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European Securities and Markets Authority

By attachment to website form at:
https://www.esma.europa.eu/press-news/consultations/consultation-mar-review#registration-form_consultation

29 November 2019

Dear Sir or Madam

Consultation Paper – MAR Review Report (the "Report")

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

Thank you for the opportunity to provide feedback to the consultation on the Report. A copy of the responses submitted by the website form is set out at Annex 1 to this letter.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Karen Anderson (Chair, Herbert Smith Freehills LLP)
Matthew Baker (Bryan Cave Leighton Paisner LLP)
Peter Bevan (Linklaters LLP)
Chris Borg (Reed Smith LLP)
Simon Crown (Clifford Chance LLP)
Richard Everett (Travers Smith LLP)
William Garner (Charles Russell Speechlys LLP)
Angela Hayes (TLT LLP)
Hannah Meakin (Norton Rose Fulbright LLP)
Mark Kalderon (Freshfields Bruckhaus Deringer LLP)
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Brian McDonnell (Addleshaw Goddard LLP)
Simon Morris (CMS Cameron McKenna Nabarro Olswang LLP)
Rob Moulton (Latham & Watkins LLP)
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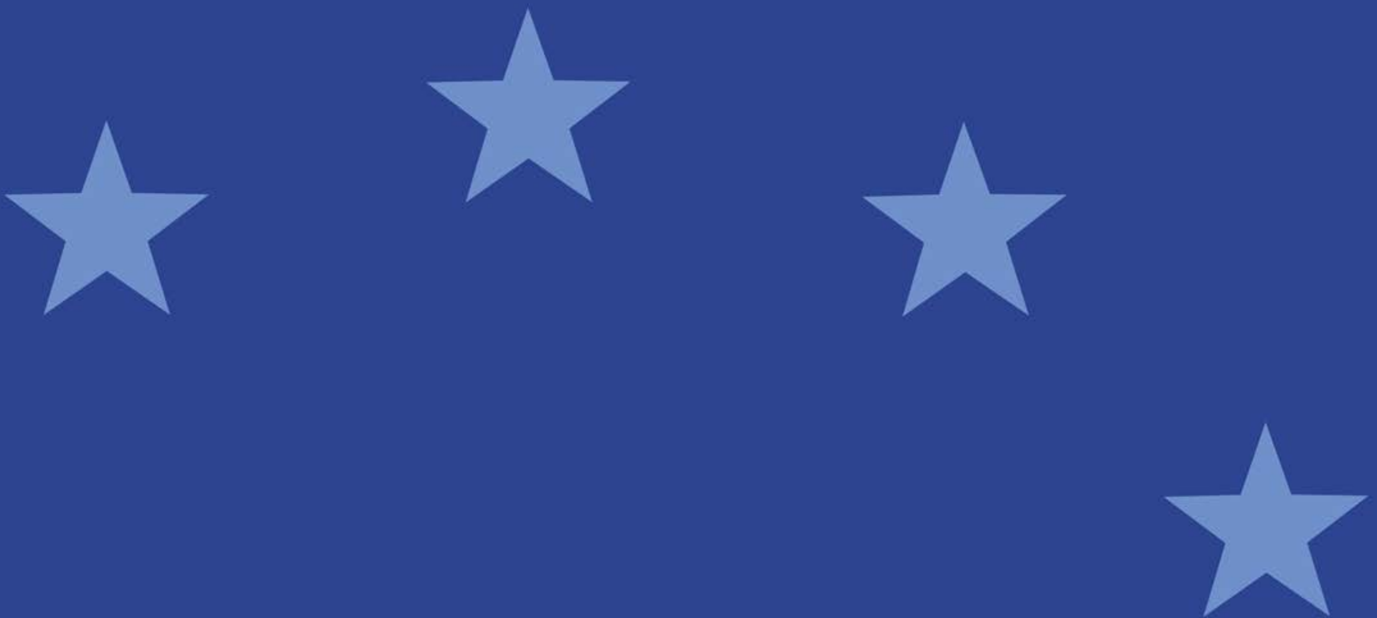
Its contents should not be taken as legal advice in relation to a particular situation or transaction.

ANNEX 1 – RESPONSE

Reply form for the Consultation Paper on MAR review report



3 October 2019

esma European Securities and Markets Authority

Date: 3 October 2019

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MAR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA_CP_MAR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_CP_MAR_ESMA_REPLYFORM or

ESMA_CP_MAR_ANNEX1

Deadline

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	City of London Law Society Regulatory Law Committee
Activity	Audit/Legal/Individual
Are you representing an association?	☒
Country/Region	UK

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
Please see attached cover letter
<ESMA_COMMENT_CP_MAR_1>

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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.

<ESMA_QUESTION_CP_MAR_1>
We acknowledge the fact that the spot FX market is currently outside of the MAR framework, and that this could mean that market abuse in that market is not being addressed to the same extent as market abuse in relation to financial instruments. However, we have reservations about whether extending the scope of MAR to include spot FX is the most proportionate or effective solution.

There are certain prohibitions and obligations in MAR which one might consider applying to spot FX; however each of them pose some genuine challenges, not least because spot FX has different characteristics to the instruments for which those prohibitions were designed, and it is traded in a different wat (see our response to Q2). There would be significant operational difficulties and costs involved in extending the MAR framework to the spot FX market, and it may be that there are other options for addressing any misbehaviour in this market as a preliminary measure.

As ESMA recognises in the Consultation Paper, the FX Global Code has already achieved progress in promoting higher standards in the wholesale FX market. Supporting the FX Global Code would be an alternative way to improve confidence in the spot FX markets and this could be done in a way that would allay concerns about its voluntary nature.

For example, in the UK, the FX Global Code has been incorporated into the Senior Managers and Certification Regime by the regulators providing that compliance with it (in relation to both regulated and unregulated activities) indicates compliance with a rule requiring certain individuals to observe proper standards of market conduct. Other Member States may have similar high level rules or principles through which they could refer to the FX Code.

Another alternative might be to 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..
<ESMA_QUESTION_CP_MAR_1>

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.

<ESMA_QUESTION_CP_MAR_2>
We agree with the preliminary view expressed by ESMA regarding the structural changes that would be necessary to apply MAR to spot FX contracts.

As ESMA indicates in the Consultation Paper, the ability of the NCAs to enforce the provisions of MAR is based on the systems and controls that authorised firms are required to have in place as a result of their authorisation. For example, the MiFID II transaction reporting and record keeping requirements (for both investment firms and market operators) are fundamental to a NCA's ability to monitor compliance with MAR. Requiring market participants who are already subject to MiFID II to alter these systems and controls to apply them to spot FX is likely to be both expensive and operationally burdensome. Participants in the spot FX market are not presently required to have any such systems and controls in place, and for non-authorised spot FX market participants, the requirements would likely pose a significant barrier to entry (given the level of operational investment which would be required).

The size and speed of transactions in the spot FX market would also make it a challenge for NCAs to be able to effectively monitor the spot FX market without significant investment in their own monitoring and surveillance systems. Unlike some of the spot commodity markets, the spot FX market lacks an equivalent regulatory body which could support the NCAs in this regard.

If MAR were to be extended in this respect, clarity would be required on which spot FX instruments were in scope. As the spot FX market is a largely OTC market, it might be difficult to limit to application to spot FX products traded on EU trading venues without also sacrificing the intended purpose of reducing market abuse in the spot FX market. However, without some form of limitation in scope, Article 2(4) of MAR would mean that the MAR regime would apply to any person who traded spot FX anywhere in the world. This is an unrealistic proposition.

As noted in our response to Q1, it would also be important to consider which obligations spot FX should be included within by reference to the ability of market participants to comply and regulators to enforce. For example, careful thought would be needed in designing the definition of inside information for the purposes of spot FX instruments. For example, what would be considered to be inside information for the purposes of a currency, and how, with any certainty, could market participants and NCAs identify whether a piece of information about a currency had been made public.

Finally, as the spot FX market has a large number of individuals, rather than legal entities, as market participants, additional clarity on how the obligations in MAR would apply would need to be provided, particularly regarding record keeping and reporting requirements.
<ESMA_QUESTION_CP_MAR_2>

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?

<ESMA_QUESTION_CP_MAR_3>
We agree with ESMA's analysis of the difference between the MAR and BMR definitions. However, we think it would be helpful to clarify that the reference to financial instruments in the definition of benchmark is limited to those described in Article 2(1) as the natural tendency is to refer to the definition of financial instrument in Article 3(1)(1) where the limitation is not expressed.

We believe it would be appropriate, before amending the definition of benchmark in MAR, to undertake additional work to establish whether there is in fact a significant number of indices that are benchmarks for the purposes of the BMR but not MAR. If this is the case, then similar issues as flagged with the proposed inclusion of spot FX in the MAR regime are raised. For example, how would NCAs be able to monitor for manipulation of such benchmarks using the current MAR framework. Given that, if such benchmarks exist, they would be used for privately negotiated financial contracts rather than "market trades", it may be the case that anti-manipulative provisions would be better placed in the BMR.
<ESMA_QUESTION_CP_MAR_3>

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?

<ESMA_QUESTION_CP_MAR_4>
We agree that Article 30 of MAR should also make reference to administrators of benchmarks and supervised contributors. Both of these entities could be involved in the manipulation of a benchmark, and including them in Article 30 would be a proportionate way of addressing this potential risk.

We also suggest that, if ESMA makes such an amendment, it should clarify whether the amended Article 30 includes recognised and endorsed third country administrators and their legal representatives and endorsing entities.
<ESMA_QUESTION_CP_MAR_4>

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?

<ESMA_QUESTION_CP_MAR_5>
We agree that Article 23 of MAR should be extended to make reference to administrators of benchmarks and supervised contributors.

We also suggest that ESMA consider whether Article 23 should include references to recognised and endorsed third country administrators and their legal representatives and endorsing entities.

In addition, ESMA should consider whether the power to suspend or require the recalculation of a benchmark is required to be included in Article 30 of MAR.
<ESMA_QUESTION_CP_MAR_5>

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?

<ESMA_QUESTION_CP_MAR_6>
We agree that Article 30 points (e) and (f) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks.

However, in relation to Article 30 point (g), we do not see the justification for a blanket ban on "dealing on own account" to be included. This should be limited to a ban on dealing on own account in respect of financial instruments which are related to the benchmark for which the person is a submitter or assessor.
<ESMA_QUESTION_CP_MAR_6>

Q7. Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

<ESMA_QUESTION_CP_MAR_7>
We agree that that identification of relevant venues can be difficult for issuers, and particularly challenging for those whose financial instruments have been traded on a venue without their knowledge and consent, and so a narrowing of the disclosure obligation is welcome.
<ESMA_QUESTION_CP_MAR_7>

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.

<ESMA_QUESTION_CP_MAR_8>

However, we propose a simpler alternative (a modified version of ESMA's option 2), given the burden and potential difficulty involved in applying a "most relevant in terms of liquidity" assessment. The alternative is to confine the disclosure requirement to the NCA of the primary admission venue, accompanied by a right of other NCAs to request the data from that NCA.
<ESMA_QUESTION_CP_MAR_8>

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.

<ESMA_QUESTION_CP_MAR_9>
We agree.
<ESMA_QUESTION_CP_MAR_9>

Q10. Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_10>
We agree.
<ESMA_QUESTION_CP_MAR_10>

Q11. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_11>
We agree.
<ESMA_QUESTION_CP_MAR_11>

Q12. Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

<ESMA_QUESTION_CP_MAR_12>
We support the proposal for public disclosure to include aggregated transaction data, supporting ESMA's view that this is likely to be useful to investors, but only if this involves no additional cost/work for the issuer (i.e. disclosure of data already aggregated for the purposes of NCA disclosure).
<ESMA_QUESTION_CP_MAR_12>

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?

<ESMA_QUESTION_CP_MAR_13>
There are some significant areas of practical challenge in pinpointing when something is precise (e.g. internal or external investigations, board changes, disputes regarding key contracts, declining financial performance not within the sphere of insolvency, transactions such as M&A or joint ventures) and when something is likely to have a significant effect on price (financial results in line with market expectation, non-financial developments such as ESG/corporate governance failings).

This has led to a marked increase in the need for external advice from brokers and lawyers as well as some inconsistencies in approach by different market participants on analogous fact patterns (with some being more cautious than others).

It can also often be difficult to reconcile the precise test with the practical reality of when an announcement will make sense to the market.

That said, these difficulties arise more from the complexity of the circumstances than from the definition itself, and we consider that changes to the definition would be likely to create more practical challenges for issuers and other market participants than they would solve.
<ESMA_QUESTION_CP_MAR_13>

Q14. Do market participants consider that the definition of inside information is sufficient for combatting market abuse?

<ESMA_QUESTION_CP_MAR_14>
Yes. The definition has a very wide ambit. The lack of certainty over what types of information would typically be inside information and at what point they become often create difficulties for legitimate transactions as market participants are concerned to avoid the possibility of insider dealing.
<ESMA_QUESTION_CP_MAR_14>

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?

<ESMA_QUESTION_CP_MAR_15>
No.
<ESMA_QUESTION_CP_MAR_15>

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?

<ESMA_QUESTION_CP_MAR_16>
No.
<ESMA_QUESTION_CP_MAR_16>

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?

<ESMA_QUESTION_CP_MAR_17>
It is critical that any changes do not prejudice the ability to engage in appropriate hedging, in particular by capturing, as inside information under MAR, pieces of information from the physical markets that are not normally disclosable in those markets.
<ESMA_QUESTION_CP_MAR_17>

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.

<ESMA_QUESTION_CP_MAR_18>
The concerns noted in Q13 and Q14 apply equally here: uncertainty over the tests of certainty of information and price sensitivity, when applied to commodity producers.
<ESMA_QUESTION_CP_MAR_18>

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?

<ESMA_QUESTION_CP_MAR_19>
The requirement for information to be disclosable in the market is critical. Without it, market participants risk being unable to trade legitimately as they possess information but with limited prospect of being cleansed by an announcement.
<ESMA_QUESTION_CP_MAR_19>

Q20. What changes could be made to include other cases of front running?

<ESMA_QUESTION_CP_MAR_20>
We see no reason to extend MAR further to capture cases of front running, which is adequately covered already both by MAR and by conduct obligations under MiFID. Front running is capable of being an abuse of the market, but is often more likely to be a failure to meet obligations towards a client and is better dealt with in that context.

Any amendments here which hampered the ability of market intermediaries to conduct their business and provide liquidity to the market should be avoided.
<ESMA_QUESTION_CP_MAR_20>

Q21. Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?

<ESMA_QUESTION_CP_MAR_21>
The requirement for market intermediaries to limit their activities to "legitimate" business is sufficient.
<ESMA_QUESTION_CP_MAR_21>

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?

<ESMA_QUESTION_CP_MAR_22>
We consider that this topic, similar to front running, is already adequately dealt with. A number of industry codes and guidelines have been issued which address acceptable practices in this area.
<ESMA_QUESTION_CP_MAR_22>

Q23. What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?

<ESMA_QUESTION_CP_MAR_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_23>

Q24. What financial instruments are subject to pre-hedging behaviours and why?

<ESMA_QUESTION_CP_MAR_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_24>

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.

<ESMA_QUESTION_CP_MAR_25>
We consider that the conditions for delay function effectively and enable issuers to delay disclosure of inside information when necessary. The ESMA guidelines on the legitimate interests of the issuer for delaying disclosure of inside information, and situations in which delay of disclosure of inside information is likely to mislead the public, provide helpful examples to assist issuers in their decision to delay public disclosure of inside information.
<ESMA_QUESTION_CP_MAR_25>

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.

<ESMA_QUESTION_CP_MAR_26>
With regard to the assessment of conditions for the delay, we support and agree with the response of the Company Law Committee of the City of London Law Society to this question.

In the UK, so far as the application of the procedure for notification of delay to the regulator immediately after the information is disclosed to the public under Article 17(4) of MAR is concerned, our experience is that it functions effectively and provides the regulator with sufficient and timely information to enable the making of enquiries where necessary.

We note that it is often not possible at the time of delaying disclosure of inside information for issuers to give any kind of precise assessment in terms of date and time when the information is likely to be disclosed, as the timing of the outcome of negotiations, or the fulfilment of additional requirements, may not be within the issuer's control.
<ESMA_QUESTION_CP_MAR_26>

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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?

<ESMA_QUESTION_CP_MAR_27>
As a practical matter, in order to comply with the MAR disclosure requirements, issuers need to have systems and controls for identifying handling and disclosing inside information.

If ESMA considered it necessary, guidance could be issued assist issuers in their compliance with the identification and handling of inside information. We note that because the MAR regime covers a large spectrum of issuers, in terms of business types, size and complexity, any such guidance would need to be proportionate and recognise the diversity of the population of issuers within the scope of MAR.

It is not clear what an express systems requirement would add to this beyond the ability to enforce for a failure to have controls in place (where no breach of disclosure requirements has been established).

We recognise that in the UK, listed companies are subject to the FCA's Listing Principles. These apply not just in respect of their obligations arising from the disclosure requirements in MAR, but also those under the listing rules, the transparency rules and corporate governance rules. However, the Listing Principles apply to a much narrower set of issuers than is under consideration here. Specifically, no application for listing can be entertained unless it is made by or with the consent of the issuer of the securities concerned. The regulator is able to enforce effectively against all issuers within scope of the Listing Principles.

We question whether it would be appropriate for this kind of provision to be applied to, or enforced against, an issuer that is technically within MAR scope (with regard to the prohibitions) but has not consented and/or is not aware of the trading of their instruments on an EEA trading venue and is therefore not subject to the disclosure requirement. As a general principle, unenforceable or simply unenforced regulations have a propensity to foster significant uncertainty and unfairness.
<ESMA_QUESTION_CP_MAR_27>

Q28. Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

<ESMA_QUESTION_CP_MAR_28>
Please see our response to Q13 above.
<ESMA_QUESTION_CP_MAR_28>

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.

<ESMA_QUESTION_CP_MAR_29>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_29>

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.

<ESMA_QUESTION_CP_MAR_30>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_30>

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.

<ESMA_QUESTION_CP_MAR_31>
We do not have examples of such difficulties.
<ESMA_QUESTION_CP_MAR_31>

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.

<ESMA_QUESTION_CP_MAR_32>
We have not encountered such difficulties. If a regulation required issuers not to announce redemptions, reductions and repurchases of own funds instruments before obtaining the prior approval of the NCA, this would appear to us to fall within the conditions for delay under Article 17(4) (assuming that confidentiality can be assured).
<ESMA_QUESTION_CP_MAR_32>

Q33. Do you agree with the proposed amendments to Article 11 of MAR?

<ESMA_QUESTION_CP_MAR_33>
No, we do not agree with the proposed amendments and we consider that making the requirements obligatory in relation to market soundings that do not involve the provision of inside information is disproportionate and burdensome. We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_33>

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?

<ESMA_QUESTION_CP_MAR_34>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_34>

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?

<ESMA_QUESTION_CP_MAR_35>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_35>

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?

<ESMA_QUESTION_CP_MAR_36>
We do not this the reference should be amended. We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.

It may however be helpful for MAR to be clarified to make clear that the safe harbour resulting from compliance with the requirements is nevertheless available and applicable even if in practice there is no announcement of a transaction following the market sounding.
<ESMA_QUESTION_CP_MAR_36>

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?

<ESMA_QUESTION_CP_MAR_37>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_37>

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)?

<ESMA_QUESTION_CP_MAR_38>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.

The Market Sounding procedures could also be simplified by making clear they do not apply in circumstances where the DMP knows that no inside information will be communicated.
<ESMA_QUESTION_CP_MAR_38>

Q39. Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_39>
We agree with ESMA that insider lists serve a number of important purposes. Provided the information required by insider lists is helpful to NCAs, we agree with ESMA's preliminary views.
<ESMA_QUESTION_CP_MAR_39>

Q40. Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

<ESMA_QUESTION_CP_MAR_40>
We do not consider that the insider list regime requires further amendment. We consider it currently to be effective and well understood in the UK market..

We note with interest ESMA's comments on actual versus potential access to inside information. We do not believe that further legislation or guidance is required given the wording of recital 57. We note that there are a number of technical challenges to tracking actual versus potential access, not least in respect of IT access. For example, a difference might be found between IT access for the purpose of producing a file of documentation relating to a particular transaction (which we believe would amount to "gaining access" for the purposes of recital 57) and standard IT maintenance where documents were sourced from a variety of folders on a random basis for the purpose of providing standard maintenance, which may or may not amount to the gaining of access depending upon the process being followed and the information involved.
<ESMA_QUESTION_CP_MAR_40>

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?

<ESMA_QUESTION_CP_MAR_41>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_41>

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.

<ESMA_QUESTION_CP_MAR_42>
We do not agree with expanding MAR in the way contemplated by Q42. The obligations within MAR relating to insider lists come from a relationship of some type with an issuer that is within the scope of MAR. Where another party receives inside information, they are already prohibited from trading on it, encouraging others to trade, or passing it on. We consider it to be beyond the competence of MAR to also require such a person to keep an insider list in a way which, in our view, only makes sense for issuers and those working on their behalf, in particular given MAR's extra-territorial impact.
<ESMA_QUESTION_CP_MAR_42>

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.

<ESMA_QUESTION_CP_MAR_43>
We support the use of permanent insider sections. In our view, persons who have access at all times to inside information should be considered for inclusion on the list. We are aware that article 2(2) of Implementing Regulation 2016/347 requires them to have access at all times to all inside information. In practice, it is not always possible to know for certain whether anyone who is likely to have access to much of the inside information within a firm always knows all of it. For instance, when working on a transaction, it could be that the deal team receives inside information beyond that already known. At that point, they will not pass all of the information on to all of the permanent insiders. Indeed, we consider it likely that the MAR obligation that inside information only be exchanged where necessary should, instead, prevent it from being provided to any permanent insiders that did not need to know it.

Whilst we understand ESMA's comment relating to "inflation" in the persons included in the lists, in our opinion, the extremely short list of individuals named by ESMA is too limited. For instance, ESMA names the Compliance Officer. The Compliance Officer might not be aware of all information which is being held by, for example, two deputy Compliance Officers who work in the Capital Markets division of an investment firm. Those two persons might always have access to information relating to deals that the firm is working on, and therefore ought to be on the insider list as well. We agree that the Compliance Officer should be on that list given their role, but consider that a list of the titles held is not required or helpful, and that the current description in MAR is adequate for supervisors to prevent inflation in the persons included in the lists.
<ESMA_QUESTION_CP_MAR_43>

Q44. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_44>
We agree with ESMA's proposal that issuers should only be required to keep one contact person for each external service provider having access to inside information. We consider that this would be the right way to track down inside information which is held at such service providers, whilst limiting the administrative burden on firms. In practice, this approach will still enable NCAs to obtain the information that they require.
<ESMA_QUESTION_CP_MAR_44>

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.

<ESMA_QUESTION_CP_MAR_45>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_45>

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?

<ESMA_QUESTION_CP_MAR_46>
Most UK issuers disclose all relevant PDMR transactions without reference to the reporting threshold, there would be little value in increasing the threshold. The practical operation of a reporting threshold is likely to be administratively burdensome at any level.

We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_46>

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).

<ESMA_QUESTION_CP_MAR_47>
The UK does not use this threshold. Please see our answer to 46 above.
<ESMA_QUESTION_CP_MAR_47>

Q48. Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_48>
We did not identify alternative criteria which would work as well as the current criteria.
<ESMA_QUESTION_CP_MAR_48>

Q49. On the application of this provision for EAMPs: have issues or difficulties been experienced?

<ESMA_QUESTION_CP_MAR_49>
We are not aware of any issues experience by EAMPs.
<ESMA_QUESTION_CP_MAR_49>

Q50. Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_50>
We support and agree with the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_50>

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.

<ESMA_QUESTION_CP_MAR_51>
We agree that it is appropriate.
<ESMA_QUESTION_CP_MAR_51>

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?

<ESMA_QUESTION_CP_MAR_52>
No, we have not identified a possible alternative system.
<ESMA_QUESTION_CP_MAR_52>

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?

<ESMA_QUESTION_CP_MAR_53>
Please see discussion in our response to Q57 below.
<ESMA_QUESTION_CP_MAR_53>

Q54. Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

<ESMA_QUESTION_CP_MAR_54>
We are not aware of any further need for clarification on timing of the closed period since ESMA's Q&A; otherwise please see our response to Q57 below.
<ESMA_QUESTION_CP_MAR_54>

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.

<ESMA_QUESTION_CP_MAR_55>
We do not think this is necessary. As ESMA notes, the prohibition to carry out transactions in the closed period is a preventative - "belts and braces" - measure which aims at limiting the violation of Articles 14 and 15 of MAR, addressed to persons that, by virtue of their functions, are likely to be in possession of inside information. It seems unnecessary and administratively burdensome to include closely associated persons who are not carrying on relevant functions and are already subject to the MAR provisions prohibiting insider dealing and attempted insider dealing, and unlawful disclosure of inside information (as well as market manipulation and attempted market manipulation).

The same goes for issuers, whereas also noted by ESMA, trading prohibitions could restrict normal treasury functions and result in possible limitations of on-going refinancing. In any event, many issuers will already take steps to limit transactions in the closed period to mitigate the risk of Article 14 MAR breach. This matter is also related to the discussion in response to Q57 below insofar as transactions relate to employee share schemes.
<ESMA_QUESTION_CP_MAR_55>

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.

<ESMA_QUESTION_CP_MAR_56>
We support the extension of the "exceptional circumstances" exception to cover sales of all types of financial instruments, although we recognise that shares will be the most common instruments to be sold..
<ESMA_QUESTION_CP_MAR_56>

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.

<ESMA_QUESTION_CP_MAR_57>
The application of the Article 19 to employee share schemes (e.g. Share Incentive Plans and Save As You Earn plans) has been unclear since MAR implementation. The exemptions in MAR (Article 19(12)(b) & (13) and specified in Article 9 of Commission Delegated Regulation ((EU) 2016/522)) are for various reasons unsatisfactory e.g. Article 9(a)(1i) of Commission Delegated Regulation requires as a condition that the PDMR does not have any discretion as to the acceptance of the financial instruments awarded or granted· in fact, the PDMR will usually have discretion to accept / decline in such circumstances.

Under the old Model Code, all transactions under all-employee share schemes were excluded as opposed to the current position where prescriptive exemption conditions must be met.

We further refer to and support the response of the Company Law Committee of the City of London Law Society to this question.
<ESMA_QUESTION_CP_MAR_57>

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.

<ESMA_QUESTION_CP_MAR_58>
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<ESMA_QUESTION_CP_MAR_58>

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.

<ESMA_QUESTION_CP_MAR_59>
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<ESMA_QUESTION_CP_MAR_59>

Q60. Do you agree with ESMA's preliminary view? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_60>
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<ESMA_QUESTION_CP_MAR_60>

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.

<ESMA_QUESTION_CP_MAR_61>
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<ESMA_QUESTION_CP_MAR_61>

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.

<ESMA_QUESTION_CP_MAR_62>
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Q63. Do you agree with ESMA's conclusion? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_63>
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<ESMA_QUESTION_CP_MAR_63>

Q64. Do you agree with ESMA preliminary view? Please elaborate.

<ESMA_QUESTION_CP_MAR_64>
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<ESMA_QUESTION_CP_MAR_64>

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?

<ESMA_QUESTION_CP_MAR_65>
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<ESMA_QUESTION_CP_MAR_65>

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.

<ESMA_QUESTION_CP_MAR_66>
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<ESMA_QUESTION_CP_MAR_66>

Q67. Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.

<ESMA_QUESTION_CP_MAR_67>
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<ESMA_QUESTION_CP_MAR_67>

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.

<ESMA_QUESTION_CP_MAR_68>
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<ESMA_QUESTION_CP_MAR_68>

Q69. What are your views regarding those proposed amendments to MAR?

<ESMA_QUESTION_CP_MAR_69>
We note that these proposed amendments follow from ESMA's Report on preliminary findings on multiple WHT reclaim schemes (published on 2 July 2019). The report examined schemes involving share trading transactions aimed at creating the paperwork (such as tax certificates) that allow persons to obtain tax refunds on dividend tax which has not actually been paid and so may represent a fraud under national legislation.

We recognise that NCAs are not presently permitted under MAR or MiFID II/MiFIR to share information received through STORs and TREM data with tax authorities. It seems to us sensible that, provided that appropriate checks and balances are put in place, NCAs be given the power to cooperate and share information with tax authorities upon request, including an exchange of information across the EU.

However, the issues relating to WHT reclaim schemes are not EU wide issues: they have arisen as a result of choices made by some Member States in their national tax laws. ESMA itself notes that the WHT reclaim schemes are designed not to interfere with price formation and concludes that they typically do not involve breaches of MAR.

We do not agree that NCAs should be give 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". This expressed in such broad and inchoate terms that it would create an extremely wide MAR perimeter, which would overlap significantly with a range of other EU legal regimes including competition law, and national criminal and civil fraud laws.

Such an extension would be a wholly disproportionate response to the narrow areas of frustration regarding WHT schemes. The simple solution is for member states to address the loopholes in their legislation that are allowing multiple fraudulent claims to be made; in the meantime ESMA can assist the tax authorities by widening the NCA's powers to share existing information.

We also consider that where regulated entities are engaging in unlawful behaviour, such as facilitating tax fraud, existing MiFID II powers should be engaged in any event. We do not believe that MAR is the appropriate legislative vehicle for addressing such issues.
<ESMA_QUESTION_CP_MAR_69>

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.

<ESMA_QUESTION_CP_MAR_70>
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<ESMA_QUESTION_CP_MAR_70>

Q71. Please share your views on the elements described above.

<ESMA_QUESTION_CP_MAR_71>
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