is sufficient for combatting market abuse?**

729. ESMA received 55 replies to this question. A large majority of respondents considers that the current definition of inside information is broad enough to allow NCAs to combat market abuse.

730. Nevertheless, the same broadness of the definition poses difficulties in its interpretation, and a number of respondents proposes to narrow the definition as also a more restrictive one would allow to capture market abuse conducts. Many of them were already explained by the respondents in their replies to the previous question No 13.

731. Namely, below are the main observations by respondents (in line with those included in the reply to question No 13):

- In light of the broad definition, issuers are often risking premature disclosure. On the other hand, certain respondents believe that, given the broad definition of inside information, issuers tend not to analyse whether information they have is inside or not to avoid the related procedural burden, which exposes them to the risk of staff committing market abuse.
- Certain issuers do not appropriately disclose inside information. One respondent reports the case of documents material to the credit structure of an issuer being withheld from the public since they are deemed to not have any inside information, despite including highly material information such as restructured liabilities and pay-out waterfalls. Another respondent requests to have more clarity on the labelling of the statements containing inside information.
- A respondent encourages ESMA to set out factors that may be taken into account in determining whether or not information has been made public, and also to clarify if information disclosed via social media can be deemed to be public. Such respondent includes among the non-public information (i) the CEO of a publicly listed company speaking at a conference that is not open to the public but only to invited guests, (ii) 1-1 or group call or meeting held with a firm e.g. with their Investor Relations, CEO, CFO etc; (iii) a company sending information to the members of a mailing list which is not open for all to subscribe to e.g. only current shareholders may subscribe; (iv) broker's message in an Instant Messenger chat in Bloomberg (a blast) that is only sent to their clients; (v) official communication (e.g., from a government body, regulator, trading venue) that is disseminated in a manner outside of their disclosure policy e.g., where it is selectively disclosed; (vi) a price request that is provided by a counterparty to a broker(s), and a price request that is sent to a MTF by a counterparty where

the MTF does not have pre-trade transparency to the market as a whole at the time of receipt by selected market makers.

- One respondent considers that clarifications should be provided on whether the execution of a non-disclosure agreement implies that the information is inside information (according to such respondent, information that requires strict confidentiality agreements is likely to also be sufficiently precise and price sensitive to constitute inside information).
- Some respondents referred to the need to differentiate between inside information which has to be disclosed to the public and that which is relevant for the insider dealing prohibition. The first one should include only transactions formally and definitively approved and should take into account the intermediate steps only if it is certain beyond reasonable doubt that the intended circumstances or event will materialise.
- As regards the intermediate steps as such, one respondent proposes to clarify that, where the intermediate step does not have a potential to have a price impact related to the future event, it does not constitute inside information before the future event has a realistic prospect. Overall, there is criticism on whether the reference to intermediate steps brought clarity to the definition of inside information.
- As regards forecasts, one respondent requests to clarify that as long as an issuer maintains his own financial results within the forecast, no publication requirements should be triggered in addition to the regular financial reporting.
- As regards the reasonable investor test, several respondents requested to clarify if the criterion of the “information that a reasonable investor would use as a basis for investment decisions” has to coexist with the significant effect on the price or not, proposing to clarify this point in the level 1 text.
- Some respondents request to apply more broadly the delay of disclosure, considering it misleading only if the information contrasts with previously disseminated data or information. Also, the requirement of the legitimate interest is interpreted too narrowly by regulators.

732. In addition to that, the following issues were raised, resulting in proposed amendments to the definition of inside information:

- One respondent proposed to clarify the definition concerning front running. In particular, it covers information conveyed by a client and relating to a client’s pending orders in financial instruments. According to the respondent, this is problematic as buy-side participants in bond markets are not generally “clients”. They are instead treated as arm’s length

counterparties to which no fiduciary or investor protection duties are owed. Likewise, communications of buying or selling interest from the buy-side are in the form of RFQs and not formal “orders”. In light of this, the respondent requests to amend Article 7(1)(d) to refer to “...information conveyed by a client or dealing counterparty and relating to the client’s pending orders or dealing counterparty’s requests for quotes in financial instruments...”.

- One respondent proposed to delete the reference in Article 7(1)(a) to the significant effect on the prices of ‘related derivative financial instruments’, since the price impact on derivative instruments depends on its structure, particularly the leverage. As there is no general transparency of any possible derivative instrument, it is factually impossible for market participants to make that assessment.
- One respondent proposes to amend Article 17 of MAR to either avoid the disclosure obligation for intermediate steps, or amend the criteria allowing the delayed disclosure in order to align the delay to the application it had before MAR.

**Q15: In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?**

733. ESMA received 40 replies to this question. A large majority of respondents considers that there is no information that they identified as inside information and which is not covered by the definition.

734. Few respondents identified cases which in their view are not clearly covered by the definition:

- One respondent requests to clarify that the requests for comments and non-actionable indications of interest constitute inside information since the fact that a party requests for a quote on a particular volume of financial instruments is considered as price-sensitive by such respondent. Another market participant notes that pre-hedging should be tackled in the MAR review since many investors have the impression that when they approach brokers for certain transactions there is often an effect on their share price.
- One participant notes that the definition would need to be amended where the scope of MAR was amended to include spot FX contracts.
- In certain cases a single item of information may fall into the inside information category when fully considered in the context of a group (as in a case of a managing director of a business unit of a group, which is relevant with respect to the entire group’s results).

**Q16: Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?**

735. ESMA received 21 replies to this question. No respondents have identified price relevant information which is not covered by the definition of Article 7(1)(d).
736. Most of the respondents consider that the definition included in Article 7(1)(b) of MAR is appropriate when it comes to inside information on commodity derivatives, as it recognises the structural difference between information on an issuer of securities and a commodity derivative contract or the underlying commodity to this contract. The application of the general definition of inside information on financial instruments would pose many problems and result in higher costs for commodity producers, as they could not carry out their hedging strategies.
737. Also, unintended consequences could take place in the physically traded commodity markets. With reference to the statement of the CP (paragraph 91) that the definition causes discrepancies between listed and non-listed commodity producers, one respondent noted that they never experienced anomalous outcomes since information relating to a company is rarely material to the price of a commodity so to be relevant as inside information for commodity derivatives. Another respondent noted that there is information that a non-listed commodity producer would have to disclose as inside information (in relation to commodity derivatives) which a listed firm would not have to disclose (in relation to bonds / shares), simply because the information is not relating to the commodity producer but to the commodity derivative. With reference to the latter, the disclosure may concern information about the issuer that might have an effect on the price of securities issued by that issuer, and also information about the underlying commodities. Such information could include information about global trading, political situations in relevant countries, key refinery outages, as well as information on the firm's own trading strategy. Since the scope of inside information in relation to commodity derivatives is potentially so much wider, it is appropriate to limit it to information that can reasonably be expected to be monitored and disclosed.
738. The following possible amendments to the definition were proposed:
- As suggested for the emission allowances, few participants proposed to analyse the possibility of introducing a cross reference to the inside information definition in REMIT for wholesale energy market participants. In particular, REMIT already sufficiently covers the emission allowances, power and gas markets. Hence, MAR creates an additional layer of complexity and legal insecurity for wholesale energy market participants that are already subject to REMIT (without obvious benefits). Since wholesale energy market participants are active in both physical and financial markets, it would be appropriate to have one comprehensive market abuse framework covering both relevant physical and financial instruments which should be constructed on the basis of the same principles and policies. Information that is not (incl. own trading strategy and plans)

inside information under REMIT, should not constitute inside information under MAR neither. According to such respondents, a reference to the definition of inside information of REMIT into the definition of Art. 7 (1) (b) MAR would substantially reduce complexity for the real economy.

- One respondent, in order to include in the definition of Article 7(1)(b) of MAR information which is not required to be disclosed but which could impact electricity and gas prices, proposes to replace the word “and“ with “in particular”.

**Q17: What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?**

739. ESMA received 21 replies to this question. Most of the respondents consider that the current definition of inside information concerning commodity contracts is appropriate as regards the balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information (see also the summary of replies to question No 16). In particular, considering the fundamental differences between financial markets and commodity markets, the current definition allows market participants to perform their hedging transactions without being exposed to regulatory uncertainty via too wide a definition.

740. Commodity market participants must be able to hedge their production needs and commodity price risks. A general disclosure obligation would dramatically restrict the ability of physical market participants to hedge, leading to increased costs of trading and production.

741. As regards possible amendments to the definition, the following points were raised:

- One respondent considers that MAR should recognise that in respect of commodity producers and their group companies, own trading plans and strategy do not constitute inside information.
- One respondent, on the basis of the qualification of the transactions either as speculative or hedging pursuant to Article 10(3) of EMIR, suggests that the transactions executed by/or on behalf of a commodity producer and qualified as hedging in accordance with EMIR should be outside of the scope of MAR.

**Q18: As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.**

742. ESMA received 21 replies to this question. According to all respondents, MAR allows commodity producers to hedge their commercial activities and the current definition works. Several respondents noted, in replies to this and to previous questions, that due to Article 7, there is uncertainty as regards the tests of preciseness of the information and price sensitivity.

**Q19: Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?**

743. ESMA received 24 replies to this question. Only three respondents consider that the definition of inside information applicable to financial instruments could be used also for commodity derivatives. Among them, one respondent suggests introducing safeguards to protect the hedging and another one is not in a position to comment on the point.

744. All other respondents consider that the structural differences between securities markets and commodity derivatives markets justify the specific definition of inside information for commodity derivatives. EU legislators decided to have separate definitions of inside information for those reasons, which are still valid. By applying Article 7(1)(a) to commodity derivatives the scope of information falling under the definition would be significantly expanded and lead to the definition becoming unmanageable for commodity derivatives, given that it includes information that relates to either the commodity derivatives themselves, directly or indirectly, or directly to related spot commodity markets. In contrast to the securities markets where non-public information relating to the issuer will be disclosed periodically by the issuer, cleansing the market and enabling trading to resume, in the commodity markets a counterparty to a derivative could potentially be in possession of inside information indefinitely and would not be able to trade at all until the information somehow becomes public.

745. One responded, while strongly recommending keeping the existing definition, noted that if Article 7(1)(a) of MAR was applied to inside information on commodity derivatives it would be necessary to introduce safeguards to replicate this protection and to enable commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities and to protect other commodity spot and derivative market participants. One way to do this would be to create a new safe harbour (e.g., where a person in possession of inside information places orders or enters into transactions for the purposes of hedging activity). The safe harbour would however not change the fact that a much wider range of information would become "inside information" and therefore any person dealing in commodity derivatives would need to have systems in place to identify and monitor relevant information and ascertain before trading that each transaction falls within the safe harbour. Given the fact that insider dealing is a criminal offence in most EU jurisdictions, it is likely that many market participants would err on the side of caution and limit trading

when they are in possession of relevant information. As a result, even introduction of a safe harbour is still likely to have a significant effect on the effective functioning of commodity derivative markets.

**Q20: What changes could be made to include other cases of front running?**

746. ESMA received 25 replies to this question. Most of the respondents consider that no amendment is needed to the definition of Article 7(1)(d) of MAR. Many of them agree also that front running is also covered by MiFID II and some pointed out that also the UCITS implementing Directive 2010/43 requires managers of AIFs or UCITS not to misuse information related to pending investment fund orders and shall take all reasonable steps to prevent the misuse of such information by the relevant persons.

747. One respondent considers that the definition does not need to be amended. Nevertheless, in case of extension to catch other persons, also Article 17 should be amended so that an issuer aware that someone else is planning to deal in its financial instruments should not automatically be expected to announce that information.

748. One respondent, replying to ESMA's question on whether to extend front running to persons within the issuer, clarified that in its view the scope concerns the knowledge of other market participants' orders, and therefore the definition should not include staff within the issuer.

749. One respondent requests ESMA to issue guidelines in line with the FXCoC and the FICC practice standards.

750. Other respondents proposed to amend the definition as follows:

- One respondent considers that orders are inside information where they are of a precise nature, not public and likely to have a significant effect on the relevant prices of financial instruments. In light of this, Article 7(1)(d) may create confusion that orders would only be considered as inside information for "persons charged with the execution of orders". A further issue linked to Article 7(1)(d) is that such wording is too restrictive as other people within an investment firm can have access to a pending order without being the person in charge of the order. The respondent identifies two possible solutions: (i) removing Article 7(1)(d), or (ii) amending it on the basis of the wording used in MiFID II for designating staff involved in execution of client orders and include also the persons whom conversations and communications are to be recorded in compliance with Article 16(7) of MiFID II.
- Several respondents propose to extend the Article to all persons aware of information concerning pending orders (provided that the orders constitute inside information).one among them requested to refer to all persons involved in the pre-trade lifecycle, research analysts and persons involved

in various internal committees where investment strategies may be discussed and investment activities reasonably anticipated, and all persons with access to aggregated information, such as advisors and brokers, as well as persons in support functions (e.g. IT, compliance), where they have access to pre-trade information.

- One respondent indicated that all employees who put orders before clients by the same terminal should be considered.
- One respondent proposed to amend the definition by deleting the reference to the significant effect on the price, as it does not allow to consider number of front running behaviours.
- One participant requested to extend the provision to include the effect on any financial instrument whose price movements are highly correlated to the price movements of the financial instrument.

**Q21: Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?**

751. ESMA received 21 replies to this question. The respondents do not think that amendments in the definition of front running are needed to consider the case of illiquid instruments.

752. One respondent noted that as the number of individuals aware of a specific order flow increases, the risk that any can take advantage of the combination of illiquidity, market impact and order execution increases. Hence, for illiquid instruments, the client should at least be informed on the conditions of execution of their orders.

753. Notwithstanding the fact that front running in illiquid markets may cause the potential profits for the market abuser to be higher and the potential losses for the unaware investor to be larger, the criterion to be considered is whether the information on which front running is based has the potential to meaningfully affect transaction prices in a financial instrument, not necessarily volume.

754. One respondent requested to clarify that where liquidity contracts are in place with the issuer of illiquid securities, where the liquidity provider is facilitating the retail flow by providing additional liquidity, this is not considered front-running.

755. One respondent requested to have guidance in the form of examples of specific situations relating to financial instruments with low liquidity and illiquid markets. Such guidance or legislative change should however not disrupt liquidity or prevent the possibility of conducting transactions or making markets.

**Q22: What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?**

756. ESMA received 30 replies to this question. Mixed views were expressed on the usefulness of pre-hedging and on the risks related to this practice. Namely, the responses show different attitudes towards pre-hedging: certain respondents consider that pre-hedging entails market abuse risks and that it may mainly benefit the brokers. Other respondents consider pre-hedging as a common and usual practice, which proves useful especially for illiquid instruments, and for which the risks linked to market abuse would be limited to cases of brokers trading against the clients. Further points raised by the respondents are summarised below.

1) Respondents that tend to consider pre-hedging as market abuse prone and not beneficial for investors or clients

757. As indicated above, several respondents consider that pre-hedging has the potential to create market abuse risks, since buy-side RFQ information is often inside information and trading based upon it can constitute insider dealing and there are conduct risks stemming from the fact that pre-hedging essentially places the proprietary interest of the broker ahead of the de facto client. Several respondents also questioned the 'benefits to investors' as prices can be improved where risk is hedged, some of them consider, on the contrary, that it is detrimental, especially where coupled with the risks of information leakage and the cumulating multiple price impacts of all RFQs.

758. As regards the RFQ one of the elements supporting that it constitutes inside information is that trading venues that make use of the RFQ facility normally make RFQs only visible at the time of the request to the market makers who have been asked to respond to the RFQ. Consequently, these specific requests cannot be deemed to be public at the time of receipt and will only become public once the quote(s) by the market maker(s) provided in response to the RFQ have been made pre-trade transparent under the rules of the venue. Where the size and direction of the trade are disclosed, since the information is not "public", it should not be used by the broker to trade.

759. RFQs for a two-sided quote are unlikely to contain enough specific information to constitute inside information.

760. Some respondents also noted that in the context of bond trading markets, when brokers explicitly refuse to transact with buy-side participants on an agency basis they do not have to apply the conduct rules in MIFID II and may avoid committing to any obligation to act in the client's best interest associated with a broker/client relationship.

761. One respondent observed that buy-side firms cannot put in place additional systems and controls to address market abuse linked to pre-hedging, other than avoiding submitting RFQs to multiple brokers and concealing potential trading intentions by asking for two-way prices.

762. One respondent proposed that to address these risks, a specific measure could be to regulate the flow of information between the sales and trading areas, so as the salesperson could only communicate to the trader in an RFQ a limited set of

information. For instance the identity of the client should not be disclosed (but only a tiering so that the trader can manage the risk).

763. One respondent considered that for bond issuance, brokers not selected for underwriting syndicates or playing a minor role may use the information by selling the relevant products to investors. According to the same respondent companies benefit as well, as part of the hedging returns will be used to offer lower yields for corporates on the 'to be issued' bonds, whereas the investor would not have any benefit out of it. As regards bonds, this respondent considers that issuers/brokers should be allowed to hedge only (i) the general interest rate risks (corporate bonds are typically quoted against swap rates/government bond yields), and (ii) general credit market risks through the trading of credit default swaps on highly diversified indexes of corporate bonds.

764. A concern for investors is that there may be information leakage during the RFQ process. I.e., the concern that market participants may take advantage of the investor's price requests in order to make trading profits and, in the process, move prices against the investor. Considering that pre-hedging and call around markets should not compromise market integrity objectives, the same respondent considers that the pre-hedging is admissible in certain cases, including:

- a. in case of agreement following a request for a price from a counterparty.
- b. Where following an agreed understanding with a counterparty the market participant indicates that he will trade at a particular price or better if they are allowed to pre-hedge.
- c. Where a third country exchange permits pre-hedging and the activity is done in accordance with their rules and relates only to orders in contracts traded on that exchange.
- d. Where following the receipt of an RFQ the market maker continues to update their quotes in line with moves in the displayed market quotes but not based on the information that they have received.
- e. Where following receipt of an RFQ which they fill the market maker is free to trade notwithstanding the fact that the trade may not be public as yet.
- f. Where following receipt of an RFQ a market maker widens out their quote or pulls their quote to protect themselves against persons who may misuse the information.
- g. Where following the receipt of an RFQ a market maker is notified that the order has been filled elsewhere the market maker is free to update their prices to reflect the information even though that trade may not have been published.

h. Where following receipt of an RFQ which is not immediately filled by the market maker a reasonable period of time has passed by such that the counterparty has had a reasonable opportunity to execute the order the market maker is free to update their prices to reflect the information.

i. Where following the receipt of an RFQ which is not immediately filled by the market maker, the market maker receives a RFQ with the opposite direction to the first RFQ, the market maker may improve its price for the second RFQ and may deal whilst having knowledge of the first RFQ.

765. Another respondent has a more restrictive view and deems that the pre-hedging should only be permitted where the market maker has taken on actual risk which occurs only when the trade has been agreed. The market maker has not taken on actual risk either at the point when the RFQ requestor sends the RFQ or at the point when the market maker responds with a quote, and the pre-hedging should not be permitted in the competitive RFQ context. The same respondent clarifies that it is not justified to hedge after a market maker submits a firm quote but before the trade has been agreed (i.e. the moment in which the market maker takes the risk). The effect of permitting pre-hedging prior to the counterparty actually agreeing the trade is to worsen the price the counterparty ultimately receives as it means every other market maker has to update their price based on the action taken by the market maker who is pre-hedging.

766. In line with the above respondent, with reference to the risk that the market maker takes with the pre-hedging, a respondent notes that (i) at any point in time during a RFQ process, a quote (which may or may not be competitive) can be updated or cancelled by the market maker. Technically quotes can be updated up to 4 times per second across all platforms. A market maker is therefore not assuming any risk as they can update their 'firm' quotes at any time in the process to reflect market movements, and (ii) once the responder has lifted a quote (awarded the trade), there is a 20 second 'handshake' phase on Tradeweb where by the market maker can choose to accept or reject a quote which supports the respondent's position that risk is only assumed once the trade is executed.

## 2) Supportive views on pre-hedging

767. Other respondents consider that pre-hedging behaviours do not most likely affect the market price and qualify as insider dealing, since (i) MiFID II already provide requirements aiming at preventing of impacting negatively the client and managing potential conflict of interests raised by the practice, and (ii) RFQs do not often meet the definition of inside information for lack of the precision requirement, since it cannot be reasonably expected that the client will actually deal on the basis of the quote. One respondent considers that the assessment should be made case by case and that if the RFQ is two-ways it cannot constitute inside information.

768. Respondents also stress that pre-hedging is an important function for the smooth operation of financial markets, benefitting clients by allowing brokers to provide

increased liquidity to their clients and provide the quality of execution expected by clients. The main risks linked to pre hedging behaviours are the conduct risk and the potential prejudice for the client in case of competitive requests for quote, which could show an over-demand to the market and is more likely to have an impact on the price that could impact negatively the client. On the other hand, precisely thanks to pre hedging, the firm can reduce its risk and therefore offer a better price for the client. By doing so, it helps to achieve its best execution duties. Transparency towards clients is also needed.

769. Therefore, the main risks linked to pre-hedging could be mitigated through transparency towards the clients and RFQs in two directions.

770. Some respondents recognise though that there may be a risk of insider dealing, if a broker were to use the information received from the client to trade on its own account, including potentially trading against the client, or when pre-hedging potential operations for liquid assets (where pre-hedging would not be needed).

771. In this respect, some respondents, though acknowledging that in the case of the broker trading against the client there may be risks of insider dealing, deem that the current MAR framework is appropriate to deal with it.

772. Some respondents deem that the pre-hedging has different functions and features depending on the relevant markets. Namely: (i) derivative markets: market participants are at times trying to facilitate trading in markets where it is not always simple to readily see prices, for example in less liquid options markets, where investors need the support of brokers, and where liquidity providers/ market makers provide prices to what is demanded and could wrongly be understood as front-running; (ii) European ETF market: there may be loopholes when using information out of private RFQ protocols to act on lit markets, before such information has become part of the public domain.

773. Some respondents are aware that market participants trade on the basis of information taken from a received RFQ, and this has given rise to client concerns regarding information leakage when requesting RFQs from liquidity providers. In other words, investors are concerned that market participants may take advantage of their price requests in order to make trading profits and, in the process, move prices against the investor.

774. One respondent considers that in certain circumstances it is not appropriate to conduct a transaction without pre-hedging, since the bank or investment firm might not be able to offset the risk exposure entailed, for example bond issuances and M&A transactions. If a bank would assume risk in a customer transaction that it will not be able to hedge, it would increase risks in the trading book and increase cost of funds. This may discourage banks or investment firms from conducting transactions thus impacting the liquidity and the risks in the whole financial system.

### 3) Commodity firms

775. In line with replies to the previous questions, several respondents also clarified that the pre-hedging should not be mistaken for the hedging activities of commodity firms. Market participants should be able to implement their own plans and strategies for trading, production and hedging. Like under REMIT, information regarding the market participant's own plans and strategies for trading should not be considered as inside information. For example, energy producers must be able to implement their own plans and strategies for their power production and for this purpose to procure all necessary commodities and emission allowances at any point in time to run their power plants and to sell the power (to be) produced and this on any (spot and future) commodity markets

### 4) Requests to issue guidance /amend MAR

776. Guidance (or the possible amendments of MAR, which is however mentioned by few respondents) on what is considered to be permitted in relation to pre-hedging and what actions could be considered as 'front-running' would help market authorities to effectively monitor and identify instances of potential market abuse. Guidance is also needed according to some respondents on when an RFQ is considered inside information, on setting out the records needed for the pre-hedging, the disclosure of pre-hedging arrangements by brokers to their clients – which some brokers already do - and internal policy within the firm that traders must adhere to.

777. On the other hand, some respondents deem that a number of industry codes and guidelines have been issued which address acceptable practices in this area.

778. One respondent requested ESMA to gather intelligence on the exact nature of 'pre-hedging' and how to delineate from front-running and negative consequences for the market (definition clarification). This could be achieved by understanding which market practices exist, how the interaction in the triangle for the parties involved (investor, broker, liquidity provider) looks like, according to the market they interact in.

779. One respondent requested ESMA to endorse EPTA's examples of legitimate activities (as set out in paragraph 6 of the EPTA response) and to explicitly point out that it is not acceptable for a party to respond to an RFQ when in competition with other market makers and then hedge on the basis that they might be filled on the trade and are taking on risk. It is only acceptable to hedge in those circumstances where the trade has been executed.

### **Q23: What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?**

780. ESMA received 20 replies to this question. Most of the respondents expressed their opinions on the benefits of pre-hedging already in the replies to question No 22,

on the basis of which there is not a striking majority of views, and many respondents pointed out at a number of features of pre-hedging practices to be considered.

781. In addition to the considerations included under the replies to question No 22, one respondent noted that pre-hedging more frequently operates to the detriment of buy-side participants. Pre-hedging facilitates the sell-side trading ahead of other market participants to which no duty or obligation to act in their best interests is owed, and that the benefits are taken by brokers. Several brokers have refused to pre-hedge due to recognition that the practice is detrimental to their counterparties and damaging for ongoing relationships. The respondent considers also that broker pre-hedging can damage the functioning of the fixed income market and can lead to the market moving against bona fide traders before they trade. Some market participants may consider that pre-hedging could also narrow spreads. Whilst this may appear positive for buy-side participants, narrower spreads are not relevant when then the entire market has moved to a more disadvantageous price point. Pre-hedging creates a cost to the buy-side which could be incorporated in the spread of a single broker with whom they are trading, as opposed to being added cumulatively to the market price by each broker that the buy-side participant submits an RFQ to. Additionally, the respondent considers that pre-hedging does not necessarily has a substantial link to brokers attempting to provide competitive market prices. Brokers will often pre-hedge regardless of whether they have sufficient inventory to undertake the trade. Therefore, pre-hedging frequently does not improve liquidity for buy-side participants.

**Q24: What financial instruments are subject to pre-hedging behaviours and why?**

782. ESMA received 17 replies to this question. Respondents indicated that:

- Pre-hedging tends to be limited to fixed income instruments traded on RFQ markets, such as bonds (best execution requirements do not apply).
- Many financial instruments (and most notably listed derivatives) are subject to pre hedging
- All financial instruments under the scope of MAR are subject to pre-hedging.
- Pre-hedging is a feature of any commodity derivative market and not specific to any; some of the financial instruments that are subject to pre-hedging are:
  - a. In the FX markets for the management of risks associated with one or more anticipated client order, designed to benefit the client in connection with such orders and any resulting transactions. This is covered in the FX Global Code under Principal 11.
  - b. It is also permitted on the ICE Futures US markets when trading block trades as described in its Frequently asked questions number

24, on when these are allowed and who can undertake these arrangements.

- c. The Financial Markets Standard Board (FSMB) also recognises pre-hedging arrangements in the Final 3 July 2018 paper in the new issuance of fixed income instruments for the purpose of risk management activity.
- d. Where this arrangement is recognised as an accepted practise, there are control frameworks to manage these behaviours in the permitted environment.
- e. Financial instruments trading in OTC markets where investment firms trade in principal capacity.
- f. Pre-hedging is not specific to a subset of financial instruments. Should there be concerns on pre-hedging in relation to wholesale FX markets, one respondent believes these should be addressed through the upcoming review of the FX Global Code, rather than revisions to MAR.

**Q25: Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.**

783. ESMA received 53 replies to this question. Respondents expressed mixed views. Several stakeholders (12) reported that the current regime generally works well.

784. At the same time, other respondents requested clarifications on the below points:

- 14 respondents raised concerns as regards the provision for which “delay of disclosure is not likely to mislead the public”. It should be better clarified for different reasons. An example is that inside information, by definition, is expected to have a significant influence on the decisions by investors to trade on securities (this view is shared by many respondents). A couple of respondents also proposed deleting the condition of “non-likelihood to mislead the public”.
- 8 respondents requested to clarify that the activation of the delay mechanism should be considered as a logical counterweight of the current definition of inside information and is not exceptional (as hinted by ESMA’s guidelines).
- 4 respondents asked to clarify that the leak of rumours should be new, sufficiently precise, persistent and have an impact on the price of the financial instruments of the issuer to trigger the obligation to disclose inside

information, otherwise a no-comment policy should be possible. In this context, one other respondent stressed that the criteria of sufficient accuracy of the rumours are unclear.

- ESMA should provide greater clarity as to what constitutes inside information that requires disclosure (certain issuers do not classify information as inside information).
- Several respondents noted that the point on prejudice of legitimate interest is crucial and should be granted a broad reading. The condition of the “prejudice of a legitimate interest of the issuers” in ESMA’s guidelines remain overly restrictive and the removal by ESMA of “impending developments that could be jeopardized by premature disclosure” is not helpful to issuers. ESMA should consider revising the guidelines to broaden the idea of prejudice of legitimate interests.
- It would be beneficial if the ESMA Guidelines could be further developed to also include different types of issuers, as well as examples of other situations in which inside information may arise and there may be a legitimate reason for the issuer to delay the disclosure, since for the issuer it may be difficult to establish whether the requirement is met. In addition, a respondent argued that the “issuer’s legitimate interests” should be interpreted to encompass the issuer’s direct or indirect interests.
- In line with what stated above, the ESMA Guidelines seem to be not exhaustive and it would be warranted to revisit the cases where the delay of disclosure is justified to cover a broader set of circumstances for example in respect of administrative or other legal procedures.
- ESMA should investigate the reasons for the differences in the amount of delay procedures triggered in the various member states and, on this basis, carry out a new consultation on the regulation of the delay procedures.
- The distinction between delaying disclosure of information in accordance with MAR Article 17(4) and publishing inside information as soon as possible is not always clear.
- In some circumstances, it would be more appropriate for the issuer to be able to further evaluate the information, during an evening/night or during a weekend, before disclosing the information to the market. In this context, a couple of respondent suggested ESMA to make a clarification by publishing Guidelines for the interpretation of “as soon as possible” outside the market hours.
- The issuer obligations under Article 17 of MAR only apply with regard to inside information in relation to financial instruments issued by that very

issuer and the documentation related to a decision to delay should be streamlined.

- Clarification was requested on the fact that the duty to disclose information related to instances that require the formal approval of a body arises only after the final approval by the competent body.

785. Amendments were requested on the below points:

- A couple of respondents also proposed deleting the condition of “non-likelihood to mislead the public”.
- The provision in the last paragraph of article 17(4) of MAR requiring any issuer who has delayed the disclosure of inside information to inform the competent authority that disclosure of the information was delayed and to provide a written explanation should be removed; the exemption applicable for the SME package should concern all issuers.
- Given that the meaning of the phrase ‘ensuring the confidentiality of inside information’ is not clear, Article 17(4)(c) MAR should be amended the following way: ‘the confidentiality of that information is ensured or the issuer or emission allowance market participant may reasonably expect its confidentiality’.
- The previous regime in place in certain countries was deemed to be more satisfactory than MAR since, among other things, an issuer's obligation to publish inside information was not triggered until the inside information becomes a “reality”, whereas the prohibition against insider trading would take effect immediately when the inside information came into existence. The respondent is indeed proposing to amend MAR to reflect such changes.
- The conditions that must be met in order to delay the disclosure are too burdensome and a narrower definition should be provided (e.g. to allow companies to disclose negotiations once sufficiently certain that a positive outcome would be reached.). The same entity mentioned that record keeping requirements can be too burdensome, and ESMA should consider alternative arrangements.

**Q26: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.**

786. ESMA received 43 replies to this question. A great variety of respondents provided the same set of practical examples of difficulties encountered with Article 17(4) of MAR, such as:

- An issuer encounters a production problem or the preparation that is considered inside information. The problem and its immediate effects can be disclosed, but there might be supplementary information may not be ready for disclosure at the precise same time.
- The interim report preparations reveal a deviation from market expectations in a business area of an issuer that is significant enough to qualify as inside information. An immediate disclosure of the inside information and the interim report following shortly thereafter may well confuse the market.
- Negotiations with potential customers or suppliers since it is difficult to identify the precise moment in which the information becomes inside information.

787. In light of what mentioned above (point 2), there seems to be strong consensus on the fact an area where difficulties are often encountered relates to drafting financial reports. On top, according to one trading venue, there appears to be a diverging approach between issuers in different jurisdictions in the treatment of non-public information in draft financial reports.

788. One respondent recommended ESMA to delete the requirement in Article 17(4) for an issuer to notify an NCA separately where the disclosure of inside information has been delayed as this seems to be additional to the requirement in Article 17(1) where inside information has to be disclosed to the public as soon as possible.

789. Many respondents raised a general point, rather than providing specific examples, mentioning that difficulties are mainly related to the interpretation of the conditions for the delay provided for by Article 17(4) MAR especially by letters (a) and (b). With respect to the fact that the delay of disclosure should not likely to mislead the public, one respondent provided the following examples as a “problematic” area:

- In case of a planned M&A transaction where legitimate interests to delay the disclosure clearly exists, it is difficult to assess the condition relating to misleading the public;
- In case of decisions by authorities (e.g. tax, environment, competition) issuers may receive reasonably precise indication of the likelihood of a positive or negative decision. Such information can constitute inside information, but any disclosure is premature before the authority has issued its decision. However, the argument for meeting the condition 17(4)(b) would need to be built on argument that speculative disclosure before the authority has issued its decision can mislead the public or create false markets. The same applies in other circumstances such as the negative auditor’s opinion (where the negative opinion constitutes inside information).

790. One trading venue argued that difficulties were encountered in identifying whether an issuer could still have legitimate interests to delay a disclosure even after the relevant event becomes final (e.g. a contract being entered into and signed or a CEO's formal resignation).
791. One respondent then mentioned that the wording of recital 50 of MAR may also cause doubts, given that the publication of inside information may be delayed when financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law.
792. One other respondent mentioned that it is not clear whether in a board succession or board succession planning situation an issuer can delay disclosure pursuant to Article 17(4) MAR. Other examples provided are negotiations with potential customers or suppliers (i.e. when is the information inside information?) or in case of CEO or board member replacement.

**Q27: Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?**

793. ESMA received 54 replies to this question. Respondents expressed mixed views on the inclusion of such requirement.
794. Majority of respondents (40) mentioned that further systems and controls requirements, in addition to the ones already in place, may not bring much to the established practices and may somehow be superfluous. Therefore, such provision should not be added to Level 1 text. Along the same line, most of the respondents leveraged on the fact that MAR has already resulted in a complex regulation with heavy bureaucratic and burdensome procedures and introducing requirements for identifying, handling and disclosing inside information would only create additional burden. Few respondents also mentioned that more flexibility is required on this aspect.
795. One respondent did not express support for ESMA's proposal but noted that, if such rules or recommendation were to be considered necessary, they could be included as ESMA's guidance (Level 3) and contain practical examples.
796. Similarly, with respect mainly to UK markets, issuers are required by various market rules to put in place systems and controls that enable them to comply with MAR and therefore respondents believe that such matters are best left to market regulation. However, one respondent, although not being in favour of introducing such provision, emphasized that there may be merit in introducing ESMA's suggestion provided that this is structured as a high-level principle and it applies on a proportionate basis.
797. It was also reported that some entities may be bankruptcy-remote special purpose vehicles (SPVs) and it is unclear how they could 'operate' prescriptive systems

and controls. Respondents mentioned also that issuers shall decide how to organise themselves in order to be compliant with the legislation to find solutions adapted to the scale, size and nature of their business.

798. On the other hand, a residual part of participants (7) supported the inclusion of such requirement in MAR, mentioning that that this would make internal identification and evaluation processes more robust. Although being in favour of ESMA's proposal, almost all these respondents emphasized that ESMA should provide for high-level obligations, leaving to the issuer the choice of arrangements, systems and organizational as well as procedural mechanisms consistent with its governance systems. One law firm added that in such cases, SMEs listed on MTFs shall be exempted in order to avoid burdensome regulatory costs which could discourage initial public offerings.

799. Finally, it was argued that the systems described in MAR Art. 16, as well as their application to inside information as suggested by ESMA, should be further detailed and clarified.

800. Some respondents used the reference to Article 16 to express their concerns on this provision, and noted that non-financial counterparties (NFCs) should not have to comply with the obligation of such article and that the review of MAR should clarify that non-financial firms are excluded from the scope of Article 16. Namely, financial the ESMA Q&A on Article 16 brings into scope non-financial firms whose main activities do not consist in arranging or executing financial transactions on a professional basis, and which engage in financial transactions on an ancillary basis only, with the main objective to hedge risks resulting directly related to their commercial or treasury financing activities (mainly with derivatives on exchange rate or taxes). Hence, decisions to use financial instruments are taken based on operative requirements, within the framework of internal guidelines, and not with the aim to chase opportunities in financial markets. Moreover, NFC's mostly act as clients of the financial sector in the respective transactions, not as providers or market makers. Therefore, NFCs should not have to comply with the obligation of Art. 16 MAR.

801. The rest of respondents (6) did not express a strong view on ESMA's proposal.

**Q28: Please provide examples of cases in which the identification of when an information became “inside information” was problematic.**

802. ESMA received 38 replies to this question. Respondents provided different examples of cases in which the identification of when an information became “inside information” was problematic:

- Preparation of financial reports could be a relevant example (i.e. when does the information compiled become sufficiently concrete to consider the work material as inside information?).

- In any protracted process (e.g. M&A transactions – especially in the early stage of a transaction - or decisions regarding boards members), it can be difficult to identify the right point in time in the process when an information becomes inside information.
- When an issuer is approached concerning a possible take-over offer but the indicative price is unattractive or the terms of a due diligence unacceptable.
- In a public procurement process, issuers may find it difficult to evaluate when the information becomes inside information, especially when there are only 2-3 bidders left in the competition.
- In board succession processes and board succession planning it can be difficult to identify when a process becomes sufficiently concrete for it to qualify as "inside information".
- A company was considering consolidating its share capital, and after a lengthy process, the board determined that the information had become inside information only once the shareholder circular had been substantially drafted. It was only at this point that the board was persuaded there was clearly a realistic prospect that the consolidation would go ahead. However, determining what is realistic involves subjective judgement, as reflected in the conflicting advice the board was receiving from its external legal adviser and broker.
- In case of: potential breach of financial covenants; forecasts (including approval of the budget and changes to forecasts that the issuer has disclosed to the market); amendments to or introductions of new rules and regulations (especially relevant in "heavily" regulated industries), judgements and approvals/rejections from authorities; and amendments to the issuer's business strategy.
- When it is difficult to determine the threshold above which it should be considered that the influence it could have on the prices of financial instruments or related derivative instruments is appreciable.
- Information subject to non-disclosure agreements (NDAs) and its relationship with inside information: the different interpretation of whether information covered by NDA is inside or not has consequences on the publication of such information.

803. In contrast, according to one respondent the identification of when an information became inside information was not problematic.

804. Finally, a great part of respondents (13) referred to answers given to other questions (mainly Q. 13, but also Q. 15 and Q. 27).

**Q29: Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.**

805. ESMA received 47 replies to this question. Almost all respondents answered that there should not be any obligation to notify NCAs of the delay of disclosure of inside information, when this information loses its inside nature for the following reasons:

- It would add further administrative burdens on issuers while the NCAs have already at their disposal many other tools to detect abusive behaviours;
- It would pose problems of confidentiality and it would create more confusion on the notion of inside information;
- The compliance costs relating to such a requirement clearly outweigh the potential benefits;
- It is not in line with the Q&A 5.2 on the Market Abuse Regulation (ESMA 70-145-111) where it is said that: “(..) when the issuer has delayed the disclosure of an inside information and this information has subsequently lost the element of price sensitivity, that information ceases to be inside information and thus is considered out of scope of art. 17.1 MAR”;
- There is a risk that the proposed change could have an unintended chilling effect on issuers' willingness to determine that something is inside information if there remains any doubt over this.
- This obligation would create conflicting incentives for the issuer – e.g. on the one hand the issuer should assume the existence of an inside information rather early in the project and decide on a delay and, on the other hand, he then would have to report to the NCA even if the project fails and exposes himself to scrutiny, thereby being disincentivized to assume an inside information early on.

806. Generally, NCAs and/or other public authorities already as of today has far-reaching authority to request information on an ad hoc basis in connection with any investigation or criminal proceeding relating to insider dealing or other market abuse.

807. NCAs still have the right to ask the issuer to send it the lists of persons with access to inside information.

808. Compliance with such a requirement would be almost impossible to police effectively and would be unlikely to deliver any meaningful increase in the detection of incidences of market abuse

809. A softer approach is undertaken by a couple of respondents, which noted that:

- In order not to impose an additional administrative burden on issuers and the NCA, NCAs could be given the choice of implementing this requirement if they considered those tests were met in the case of their market.
- The notification would be considered unnecessary only if there is not an impact on the market.

810. Finally, a minority of the respondents (2) supported ESMA's proposal, as this would enable NCAs to better identify possible cases of insider dealing.

811. One respondent did not provide any comments.

**Q30: Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.**

812. ESMA received 18 replies to this question. No 17 respondents generally agreed with ESMA's proposal to make Article 17(5) of MAR more explicit including the case of a listed issuer (which is not credit or financial institution) controlling a listed or non-listed credit or financial institution. In this context one respondent suggested that the word "issuer" in condition (a) should be replaced by the words "credit or financial institution" and that consequential changes will also be needed to Article 17(6).

813. However, one respondent, although supporting ESMA's proposal, noted that there is no definition of control in MAR, and that depending on the definition of control, the issue at stake might not be limited only to listed issuers controlling a credit or financial institution.

814. Finally, one other stakeholder mentioned that in view of such amendment to Article 17(5) of MAR, it would be necessary to decide which entity should be required to apply to the supervisory authority for the consent to delay the disclosure of inside information.

815. One respondent did not provide any comments.

**Q31: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.**

816. ESMA received 10 replies to this question. Half of the respondents (5) mentioned they have no examples or no comments on difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

817. However, the rest of respondents provided different views, mentioning that:

- Public disclosure of insider information (Article 17 MAR) should take into account the specificities of the two-tier board system in the sense that

issuers frequently face the problem that it remains unclear whether they can delay the disclosure of inside information on the grounds that a decision of the management board is not yet approved or even not yet discussed by the supervisory board;

- It is unclear whether the condition of Article 17(4) MAR can be applied to the publication of information relating to periodic financial reports;
- MAR sets out only low conditions for the forced disclosure in case of a rumour where confidentiality is no longer ensured.

818. One other respondent mentioned that, in the pre-resolution phase, some actions of the resolution authority aimed at preparing for resolution may be considered 'inside information' and therefore a delay of disclosure of this information based on Article 17(5) MAR will be appropriate. In addition, one banking association argued that it may sometimes be difficult to determine what is in the public interest (as defined in Article 17(5)(b) of MAR).

819. Another issue identified by respondents is the problem of waiting for the consent of the competent authority, while there is a requirement to publish information for investors under "normal" disclosure requirements. An example of such situation is observable when time for publication of financial report expires and the data published in this report would disclose "temporary liquidity problem". Respondents analysed further the issue and argued that the request to delay under Article 17(5) of MAR should be preceded by the decision of issuer to delay publication of information under Article 17(4).

820. Finally, one banking association suggested that Article 17 of MAR should not generally apply to extraordinary situations.

**Q32: Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.**

821. ESMA received 14 replies to this question. Generally, respondents appeared to be sufficiently happy, as they considered that MAR in this area should be regarded as sufficiently clear and uncontroversial. Few respondents (6) also mentioned not to have encountered any relevant case.

822. However, part of the stakeholders expressed different views. One respondent took the opportunity to provide a broader comment on the MAR regime pointing out that the Regulators should exclude issuers that exclusively trade their bonds on MTF from the scope of application of MAR.

823. A couple of stakeholder mentioned that, in certain cases, supervisory authorities have implied that they expect an issuer to abstain from the disclosure of certain information received from such authorities (e.g., as part of an ongoing inspections), which results in a difficult position for the issuer.
824. A potential conflict between MAR and BRRD (Article 17 MAR vs Article 81 et seq. BRRD) was identified by one respondent which noted that conflicts may arise in case of notification and communication obligations of institutions and authorities in a resolution scenario. In such circumstances, according to this stakeholder, the specific notification and communication provisions in the BRRD should prevail in a resolution scenario and Article 17 MAR should not apply.
825. Separately, one banking association mentioned that it would be desirable to introduce a legal provision that obliges EU supervisory and market authorities to share jointly and in advance the rules on information to be published and the terms of publication.
826. Finally, one respondent raised a general point stressing that financial institutions, being subject to different directives and regulations, have problems with indicating whether, when and to what extent they should provide reports to the market.

**Q33: Do you agree with the proposed amendments to Article 11 of MAR?**

827. ESMA received 43 responses to this question.
828. 23 respondents do not agree with ESMA proposed amendments, stating that:
- i. no “clarifications” along the lines should be made and that ESMA proposal would not represent a mere clarification, but rather a fundamental change in the nature of the market sounding regime, and
  - ii. a mandatory market sounding, even when it does not involve provision of inside information, would be disproportionate and burdensome for the recipients. These respondents believe that the language of MAR is clear in providing a safe harbour against Art.10(1) MAR.
829. Among these respondents, some welcome a clarification on the voluntary nature of market sounding regime.
830. 12 respondents strongly agree with ESMA proposal and on the need to add additional clarity on Art.11 MAR in order to harmonize the reading and interpretation across the EU.
831. Other 8 respondents welcome a clarification of Art.11 MAR, but raised some points that should be taken into consideration:
- i. the obligatory nature of market sounding only makes sense when inside information is transmitted;

- ii. it could be clarified that art. 11 MAR is a real safe harbour, meaning that the subjects mentioned in art. 11 that sound the market in a way described in art. 11 are always safe, however, they can do market sounding in any other way provided that they comply with MAR duties;
- iii. the requirements in art. 11 MAR are very burdensome and should be simplified or removed.

**Q34: Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?**

832. ESMA received 40 responses to this question.

833. The great majority of the respondents (36) think that the current scope of market sounding is too wide and therefore some limitations should be introduced. Those respondents who strongly oppose to make the market sounding a stand-alone obligation also support limitation of its scope in case Art. 11 will be turned into a stand-alone obligation.

834. The respondents believe that the scope should be narrowed in the following ways:

- clarifying that certain transaction types are not in scope;
- clarifying that the regime would only apply in case inside information is shared;
- excluding public M&A transactions from the scope of the regime;
- with reference to SME listing package, clarifying that market sounding requirements do not apply to the issuance of bonds not providing inside information;
- clarifying that market sounding refers to “transactions” involving financial instruments in order to exclude from its scope transactions involving only tangible assets (e.g. gas transaction);
- clarifying that contracts in the framework of block trading should not fall into the regime;
- providing further guidance on the terms “transaction announcement”, “acting on the issuer’s behalf” and “gauging interest”.

835. The 4 respondents who do not support the proposal of limiting the definition of market sounding believe that the markets need the flexibility in the definition of market sounding and that a clarification would make the regime more complicated.

**Q35: What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?**

836. ESMA received 22 responses to this question. 9 respondents are of the view that point of first contact between the DMP and the potential investor should not be covered by the definition of market sounding. In particular, they argue that the definition should only cover communications which include inside information or relate to a specific transaction. The initial contact involves very limited or general information that is not considered inside information and as such this stage should not be regarded as market sounding.

837. On the other side, 2 respondents are of the view that, according to the current status of the laws in force and ESMA guidance, the applicability of the market sounding regime is limited to the initial step of the transaction, during the phase of identification of opportunities for potential transactions.

838. 10 respondents are of the view that the stages in the definition of market sounding should be from the initial contact with the potential investor, therefore further clarification on this does not seem to be required.

**Q36: Do you think that the reference to “*prior to the announcement of a transaction*” in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?**

839. ESMA received 30 responses to this question. 12 respondents are of the view that the reference to “prior to the announcement of a transaction” in the definition of market sounding is appropriate. Few respondents also fear that extending the wording may potentially add uncertainty to the application of the regulation.

840. 18 respondents, on the other hand, states that such reference should be amended:

- to cover also those communications of information not followed by any specific announcement;
- to clarify what constitutes the “announcement”;
- to clarify that market sounding regime is only applicable where the relevant information is related to potential secondary market transactions and not when it is related to primary markets one;
- so that it reads “...communication of information, prior to the intended announcement of a transaction, ...” or similar wording to capture failed transactions without inadvertently extend the scope of the regime;
- by adding “expected” before prior to the announcement of a transaction;

- to clarify if the important element of any sounding is that there is a “communication of information”.

**Q37: Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?**

841. ESMA received 37 responses to this question.

842. According to the respondents, the market sounding regime has proven to be difficult for the following reasons:

- the highly formalised procedure prescribed in Art.11, which causes an inflexible practice here the focus is on satisfying detailed formal requirements rather than applying sound judgment and due care;
- in relation to Euro PP transactions, early looks meeting and M&A transactions, where the regime should not apply;
- excessive burden of the applicable regime and onerous administrative requirements on both parties causing reluctance from investors to be sounded. Moreover, investors who are already invested in a company do not want to receive any insider information and be restricted;
- asymmetric interpretations of the market sounding definition from DMPs and Investors,
- the regime proves to be unclear to apply to club deal transactions executed on a confidential basis (this has been the case for project bonds and for small bond transactions (EUR 50 M): these transactions are only made public after pricing when the bond is created on Bloomberg to generate the trade tickers for investors;
- a market sounding recipient is defined as any person who is the recipient of a market sounding, this will encompass a very wide variety of different investors ranging from large buy-side firms, who may be frequent recipients of market soundings, to investors who have only a very limited number of publicly traded investments and therefore who will be very infrequent recipients of market soundings. The respondents believe that many of the proposed market sounding rules would not be appropriate for market players with infrequent access to publicly traded securities.

**Q38: Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?**

843. ESMA received 38 responses to this question.

844. In order to simplify and improve the market sounding regime, the respondents suggested to:

- simplify the record keeping requirements;
- prescribe that MSR can rely on the assessments made by the DMP, without being charged with the duty to make an independent assessment;
- allow more flexibility to listed issuers which do not use mandatory recorded telephones lines;
- not extending the scope of recorded telephone lines and making it mandatory for all soundings, as minutes taking should be sufficient;
- publish standard scripts covering different situations in order to avoid each bank coming up with its own script when contacting investors;
- remove the need for signature from the minute requirements;
- clarify that where a potential investor has received a market sounding, follow-up conversations can be viewed as part of the sounding;
- align the market sounding requirements to the insider list requirements;
- consider more appropriately and take into account the investor-buyer side;
- limit the market sounding regime to the cases where inside information is disclosed.

**Q39: Do you agree with ESMA’s preliminary view on the usefulness of insider list? If not, please elaborate.**

845. ESMA received 54 answers to this question. Out of them, 41 agreed with ESMA’s preliminary assessment regarding the usefulness of insider lists. It is worth noting that three respondents insisted on the benefits that insider lists provide in relation to the establishment of warnings when employees request pre-approval on personal account dealing trades, on the investigation of alerts following an employee trading warning, to help checking if there has been an improper wall crossing and/or if need-to-know basis principle has been complied with.

846. However, several of the responses received (including most of those within the group of responses supportive of the usefulness of insider lists) identified drawbacks in the current regulatory framework for insider lists:

- 18 responses considered that too much information is currently required. In this respect, two responses noted the difficulties that issuers and related persons found in elaborating these lists due to the conflict that exists between Commission Delegated Regulation 2016/347 on the format of insider lists and regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

- Eight responses identified problems with permanent insider lists.
- One additional response differentiated between small debt issuers and big equity issuers: whereas for the former the administrative burden entailed by insider lists was excessive, they considered correct the status quo for the latter. Another response suggested exempting (or permitting 'opting-out' to issuers that trade exclusively their own bonds on an MTF.
- Finally, two responses requested a specific differentiated (simplified) regime for financial intermediaries as opposed to that of regular issuers. In these respondents' view, financial intermediaries should be required to have in place systems that enable them to elaborate the insider lists upon request on the basis of their own systems and records.

**Q40: Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.**

847. 57 responses were received to this question. Only eleven opposed to modify the existing framework.

848. The rest supported amending the insider list regime, either by introducing changes in MAR or by amending Commission Delegated Regulation 2016/347.

849. The following proposals to amend Article 18 of MAR can be identified:

- Fifteen responses agreed with clarifying in level 1 that the insider list should only include those persons who effectively gained access to inside information, considering that the system is currently well-known and such practice should already be embedded in the issuers' regular processes for managing inside information. On the contrary, nine responses considered that insider lists should contain those persons who could have gained access, noting that it may not be possible (or excessively burdensome) to identify each individual who effectively accessed a piece of inside information.
- Nine respondents supported coming back to the pre-MAR regime or otherwise granting freedom to the issuer to determine the information to be collected.
- One response requested clarifying that that independent service providers are not obliged to have in place the same monitoring systems than issuers, to check each individual gaining effective access to inside information. Therefore, independent service providers should be excluded from responsibility in case a person gains access to inside information through illegitimate means (for instance, by accessing the provider's 'cloud').

- Another respondent considered that the amount of information to be requested by the issuer (and the reluctance from non-staff members to provide such information) leads in many cases to a situation where the completion of the insider list takes longer than the publication of the piece of inside information. To prevent that from happening, they requested specifying in MAR the obligation of external service providers to provide the necessary data to the issuer.

The same response considered necessary modifying the regime for long term service providers (e.g. auditors). These market participants proposed that MAR should specify that, instead of an event-based insider list, they only have to create a list per engagement, that would cover any inside information episode to which the external service provider could access.

- Two associations requested exempting emission allowance market participants from the obligation to elaborate insider lists, based on the limited amount of inside information they generated, since, in their view, non-public information from EAMPs is less relevant than macroeconomic data. To achieve that, they proposed either raising the threshold higher or setting the existing thresholds at a lower level than the group level.
- One respondent requested clarifying that the confirmation 'in writing' can also be provided by using email or specific software.

850. The responses suggesting amendments to Commission Implementing Regulation 2016/347 elaborated around two main topics:

- Reducing the amount of information required, and in particular the information that could be sensitive from the perspective of the GDPR; and
- Permanent insider lists were perceived as a problem for these respondents.

**Q41: What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?**

851. From the 41 responses received, only 25 effectively addressed the question asked about the systems and controls required to identify and provide the insiders who effectively accessed the inside information. These 25 responses unanimously rejected the idea of requiring specific systems and controls for these purposes based on similar arguments:

852. Technical challenges and costs derived from the identification of who had actually accessed the information, including that it is impossible to track the moment when someone has read a document.

853. The costs would be impossible to bear for certain small cap companies.

854. One response suggested that the external service providers should not be obliged to provide a copy of the insider list to the issuer when requested by the relevant NCA.

**Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.**

855. ESMA received 49 responses to this question.

856. 36 responses opposed to the proposal to expand the scope of the obligation to draw up and maintain insider lists to any person performing tasks through which they have access to inside information. Nine responses supported the extension with certain caveats.

857. The arguments against the extension of the scope of Article 18 of MAR were:

- Several responses warned against an extensive interpretation of Article 18 of MAR that would lead to applying these obligations to contractual counterparties and the counterparty's advisors, or to market participants that deal in financial instruments of the issuer (e.g. buy-side firms). Another respondent considered that only persons acting as agents of the issuer (e.g. having a power of attorney) should be obliged to elaborate their own insider lists. Any other person performing tasks through which they access inside information should be represented in the issuer's insider list, but not be forced to elaborate their own list.
- In this respect, many responses noted that the individuals mentioned in the CP (auditors and notaries) are already included in the issuer's insider list when they have access to inside information. Forcing them to elaborate and maintain their own insider lists would only imply an additional administrative burden and additional IT investments that might imply higher costs for customers and compromise certain business models (11 responses). Several of these respondents underlined that persons performing tasks through which they may access inside information are already bound by non-disclosure agreements or non-disclosure obligations, professional secrecy and deontological or other similar regulatory prohibitions.
- Moreover, three responses noted that a broad interpretation of this requirement might lead in certain cases to an extra-territorial application of the obligation to maintain an insider list. Given the existing difficulties in gathering this information due to data protection obligations and the reluctance of third parties to confirm their obligations in writing, it would not imply better effectiveness of insider lists.
- As an additional argument against expanding the scope of the obligation to draw up and maintain insider lists, one response noted that spreading the obligations in

Article 18 MAR to other persons might end up, as a side-effect, in watering down the core obligation of the issuer, i.e. maintaining inside information confidential: since those other persons would have to elaborate their own insider lists, the issuer may feel comfortable with sharing inside information with a wider population than before.

- One response, focusing on the case of auditors, noted that the identification of inside information corresponds to the issuer, and other individuals (and more specifically auditors) cannot make that assessment. The only exception to this principle is where the piece of inside information comes from the activity of the auditor itself (e.g. from an audit objection). This respondent considered appropriate that the insider list contains a section where all the auditing team members are represented.
- Along the same line, other three responses considered that persons acting on behalf or on the account of the issuer should only be obliged to establish their own insider lists when the issuer determined not only that a piece of inside information exists, but also that the disclosure of that inside information has to be delayed.

858. Those who supported the expansion of Article 18 of MAR noted that:

- Some Member States already require that (4 responses).
- Two responses, while supporting the extension, recommended differentiating between auditors commissioned by the issuer and auditors appointed by the relevant supervisory authority.

859. The responses identified other cases that might fall under the same category as auditors and notaries and generally expressed against their inclusion in the scope of Article 18 of MAR:

- Counterparties to a transaction and the counterparty's advisors. In this respect one response wondered whether natural persons or unlisted companies intending to make a takeover bid or unlisted companies negotiating with a listed issuer;
- Public authorities (e.g. tax, competition, environment, banking authorities) including courts; in particular, one respondent suggested ESMA clarifying whether individuals, bodies and authorities regulated in the bankruptcy law and the restructuring law should be considered within the scope of Article 18 such as creditor committee, bailiff, court experts and the like.

**Q43: Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.**

860. ESMA received 48 answers to this question.
861. Twenty-six (26) responses supported the existence of permanent insider sections while eighteen (18) were against it.
862. However, out of those who supported the permanent insider section of the insider list, six responses noted that the description made by ESMA in the CP about the persons who should be included in that list was too narrow, and proposed including in the list other individuals or bodies, like the executive board and the board of directors and the compliance staff. Two of these responses underlined that the persons to be included in the list are not always the same and requested flexibility in terms of who could issuers include in the list.
863. Four supportive respondents suggested ESMA mirroring the approach to the permanent insider section that appears for insider lists in Regulation (EU) 2019/2115 as regards the promotion of SME growth markets, which refers to 'persons who, due to the nature of their function or position within the issuer, have regular access to inside information'. One response considered that EAMPs should be entitled to include in their permanent insider section all persons who could have access to inside information.
864. ESMA notes as well that four responses requested further guidance about the persons or bodies that should be included in the permanent insider lists, and three other respondents requested clarification about the point in time where the insider list should be elaborated, since there seems to be divergent interpretations about it: when the inside information is generated or when the disclosure of a piece of inside information is delayed.
865. From the responses who were against the existence of the permanent insider section of the insider lists, nine responses did not consider useful to maintain the possibility to elaborate the permanent insider section. In coincidence with some supportive responses, one of these respondents noted that it is unlikely that nobody has access at all times to all pieces of inside information.
866. Finally, seven additional responses did not consider the permanent insider section as useful in general but did not propose to abolish that option, since it was widely used by companies that only had to include there a small group of individuals.

**Q44: Do you agree with ESMA's preliminary view?**

867. ESMA received 54 replies to this question that almost unanimously supported its preliminary view. Three of these responses noted that this was already regular practice in several EU jurisdictions.
868. Only three responses (two supportive of ESMA's preliminary view and one opposed) raised a different interpretation. For these respondents the legal obligation to keep an insider list remains with the issuer and does not correspond to external service

providers. Therefore, one of the supportive responses considered that external service providers do not have to keep insider lists but just written records of the persons who have access to a piece of inside information. Other supportive response considered that the proposal should remain as an option, that the issuer should always have access to the insider lists of its external providers and that the issuer remains responsible for the accuracy of the insider list. On similar grounds, one negative answer considered necessary clarifying in MAR the obligation of external service providers to provide information for these purposes, i.e. to make such provision a statutory obligation, and therefore compulsory for them according to the data protection regulation.

869. Seven supportive answers noted that the external service providers of the issuer should have the similar capacity with respect to their own insider lists (i.e. they should be able to include one natural contact person per legal person performing services for them).

870. Two supportive responses noted that only the business contacts of the natural persons should be included in the external providers' insider lists.

**Q45: Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.**

871. From the 42 responses received, there was almost unanimous support for eliminating from the requirements the references to “date of birth”, “personal telephone numbers”, and “personal full home address”. Many of these responses also considered unnecessary the national ID number.

872. Eight of those responses supported including only in the insider lists the identification of the relevant person, the specific date and time on which a piece of information became inside information and the date and time on which the relevant person gained access to that piece of inside information. One response considered appropriate saving just one single official identity number (such as a passport number). Similarly, three respondents supported gathering only information about name, ID, work phone, work email, reason for becoming an insider and time for becoming an insider.

873. Many of these responses considered that a reduction of the fields of the insider lists would limit the difficulties that issuers and their service providers find when gathering personal data, which may become more burdensome in case of involving non-EU jurisdictions.

874. Several of these responses noted as well that it should be possible to provide the additional information included in the current insider lists upon request from the national competent authority.

875. Other respondents raised the following points for potential reduction of the administrative burden that insider lists entail:

- Allowing personal data to be stored separately and provided to the national competent authority upon request
- One association recommended the acknowledgement of the validity of alternative systems currently used by issuers and investment firms to detect and register persons with access to inside info as insider lists;
- Provision of information between issuers and external service providers:
  - a. Some responses considered necessary that, if external service providers were to keep their own insider list, MAR should include the legal obligation of the issuer to notify those service providers when a piece of inside information is qualified as such, so as to enable them to fulfil their legal obligations. In connection with that, it was noted that the timing for elaboration the insider list of external service providers should be specified.
  - b. Several responses referred to the necessity of establishing a legal obligation of persons acting on behalf or on the account of the issuer to provide the issuer with the relevant information about their own insider lists when established by the legislation, and in particular, when requested by the national competent authority; and
  - c. Decoupling the issuer's responsibilities from the persons working on their behalf or on their account (for instance, one respondent requested specifying in MAR that, if after two attempts the external service provider has not provided the data, the issuer is no longer responsible).

- Two responses requested the clarification of the moment in time when the insider list should be elaborated, identifying different interpretations across jurisdictions of this obligation (for some authorities, the obligation arises in the moment when the inside information is generated, even if it is immediately disclosed, whereas some authorities consider that it is only necessary when the information is delayed);
- Several responses requested clarifying that the acknowledgement in writing of the legal and regulatory duties entailed by the inclusion in the insider list under Article 18(2) of MAR can be made by email or any other IT means;
- Amending MAR to permit the issuer to update its own insider list within “a reasonable period of time”.
- One respondent requested the establishment of a unified portal where issuers and external service providers could upload and manage their insider lists;
- Allowing specific trading windows for permanent insiders after the publication of financial results.

**Q46: Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?**

876. ESMA received 52 replies to this question. 47 respondents believe that the current threshold of Euro 5.000 causes the disclosure of insignificant transactions and therefore the reporting threshold should be increased to:

- Euro 20.000, (40 respondents);
- Euro 50.000, (2 respondents);
- Euro 100.000 (2 respondents);
- Euro 10.000 (1 respondent).

877. Moreover, the respondents state that the increased threshold should apply in all EU member states without specific considerations by NCAs and should be harmonized in order to avoid differences of interpretations among the EU. A single threshold would promote uniformity and make it easier for issuers active in more than one Member State.

878. Only 2 respondents are not in favour of increasing the minimum reporting threshold.

879. 3 respondents support the aggregation of transactions as a means of making the disclosure exercise as simple as possible and they state that this should be

continued and be on a same day basis with no netting, with only the highest and lowest prices (not the weighted average) disclosed.

880. Unrelated to the reporting threshold, several participants noted that:
- The scope of transactions subject to notification has been defined in an excessively broad manner (5 respondents). The list of transactions triggering the disclosure requirement should be amended in order to limit it to transactions that would give meaningful signals to the market. Transactions with no nexus to an active investment decision by a PDMR should be excluded from the scope. These include transactions where the PDMR's involvement is purely passive, such as gifts and donations received, and inheritance received and automatic conversion of a financial instrument into another financial instrument.
  - One respondent identified certain transactions which could be notified on an aggregated basis every 6 or 12 months, as (i) acquisitions of securities under an employee savings scheme where those acquisitions are planned under the scheme to occur at regular intervals or under an employee savings scheme that is open to all or most employees; (ii) acquisitions of securities by way of dividend reinvestment; (iii) sales of securities acquired pursuant to an employee scheme, where those securities are the only ones being sold by or on behalf of the PDMR/CAP at that time and are being sold to raise funds to cover taxes and/or social security contributions (or similar) and/or exercise monies, in each case arising in connection with the acquisition of the securities (or participation in the employee scheme); (iv) acquisitions or disposals of securities below a specified threshold, being a percentage of the PDMR/CAP's existing shareholding; (v) dealings where the beneficial interest in the relevant security does not change.
  - One respondent asked to clarify at which point in the process of share issues the reporting obligation for PDMRs arises in connection with subscription of shares, in respect of both right issues and private placements.
  - 12 respondents noted that notifications on stock options should only happen when shares are sold, not when shares are granted for free and when stock options are allocated. The rationale should be that notifications are due when there is a decision by the PDMR (there is no decision if they are granted shares for free) which may have a signalling value for the market. Another case is if the PDMR works for an investment firm that assigns financial instruments based on an underlying that is a financial instrument of a third party.

- Issuers keep private information on PDMRs by having the list of CAPs, few respondents suggested to eliminate the notifications concerning CAPs and the obligation for the issuer to keep the related list.
- It was noted that some member states require, in addition to the form based on Regulation 2016/523, further information, and harmonisation was asked on this.
- As regards the timing of the notification, several respondents (4) noted that the SME package made things more complex, since if the PDMR notifies the issuer late, the latter won't be able to meet the deadline.
- Several respondents commented also on the threshold for subsequent notifications, requesting to amend the current regime – which requires the notification of each transaction – possibly applying again the same threshold used for the first notification.
- The 12 months should be calculated on the basis of the financial calendar of the issuer.

**Q47: Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).**

881. ESMA received 39 replies to this question. 28 respondents are of the view that the current threshold of Euro 5.000 should be raised by ESMA to Euro 20.000 at European level in order to ensure clarity and harmonization and to be in line with the Capital Market Union, without giving to the NCAs the option to keep an higher threshold, since this would represent an administrative burden for issuers operating in several EU countries.

882. On the contrary, 8 respondents believe that the option for NCAs to keep a higher threshold should be maintained in order to take into account specific circumstances if the national markets. However, these respondents are divided on the amount of the optional threshold: for some of them the optional threshold should be higher than Euro 20.000 (for 3 respondents it should be up to a maximum specified in MAR), while for other respondents the optional threshold should not exceed Euro 20.000.

883. A few respondents mentioned that the liquidity of the financial instrument should be the key criteria in setting the threshold.

**Q48: Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.**

884. ESMA received 25 replies to this question. Few respondents (8) could not identify alternative criteria on which the reporting threshold could be based.

885. The other respondents identified the following alternative criteria:

- tranching scheme: the notification should be done for tranches of threshold. In practice, once the threshold has been reached, the calculation of the threshold should restart from zero until a new threshold has been reached again (meaning that all the following amounts must be summed up until they reach again the threshold).
- market capitalisation: the reporting threshold should be set on the market capitalisation of the issuers or the type of trading venue where the financial instruments are traded, considering the following options:

886. Option 1:

- keep the current threshold of 5,000 Euro for the issuers whose financial instruments are admitted to trading only on an MTF / OTF, and
- introduce a higher threshold of 20,000 Euro for the issuers whose financial instruments are admitted to trading on regulated market.

(Another solution within this option might be to keep the current threshold of 5,000 Euro for the issuers who are SMEs according to EU law. However, the problem with this option is the lack of one, unified definition of SME under EU legislation. Moreover, this option might lead to existence of two different regime on one particular trading venue.)

887. Option 2:

- introduce a higher threshold of 10,000 Euro for all issuers whose financial instruments are admitted to trading regardless of their size and the place of trading (i.e. regulated market, MTF / OTF).

888. Exemption of certain types of transactions: passive transactions and transactions that result from a transfer by operation of law (such as in case of marriage, divorce, inheritance, gifts, donations, acquisitions of securities under employee saving schemes) should be exempted or not be qualified as transactions for the purpose of Article 19(11).

**Q49: On the application of this provision for EAMPs: have issues or difficulties been experienced?**

889. ESMA received 4 replies to this question. On the application of this provision for EAMPs the following issues have been detected.

890. Some respondents are not aware of issues concerning EAMPs. A respondent highlighted the following, which is not referring to EAMPs though: It is not clear whether the transactions performed by PDMRs and involving so-called listed investment certificates issued by the issuing company but representing derivative contracts where

the asset base is a share or debt instrument issued by an entity other than the issuer, and not in any way connected with this, are exempt from the disclosure obligations under Article 19 MAR.

891. The definition of a Person Discharging Material Responsibility (PDMR) is significantly broader than in other international jurisdictions, including “closely associated persons”. In addition, the term ‘closely associated persons’ (CAP) is perceived as ambiguous. Based on the current definition of CAPs under MAR, potentially it means numerous notifications to be made by the PDMR to all companies where he/she plays a role in the management.

**Q50: Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.**

892. ESMA received 23 replies to this question. 6 respondents have not identified alternative criteria on which the subsequent notifications could be based and therefore suggest keeping the actual criteria.

893. The other respondents identified the following alternative criteria for subsequent notifications:

- The threshold for subsequent notifications should apply on a per transaction basis – i.e. the obligation to notify a particular dealing arises only if the value of that dealing exceeds a specified threshold. This would mean that each PDMR (or the issuer on its behalf) would not need to keep a running total of the value of that PDMR's dealings during a calendar year and would result in notifications that are more useful to investors. And if a PDMR is unsure whether a particular transaction exceeded the threshold, he/she could avoid the risk of failing to notify a transaction that should have been notified simply by choosing to notify it;
- Establishing a mechanism based on ‘resetting the counter’ each time the threshold is exceeded (i.e. after each actually disclosed transaction), in contrast to ‘resetting the counter’ only once a year. In consequence, instead of notifying several minor transactions the market would be informed about ‘packages’ of transactions;

894. Defining some specific additional thresholds (of EUR 10.000 each) for the 2 following additional dimensions:

- the amount of personal money invested by PDMR in order to comply with investment policies encouraging portfolio managers to invest in the funds they manage.
- the amount of personal money invested in the fund as support for pension scheme purpose.

895. Defining a disclosure method where the existing ownership levels would be updated regularly on a website should be assessed as one alternative, as such information would usually be more useful than reporting on individual transactions.

896. Unrelated to the question, few respondents highlighted issues concerning the notifications of the transactions carried out by closely associated persons and the related burdens.

**Q51: Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.**

897. ESMA received 28 replies to this question. All of the respondents believe that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate. However, many respondents noted that it is unhelpful and confusing that no similar threshold has been introduced in respect of Article 19(11): if the 20% threshold is not breached, an investment in a CIU will be excluded from the notification obligation in Article 19(1), and such investment would not be subject to the prohibition under Article 19(11).

**Q52: Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?**

898. ESMA received 10 replies to this question. None of the respondents have identified any possible alternative system to set the threshold in relation to managers' transactions.

**Q53: Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?**

899. ESMA received 33 replies to this question. 11 respondents have not identified elements of Article 19(11) of MAR which could be amended.

900. For the other respondents, Article 19(11) should be amended so as to:
- Clarify that transactions executed under a discretionary asset management mandate are excluded from the prohibition. In fact, the PDMR has no possibility to influence the asset manager and to make any investment decision, there cannot be any reason why such transaction would be captured by Article 19(11).
  - Trading in company securities by an independent third party on behalf of a company insider (such as on the basis of a discretionary trading mandate entered into outside the closed period) falls outside the scope of the general insider dealing prohibition, on a combination of two (conceptually related) legal grounds: (i) first, the express exemption under Article 9(3) MAR for transactions conducted in the discharge of an obligation that “results from

(...) an agreement concluded before the person concerned possessed inside information”, and (ii) the possibility to rebut the presumption (established by the Spector decision of the ECJ (C-45/08)) that where an insider trades in the affected securities he or she is deemed to have made use of the inside information: where (a) a trade is effected on the basis of a trading mandate granted before the principal became aware of the information and (b) the broker executing the trade is neither aware of inside information that the principal may subsequently possess nor otherwise influenced by the principal, then the trade is not unlawful insider dealing.

- Repeal Article 19(11) in that PDMRs who are aware of inside information are already monitored and limited in their operations following their inclusion in the insiders’ list.
- Clarify which types of dealings can be exceptionally permitted during a closed period (for instance, when subscribing shares without subscription rights in a rights issue or subscribing shares in a private placement).
- Exclude dealings by a PDMR in conjunction with certain corporate events in which a PDMR is not treated differently than any other shareholder, for example when (i) subscribing (or undertaking to subscribe) for the PDMR’s pro rata share in a rights issue or (ii) accepting (or undertaking to accept) a public takeover offer.

901. One respondent indicated that NCAs should grant exemptions to the closed period instead of the issuers, that are less knowledgeable and also are too many to guarantee that exemptions are applied consistently.

902. Interpretations of the closed period by trading venues implies that the closed period has in certain cases been extended to quarterly reports, thereby resulting in 4-months per year. It should be clarified that only the annual and half year reports are relevant.

**Q54: Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.**

903. ESMA received 33 replies to this question. 14 respondents are of the view that the current framework for the identification of the closed periods is sufficiently clear in its practical application, especially with the benefit of the ESMA clarification provided in the Q&As.

904. On the contrary, the majority of respondents believe that clarification on the closed period framework is needed with reference to:

- The wording of the provisions whether final performance or estimates should be taken into account: it is frequent that some companies publish

estimates on financial performance (preliminary financial results), before the actual final results. The literal wording of Article 19(11) of MAR refers only to the announcement of an interim financial report or a year-end report and not the preliminary estimates. This may cause difficulties, as the final performance is usually published only within another month after the estimates. Market participants therefore asked ESMA to clarify the point.

- Diverging approaches and market practices among issuers across EU on the closed period announcements with the same formal requirement: the closed period under article 19(11) only applies before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public according to (a) the rules of the trading venue where the issuer's shares are admitted to trading; or (b) national law. Q1 and Q3 reports do not fall under this definition. On some markets, the market practice is to apply the 30-day closed period in advance to all four reports. Therefore, market participants suggest that ESMA emphasises this further in its guidance by highlighting that an issuer will need to consider the relevant rules in its own jurisdiction for these other scenarios.

905. The period of non-trading: Article 19 (11) MAR states that there should be a trading ban 'during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report'. Market participants report that this phrase can also be understood as the publication itself not being included, which, in view of the protective purpose of Article 19 MAR, cannot be effective. Therefore, they believe it would be desirable to clarify whether the trading ban period also extends to the day of publication and, if so, whether only the hours before publication or the whole day are counted in the period.

**Q55: Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.**

906. ESMA received 48 replies to this question. Vast majority of respondents opposed to proposal of extending the requirement of Article 19(1) to issuers and persons closely associated (CAPs) with PDMRs. Only one Institution fully supported the proposal for an extension to both groups without providing further analysis on the benefits, while 2 institutions partially supported the proposal. These two institutions recognised a desirability of extending the requirement to CAPs. Among the benefits, this could be a good measure for reducing complexities in distinguishing between cases that are permitted and those that are currently not.

907. However, the rest of respondents did not support the proposal, pointing out to three main arguments:

- Unnecessary. The current drafting of Article 19(1) already imposes enough prevention for insider dealing, as it captures transactions conducted by PDMRs acting on their own account and on account of a third party. Several respondents also referenced to the prohibitions already set up in Article 8 for trading resulting from PDMRs' recommendations to CAs as additional coverage by the law. Furthermore, CAs should not be legally allowed to obtain inside information from PDMRs without any legal basis. If PDMRs were to do so they could be criminally responsible for the offense of unlawful disclosure of inside information according to Art. 14(c) in MAR. Finally, some respondents also mentioned that ESMA has already expressed a view in their Final Report on possible delegated acts concerning to who the closed period should apply. In general, there is a consensus that the current drafting presents an appropriate balance between the level of transparency and reports' notification, as stated in MAR recitals.
- Undesirable. Respondents argued that not only the extension would suppose a disproportionate burden for issuers and PDMRs but also, it could be a source of financial distress and volatility associated to a potential more limited number of issuing windows within a year, or concentration of all issuers in a narrow market time frame. Finally, some institutions reported the lack of clarity on the definition of a "closely associated person" referred in Art. 3(1)(26)(d).
- Contradictive. If such a proposal was to be implemented, this could entail contradictions with some exemptions under order articles (Art. 4(2)(b) for example). There could also be the case that issuers were always subject to sanctions for infringements of Art 14 and 15 MAR.

908. One respondent, while opposing the application of 19(11) to issuers, noted that, should 19(11) be extended to issuers, exemptions should be provided to permit issuing new securities in fundraising, performing buybacks and securities redemptions if certain conditions are met.

**Q56: Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.**

909. ESMA received 38 replies to this question. Vast majority of respondents (36) supports ESMA proposal to extend the immediate sale provided by Article 19(12)(a) to cover other financial instruments that just shares. They believe it is logical to extend the exemption to all trades in all financial instruments.

910. 2 respondents raised the following points:

- Article 9 of delegated Regulation (EU) 2016/522 lacks clarity and issuers question whether transactions such as subscriptions to a capital increase

reserved for employees or allocations of amounts paid under profit-sharing or incentive schemes to employee savings plans are included in the scope of Article 9. Therefore, even if PDMRs hold inside information, Article 9 should be amended to expressly enable PDMRs to subscribe or take allocation decision.

- the scope of transactions conducted “indirectly” by a PDMR should be narrowed only to transactions conducted by legal entities which are directly or indirectly controlled and managed by such a PDMR, in order to avoid undue restrictions on certain closely associated persons.

**Q57: Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.**

911. ESMA received 32 replies to this question. Whilst a minority of respondents did not state a need for including more criteria resulting in further cases of exemptions, most participants identified interpretation issues regarding the provisions of some of MAR Articles (mostly those enclosed by Article 9 of the CDR 2016/522) that should be solved by ESMA (in the form of a Q&A for example) before assessing whether further criteria should be considered.

912. More concretely, some respondents mentioned that Article 19(11) might have been misunderstood. As the article aims to prevent insider dealing by PDMRs, the potential exemption mentioned by ESMA in the CP (contracts requiring completion of transactions within the close period) should not be even added to the list of proposals, as these transactions are out of the scope of Article 19. This is because the PDMR is not trading during the closed period.

913. Many respondents agreed on amending the exemption for employees' schemes, so that it includes all sort of transactions and instruments other than shares or that it covers also non-executive's directors receiving or reinvesting their fees by way of shares and DRIPS. Also conversions of financial instruments into other ones and gifts and donations made or received and inheritance received should not be subject to the prohibition. Also, the prohibition should not apply to dealings carried out in the closed period but entered into before the closed period started and where the PDMR did not have control on whether the conditions were satisfied or the dealing would occur during such closed period. A respondent considers that scrip dividends should be exempted too.

914. As regards employees' schemes, employees should nevertheless be able to subscribe since:

- the operation is collective and open, under the labour law rules, to all employees of the group;

- the operations are planned well in advance and the employee has no control over the choice of the subscription period;
- the shares subscribed are blocked for several years (generally 5 years except in the event of release), which neutralises the effects of the holding of privileged information;
- in certain cases, the shares may be released by regular payments or regular deductions from wages, which precludes their sale during this period;
- there is a gap between when the shares are subscribed and when they are allocated in the saving plan, so that their allocation may occur at a time when the information has been made public.

915. One of the criteria to consider for employees' schemes is that the recipients and the amount cannot be univocally determined when the plan is approved.

916. Perhaps not related to the question, respondents took the opportunity to highlight their exemption's proposals for other articles or prohibitions set up in Article 19 (e.g. article 19 (11)). Additionally, as Article 19 refers to transactions enclosed by Article 9 of the Delegated Regulation 2016/522, more clarification was demanded for the transactions that should be in scope of article 19 (subscription to a capital increase for example). The issue seems to be originated in the MAR recital (61) mentioning only "trading" instead of all transactions. Market participants also expressed concerns on interpreting the financial instruments that are indeed in scope of Article 19 and asked ESMA for Q&A.

917. Many agreed on looking into the requirement for issuers to consent trade by a person discharging managerial responsibilities, so that this one is potentially excluded. There was also a proposal for article 19(12) so that it does not cover transactions in which financial instruments are transferred between accounts owned by a person discharging managerial responsibilities. Also, when the prohibition leads to a loss of rights such as inheritance, receipt of gift or subscriber right.

918. Finally, a few participants proposed extending the exemption to situations where a person having a pension scheme is forced to sell financial instruments in order to be able to pay required annual taxes.

919. Clarification on the financial instruments in scope was requested, as certain NCAs provided different interpretations: (i) some NCAs consider that it applies to shares/debs instruments traded or admitted to trading and derivatives or other financial instruments relating thereto, (ii) other NCAs interpret it as applicable to any financial instruments issued by an issuer if the issuer has requested or approved the trading of any of its financial instruments.

920. One respondent requested also to provide for exemptions from insider dealing for the case of granting of shares on the basis of employees' schemes where those that act on behalf of the issuer possess inside information.

**Q58: Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.**

921. Fifteen responses were received to this question.

922. Twelve respondents were against extending the general MAR regime to CIUs admitted to trading or trading on a trading venue. Two respondents considered that the scope of MAR provisions should exempt CIUs traded at their net asset value (NAV) and maintain ETFs within the scope.

923. All the other responses raised different arguments supporting a differentiated regime for CIUs admitted to trading or traded on a trading venue:

- a. For several respondents, extending MAR to CIUs would not pass the cost-benefit analysis since, for rarely observed instances of market abuse, management companies/AIFMs, CIUs (and ultimately investors) should bear a severe (and costly) administrative burden.

These responses highlighted the low risk of market abuse that these CIUs present: as most CIUs trade at their NAV or close to their NAV (which is subject to daily disclosure and transparency of the calculation method), the market price is not determined by the managerial decisions but by the price of a wide range of underlying assets on which the management company/AIFM does not have control.

Accordingly, trading of open-end CIUs on a trading venue does not follow the same logic as for regular issuers: buying and selling are made at a NAV which is only known at the end of the trading session. Trading on these instruments operates in practice as a substitute of the traditional redemption and subscription mechanisms.

- b. In line with this, one response noted that the scope of managerial decisions is narrowed down further by the investment policy of the CIU that is established at the outset (and reaches the extreme in the case of index-based CIUs [i.e. ETFs], where there is no managerial discretion at all in relation to the investment policy).

- c. Another response noted the independence between the management company and the CIU: bad news on the management company are not followed by a price decrease of the funds managed by that company.
- d. In line with the previous point, two responses warned against possible unintended consequences of extending MAR explicitly to CIUs admitted to trading or traded on a trading venue, such as reducing the appeal of CIUs traded on EEA trading venues; and de-localisation of third-country CIUs traded on EEA trading venues.

924. Some responses noted that the existing legislative framework adequately covers the risks identified by ESMA in the CP: UCITSD and AIFMD already address conducts such as fraud, insider offences, front-running and prevent market timing in the CIUs' investment policy and establish reporting obligations to facilitate supervision. Along the same argument, two respondents noted that CIUs admitted to trading or traded on a trading venue are exempted from the Transparency Directive and transactions in CIUs are exempted from MAR reporting requirements (Article 19(1a) and (7) of MAR).

925. Finally, two alternative solutions were presented:

- a. Applying MAR to CIUs replicating the lighter approach for SME growth market issuers; and
- b. Expanding UCITSD and AIFMD to 'import' the relevant MAR provisions, to ensure that the differences in nature between the range of CIUs were duly taken into account.

**Q59: Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs**

926. Fifteen replies were received to the question on whether MAR should explicitly cover PDMR obligations to CIUs and their management companies/AIFMs.

927. Consistently with the answers provided to the previous question, ten responses rejected applying the PDMR regime to CIUs admitted to trading or traded on a trading venue and their management companies/AIFMs, reiterating the comments already made (i.e. low risk of market abuse and existence of inside information since managerial decisions do not alter a trading price which is at or close to the NAV; existence of a specific regime in UCITSD/AIFMD that overlaps or even exceeds the MAR PDMR requirements, especially taking into account national supplementing legislations; such extension would not meet a cost-benefit analysis). A response noted that such extension would be contradictory with other pieces of EU regulation that incentivise the alignment of interest between unit holders/shareholders and management companies/AIFMs.

928. Four respondents supported extending the MAR PDMR regime to CIUs admitted to trading or traded on a trading venue and to their management companies/AIFMs with the following caveats:

929. Two of them requested specifying that the definition of PDMR should only encompass persons with direct implication with the management of the CIUs (i.e. employees of the management company/AIFM or sub-delegated management company AIFM) and not following strictly the definition of 'relevant persons' in Commission Directive 2010/43/EU.

930. One of them, while opposing in general to the extension, considered that it would work for private equity funds admitted to trading when acquiring control of non-listed companies.

**Q60: Do you agree with ESMA's preliminary view? If not, please elaborate.**

931. ESMA requested the views of market participants regarding its preliminary identification of PDMRs for CIUs admitted to trading or traded on a trading venue as follows:

a) In the case of CIUs without legal personality, the 'relevant persons' from the management company/AIFM (or from external service providers acting for the CIU in question); and

b) In the case of CIUs with legal personality managed by an external management company, those that currently meet the PDMR definition in the issuer and the 'relevant persons' from the management company/AIFM (or from external service providers acting for the CIU in question).

932. Sixteen replies were received to this question.

933. Only one of them was supportive of ESMA's preliminary proposal and considered that the proposal might not capture all the individuals who could get access to inside information.

934. Respondents generally disagreed with ESMA's preliminary view on the following grounds:

- Eight responses considered that the case for expanding the PDMR obligations to such a broad universe of individuals was not sufficiently built and would be extremely burdensome and costly for a limited and undemonstrated benefit under MAR perspective. The cost-benefit analysis become more difficult to pass if it is considered that the current UCITSD and AIFMD regimes already covers these cases. One of these respondents recommended analysing in depth the impact of the application of 'closely associated persons' to this area.

- Using the concept of 'relevant persons' entails specific risks:

a. Other CIUs managed by the same management company/AIFM could be considered as ‘closely associated persons’ and would be prevented from buying/selling the financial instruments of the CIU in question.

b. Additional risks for the management company/AIFM, since it would be necessary reporting not only the transactions of its own employees but also the transactions of persons of third companies to the authorities (which, for example, provide portfolio management on the way of delegation), with the subsequent risk of receiving inside information. This respondent noted that UCITSD and AIFMD already address these cases.

- Four respondents requested from ESMA differentiating between CIUs internally and externally managed. These responses rejected the possibility of PDMRs within CIUs with legal personality that are externally managed: despite these persons within the CIUs might meet the definition in Article 3(1)(25) of MAR, they would not have any influence on the management of the CIU, delegated to an external management company.

935. One association proposed using the concept of ‘regular access to inside information’ as for SME growth market issuers in Regulation (EU) 2019/2115 as regards the promotion of the use of SME growth markets to identify PDMRs in CIUs admitted to trading or traded on a trading venue.

**Q61: What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of “relevant persons” would be adequate for CIUs other than UCITs and AIFs.**

936. ESMA received twelve replies to the question about the individuals who should fall under the definition of PDMR for the different CIU types.

937. Only one of them was supportive of ESMA’s preliminary view.

938. All the other respondents disagreed with the proposed use of ‘relevant persons’. Six of these respondents understood that the proposal would enlarge too much the scope of PDMR obligations, since persons who are ‘involved’ (regardless of their genuine involvement in the investment-decision-making process) or providing services (again that may not be related to the investment decisions) would be captured. In their view, only the persons directly involved in the investment decisions should be captured. Another reply considered that the identification of PDMRs for CIUs admitted to trading or traded on a trading venue should be made following the parameters in Article 3(1)(25) MAR: decision-making capacity or regular access to inside information.

939. Two responses reiterated the comment made for the previous question, i.e. that for CIUs with legal personality that have appointed a external managers, PDMR within the CIU should be left out considering their limited impact on the day to day

management of the CIU. One of these responses insisted that in the case of ETFs, the PDMR concept should only encompass the relevant staff in the management company.

940. One additional reply insisted that there should be no PDMRs for CIUs admitted to trading or traded on a trading venue because the management company has no influence in the price (as the market price replicates or tracks closely the NAV).

**Q62: ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.**

941. Twelve replies were received to the question on whether the PDMR obligations should be extended to depositaries and/or other entities performing tasks for the CIUs following a delegation.

942. None of them supported extending the PDMR concept to depositaries.

943. Two responses supported covering delegated entities (while noting that the specific nature of the tasks performed should be taken into account). One response considered that other entities that should fall under the scope of PDMR obligations for ETFs would be authorised participants and the relevant employees of official liquidity providers.

944. One trading venue considered necessary analysing in depth the different tasks performed and differentiating between the different situations (e.g. a CIU without personality managed by an external management company is different from a CIU with personality that has delegated the investment management to an investment company/AIFM). One respondent reiterated that such extension would be disproportionate.

**Q63: Do you agree with ESMA's conclusion? If not, please elaborate.**

945. Thirteen replies were provided to the question on the possible amendment of Article 19(1)(a) of MAR to explicitly mention 'units'.

946. Six of them supported the proposal.

947. Six other responses, while agreeing with ESMA's approach to this topics (whereby MAR should not create an unlevel playing field between CIUs with and without personality), remained of the view that PDMR obligations should not be applied to CIUs admitted to trading or traded on a trading venue. One of these respondents warned against extending the scope of MAR to 'units' (of ETFs) using the following arguments:

948. It would create an unlevel playing field with CIUs not admitted to trading or trading on a trading venue; and

949. At the moment it is possible that a unit class of UCITs be traded on a secondary market and another subject to direct purchase and redemption (e.g. for cross-border distribution of the CIU). If MAR were extended to 'units' the admission to trading/trading of CIUs in the EU would be jeopardised due to the additional administrative burden that MAR entails.
950. One response disagreed with ESMA's technical analysis and considered that 'units' of CIUs are already within the scope.

**Q64: Do you agree with ESMA preliminary view? Please elaborate.**

951. Eleven replies were submitted in relation to the question about the proposal to amend Article 17 of MAR whereby the management company should be responsible for the publication of inside information in the case of CIUs without personality admitted to trading or traded on a trading venue, with the other entities to which the management company has delegated the execution of certain functions should be responsible for reporting to it any information that might be of relevance immediately.
952. Five respondents agreed on the need to clarify that management company is responsible for disclosing inside information. Another respondent considered that the existing Q&A is enough and there is no need to amend MAR.
953. Four responses disagreed considering that the existing general disclosure obligations for CIUs under UCITSD/AIFMD suffice. Another respondent reiterated the view presented in previous responses: as a matter of principle, it is not possible that inside information is generated in CIUs traded at or close to their NAV.

**Q65: Do you agree with ESMA's preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?**

954. ESMA considered that no further amendments should be made to Article 18 of MAR in this respect, as CIUs admitted to trading or traded are already covered under the current text.
955. Seven respondents agreed with ESMA's preliminary assessment and were of the view that there was no need to have further clarification on how insider list must be established for CIUs admitted to trading or traded on a trading venue and agreed with. However, three of these replies reiterated that 'inside information' in this context would not have an impact on the NAV. In the limited cases where it would have an impact, these respondents noted that there would be immediate disclosure under sectorial legislation, without specifying which legislation would force that disclosure.
956. Another supportive response supported the alignment with the insider list obligations established for SMEs in Regulation (EU) 2019/2115, whereby only persons with 'regular access' have to be included.

957. Two other responses considered that UCITSD and AIFMD already cover these situations and therefore insider lists should not apply to CIUs admitted to trading or traded on a trading venue: the obligations to report transactions under Commission Directive 2010/43/EU and Commission Delegated Regulation [EU] 231/2013 and the capacity of the management company to manage inside information by suspending the issuance and redemption of units of the fund were mentioned. One response supported excluding only ETFs within the scope of insider lists obligations.

**Q66: Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.**

958. ESMA received 29 replies to this question. Most of the respondents agree with the harmonisation of the templates and of the standards and with ensuring order book data quality.

959. Among them, some also agree with the use of the ISO 20022 standard and the XML templates. Two respondents that agree with the use of the ISO standard and the XML, suggests however to take a phased approach with enhancing the content in a second step. Another respondent deems that the XML should provide the necessary room to mirror the differences among markets and trading mechanism existing in the EU.

960. One respondent would prefer the use of the CSV templates rather than the XML.

961. One respondent considers that the XML is not a space-efficient format to transmit order book data and would therefore suggest to use the FIX format.

962. Several respondents, even though they agree with the harmonisation of reporting formats, are concerned of the cost increase.

963. Two respondents request however to perform a cost-benefit analysis, since the standardisation costs, which should be high, will be passed on to market participants and added to all the costs already incurred through MIFID II. An estimate of such costs will be possible when further clarity is provided on the specific changes, which will allow a calculation of the developments and testing needed.

964. The cost-benefit analysis should demonstrate that there are clear benefits to justify the cost increase. Some respondents consider that the T+1 data reporting, and not intraday deliveries, should be chosen. The other one advocates for a transition phase when the XML schema is updated and requests not to apply changes retrospectively and also to extend them to systematic internalisers.

965. One respondent considers that the orders should be transmitted at t+2 since trading venues have setups for which client and personal data are provided separately from the order entry point.
966. One respondent asked to provide for a limited time in which a regulator can check and reject the reports.
967. One respondent notes that the harmonisation would be welcome since as of today trading venues have to comply in certain cases with national standards, and the investments already performed to ensure such compliance should be taken into account. The harmonised framework should apply to any execution venue, and no distinction between different categories of trading venues should apply. In this respect, it is fundamental that no regulator asks for deviations from the harmonised standards.
968. One respondent deems that the trading venues and the members will have to support the costs of such standardisation and of the reporting. In light of this, the respondent request that, if NCAs are equipped with the possibility to get the cross-market order book, the obligation for trading venues and investment firms to submit STORs should be abolished.
969. Several respondents requested to organise a workshop to allow participants to engage on the project and guarantee a satisfactory result to all parties.
970. One respondent indicated that the harmonisation is fundamental for commodity trading firms and it could reduce the cost of market abuse surveillance for firms.
971. One respondent considers that order records are usually viewed and monitored in sequence of events, and that the validation of the data should take into account the logic of sequences of order events.
972. Number of respondents disagrees with the proposal for reasons mainly linked to the related costs, which could not be proportional to the benefit brought by the measure, also lacking a cost-benefit analysis that demonstrates that it would be overall advantageous.
973. One respondent considers that the proposed changes would entail major changes throughout the industry and therefore considers medium/long term for the implementation of such changes, noting that there would be major costs for market participants.
974. Other respondents consider that, even though regulators' ability to monitor the market should be enhanced, this should be done through perfecting the already existing mechanisms, in order not to impose further costs, which would severely increase also for the standardisation and harmonization advocated in the CP.

975. Several respondents disagree with the change for the massive investments implied. One among them considers that the costs to generate and transmit meaningful data would be disproportionate and the size of the data to be collected too big.
976. One respondent deems that the harmonisation has to be carefully considered, and should be accompanied by an impact assessment, since it is not clear if the costs incurred by trading venues would effectively be counterbalanced by an improvement in market surveillance. An estimate of such costs will be possible when further clarity is provided on the specific changes, which will allow a calculation of the developments and testing needed.
977. One of the respondents is concerned that adding the reporting format to order data could reduce the performance of low latency environments.
978. Two respondents are concerned about the transmission of personal data. Namely, one respondent considers that the information to be submitted, which include personal data, would have a chilling effect on trading in the EEA, effect which was already observed in the implementation of MiFID II on FX derivatives. The other respondent is concerned that compliance with GDPR would request firms dedicated resources. Both respondents deem that full order capture (i.e. not only the final instruction leading to the order) registration would in addition be too costly and practically unworkable [CMCE and EVIA]. One respondent that agrees with ESMA's proposal on standardisation and harmonisation of order data considers that the mechanism of the US REG CAT should be considered, since appointing a central facility that manages all personal and client data issuing unique numeric codes would allow investment firms to save and use a unique format, and not bearing the costs linked to storing of personal data.
979. One respondent opposes changes to the current reporting system and would support harmonisation where strictly based on and limited to the order reporting format as established by ACER under REMIT and for the suspicious orders.
980. One respondent considers that transaction reporting is sufficient for the purposes of detecting market abuse cases.
981. One respondent considers that building an order record infrastructure would entail significant costs. As far as harmonisation is concerned, it would generally be desirable to have a common technical template to use across all NCAs, and there is already a multitude of technical reporting templates applicable under MiFIR.
982. One respondent suggested that financial instruments which have their primary listing outside the EEA should be excluded from the scope of these requirements.

**Q67: Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.**

983. ESMA received 18 replies to this question. Almost all respondents to the consultation oppose the proposal on mandatory reporting of order data.
984. Namely, most of the respondents, among which a number of trading venues, advocate for maintaining the current framework, considering that the mandatory reporting would not be proportionate as it imposes costs both on NCAs and on trading venues.
985. In addition, some of the respondents consider that the cost increase linked to the proposal entails a concrete risk of driving trading activity and liquidity out of Europe.
986. Several respondents consider that a mandatory reporting system could be considered if there were evidence concerning shortcomings of the current regime designed by Article 25 of MiFIR and if evidence was provided of how the establishment of a mandatory reporting system of order data could improve market surveillance. In addition, information on why NCAs would need the daily reporting and in addition to the reporting upon ad hoc request should be provided.
987. The need for NCAs to have in place an adequate IT infrastructure to receive and process the order data is also considered as a concern for several respondents.
988. Further, one respondent noted that the creation of a cross-market order book may lead to misleading results as 1) market models of trading venues might vary, e.g. it is hard to compare price determinations in continuous trading with market models with specialists, 2) products differ, especially in derivatives markets and 3) the underlying rulebooks may be different which might lead to wrong conclusions when doing cross-market surveillance.
989. Several respondents noted that OTC transactions and those occurring through systematic internalisers should be considered as well, in order to combine information on all orders.
990. One of the respondents observed that the transaction reporting represents the transmission of 2 to 5 million records every day, whereas it receives around 300 million orders every day and can reach the triple in peaks days. Such figure is also likely to increase in light of the increasing ratio of orders to trade due to algorithmic trading.
991. One respondent noted that the high volume of order data would increase operational risk and require additional costs to correct errors. An independent centralised data collection and validation mechanism, similar to the ARM construct for RTS22 data could in its view be a sensible step to provide order and transaction datasets for centralised market oversight.
992. Few respondents were in favour of the proposal, among which trading venues that are already reporting order data on the basis of daily requests to certain NCAs.

993. In particular, one respondent considers that it could support the daily (t+1) reporting since it is already submitting order data to some regulators. Anyway, the respondent requested the performance of further cost-benefit analysis on the proposal, in order to understand if the cross-market order book surveillance is needed for regulators, and if that is the case to make sure that the same approach is followed by all regulators.
994. One respondent deems that the proposal could be implemented with moderate impact and costs, since it already provides order data to two NCAs. The cost-benefit analysis would be positive if a centralised management of personal and client data – which would reduce the costs linked to personal data management – was also implemented.
995. Another respondent supports ESMA's aspiration but notes that without simple and common implementation options there is the risk of liquidity diminishment and movement of trading outside the EU.
996. Finally, two respondents did not support or oppose to the proposal.
997. All respondents, both in favour and against the proposal, indicated that intraday reporting of order data is not possible (t+1 can be considered). This also depends on the fact that some information required under RTS 24 can only be obtained by trading venues through its participants on a T+1 basis, which would be incompatible with a requirement on the venue to report this information daily to the relevant NCA.

**Q68: In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.**

998. ESMA received 19 replies to this question. Many replies are consistent with those provided under question No 67, therefore a large majority of the respondents considered that no mandatory reporting should be set up.
999. Among the respondents that disagree with the mandatory reporting, some options were identified to limit the scope of regular reporting.
1000. One respondent indicated that the limitations should focus on excluding:
- Quote-driven system
  - Periodic auction trading system
  - Request-for-quote trading system

- Voice trading system

1001. Another respondent considers that market abuse could gravitate towards the sectors excluded from the order reporting, whereas another respondent observed that the reporting should be limited to liquid equity instrument.

1002. One respondent noted that if the reporting is limited to a subset of instruments, this would result in the worst-case scenario since trading venues would have to maintain both a mechanism for record keeping and another one for reporting.

1003. A small minority of respondents approves ESMA's proposal on the mandatory reporting, favouring a t+1 reporting and, as regards the limitations to the scope, suggesting that the inclusion of all financial instruments would prove more efficient than that of a subset.

1004. One respondent noted that quote driven securities as securitized derivatives have high numbers of order events, therefore excluding them from the mandatory order book reporting would eliminate 50-60% of all order events.

#### **Q69: What are your views regarding those proposed amendments to MAR?**

1005. Only a small minority of respondents are supportive of ESMA proposals to a) give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation and b) grant the NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU, illustrated in Para317 of the CP.

1006. 12 respondents do not agree with any of the proposals submitted by ESMA, arguing that the market abuse framework is already very strict and does not need to be complemented with non-essential provisions on multiple withholding taxes reclaim and that giving NCAs additional authority beyond market abuse issues could risk unintended consequences on other areas of UE legislation.

1007. Some of the respondents motivated their disagreement with ESMA expressing concerns on the terms "unfair behaviours" or "a threat to the integrity of the financial markets as a whole", which are deemed undefined, vague and out of focus. They argued that such terms carry the risk of abuse in practice of the discretionary power of competent authorities in classifying the behaviour of sanctioned entities to which the draft rules would apply.

1008. 4 respondents do not support the proposal to amend MAR to extend powers to NCAs to investigate and sanction behaviours beyond market manipulation (Para.317 a) of the CP) but are in favour of granting the NCAs the possibility to cooperate and share information with tax authorities upon request across the EU (Para.317 b) of the CP).

1009. 1 respondent, on the contrary, support the proposal of amendment to MAR laid down in Para.317 a) of the CP and not the proposal on the cooperation among NCAs of Para.317 b) of the CP.

**Q70: Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.**

1010. Sixteen respondents considered that there is no need to amend Article 30(1)(2) MAR. However, some of them pointed out that many operators of trading venues still have their own rules on market manipulation and can impose fines based on their own market rules.

1011. Four respondents, on the contrary, believe that the administrative sanctions/measures on market manipulation should be harmonized across the EU, in order to reduce the risk of regulatory arbitrage and to facilitate the cross-border enforcement. However, granting powers of intervention to the NCAs should be strictly limited by valid and concrete mentioned reasons and not be granted solely on the ground of indefinite legal terms or more or less general clauses.

1012. In the context of MAR sanctions, four respondents noted that the sanction regime in MAR seems tailored to larger companies: many listed companies are SMEs and their capitalisation is smaller than the amount of possible sanction. The respondents suggest reviewing the regime bearing in mind that the maximum administrative sanctions should be related to the size of companies (in case of legal persons) and to the level of managers' compensation (in case of natural persons).

1013. Eight respondents from one jurisdiction asked from ESMA clear guidance on how the sanction fees should be calculated. Market operators from this jurisdiction complained about the very strict interpretation of MAR adopted by its NCA, where apparently, the amount of sanctions imposed under MAR is the highest in Europe.

**Q71: Please share your views on the elements described above.**

1014. Answers received show most stakeholders support the idea of effective cross border enforcement of sanctions, as an objective beneficial for the market.

1015. Some respondents, however, shared their concerns that the relevant proceedings could interfere with the national legislations, or lead to cumbersome procedures involving multiple authorities. In this respect, one answer stressed the importance of establishing one leading authority for each individual case in order to avoid duplication of investigations and sanctions. Another respondent highlighted that in case of EU law amendment, the home country control principle should be taken into account.

1016. Most of the respondents expressing their view on the current legal framework declared that such regime does permit cross border enforcement of sanctions. One of this respondent, however, noted that NCAs do face legal uncertainty in enforcement of market abuse obligations. The observation is made considering that the Framework Decision may not be an appropriate tool to achieve cross border enforcement because (i) the Framework Decision is not meant to address financial services, and (ii) Framework Decisions transposition in national law may lead to differences across jurisdictions able to hinder effective enforcement.

1017. Some respondents did not consider themselves in a position to answer, and one reply indicated the question would be better addressed to NCAs.

1018. Some answers raised issues relating to MAR sanctions but not pertinent to cross border enforcement (e.g. quantum of sanctions, obligations relating to prevention and detection of market abuse, and possibility to opt out from certain MAR prohibitions).

**Other input received by ESMA in the context of the MAR review CP: introductory remarks provided by respondents to the CP and the Securities and Markets Stakeholder Group (SMSG) response to the MAR review CP**

1019. The reply form to the MAR Review CP offered to respondents the possibility to make introductory comments. ESMA received 80 introductory remarks. Despite most of them introduced the company/association that replied to the CP or summarised the responses provided to the other sections of the CP a significant number of responses raised topics not included in the CP that, in their opinion, was necessary to address.

1020. In particular, ESMA notes that the following common points of concern could be identified from the responses of different stakeholders:

- Buy-back programmes:
  - a. Request for explicit acknowledgement that buy-back programmes of debt and derivatives are not banned under MAR;
  - b. Need for expanding the purposes recognised in Article 5(2) of MAR.
- Investment recommendations:
  - a. Several responses noted the misalignment between the MAR rules on investment recommendation and the MiFID II rules on investment research and marketing communications.
  - b. The general language used by MAR to define investment recommendations has led to other activities being incidentally caught within this concept despite they are fundamentally different.

It was requested revising the rules to avoid that the explanations provided by management companies regarding portfolio holdings and transactions or the information flows coming from salespeople and sales traders in wholesale trading rooms can be assimilated to investment recommendations. One of these responses requested bringing back to MAR the original language used in MAD [distribution channels or for the public]

- Some respondents considered that applying MAR to issuers admitted to trading or traded on MTFs had led to a significant increase of their regulatory burden, making that many of these issuers (SMEs or not) to move away from these markets. In particular, it was requested:
  - a. Simplification of the administrative burden for SMEs, beyond the partial waivers created in Regulation (EU) 2019/2115 on the promotion of the use of SME growth markets; and
  - b. Exempt issuers that only have bonds admitted to trading on a trading venue from the regular MAR regime.
- Some respondents requested specifying that CIUs not admitted to trading or traded on a trading venue are exempt from MAR.
- Two different responses raised issues related to Article 4 of MAR: one considered that the different steps foreseen in that Article (and Article 27 of MiFIR) to incorporate instruments to FIRDS made impossible to know whether a firm was subject to MAR obligations; and another one requested that when a company as requested admission to trading it should be obliged to make a public announcement, to ensure sufficient awareness of the applicability of MAR to that company.
- Several responses noted the importance of not proposing amendments of MAR that implied additional costs to market participants.
- Two different responses also raised procedural issues: the necessity to consult any recommendation that had not been tabled in the CP and the short timeframe established by Article 38 of MAR to assess its impact.

1021. The SMSG made public its response to the MAR Review CP on 12 December 2019<sup>84</sup>, which is copied in Annex 2.

1022. The SMSG supported ESMA's approach in relation to the possible extension of MAR to spot FX contracts. The SMSG identified as a problem in the definition of inside information the numerous elements that require qualitative assessment and different

---

<sup>84</sup> [https://www.esma.europa.eu/sites/default/files/library/esma22-106-2044\\_smsg\\_response\\_to\\_esma\\_cp\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma22-106-2044_smsg_response_to_esma_cp_on_mar.pdf)

issues in relation to the delayed disclosure of inside information, providing a set of possible solutions in each case that included the provision by ESMA of further guidance.

1023. The SMSG did not identify any market abuse implications in the case of pre-hedging practices. In relation to insider lists, the SMSG concurred with a number of respondents in considering that the permanent section of insider lists added complexity and requested the reduction of personal details in them.

1024. The SMSG requested reducing the threshold for publication of PDMR transactions and “reset the counter” once the threshold has been reached. They also remarked the administrative burden that adds the number of closely associated persons related to each person discharging managerial responsibilities.

1025. On cross-market order book data, the SMSG agreed with ESMA’s approach on standardised xml template but warned about the complexity of trying to match order book data (that can only be analysed together with other data, as it is a sequence of events) with transaction reporting data (where each report can be analysed in isolation).

1026. The SMSG encouraged further supervisory convergence in relation to a number of issues:

- Market manipulation (where it was mentioned that there were different interpretations across NCAs on whether the non-disclosure of inside information is market manipulation)
- The exact content of the inside information to be published (where not all NCAs request to publish the counterparty of a transaction)
- Instrument scope of PDMR obligations (where for issuers that only trade on venue their debt instruments it is unclear whether transactions on non-listed shares are reportable)
- Obligations of a broker executing an order from a client when the broker thinks that the client might be committing market abuse
- Misalignment between MAR investment recommendation provisions and MiFID II investment research/marketing communications rules.

1027. Finally, the SMSG raised the convenience of alleviating the regulatory burden for MTFs under MAR.

1028. Out of the strict scope of the MAR review, the SMSG also noted that several jurisdictions were suffering increasing short selling attacks.

1029. ESMA will assess the merit of the proposals raised separately going forward and may take initiatives on the supervisory convergence side, for instance, on whether the non-disclosure of inside information should be considered as market manipulation.

1030. In relation to the increase of short selling attacks, ESMA may also take advantage of the lessons learnt in 2020 after the Covid-19 outbreak in relation to short selling bans and related emergency measures and re-consider some aspects of the short selling regulatory framework at its own initiative in the course of 2021.

## Annex 2- Advice of the Securities and Markets Stakeholder Group

### I. Introduction

1031. The SMSG welcomes the extensive and in-depth consultation paper issued by ESMA in the process of preparing a report on MAR for the European Commission. In this response the SMSG would like to point ESMA's attention to several issues, as described below.

1032. We have noted that the application of MAR varies across jurisdictions. One example is the interpretation of the MAR requirement that inside information shall be disclosed "as soon as possible". Member States can also impose even higher maximum administrative fines. For many stakeholders, such as regulated markets and investors, operating in several jurisdictions, convergence as regards the interpretation and application of various requirements in MAR is important to further drive cross-border provision of services within the EU, not least to avoid the risk for regulatory arbitrage and increased costs as well as uncertainty. Additional examples of varying applications are provided in the "Other issues" section of the response.

1033. In this context, the local regulators play an important role to ensure consistency across the EU. Also ESMA should continue to focus on regulatory convergence and take an active role in identifying and clarifying diverging interpretations of EU regulations – such as MAR – within the EU.

1034. For smaller markets, the regulatory burden can sometimes be overwhelming. The 'one-size-fits-all' model, mostly used in the context of EU level legislative frameworks, is less apt for smaller markets and brings excessive and disproportionate requirements for services providers, thus making the overall market less competitive. For instance, due to the application of the Market Abuse Regulation to MTFs, issuers on these specialised markets need to apply the same requirements as the main markets. While we acknowledge there are some alleviations for SME Growth Markets, many of the requirements apply equally to SME Growth Markets and Regulated Markets. The SMSG would like to point that excess regulatory and compliance burdens are one of the factors that may discourage issuers from public capital markets. This may be the case especially for smaller companies who face rising compliance costs and hence prefer to de-list and to resort to private equity. Such is the case for example for Poland where ca. 40 companies have delisted since 2016, even though, for certain SME Growth Markets, such as Nasdaq's First North, there has been a strong increase of companies the last years. We would therefore like to encourage regulators to run a comprehensive assessment of the impact of the various legislative files which might differ based on the size and maturity of the markets.

1035. The SMSG likes to point out that not all potentially important needs for reform of MAR are addressed in the CP. One concern is a significant increase of short selling attacks in certain Member States. Another is the diverging application of the instances

of market manipulation of Art. 15 MAR. There is indication that this is due to a different understanding of the definition of market manipulation (Art. 12 MAR). Furthermore, in some member states NCAs and law enforcement bodies show tendencies to apply Art. 15 MAR to omissions to disclose material information to the market. This is critical, in particular within the context of a potential violation of disclosure rules.

1036. The issues raised by the SMSG in this response are grouped in the following topics:

- Extension of the scope of MAR to spot FX contracts
- Inside information: definition, disclosure, delay of disclosure
- Front running
- Market sounding
- Managers' transactions and lists of managers and persons closely associated
- Order book data
- Sanctions
- Benchmarks
- Other issues

## II. Extension of the scope of MAR to spot FX contracts

The following paragraphs refer to Q1

1037. ESMA correctly identifies that, in accordance with Article 2.1., MAR does not introduce any specific reference to spot FX contracts. Moreover, ESMA notes the identification of spot FX contracts as non-financial instruments, in accordance with Article 10 (1) (a) of CDR 2017/565. Accordingly, consideration of amending MIFID II / MIFIR, as proposed in paragraph 9 of the ESMA consultation, should more appropriately be addressed as part of a specific MIFID II / MIFIR review instead of a MAR review.

1038. ESMA has identified a number of arguments in support of the inclusion of spot FX contracts and several arguments arguing against an extension of the scope of MAR to spot FX contracts. Among them, ESMA notes the publication and the implementation of the recent FX Global Code of Conduct ("the Code"), developed by central banks and market participants from sixteen jurisdictions to promote higher standards in the wholesale FX market. ESMA also recalls that this Code will be reviewed in 2020 by the Global FX Committee, and suggests in paragraph 17, that it would be better to wait for the Code to be more deeply embedded into the market before promoting an amendment of MAR.

1039. Noting the recent implementation of this framework and potential significant impacts on non-financial stakeholders of a MAR extension to spot FX contracts, the SMSG supports ESMA's suggestion. To aid in preparing this work, the SMSG suggests that ESMA should conduct, in the medium term and with the relevant stakeholders (notably central banks and market participants) a deeper impact analysis of the Code's implementation into the spot FX market, prior to introducing any amendment to MAR.

The global nature and characteristics of those markets may make it unsuitable to include them in the MAR regime as it currently is. Structural changes in relation to infrastructure, transparency and supervision of the involved entities would need to be implemented in order to achieve a valuable monitoring under the MAR regime.

1040. The impact analysis proposed above would allow ESMA:

- To verify that the provisions of the Code ensure the effective prevention and detection of market abuse in the FX spot market, which is the purpose of MAR;
- To identify where appropriate which structural changes would be necessary to apply MAR with respect to FX markets (for instance whether the definition of inside information should be amended accordingly)
- To appreciate what degree of proportionality should be included in the application of MAR, with regard to the participants, the size, and specificities of the spot FX market (in particular with respect to the volume of data to be captured to meet the obligations of detection and prevention of market abuse).
- To prepare an appropriate cost-benefit analysis of any implementation of MAR to FX spot markets.

### **III. Inside information: definition, disclosure, delay of disclosure**

The following paragraphs refer to several questions from the CP.

1041. Inside information, its disclosure and delay of disclosure are dealt with in two chapters (5 and 6) of ESMA CP. As mechanisms of disclosure and delay of disclosure are deeply linked with the definition of inside information, the SMSG combines these issues in the paragraphs below.

#### **Inside information**

1042. The SMSG would like to point out that the notion of inside information, as regulated in MAR, serves two purposes:

- It defines what information should be protected from illegal disclosure or use, for the purpose of prevention of market abuse (market abuse perspective)
- It defines what information should be disclosed by issuers (reporting or disclosure perspective)

1043. Therefore, there may be situations in which the current definition of inside information serves well one of the purposes while damaging market participants from the perspective of the other purpose. A broad definition of inside information is good from the point of view of market abuse prevention, but at the same time it may force issuers to disclose too much sensitive information or too early, damaging their competitive position versus non-public competitors. The SMSG would like to stress that any changes in the definition of inside information in the potential review of MAR should be done with adequate cost-benefit analysis and attention to both perspectives mentioned above.

1044. Q13 of the CP asks whether market participants have experienced difficulties in identifying what information is inside information and the moment at which information becomes inside information under current MAR definition. The answer to both parts of this question is positive. The current definition of inside information is very broad, especially as it is broadened by sub-definitions introduced in MAR 7.2 and 7.4. The main difficulties issuers face in identifying what information is inside information, have the following reasons:

- The definition (in MAR 7.2.) relates to qualitative assessments, such as “may reasonably be expected to come into existence”, “may reasonably be expected to occur”, “specific enough”, “possible effect”, in respect of future and uncertain events. This means that in practice a wealth of occurrences in so called protracted processes may be affected. This requires issuers’ managers to assess the probability of future events which, in many cases, is not possible considering the openness of the outcome and the lack of information available at an early stage. These challenges may be aggravated taking into account time pressure.
- Difficulties also arise from the point of reference. MAR 7.4. relates to the still un-defined notion of the “reasonable investor”. It is, in the end, the “reasonable investor’s” opinion that should be taken into consideration while assessing, what information is inside information and what is not. It is not possible to practically use the notion of reasonable investor, since it does not only relate to a type of investor, but also the financial instrument at hand (different types of investors make use of different financial instruments).

1045. An example of the difficulties described above can be shown in a study of the evolution of price-sensitivity in case of contract negotiations conducted by SEG (Polish Association of Listed Companies) and Foundation for Reporting Studies in Poland<sup>85</sup>. The study conducted among disclosure and compliance professionals shows that the majority of them could not define ex-ante at what stage of a protracted negotiations process they deal with inside information. Difficulties in assessing whether a particular piece of information is inside information can also be shown in results of the MAR compliance test run in 2017 by the Polish NCA<sup>86</sup>: the number of pieces of inside information identified in the first 12 months of MAR by particular issuers varied greatly, ranging from 0 to 179 (sic!), with mean 10.

## Possible solutions

1046. The SMSG sees four potential ways to address to the problem described above and proposes ESMA to assess them in its future analysis on the potential revision of the definition of inside information:

---

<sup>85</sup> [https://standarty.org.pl/wppsndrd/wp-content/uploads/2019/12/Infographics\\_SEG\\_FSR\\_Evolution\\_of\\_price-sensitivity\\_contract\\_negotiations\\_EN.pdf](https://standarty.org.pl/wppsndrd/wp-content/uploads/2019/12/Infographics_SEG_FSR_Evolution_of_price-sensitivity_contract_negotiations_EN.pdf)

<sup>86</sup> [https://standarty.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR\\_compliance\\_test\\_by\\_Polish\\_FSA.pdf](https://standarty.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf)

- Further refinement of the definition of inside information

This solution would require fine-tuning key elements of the current definition that are not precise enough (i.e. definition of reasonable investor and definition of qualitative assessments in MAR 7.2.)

- Providing issuers with guidance on the most common cases of inside information

This solution would leave the current definition of inside information unchanged and would consist of the introduction of a non-exhaustive list of information which can typically be considered inside information in level 3 ESMA guidelines. This is currently the case for commodity derivatives markets or spot markets and a similar guidance mechanism could be expanded to stock and bond markets. To that end, the SMSG suggests to build on best practices among NCAs. For example the German NCA BaFin has in its consultation document to the new issuer handbook provided a list of examples of what can constitute an insider information.<sup>87</sup> In the same vein the French NCA AMF has issued good practices relating to the identification of inside information<sup>88</sup>.

- Introduction of a two-stage definition of inside information and price sensitive information

This solution would require the introduction of an additional definition of “price-sensitive information” in the MAR framework. The SMSG proposes to introduce the following definition of price-sensitive information (based partly on current MAR 7.2.):

Information shall be deemed to be price-sensitive if it indicates a set of circumstances which exists, or an event which has occurred, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the price of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances.

The definition of inside information would remain unchanged, as well as all regulations regarding its protection, prohibition of unlawful disclosure, insider dealing etc., thus providing with the same high level of market protection, as in the current regime. The difference would be that this kind of information would not prompt the duty of immediate disclosure according to Art. 17 MAR. This would only be the case when inside information also becomes price-sensitive. Although the definition of price-sensitive information is narrower than the current definition of inside information, it would not affect market integrity since its nature would persist until publication. All the same in the intermediate stage all the elements of protection (prohibition of unlawful disclosure,

---

<sup>87</sup> [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Konsultation/2019/kon\\_14\\_19\\_modul\\_c\\_des\\_elf.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Konsultation/2019/kon_14_19_modul_c_des_elf.html), see I.2.1.5.13.

<sup>88</sup> <https://www.amf-france.org/Reglementation/Dossiers-thematiques/Societes-cotees-et-operations-financieres/Marches-d-actions/Bonnes-pratiques-en-matiere-d-information-privilegiee>

prohibition of insider trading, obligation to draw up and keep insider lists etc.) would remain unchanged.

In order to provide an example of the functioning of the two-stage definition we would like to summarize a common situation that may arise within companies. In case a company identifies an “important” piece of information that may be inside information but is not mature enough for disclosure (there is no certainty as to the result of a process or other conditions that may apply in the future), the company could identify it as inside information. As result, the information would be protected (drawing up of an insider list, ban on unlawful disclosure, ban on use of this information etc.). The information would be kept within the company and would not be disclosed at this stage. Only when the information would become mature enough (it becomes precise, certain etc., i.e. it fulfils the above-mentioned definition of price-sensitive information), it would need to be immediately disclosed.

The introduction of a two-stage definition of inside and price-sensitive information also responds to the problem raised in the EC’s mandate for advice. The EC states that “Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. Oneway issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4).” That seems to imply the existence of “almost-inside-information” and in fact is a problem that many issuers face while trying to determine at which precise moment in time information turns into inside information.

The question remains what the criteria should be to differentiate between insider information (potentially price relevant) and information subject to disclosure.

- Revision of MAR 7.2. and 7.4.

A fourth solution would be to revise Art.7.2. and 7.4. in a way that inside information would be dependent on a high probability of the realisation of future events combined with a high probability of relevant price effects. This would restrict the line the ECJ had pursued in the *Geltl* case, while at the same time reducing the problems of correctly qualifying certain knowledge as insider information. This would, however, reduce the level of protection of market integrity compared to the dual definition.

All four proposed solutions would maintain a high level of market protection against unlawful disclosure and use of inside information. All of them reduce, to some degree, the burdens imposed on issuers resulting from difficulties in assessing what information should be disclosed at what precise moment in time. The third and fourth solution (two-stage definition) would require the most far-reaching changes. The SMSG holds that these possible changes need closer analysis and assessment by ESMA and the EC.

The MSG considers that any insider obligations resulting from MAR should only be linked to price relevance for securities issued by the issuer and not for financial instruments issued by third parties (eg. derivatives). For issuers, determining the price relevance of a financial instrument issued by a third party is impossible and ESMA should provide clear guidance that no legal obligation in this respect exists for the issuer.

## **Delay of disclosure**

The following paragraphs refer to Q25.

1047. Delay of disclosure of inside information is an exception to the general obligation to immediately disclose any inside information arising within a company. Its main purpose is to protect legitimate interests of the company while maintaining an adequate level of market protection regarding inequality in access to information.

1048. The current regime of delay of disclosure has, however, several setbacks which make this mechanism difficult, or sometimes impossible, to use for issuers:

- ESMA's guidelines issued under MAR 17.11. contain only a non-exhaustive list of situations in which delay of disclosure is likely to mislead the public.
- According to market and supervisory practice in several member states, there is no possibility for a non-financial issuer (i.e. company that is not a credit institution or a financial institution) to delay disclosure of financial inside information, for example information on its preliminary financial results. The mechanism for delay of disclosure of financial inside information, defined in MAR 17.5. and 17.6., is accessible only to credit and financial institutions. There are cases in which a non-financial company is forced to immediately disclose financial inside information few days before publishing its annual or interim report, thus providing investors with fragmented information without proper context, which is necessary for better understanding of its situation.
- Rumors are not interpreted uniformly in Europe. A clear definition of (true) rumors is important against the background that the origin of the breach of confidentiality is not necessarily a precondition.

### **Possible solutions:**

1049. The first point described above may be solved by ESMA issuing a non-exhaustive list of situations in which delay of disclosure is not likely to mislead the public.

1050. The second problem may be solved by:

- either adding financial inside information to the catalogue of legitimate interests of the issuer for delay of disclosure. This should be considered at least where the financial statement is eminent, or
- extending the system defined in MAR 17.5. and 17.6. to non-financial companies.

1051. The third problem may be solved by guidance from ESMA on what is considered a rumour and what is pure speculation not falling within the MAR regime. The SMSG would welcome a clarification that rumours without true key elements will not be considered as a precise rumour. Further, rumours should only be considered as sufficiently precise when the key aspects of the insider information are correctly included, when they do not include materially false statements and when they are not predominantly based on speculations.

1052. Several of the problems described above could also be solved in many cases by the introduction of a two-stage definition system (inside information and price-sensitive information) as described above.

#### **IV. Front running**

The following paragraphs refer to Q20, Q21, Q22 and Q23

1053. The SMSG notes that:

- Article 7(1)(d) applies to persons charged with the execution of orders, and explicitly includes in the scope of inside information the information on pending orders;
- Article 7(1)(d) does not apply to other categories of persons that may be aware of a future relevant order (e.g., directors of an issuer, the issuer itself, institutional investors, etc.);
- Article 7(1)(a) does not explicitly include the orders in the general definition of inside information concerning financial instruments.

1054. The SMSG believes that data on pending orders are relevant for the purposes of the inside information as long as it is of a precise nature, has not been made public and can have a significant effect on the price of the financial instruments or related derivatives, even when this information refers to persons other than those charged of order execution.

1055. The SMSG therefore shares ESMA's view that the application of Article 7(1)(a) of MAR implies that front-running behaviours will be relevant for the purpose of insider dealing even when carried out by persons beyond those charged with the execution of orders if they had knowledge relating to an order.

1056. With reference to Q20, the SMSG does not recommend to change the definition of inside information to include explicitly information on pending orders for persons other than those charged of order execution.

1057. The SMSG notes that Article 7(1)(a) refers to information of a precise nature, which has not been made public, and which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

1058. The SMSG also notes that market illiquidity would be taken into account when assessing the likelihood of having a significant effect on the price.

1059. For this reason, with reference to Q21, the SMSG does not recommend to change the definition of inside information to include explicit reference to market illiquidity.

1060. As regards Q22 and Q23 the SMSG considers that pre-hedging is a licit activity. It is in fact a diligent course of action for a counterparty asked to offer price on a Request for Quote basis, particularly where it refers to illiquid assets. Thus, no market abuse implications are seen here. Only when pre-hedging is used for liquid assets and when pre-hedging itself does not make sense for hedging purposes, potential market abuse concerns might arise.

## V. Market sounding

The following paragraphs refer to Q33, Q34, Q36 and A38.

1061. ESMA proposes “to clarify the obligatory nature of the requirements currently contained in Article 11 of MAR”.

1062. Article 10(1) of MAR prohibits a person in the possession of inside information from disclosing that information to any other person “except where the disclosure is made in the normal exercise of an employment, a profession or duties”. Conducting market soundings may require disclosure to potential investors of inside information, and so a safe harbour is provided by Article 11(4) which stipulates that “for the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person’s employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article”. The latter paragraphs set out a process which a disclosing market participant (“DMP”) “shall follow. This suggests the procedure is mandatory. The Consultation Paper itself states that “ESMA is of the view that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11 and when they do so, they can benefit from the described protection.” However, an alternative interpretation is possible and a purposive approach could suggest that Article 11 is an optional procedure. (The Consultation Paper acknowledges the existence of such an interpretation.) Recital (35) of MAR is perhaps the strongest argument for such an interpretation as it states that “There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information, but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against the unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation [...]”. Similarly, Member States are not required, though they are allowed, to provide for sanctions for non-compliance under Article 30 of MAR or under CSMAD. Market participants appear to

be adopting a cautious approach and to operate on the basis the Article 11 regime as if it were mandatory. To avoid uncertainty, the SMSG recommends that this matter be clarified and that it be made clear that whenever a behaviour meets the definition of market sounding the relevant obligations apply.

1063. Article 11(1) provides that a “market sounding comprises 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”. Article 11(2) also includes certain soundings in connection with M&A transactions. Recital 33 provides three examples but the definition is broad thus opening up the possibility of exploitation. In response to Q.34, the SMSG agrees that the scope of the definition could be clarified. It might be worthwhile to clarify that Article 11 applies only to instruments, transactions, orders, behaviours, actions or omissions implicated by Article 2 which sets out the scope of the Regulation eg. not an issuer with no other securities admitted to trading on an EU trading venue and not part of a Group with securities admitted to trading. The application of the regime to soundings with no connection to the EU in terms of process, investors and listing might also be considered. Greater clarity could be provided too in relation to the precise meaning of “to gauge the interest” in certain contexts eg. a non-deal roadshow or a private placement where the terms are to be negotiated directly with the investors.

1064. It has been noted that the nature of the “announcement” in question is not explained. A pre-launch announcement would appear to be included, but there might be less certainty in relation to an announcement with few material terms disclosed.

1065. Q36 asks whether the reference to “prior to the announcement of a transaction” in the definition of market sounding is appropriate or whether communications of information not followed by any specific announcement should also be included. The SMSG agrees that the definition should be amended to cover also those communications of information which are not followed by any specific announcement. This may arise for example where on the basis of the soundings it is decided not to proceed with the transaction. The need for a safe harbour would still remain in such circumstances.

1066. Q38 seeks suggestions as to how the market sounding procedure and requirements might be simplified or improved while still ensuring an adequate level of audit trail of the conveyed information. The SMSG considers that the use of recording facilities for all soundings may lead to a more reliable audit trail and given the widespread use of such technology would not be overly burdensome. However, persons receiving the market sounding should still be asked for their consent to the recording of the conversation and if such consent is not given, no communication should occur.

1067. The Consultation Paper suggests that an increase in the number of persons that expressed their wish not to receive market soundings may be an indicator of an

excessive burden of the regime for those persons receiving market soundings. The SMSG notes that the reluctance may also be caused by the subsequent prohibition on the use of that information set out in Article 11(5).

## **VI. Insider lists**

The following paragraphs refer to Q40, Q42, Q43, Q44 and Q45.

1068. The SMSG finds the use of permanent insider list troublesome in general. As permanent insiders do not need to be notified that they are included in an event-specific insider list, they risk being unaware that they have access to inside information. Also, there is a risk that the event-specific insider list includes persons that in reality do not have access to such inside information.

1069. The Polish NCA conducted a MAR compliance test in 2017, one year after MAR came into force. It shows that about 70 percent of Polish issuers use permanent sections of insider lists<sup>89</sup>. Usually those lists included members of the board, IR officers, accountants, legal departments and key managers. The number of persons included in the permanent section of the insider lists varied significantly, with a mean of 7, but also with cases as high as 231 persons (there was a company that included literally all its employees on the permanent section of the insider list).

1070. We agree on expanding the scope and note that the drafting expansion should include e.g. companies that submit a take-over bid, so that anybody that has inside information about an issuer shall draw up and maintain insider lists. However, it is delicate task to regulate those that are not in any other way subject to MAR.

1071. We agree with the proposal presented in Q44.

1072. The administrative burden could be reduced by requiring less personal details to be included in an insider list.

## **VII. Managers' transactions and lists of managers and persons closely associated Threshold in notifications of transactions**

The following paragraphs refer to several issues.

1073. The main reason of the obligation to notify managers' transactions is to inform investors about the sentiment managers have regarding the current situation and prospects of the company. The threshold level, currently set at Euro 5,000, seems to low and results in an inflation of notifications of transactions that are of no significant importance to investors.

1074. MAR states that issuers are required to make public the information on transactions by managers and persons closely associated with them promptly and no

---

<sup>89</sup> [https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR\\_compliance\\_test\\_by\\_Polish\\_FSA.pdf](https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf)

later than three (3) business days after the date of the transaction. The public disclosure of transactions by managers/persons closely associated with them must be done in a manner similar to the public disclosure of inside information via a stock exchange release. Since MAR came into force in July 3rd 2016, in some of the member states (for example in Finland) a remarkable dilution of investor information due to excessive public disclosure of inside information via stock exchange releases was observed, especially of managers transactions. Investors, neither retail or institutional, are interested in managers' small transactions. These public stock exchange releases represent de facto distraction of necessary market information from an investor point of view. There is clear evidence showing that some managers of issuers have actually refrained from executing some transactions in order to mitigate the unnecessary and diluting public information which does not serve investor needs properly. In addition, it has been clear since MAR that the persons taking up managerial responsibilities in issuers are less interested in receiving financial instruments under the scope of MAR as part of their remuneration scheme.

1075. A study conducted by SEG (Polish Association of Listed Companies) and Foundation for Reporting Standards<sup>90</sup> has shown that for Polish issuers the most preferred threshold would be at Euro 20,000 (option chosen by 41.5 percent of respondents).

1076. The SMSG also identifies another problem that causes an inflation in the number of insignificant notifications. Currently the threshold counter is reset only once per year (at the end of the calendar year). For this reason, after the first notification (regarding the transaction that exceeded the threshold), every subsequent transaction, no matter how small it is, must be notified. This issue could be solved by resetting the counter after every notification. This would mean that a manager would notify the first transaction exceeding the Euro 5,000 threshold and would then notify only when the Euro 5,000 threshold is exceeded again. No harm would be caused to the market, as all significant transactions would be notified. At the same time, non-significant small transactions would not be notified and disclosed, thus eliminating the amount of unimportant information from the market.

1077. The SMSG would like to propose ESMA to analyse the following solutions:

- Raising the threshold to Euro 20,000 (same level for all Member States)
- Introduction of resetting the counter after every notification
- Both of the above

#### **Lists of PCAs**

1078. MAR 17.5. requires issuers to draw up and maintain a list of all PDMRs (persons discharging managerial responsibilities) and PCAs (persons closely associated).

---

<sup>90</sup>

[https://standardy.org.pl/wp-content/uploads/2019/12/SEG\\_study\\_on\\_potential\\_regulatory\\_changes\\_improving\\_MAR.pdf](https://standardy.org.pl/wp-content/uploads/2019/12/SEG_study_on_potential_regulatory_changes_improving_MAR.pdf)

Keeping a list of PDMRs for the purpose of notification of transactions is perfectly justified and does not result in any particular burdens for issuers, as the number of PDMRs in any particular issuer is limited and these persons are well known to the issuer.

1079. At the same time, drawing up and keeping a list of PCAs is very burdensome for issuers and creates a significant threat to personal data of these persons. MAR identifies (in MAR 3.1. (25) and (26)) 3 kinds of personal relations with PDMRs, 4 kinds of economic relations with PDMRs and 4 kinds of economic relations with persons tied by personal relations with PDMRs. This results in 25,200 PCAs identified in Poland<sup>91</sup> and it may be estimated that the number of PCAs in the whole EU may be as high as 500,000 persons. All the personal data of these persons have to be gathered, kept and constantly updated by thousands of issuers across the EU.

1080. We see no particular reason for keeping the obligation for issuers to draw up and maintain lists of PCAs. These lists should help the issuer to identify whether a particular notification of transaction was really sent by a PCA. This purpose can be achieved in one of two ways which are less burdensome:

- a PCA's transaction notification could be sent to the issuer via his/her PDMR (similar to the pre-MAR regime)
- the issuer would have to disclose the notification 2 days after receiving it, thus having enough time to verify it.

1081. Additionally, as far as we know, NCAs do not make much use of the lists of PCAs in their supervisory activities. In case of suspicious trades, NCAs have different and more reliable ways of identifying persons conducting trades than using lists of PCAs.

1082. The SMSG encourages ESMA to pursue further analysis into this topic in order to get evidence-based answers to the following questions:

- What is the actual number of PCAs across all EU member states?
- In how many cases (since MAR entered into force) have lists of PCAs been for the NCAs the main source of specific and useful information, unobtainable in any other way?
- To what extent is it reasonable to impose on issuers an obligation to draw up, update and maintain lists of PCAs at the current state of usage of the contents of these lists?

1083. The study in Poland<sup>92</sup> has shown that 81.2 percent of Polish issuers are in favour of cancelling the requirement to keep the list of PCAs.

## **Extension of MAR 19.11 requirements to Persons Closely Associated**

---

<sup>91</sup> [https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR\\_compliance\\_test\\_by\\_Polish\\_FSA.pdf](https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf)

<sup>92</sup> [https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/SEG\\_study\\_on\\_potential\\_regulatory\\_changes\\_improving\\_MAR.pdf](https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/SEG_study_on_potential_regulatory_changes_improving_MAR.pdf)

1084. Article 19.11 explicitly and only refers to PDMRs as defined in Article 3.1. (26) of MAR. Article 19.11 provides that PDMRs are prohibited from carrying out transactions on their own account or on behalf of a third party, during a minimum closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public.

1085. The SMSG would like to emphasize that the main aim of Article 19.11 of MAR is to prevent the undue use of inside information in connection with the preparation of financial reports, during closed periods.

1086. ESMA asks whether it would be appropriate to explicitly extend the application of the closed period to issuers. As ESMA correctly identifies, the extension of the closed period to issuers presents a number of downsides as detailed below (A) without providing any benefit (B) for the purpose of prevention and detection of market abuse.

- This could have significant downsides...

1087. First, prohibiting the issuer from carrying out transactions during a closed period of 30 calendar could put at risk refinancing for regular issuers such as credit institutions, with potential consequences on financial stability.

1088. This could significantly reduce the ability of credit institutions to issue debt instruments in a timely manner to manage their liquidity needs. Liquidity management is a core element of risk-management for credit institutions and has been the subject of reinforced regulatory requirements.

1089. The issuance needs of credit institutions have significantly increased in the context of past regulatory reform (prudential regulation, MREL, etc.). Given quarterly reporting requirements, an extension of the blocking period would severely constrain the ability to meet those regulatory requirements as well as general-purpose refinancing needs.

1090. Accordingly, any extension of the blocking period would require some form of safe-harbour or exemption for credit institutions.

1091. Furthermore, insofar as the blocking period would also extend to trading of capital or debt securities, this could limit the ability of issuers to ensure market liquidity for those securities.

1092. Finally, the SMSG notes that applying such an extension in the context of buyback programs would result in the ineffective implementation of the relevant delegated regulation (i.e. Article 4.2. of CDR n° 2016/1052), which allows buy back transactions during the blocking period provided that certain conditions are met.

- Without providing significant benefits

1093. As ESMA correctly identifies, issuers remain subject at all times to Articles 14 and 15 of MAR prohibiting insider dealing and attempted insider dealing, unlawful disclosure of inside information, as well as market manipulation and attempted market manipulation. This implies that issuers should put in place the relevant processes in order to ensure that such requirements are appropriately complied with. Applying such a prohibition could become an additional burden for issuers when the objective of preventing market abuse is already achieved during closed periods by drawing up a list of persons who cannot carry out transactions during such closed periods (i.e. PDMR, and, by extension, other relevant persons who principally work in the financial department) and by applying the market abuse prevention procedures.
1094. In that context, it is worth noting that teams in charge of market making in credit institutions are separated (through formal and physical “Chinese walls”) from persons who, by virtue of their functions, could have inside information during closed periods, in connection with the preparation of financial reports (e.g. PDMRs and persons working in the financial department). The same remark applies to structured products issued under EMTN format.
1095. In the case of plain vanilla debt issues, some market participants foresee, as a preventive measure, closed periods generally shorter than 30 calendar days before the publication of financial reports, since the decision to issue such issuance depends generally on the financial department, the staff of which could, by virtue of their function, have inside information. Moreover, through an extensive application of article 19.11, relevant persons working in the financial department are subject to a regime similar to that of PDMRs and article 19.11. This is part of the pursuit, within credit institutions, of the goal of preventing market abuse during closed periods.

## VIII. Order book data

The following paragraphs refer to Q66, Q67 and Q68.

1096. A cross-market view of order books would be valuable for NCAs to detect and investigate cases of market manipulation and insider dealing.
1097. In principle, we agree with applying a standardized xml template for order records under RTS24. In practice we think that it would be perfectly feasible to apply the template formatting requirements to individual order records. Where we see a challenge is in applying templates, logic and validation to sequences of order events. Trade records under RTS 22 and order records under RTS 24 differ in their characteristics in the sense that trade records can be viewed and analysed in isolation, or at the most complex as part of a combination trade where they share a complex trade id, whereas order records usually are viewed and monitored in sequences of events. Since most trading venues in Europe have different trading systems, we believe that it will be difficult to mandate or expect a uniform transaction logic across venues, which may in turn pose challenges to a cross-market order book surveillance. The consultation paper mentions that the NCA’s would apply validation of supplied order

records. We are supportive of such validations as long as they are similar to the validations for transaction reporting, but would caution ESMA to validate transaction logic of sequences of order events based on its guidelines because of the aforementioned concerns. Furthermore, any proposal to change the requirements for trading venues to provide order book data to regulators should also apply to investment firms in the same way, as this is essential in order to deliver a full picture for regulators to monitor activity for market abuse.

1098. There is no explicit mention of the timing of the mandatory provision of order book data to NCAs, other than the generic reference to “end of day” data. Since ESMA has stated that the collection of client identity can be obtained from members T+1 and almost all trading venues in the EU have implemented setups where client and personal data is provided to trading venues separately from the order entry point, the earliest that mandated provision of order records could be required would likely be T+2. We would also urge ESMA to review the implementation of REG CAT in the US with a view to potentially harmonize order record requirements under MiFIR where possible. One natural area would be in respect of the identification of clients. Under MiFIR, each trading venue is required to obtain sensitive and personal data from its members on orders whereas under REG CAT, the SEC appoints a central facility that manages all personal and client data and issues unique numeric codes to investment firms to use on orders to the US venues. Applying a similar concept in Europe with an ESMA appointed (or under ESMA’s helm) facility would arguably save significant costs for the industry. An investment firm that connects to multiple trading venues in Europe would only need to report client and personal data to one facility instead of multiple trading venues that all apply different formats. Additionally, trading venues would be relieved from carrying and storing GDPR sensitive data purely for the purpose of transportation between the investment firms and the NCA’s.

1099. For example, Nasdaq operates multiple trading venues and answers to a combined total of 8 competent authorities in the EU. Two of these NCA’s already request daily order records so we believe that the proposal could be implemented. Ideally, if it is implemented alongside a centralized management of personal and client data, we see a substantial cost reduction.

- A. There is obviously a difference in terms of data processing and data storage of producing and transmitting order records daily compared to ad hoc extractions and requests. Then again, for example Nasdaq already has a daily transmission requirement for two markets, so the delta would be moderate.
- B. Quote driven securities such as securitized derivative products have a disproportionately high number of order events compared to the actual turnover of these products. Therefore, if these products would be considered less relevant from a market abuse monitoring perspective, it would actually make a significant difference to exclude them from the requirement. For Nasdaq’s cash equity markets it would roughly eliminate 50-60% of all order events but only a fraction of the security universe and turnover.

## **IX. Sanctions**

The following paragraphs refer to Q70.

1100. As ESMA's report on MAR sanctions has shown, the situation looks very different across Member States, especially with Sweden standing out in certain respects. We would encourage any measures which would streamline enforcement and sanctioning, whether in the MAR framework or in practical efforts to achieve better convergence. The split picture contributes to maintaining barriers for cross-border financing opportunities for issuers, as investors hesitate on cross-border investments. Better convergence would support financing of companies, contributing to growth and job creation.

#### **X. Benchmarks**

1101. We suggest removing benchmarks from the scope of MAR and have a separate manipulation regime in the EU Benchmarks Regulation (BMR). From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon.

#### **XI. Other issues**

1102. Regarding the issue raised in par. 2, the SMSG would like to point ESMA's attention to other examples of diverging application of MAR in various jurisdictions. These include:

- The content of the publication of insider information, such as the identification of a counterparty in a substantial agreement with a new user of the products - in some countries it is very important to disclose the counterparty, in some others not. The same requirements/understanding should apply in the entire Union.
- Financial Instruments in scope of Article 19: Competent authorities have different views on the question whether a PDMR of an issuer with only debt instruments admitted to trading on an EU trading venue, must notify the issuer and the competent authority of transactions in ordinary unlisted shares of the issuer. German and UK authorities have clarified that this is not the case, while the Swedish authority and Swedish Administrative Courts have held that Article 19 applies to all financial instruments issued by the issuer.
- Whether the execution of a client order by an investment firm/dealer which has reasonable suspicion that the client intends to commit market abuse, is to be considered as a criminal offense, is debated in some Member States. Clearly the same interpretation should apply in the EU in this respect and clarification is needed.

1103. There is a lack of alignment between the rules on investment recommendations under MAR and the rules on investment research and marketing communications and research unbundling under the MIFID II regime. There is an inherent conflict between the obligation under MAR to provide recommendations free of charge under some circumstances and the requirement under MIFID II to ensure that research is subject to a separately identifiable payment. Harmonisation in this respect is needed.

1104. In the SMSG's view, ESMA's interpretation that asset managers and non-financial firms have to monitor their own trading should be reviewed and a cost-benefit analysis should be made.

1105. Regarding the public disclosure of a request for admission to trading, the SMSG would like to point out that the main scope of MAR and MAD is financial instruments admitted to trading on a regulated market or traded on an MTF or for which a request for admission to trading has been made. Notification of the fact that a request for admission has been made, needs to be provided under a common format and common process throughout the union, preferably proper information in the NCAs webpage/s.

## Annex 3- European Commission's mandate on the MAR Review

Under Article 38 of Regulation (EU) No 596/2014 on market abuse ('MAR') the Commission is required to submit, by 3 July 2019, a report to the European Parliament and to the Council on, firstly, the application of MAR and, secondly, the level of thresholds set out in its Article 19(1a)(a) and (b) in relation to managers' transactions in certain specific circumstances. The Commission will rely on this report as a basis for any legislative action it may deem appropriate. In light of the Commission's obligation under Article 38, I wish to seek ESMA to provide the Commission with advice on the elements set out in the first section below.

Under Article 38, the Commission may also consider other elements of the MAR framework it deems necessary in order to put forward purposeful legislative amendments. It is with this in mind that the Commission seeks ESMA to consider in its technical advice not only the mandatory elements indicated in the first section, but also to provide its input on the considerations specified in the second section.

### 1. Advice on the mandatory elements of the report

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements:

- (a) appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for **insider dealing and market manipulation**

In relation to the above point and pursuant to the second paragraph of Article 38, the Commission notes that ESMA is required to undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of MAR, of the application of such criminal sanctions within Member States. Any data made available under Article 33(1) and (2) are also to be included in that exercise.

- (b) whether the definition of **inside information** is sufficient to cover all information relevant for competent authorities to effectively combat market abuse
- (c) appropriateness of the conditions under which the **prohibition on trading** is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply
- (d) possibility of establishing a Union framework for **cross-market order book surveillance** in relation to market abuse, including recommendations for such a framework

With respect to this point, the Commission would like ESMA to formulate its recommendations having particular regard to the transaction reporting obligation under Article 26 of Regulation (EU) No 600/2014 and how data reported to national competent authorities pursuant to that obligation can help in designing such a framework.

(e) scope of application of the **benchmark provisions**

Furthermore, under the second subparagraph of Article 38 the Commission is required to submit, after consulting ESMA and by 3 July 2019, a report to the European Parliament and to the Council on the level of the thresholds set out in Article 19(1a)(a) and (b) in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets, with a view to assessing whether that level is appropriate or should be adjusted. Pursuant to that second subparagraph, the Commission must consult ESMA prior to submitting its report. As such, the Commission seeks ESMA's contribution on this matter, so that it can proceed in preparing the report as required.

## 2. Advice on non-mandatory elements of the report

(a) whether **spot FX contracts** should be covered by MAR

The scope of application of MAR as defined by its Article 2 does not include foreign exchange spot transactions. Given the size of the spot FX market, the Commission would appreciate ESMA's input on whether there is a need for that market to be covered by the market abuse regime. In its assessment, ESMA should give due regard to whether national competent authorities ('NCAs') have the necessary regulatory tools to effectively and efficiently supervise and sanction market abuse on spot FX markets and whether extending the scope of MAR to these markets would prove to be the most appropriate way of remedying supervisory gaps, if any exist. To that effect ESMA is encouraged to analyse and take into account the particularities of the spot FX market and how well these would mesh with the MAR framework.

(b) scope of reporting obligations under the exemption for **buyback programmes**

Under Article 5(3), in order for its buyback programme to benefit from the exemption from application of certain provisions of MAR, the issuer must report each transaction relating to the buy-back programme not only to the NCAs of the trading venues on which the shares are admitted to trading but also to those of each trading venue where they are traded. This reporting obligation is reiterated in the Commission Delegated Regulation (EU) 2016/1052<sup>93</sup>, which lays down technical standards for the conditions applicable to buy-back programmes. Since issuers are not necessarily aware of their shares being traded on a certain venue, full compliance with the reporting requirements might prove to be challenging for the issuers. In light of that consideration, the Commission would like ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

(c) effectiveness of the mechanism to **delay disclosure of inside information**

---

<sup>93</sup> Article 2(2) provides that 'the issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are traded'

Currently the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4). Possibly reflecting a diverging approach to treatment of inside information across Member States, the Commission has received indications that relying on the mechanism of delaying disclosure of inside information is used to a varying extent across jurisdictions in the Union. It would appear that, while in some Member States issuers rely on this mechanism regularly, issuers of others use it on an exceptional basis. Therefore, for the Commission to better understand whether this tool needs to be calibrated, ESMA should gather information on the usage of this mechanism across Member States and identify points of divergence in its application, if any. Furthermore, the Commission would like ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism. Finally, to gain a complete picture of the use of this mechanism, ESMA should provide information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, as provided in the third subparagraph of Article 17(4). In this latter case, the Commission would like to receive information on how many such requests have been submitted by those NCAs.

- (d) usefulness of **insider lists** drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse

In relation to the above point, the Commission would in particular like to know to what extent NCAs rely on insider lists within the meaning of Article 18 in investigating instances of market abuse. To that end, the Commission would appreciate if ESMA, in providing its answer, gathers information on the following:

- number of requests to receive insider lists addressed by the NCAs to issuers
- whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so the breakdown of requests pertaining to one or the other
- how instrumental insider lists are in completing investigations initiated by NCAs.

- (e) adequacy of the requirement to notify **managers' transactions** as applied to collective investment undertakings

In relation to this point, the Commission would like ESMA to assess and provide feedback on whether legislative amendments are needed regarding the following issues in particular:

- i. personal scope of Article 19(1) in conjunction with Article 3(1)(25)

Article 3(1)(25) defines a person discharging managerial responsibilities ('PDMR') as a person 'within an issuer' satisfying certain conditions. That definition as such might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds without a legal personality. The same logic applies to investment funds with a legal personality managed externally. In light of these considerations, the Commission would like ESMA to assess whether there is a need for the managers of management companies to be covered by the requirement to disclose their transactions and how to best adapt the scope of that requirement to ensure a level regulatory playing field between different management structures of investment firms (external vs internal management) while preserving the effective attainment of the policy objective pursued by Article 19.

ii. material scope of Article 19(1)(a)

The above-mentioned provision requires PDMRs to notify transactions conducted on their own account relating to shares or debt instruments of the issuer within which they are discharging managerial responsibilities. The PDMR obligations also apply to managers of collective investment undertakings ('CIUs'). However, the current drafting of the provision does not explicitly mention units in collective investment undertakings, which are, alongside shares, a type of ownership interest in a CIU. Therefore, it could be argued that on a strict reading of Article 19(1)(a) units in CIUs are outside of the scope of that provision, which may result in an unlevel regulatory playing field between CIUs issuing shares and those issuing units. The Commission would consequently like ESMA to assess whether this presents a regulatory loophole that should be addressed.

(f) appropriateness of certain aspects of the requirement to notify **managers' transactions**

Regarding the above point, the Commission seeks ESMA's input on the following two aspects of that requirement:

iii. level of thresholds

Currently the threshold that triggers the notification obligation is set to EUR 5 000, with the possibility for NCAs to raise it to EUR 20 000. The Commission would welcome ESMA's analysis on whether these thresholds are appropriate to ensure a high level of market transparency and integrity without creating a disproportionate compliance burden for managers and issuers.

iv. transactions to be notified once the threshold is reached

Under Article 19, after the relevant threshold has been reached, managers and issuers have to notify and disclose all subsequent transactions, regardless of the size of the individual transactions. The Commission seeks ESMA's advice and assessment on whether this reporting methodology is most appropriate to capture relevant transaction data and whether it

strikes the right balance between a high level market transparency and a proportionate compliance burden.

(g) **cross-border enforcement** of sanctions

The Commission would like ESMA to gather information on whether NCAs encounter difficulties in the recognition and enforcement of financial penalties imposed under MAR in cases with a cross-border element. Examples of such cases could include situations where the sanctioned person is a resident or has its registered seat in another Member State or when that person leaves the Member State of the sanctioning NCA without paying the fine. To better understand and assess the nature and the breadth of the problems NCAs may face, as well as potential ways of addressing them, the Commission would like ESMA to conduct an analysis of legal obstacles to the recognition and enforcement of financial penalties, if any. In doing so, it is encouraged to take into account in particular the following:

- i. number of financial penalties imposed by NCAs vis-à-vis non-residents and how successful the NCAs were in enforcing them;
- ii. whether the interpretation given to the Council Framework Decision 2005/214/JHA<sup>94</sup> in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties;
- iii. whether under the current legislative framework there are tools that might be used to facilitate the cooperation between NCAs in order to address the issue and what role ESMA could play in this process.

### 3. Guiding principles

In carrying out its analysis of the elements covered by the mandate and set out in sections 1 and 2, ESMA is invited to take into account the following principles:

- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by the mandate;
- while preparing its advice, ESMA should seek coherence within the regulatory framework of the Union;
- ESMA is encouraged to widely consult market participants and stakeholders in an open and transparent manner. In doing so, ESMA's advice should take account of different opinions expressed by the market participants and stakeholders during their consultation;

---

<sup>94</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, p. 16)

- ESMA is invited to provide sufficient empirical evidence and factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered.

#### **4. Final remarks**

Given that the procedures which need to be followed for the adoption of the report to the European Parliament and the Council are potentially lengthy, I would kindly ask ESMA to provide its contribution by no later than **31 December 2019**. I look forward to receiving ESMA's input and remain at your disposal for any questions.

## Annex 4.- Mapping exercise on the administrative and criminal sanctions imposed under Articles 14 and 15 of MAR

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Finanzmarktaufsicht, Austria <sup>95</sup>	0	0	NA	0	-	3 administrative sanctions, to natural persons.  The sanctions were	Y  5.000 euros	1	600 euros	0	-

<sup>95</sup> In addition to the information contained in the table, 16 sanctions and other measures were imposed in 2018 on the basis of MAD by the FMA.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
						published and are not under appeal.					
Financial Services and Markets Authority, Belgium	0	7 <sup>96</sup>	Y €257,145	4	Y EUR 1.457.102	No		0	NA	2	Y EUR 1.400.000
Комисията за	0	0 <sup>97</sup>	NA	0	-	No		16	Y	0	-

<sup>96</sup> Overall eight administrative sanctions and measures were imposed in Belgium, they all were published and none is under appeal. The sanctions and administrative measures were imposed on seven natural persons and one legal person.

As regards the sanctions and administrative measures concerning Article 14 of MAR, two pecuniary sanctions and other than pecuniary measures were imposed, for Euro 72,645. There were also five settlement decisions, for the aggregated figure of Euro 184,500 (reference to the aggregated figure indicates that the settlement decision amount covers Article 14 of MAR and also other legislative provisions).

<sup>97</sup> Overall in Bulgaria 30 administrative sanctions and other measures were imposed, of which none was published. 17 sanctions and other measures are under appeal. The administrative sanctions and other measures were imposed on nine natural persons and eight legal persons.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
финансов надзор, Bulgaria									BGN 440,000		
Hrvatska agencija za nadzor financijskih usluga, Croatia	0	0	NA	0	-	No		3 <sup>98</sup>	N	0	-
Επιτροπή Κεφαλαίων Κύπρου, Cyprus <sup>99</sup>	0	0	NA	0	-	No		0	NA	0	-

<sup>98</sup> The three administrative measures and sanctions were not published, are not under appeal and were imposed on three natural persons.

<sup>99</sup> In addition to the information contained in the table, three sanctions and other measures were imposed in 2018 on the basis of MAD by CySec.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Česká národní banka, Czech Republic <sup>100</sup>	0	0	NA	0	-	No		0	NA	0	-
Finanstilsynet, Denmark <sup>101</sup>	0	NA	NA	3	N Referral to criminal authorities	No		NA	NA	1	N Referral to criminal authorities
Finantsinspektsioon, Estonia	0	0	NA	0	-	No		3 <sup>102</sup>	Y EUR 15,000	0	

<sup>100</sup> No sanctions were issued on the basis of MAD in 2018 by the Czech National Bank.

<sup>101</sup> Criminal offences provided for all the infringements under MAR.

<sup>102</sup> Three pecuniary sanctions and one other than pecuniary measure. The measures were published. They were imposed on two natural persons and two legal persons.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Finanssivaltonta, Finland <sup>103</sup>	0	0	NA	0	-	No		0	NA	0	
Autorité des Marchés Financiers, France <sup>104</sup>	0	2 <sup>105</sup>	Y <sup>106</sup> EUR 450,000	3	Y EUR 190,000	1 The sanction was anonymously published and is not	Yes 40.000 Euro. <sup>107</sup>	4	YES EUR 1,710,000	5	Y EUR 25.920.000

<sup>103</sup> Criminal offences provided for Articles 14, 15 and 17 of MAR.

<sup>104</sup> In addition to the information contained in the table, 32 sanctions and other measures were imposed in 2018 on the basis of MAD by the AMF.

<sup>105</sup> Overall eight administrative sanctions and measures were imposed in France in 2018. All of them were published and none is under appeal. The administrative sanctions and measures concerned nine natural persons and five legal persons.

<sup>106</sup> One pecuniary sanction of Euro 380,000 and one settlement decision of Euro 70,000.

<sup>107</sup> The decision concerns facts that took place before 3 July 2016 however MAR's provisions were considered as lighter than those in French law, the Enforcement Committee therefore applied them.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
						under appeal.  The sanction concerns 1 natural and 1 legal person.					
Bundesaufsicht für Finanzdienstleistungen,	0	0	NA	0	--	No		0	NA	10	Y  EUR 32,300

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Germany <sup>108109</sup>											
Ελληνική Επιτροπή Κεφαλαιαγοράς, Greece <sup>110</sup>	0	0 <sup>111</sup>	NA	0	-	No		9	YES EUR 3,850,000	12	Y EUR 28,340,000
Magyar Nemzeti Bank,	0	0	NA	1	Y 2.000.000 HUF	2 1 legal person is	Y 1,000,000 HUF	2 <sup>113</sup>	Y HUF 1,450,000	2	Y

<sup>108</sup> Criminal offences for Article 14 and 15 of MAR (for Article 14, where committed intentionally and, for Article 15, if the infringement leads to an influence on the market price of the respective financial instrument).

<sup>109</sup> In addition to the information contained in the table, 49 sanctions (35 of which are criminal sanctions) and other measures were imposed in 2018 on the basis of MAD in Germany.

<sup>110</sup> In addition to the information contained in the table, 38 sanctions and other measures were imposed in 2018 on the basis of MAD by the Hellenic Capital Market Commission.

<sup>111</sup> Overall ten administrative sanctions and measures were imposed in Greece, which were all published and are under appeal. The sanctions and other administrative measures were imposed on eight natural persons and on two legal persons.

<sup>113</sup> One pecuniary sanction and one other than pecuniary measure were imposed on a natural person, were published and are not under appeal.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Hungary <sup>112</sup>						concerned  The sanction and measure are published and not under appeal.	One other than pecuniary				4.950.000 HUF <sup>114</sup>
Central Bank of Ireland,	0	0	NA	0	-	No		0	NA	0	-

<sup>112</sup> No sanctions were issued on the basis of MAD in 2018 by the Central Bank of Hungary.

<sup>114</sup> Corresponding to EUR 14,171.85

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Ireland <sup>115</sup> <sup>116</sup>											
Commissione Nazionale per le Società e la Borsa, Italy <sup>117</sup>	0	0	NA	2	Y EUR 250,132	No		0	NA	1	Y EUR 1,050,000
Finanšu un kapitāla tirgus komisija, Latvia <sup>118</sup>	0	0	NA	0		No		2	Y EUR 1,000	0	-

<sup>115</sup> Criminal offence provided for the infringement of Article 30(1), first subparagraph, letter (b) of MAR.

<sup>116</sup> No sanctions were issued on the basis of MAD in 2018 by the Central Bank of Ireland.

<sup>117</sup> In addition to the information contained in the table, 13 sanctions and other measures were imposed in 2018 on the basis of MAD by CONSOB.

<sup>118</sup> No sanctions were issued on the basis of MAD in 2018 by the Latvia Financial and Capital Market Commission.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Lietuvos Bankas, Lithuania	1 other than pecuniary measure, published and not under appeal.	1 <sup>119</sup>	NO	1	EUR 200.000	1 pecuniary sanction.  2 other than pecuniary sanctions.  The sanction and measures are published	Y  500 Euro	1	Y  EUR 500	0	-

<sup>119</sup> Overall four administrative sanctions and measures were imposed in 2018, they were all published and none is under appeal. The administrative sanctions and measures were imposed on two natural persons and two legal persons.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
						d and not under appeal.					
Commission de Surveillance du Secteur Financier, Luxembourg <sup>120</sup>	0	0	NA	0		No		0	NA	0	-
Malta Financial Services Authority, Malta	0	0	NA	0		No		0	NA	0	-

<sup>120</sup> In addition to the information contained in the table, one sanction was imposed in 2018 on the basis of MAD.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Autoriteit Financiële Markten, Netherlands	0	3 <sup>121</sup>	NO	1	-	No		0	NA	0	-
Komisja Nadzoru Finansowego, Poland <sup>122</sup> <sup>123</sup>	0	0	NA	0		No		0	NA	0	-
Comissão do Mercado	0	0	NA	0		No		0	NA	0	-

<sup>121</sup> Overall, 61 measures were imposed in the Netherlands, and they are not under appeal. 55 measures were imposed on natural persons and 6 on legal persons.

<sup>122</sup> Criminal offences for the infringements of Article 14, 15, and for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR. In addition, for Article 17 of MAR there are administrative sanctions and criminal offences for Article 17(1), (4) and (5) of MAR, where certain circumstances provided for by the Act on Public Offering are met.

<sup>123</sup> In addition to the information contained in the table, five sanctions were imposed in 2018 on the basis of MAD by the KNF.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
de Valores Mobiliários, Portugal <sup>124</sup>											
Autoritatea de Supraveghere Financiară, Romania	0	0	NA	0		No		0	NA	0	-
Národná Banka Slovenska,	0	0	NA	0		No		0	NA	0	-

<sup>124</sup> In addition to the information contained in the table, 5 sanctions were imposed in 2018 on the basis of MAD by the CMVM.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Slovakia <sup>125</sup>											
Agencija za trg vrednostnih papirjev, Slovenia <sup>126</sup>	1 pecuniary sanction, published, not under appeal.	0	NA	0		4	Y Pecuniary sanctions, published <sup>127</sup> , not under appeal.	0	NA	0	-
Comisión Nacional del	0	0	NA	2	N	No		1 <sup>128</sup>	Y	5	4

<sup>125</sup> No sanctions were issued on the basis of MAD in 2018 by the Národná Banka Slovenska.

<sup>126</sup> In addition to the information contained in the table, one sanction was imposed in 2018 on the basis of MAD.

<sup>127</sup> Out of the administrative sanctions imposed, 2 were imposed on natural persons and 3 on legal persons.

<sup>128</sup> Overall two pecuniary sanctions were imposed in Spain in 2018. Both were published and none is under appeal. The sanctions were imposed on one natural person and one legal person.

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Mercado de Valores, Spain					Other actions				EUR 15,000		EUR 315,000  1 other actions
Finansinspektionen, Sweden <sup>129</sup>	0	0	NA	0		29	Y 3,150,000 SEK	29	Y SEK 2,090,000	24	Y SEK 2,015,000 <sup>130</sup>
Financial Conduct Authority	0	0	NA	0	NA	No		0	NA	0	NA

<sup>129</sup> No sanctions were issued on the basis of MAD in 2018 by Finansinspektionen. In the same year, 11 sanctions were imposed through fine orders issued by the public prosecutor's office for criminal offences concerning market abuse cases and two court judgments became final.

<sup>130</sup> Corresponding to EUR 195,495.3 (EUR/SEK=0.09702)

	2017	2018	2018	2019	2019	2017	2017	2018	2018	2019	2019
Competent authority and Member State.	Number of administrative sanctions and measures for Article 14 MAR	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of administrative sanctions and measures for Article 15	Pecuniary? (Y/N) and if yes, aggregated monetary amount
, United Kingdom											
Fjármálaeftirlitið, Iceland	MAR is not applicable	-	-	NA		MAR is not applicable		-	-	NA	-
Finanzmarktaufsicht, Liechtenstein	MAR is not applicable	-	-	NA		MAR is not applicable		-	-	NA	-
Finanstilsynet, Norway	MAR is not applicable	-	-	NA		MAR is not applicable		-	-	NA	-

### Data on criminal sanctions under Articles 14 and 15 of MAR

	2017	2018	2018	2019	2019	2018	2018	2019	2019
Competent authority and Member State.	Number of criminal sanctions for Article 14, 15 and other MAR provisions	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Finanstilsynet, Denmark <sup>131</sup>	No	0	NA	3	N Referral to criminal authorities	0	NA	1	N Referral to criminal authorities
Finanssivalvonta, Finland <sup>132</sup>	No	0	NA	0		0	NA	0	
Bundesanstalt für Finanzdienstleistungsaufsicht	7 criminal pecuniary sanctions imposed on natural persons pursuant to	0	NA	42 (in total)	Y EUR 5.387.646	15 <sup>135</sup>	YES €65,650	42 (in total)	Y EUR 57,250

<sup>131</sup> Criminal offences provided for all the infringements under MAR.

<sup>132</sup> Criminal offences provided for Articles 14, 15 and 17 of MAR.

<sup>135</sup> The sanctions were imposed on 15 natural persons and are not under appeal.

	2017	2018	2018	2019	2019	2018	2018	2019	2019
Competent authority and Member State.	Number of criminal sanctions for Article 14, 15 and other MAR provisions	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount
cht, Germany <sup>133134</sup>	Article 15 of MAR for an aggregated amount of 12.450,00 Euro.  The sanctions are not under appeal.								
Central Bank of Ireland, Ireland <sup>136137</sup>	No	NA	NA			NA	NA	0	-
Komisja Nadzoru	No	0	NA	0	NA	0	NA	0	NA

<sup>133</sup> Criminal offences for Article 14 and 15 of MAR (for Article 14, where committed intentionally and, for Article 15, if the infringement leads to an influence on the market price of the respective financial instrument).

<sup>134</sup> In addition to the information contained in the table, 49 sanctions (35 of which are criminal sanctions) and other measures were imposed in 2018 on the basis of MAD in Germany.

<sup>136</sup> Criminal offence provided for the infringement of Article 30(1), first subparagraph, letter (b) of MAR.

<sup>137</sup> No sanctions were issued on the basis of MAD in 2018 by the Central Bank of Ireland.

	2017	2018	2018	2019	2019	2018	2018	2019	2019
Competent authority and Member State.	Number of criminal sanctions for Article 14, 15 and other MAR provisions	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 14 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount	Number of criminal sanctions for Article 15 MAR	Pecuniary? (Y/N) and if yes, aggregated monetary amount
Finansowego, Poland <sup>138139</sup>									

<sup>138</sup> Criminal offences for the infringements of Article 14, 15, and for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR. In addition, for Article 17 of MAR there are administrative sanctions and criminal offences for Article 17(1), (4) and (5) of MAR, where certain circumstances provided for by the Act on Public Offering are met.

<sup>139</sup> In addition to the information contained in the table, five sanctions were imposed in 2018 on the basis of MAD by the KNF.