Date: 4 December 2019
ESMA22-106-2044

Advice to ESMA

Response to ESMA's Consultation Paper on MAR review report

I. Introduction

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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

<u>The following paragraphs refer to Q1</u>

7. 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.

8. 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.

9. 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.

10. 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

<u>The following paragraphs refer to several questions from the CP.</u>

11. 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

12. 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)

13. 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.

14. 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).

15. 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[1]. 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[2]: 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

16. 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:

A. Further refinement of the definition of inside information

17. 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.)

B. Providing issuers with guidance on the most common cases of inside information

18. 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

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[1] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/Infographics_SEG_FSR_Evolution_of_price-sensitivity_contract_negotiations_EN.pdf

[2] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf

its consultation document to the new issuer handbook provided a list of examples of what can constitute an insider information.[3] In the same vein the French NCA AMF has issued good practices relating to the identification of inside information[4].

C. Introduction of a two-stage definition of inside information and price sensitive information

19. 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.):

20. 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.

21. 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, prohibition of insider trading, obligation to draw up and keep insider lists etc.) would remain unchanged.

22. 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.

23. 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

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[3] https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Konsultation/2019/kon_14_19_modul_c_des_elf.html, see I.2.1.5.13.
[4] https://www.amf-france.org/Reglementation/Dossiers-thematiques/Societes-cotees-et-operations-financieres/Marches-d-actions/Bonnes-pratiques-en-matiere-d-information-privilegiee

issuers face while trying to determine at which precise moment in time information turns into inside information.

24. The question remains what the criteria should be to differentiate between insider information (potentially price relevant) and information subject to disclosure.

D. Revision of MAR 7.2. and 7.4.

25. 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.

26. 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.

27. The SMSG 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 issues 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

<u>The following paragraphs refer to Q25.</u>

28. 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.

29. 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:

30. 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.

31. 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.

32. 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.

33. 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

<u>The following paragraphs refer to Q20, Q21, Q22 and Q23.</u>

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. The SMSG also notes that market illiquidity would be taken into account when assessing the likelihood of having a significant effect on the price.

40. 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.

41. 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

<u>The following paragraphs refer to Q33, Q34, Q36 and A38.</u>

42. ESMA proposes "to clarify the obligatory nature of the requirements currently contained in Article 11 of MAR".

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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

<u>The following paragraphs refer to Q40, Q42, Q43, Q44 and Q45.</u>

49. 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.

50. 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[5]. 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).

51. 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.

52. We agree with the proposal presented in Q44.

53. 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

<u>The following paragraphs refer to several issues.</u>

54. 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.

55. MAR states that issuers are required to make public the information on transactions by managers and persons closely associated with them promptly and no 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

[5] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf

up managerial responsibilities in issuers are less interested in receiving financial instruments under the scope of MAR as part of their remuneration scheme.

56. A study conducted by SEG (Polish Association of Listed Companies) and Foundation for Reporting Standards[6] has shown that for Polish issuers the most preferred threshold would be at Euro 20,000 (option chosen by 41.5 percent of respondents).

57. 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.

58. 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

59. MAR 17.5. requires issuers to draw up and maintain a list of all PDMRs (persons discharging managerial responsibilities) and PCAs (persons closely associated). 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.

60. 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[7] 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.

61. 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:

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[6] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/SEG_study_on_potential_regulatory_changes_improving_MAR.pdf
[7] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/MAR_compliance_test_by_Polish_FSA.pdf

- 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.

62. 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.

63. 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?

64. The study in Poland[8] 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

65. 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.

66. 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.

67. 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.

A. This could have significant downsides…

68. 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.

[8] https://standardy.org.pl/wppsndrd/wp-content/uploads/2019/12/SEG_study_on_potential_regulatory_changes_improving_MAR.pdf

69. 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.

70. 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.

71. Accordingly, any extension of the blocking period would require some form of safe-harbour or exemption for credit institutions.

72. 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.

73. 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.

B. Without providing significant benefits

74. 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.

75. 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.

76. 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.

77. A cross-market view of order books would be valuable for NCAs to detect and investigate cases of market manipulation and insider dealing.

78. 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.

79. 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.

80. 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 disproportionally 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.

81. 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

82. 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

83. 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.

84. 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.

85. 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.

86. 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.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA’s website.

Adopted on 4 December 2019

[signed]

Veerle Colaert

Chair

Securities and Markets Stakeholder Group