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ESMA consultation paper: MAR review (ESMA70-156-1459)

Response of the City of London Law Society Company Law Committee

Overview

This response has been prepared on behalf of the CLLS by a working party comprising members of its Company Law Committee. The 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.

We welcome the opportunity to comment on the discussion paper. As set out above, our member law firms advise a variety of clients, including a very large proportion of UK issuers, who vary in size and sector. As such, our views are reflective of the issues and difficulties that issuers are currently faced with in relation to MAR compliance and of the likely impact of ESMA's proposed changes on those issuers.

Please note that we include only answers to those questions where we have chosen to respond.

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

Yes. Currently it is not possible for issuers to have absolute certainty that they have complied with the safe harbour provisions, as they can only report to competent authorities where they know that their shares are traded on a venue in that Member State. They may fail to meet the safe harbour requirements despite their best efforts, if their financial instruments are traded elsewhere without their knowledge and they have not reported to the competent authority in that Member State.

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.

Option 3 is too uncertain, for both issuers and market participants. The liquidity on a particular trading venue can vary, especially when a buy-back programme (BBP) is conducted on one venue and not another. A typical BBP can last for several weeks/months and so Option 3 could create a situation where the authority to which a report must be made had to be constantly monitored and might change over the life of the programme. This would be very burdensome for issuers.

We would support Option 2, provided that the rules are clear that the obligation is limited to those trading venues where the issuer has requested or approved admission of their shares to trading (i.e. using the same formulation as in the third paragraph of Article 17(1) but using shares rather

than financial instruments). The advantage is that the issuer can clearly determine at the outset of the BBP where it needs to report and this will not change unless the issuer actively requests or approves a further admission. Although this may mean more reporting (for example reporting the same content to two venues rather than one), overall it will be less burdensome for issuers than having to monitor which market is the most liquid for the purposes of Option 3 and it is the Option which is most likely to align with issuers' existing reporting procedures.

Alternatively, if ESMA were to proceed with Option 3, we would suggest that a determination of the most liquid market should be made at the outset of the BBP rather than having to be continually assessed. However, we consider this modified version of Option 3 would still prove more burdensome to issuers than Option 2.

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.

Yes we agree.

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

Yes we agree.

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

Yes we agree. Furthermore, reporting in a detailed form as currently required creates a significant cost for issuers with no real benefit to market participants (the data often runs to several pages, and the issuer has to pay an extra amount for each page of their announcement).

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

Where an issuer buys shares back from an intermediary (rather than via an agent on a trading venue) it would be helpful if the rules confirmed which trade data needs to be included in the announcement (i.e. just the purchase by the issuer from the intermediary (which may itself be on-market), or the trades by the intermediary on the trading venues, or both).

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?

Generally we believe that the current definition of inside information is well understood by issuers and other market participants. Certain aspects of the definition have also been supplemented and clarified in ECJ and domestic case law and in regulatory guidance. (Case law and regulatory guidance made under the Market Abuse Directive (MAD) largely remains relevant because the definition of inside information under MAD was almost identical.) As such, and given the relatively short period of time during which the MAR regime has been in operation, changing the definition would be likely to create unnecessary uncertainty for market participants.

There will inevitably be situations where finely balanced judgements are required as to whether information amounts to inside information (or the precise point at which inside information arises). However, this results from the range and complexity of circumstances that could give rise to inside information rather than from the wording of the definition. In cases of doubt, issuers will typically seek advice from their legal and financial advisers which, in our view, also demonstrates that the system is working appropriately.

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

Yes. Practitioners generally consider the definition to have a wide ambit and in our experience abusive behaviour would not be constrained by an even wider definition of inside information.

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?

No.

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

We support and agree with the response of the Regulatory Committee of the City of London Law Society to this question.

However, if the type of inside information specified in Article 7(1)(d) were to be extended to catch other persons, we think it would be necessary also to amend Article 17 so that an issuer that becomes aware that someone else is planning to deal in its securities should not automatically be expected to announce that information.

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

We support and agree with the response of the Regulatory Committee of the City of London Law Society to this question.

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?

We support and agree with the response of the Regulatory Committee of the City of London Law Society to this question.

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.

Generally we believe that the conditions for delaying disclosure of inside information work reasonably well and are understood by issuers and other market participants.

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.

One area that ESMA might consider amending in terms of alleviating burdens for issuers is the requirement in Article 17(4) for an issuer to notify an NCA separately where the disclosure of inside information has been delayed as this is additional to the requirement in Article 17(1) for the inside information to be disclosed to the public as soon as possible. We appreciate that currently NCAs may use such notifications to help monitor market announcements and detect market abuse, but if in future NCAs develop alternative methods of achieving these aims we recommend that ESMA should consider deleting this requirement.

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?

We accept that the MAR regime already requires issuers to have systems and controls in certain areas – for example, in relation to the keeping of insider lists, and the recording of when inside information arose and, where applicable, why the issuer was entitled to delay announcing it.

In the UK, issuers are required by various market rules to put in place systems and controls that enable them to comply with MAR – in particular, to comply with the obligations in Article 17 to identify and announce inside information as soon as possible, except where a delay is permitted; and to ensure that PDMRs and their PCAs notify the issuer and the FCA of dealings in its securities, and that the issuer announces such dealings to the market, in accordance with Article 19(1) to (10).

In addition, nearly all companies with shares admitted to trading on the Main Market of the London Stock Exchange put in place a share dealing code that (i) requires PDMRs and, sometimes, other employees, to seek clearance before dealing in the company's shares and (ii) prohibits PDMRs from dealing during the 30 day closed periods specified in Article 19(11) of MAR, except in the circumstances permitted under the MAR regime. Companies with shares traded on AIM are required by the *AIM Rules for Companies* to put in place such a share dealing code. Both listed and AIM companies are also required to ensure that their directors understand their own, and their company's obligations under the MAR regime.

However, these market rules do not prescribe how such systems and controls should work: it is up to an issuer to put in place systems and controls that are suitable and effective for a company of its size and complexity and that work with the company's other policies, systems and procedures. One size does not fit all. For example, many larger companies have a Disclosure Committee whose members determine whether information is inside information and whether an announcement is required, but many smaller companies leave this role to be performed by the board itself or the executive committee; many larger companies have detailed written procedures to help identify and disclose inside information, but others rely on a more informal system; and some companies have sophisticated document management and other IT systems that restrict access to certain documents, whereas for other companies this is not feasible or would be disproportionately expensive to implement. Similarly, the amount of training and guidance that companies provide to their directors and other employees will depend on factors such as the size of the company, the number of employees who need to understand the rules, and the level of experience of those individuals.

We do not think it would be appropriate for MAR to include a requirement for issuers to have systems and controls for identifying, handling, and disclosing inside information. In our view, such matters are best left to market regulation: such regulation should recognise the fact that issuers come in many different forms and sizes, so systems and controls requirements should not be too prescriptive, and may also require issuers to put in place systems and controls that enable them to comply with other rules of the relevant market (for example to identify transactions with related parties and to obtain independent approval for them).

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

As noted in our response to Q13 above, there are certainly situations in which finely balanced judgements are required as to whether information amounts to inside information (or the precise point at which inside information arises). However, we are not aware of any examples that are so problematic that we would recommend amending the definition of inside information.

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.

It is clear that such a notification is not required under the existing rules, as noted in Q&A 5.2 of the ESMA Questions and Answers on the Market Abuse Regulation (ESMA 70-145-111) (ESMA Q&A) and as referenced in paragraph 125 of the consultation.

We do not think that such a notification should be required for the following reasons:

- Para 126 of the consultation says that imposing a notification obligation upon the issuer "would enable NCAs to better identify possible cases of insider dealing". However, ESMA does not identify any evidence that insider dealing is currently occurring where issuers delay disclosure and the information subsequently loses its inside nature. We question whether this is a high risk area which needs additional regulation.

- In order to make such a notification, an issuer would need to identify exactly when the information ceased to be inside information. Although in some circumstances it will be clear exactly when information ceases to be inside information (for example when the board takes a final decision not to proceed with an acquisition, an equity fundraising or another proposed course of action; or a particular event occurs that makes it impossible to proceed), in other circumstances it could be more difficult to determine exactly when information ceases to be inside information (for example in the scenario of a sale or acquisition where, during negotiations, the counterparty walks away but the issuer thinks that this is just a negotiating tactic and that the counterparty will come back in due course, where a number of events occur over a short period of time, or the "landscape" otherwise changes so that a proposed course of action is no longer seen to be viable, at least for the time being). If issuers were required to identify exactly when information ceases to be inside information they would therefore need to put in place systems and controls similar to those needed to identify when information first becomes inside information. This would be burdensome and, we suggest, disproportionate to the desired benefit (of helping NCAs identify when insider dealing may have occurred), particularly given that, if an NCA suspects that insider dealing has taken place, it can of course request information from an issuer at any time, including as to whether the issuer has or previously had inside information and, if so, why it is or was at the time entitled to delay announcing it. In addition, the issuer is already subject to various obligations to reduce the risk of insider dealing including those set out in Articles 17(1), 17 (4) and 18 of MAR and Article 4(1) of CIR 2016/1055.

- There is also a risk that the proposed change could have an unintended chilling effect on issuers' willingness to determine that something is inside information if there remains any doubt over this. If an additional obligation to notify the relevant NCA if something ceases to be inside information were to be introduced, issuers may well be more reluctant to determine that something is inside information where there remains some material uncertainty over whether a particular event will occur or a course of action might be taken in order to avoid the additional burden of having to comply with that obligation. Given the determination of whether something is or is not inside information can, depending on the actual circumstances, be a finely balanced judgement, we would not support any proposal to change the current regime which might make issuers more reluctant to conclude that something is inside information when in fact they should be reaching the conclusion that it is inside information.

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.

We agree it would be helpful to clarify that Article 17(5) also applies where the credit or financial institution is controlled, directly or indirectly, by a listed issuer. For this purpose we suggest that, as well as amending the opening words of Article 17(5), the word "issuer" in condition (a) should be replaced by the words "credit or financial institution". Consequential changes will also be needed to Article 17(6).

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

No, we do not agree with the proposed amendments. The proposal would represent a fundamental change in the nature of the market soundings regime, not merely a clarification of existing obligations, and would lead to significant market disruption.

In the UK the accepted market position is that Article 11(3) (the inside information assessment) and Article 11(8) (record keeping in relation to that assessment) have mandatory effect. Voluntary compliance with the remaining provisions of Article 11 and with the Level 2 provisions in CDR 2016/960 can provide market participants with the benefit of a safe harbour from the offence of unlawful disclosure in Article 10, but failure to do so does not constitute a breach of MAR.

The approach taken in the UK reflects both the correct technical reading of the provisions and the intended purpose of the regime as an optional safe harbour. As noted in MAR Recital (35), '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'. Our reading of the relevant provisions would also appear to be consistent with previous statements from ESMA, in particular where it noted, in its response to feedback to the original consultation that 'In relation to the safe harbour issue, ESMA is of the view that the nature of the provision is to serve as a protection for DMPs against unlawful disclosure of inside information, provided that the DMP complied with the requirements set forth in the TS' (ESMA/2015/1455, Appendix IV, paragraph 73), and commenting in the final report that 'where the requirements set out in MAR and further specified in the draft technical standards are not complied with, DMPs cannot benefit from such protection' (ESMA/2015/1455, paragraph 74). The Recital and the previous ESMA statements are, in our view, inconsistent with mandatory obligations, as they clearly contemplate that market participants have the option not to comply.

The introduction of a mandatory approach risks a negative impact on investor interactions and consequent disruption to the flow of information. The proposals would remove the flexibility currently afforded to market participants to obtain soundings from recipients unwilling to be subject to the recording and/or administrative obligations placed on them by the regime. It would also hinder market soundings involving recipients outside the EEA, where there may be local law requirements or practices inconsistent with the extraterritorial MAR provisions. The benefit of the safe harbour already incentivises market participants to comply with the regime for inside information soundings and for non-inside information soundings where any concerns remain around the characterisation of the disclosures. The consequence of the proposed mandatory approach would be to impose a new compliance burden on soundings where the safe harbour is not relevant, including those that communicate only public, non-inside information. A desire to avoid these obligations is likely to discourage use of soundings, particularly of potential European investors, limiting the flow of information necessary for the proper functioning of the market.

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?

As noted above in our response to Q33, in our view the market sounding regime should remain a voluntary safe harbour from the offence of unlawful disclosure of inside information. On this basis, we would not support amendments to or clarifications of the current definition, or the exclusion of certain transaction types. Changes to the scope of the regime would be unhelpful given the existence of well-understood market practices across transaction types. Retaining the current broad scope will allow market participants to continue to make use of the voluntary safe harbour where appropriate in line with well understood procedures.

If, contrary to our view, compliance with the entirety of Article 11 and CDR 2016/960 is made mandatory for any activity within the definition of a 'market sounding', then in our view it would be necessary to clarify that certain transaction types are not in scope. In particular, it would be helpful to confirm that both preliminary discussions ahead of a bilateral sale and the negotiation of terms with investors in a private placement are outside the regime. Any such clarification should also preserve the limitations on the scope of the market soundings regime recognised in Q9.1 of the ESMA Q&A, such that Article 11(1) will continue only to cover transactions in 'financial instruments covered by the MAR scope as specified in Article 2(1) of MAR'.

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?

The stages of the interaction between DMPs and potential investors that fall within the market sounding definition are well-understood in the UK market. It is clear that the regime applies to communications that seek to gauge the interest of potential investors in a possible transaction, and the conditions relating to it, and not to interactions later in a transaction process that form part of negotiations in the execution phase. In our view further clarification is not required.

Q36: Do you think that the reference to "prior to the announcement of a transaction" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?

We would not support changes in this area. As noted above in our response to Q33, in our view the market sounding regime should remain a voluntary safe harbour from the offence of unlawful disclosure of inside information. The benefit of the voluntary safe harbour will be sought when inside information is being disclosed as part of a sounding, or where there remains uncertainty over the characterisation of the disclosed information. In those circumstances an announcement of the transaction the subject of the sounding will typically be required by the inside information disclosure obligations in Article 17 or otherwise expected by the market. Announcement provides a clear, well-understood end to the scope of the market sounding regime, providing helpful certainty to market participants engaging with investors and we would therefore support its retention.

Where a transaction is announced and subsequent interactions with investors take place that involve the communication of inside information, it is already market practice to use appropriate wall-crossing procedures to ensure communications are made in a way consistent with Article 10.

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?

The market sounding regime imposes a number of onerous administrative requirements on both disclosing market participants and market sounding recipients, to avoid which some investors choose not to participate in soundings. A point of note is that the regime requires all participants in a joint market sounding to comply in full with disclosing market participant obligations. Where more than one party is carrying out a joint market sounding, it is not possible to delegate compliance to one disclosing market participant. Instead each party must comply in full (including duplicate recordings and / or minutes). Although this impacts all joint market soundings, it is a particular concern for issuers considering participation alongside a financial institution. Corporate issuers often do not have access to recording facilities and may not be as familiar with the market sounding obligations as financial advisers. In practice, therefore, corporates are often reluctant to participate in interactions with investors that fall within the market sounding regime. As noted in MAR Recital (32), market soundings are a highly valuable tool for issuers to enhance shareholder dialogue. Allowing disclosing market participants in a joint market sounding to designate a 'lead' participant as responsible for compliance with the safe harbour requirements would encourage issuers to participate fully with their own investors, to the benefit of ongoing issuer/investor relationships.

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)?

We do not support the suggestion in the consultation that recording should be made mandatory for all market soundings. Article 2(2) of CDR 2016/960 already requires the use of recorded telephone lines where the market sounding takes place by telephone, the disclosing market participant has

access to such lines and the persons receiving have given their consent. Taking forward this option would therefore only serve to exclude from the market sounding process any investor unwilling to consent to recording, potentially reducing the quality of information gained by issuers. Mandatory recording would also inhibit market soundings carried out other than via telephone recorded lines, including those currently carried out through physical meetings or as part of other interactions (such as site visits). At a practical level, disclosing market participants would be required to cancel or postpone market soundings if technical difficulties disrupted an intended recording, an undesirable step for transactions under time pressure.

The administrative burden of the current minute requirements could be reduced by removing the need for signature. It should be sufficient for a disclosing market participant to provide minutes to the market sounding recipient. If the recipient does not respond, this version would be accepted without the need for signature. The recipient would retain the right to comment in the event of disagreement: if any such comments are accepted, a revised version would be circulated by the disclosing market participant, if not then the recipient would have the option to prepare its own alternative version and send that to the disclosing market participant. In this scenario neither version would require signature.

As noted above in response to Q37, allowing disclosing market participants in a joint market sounding to designate a 'lead' participant as responsible for compliance with the safe harbour requirements would allow corporate issuers to participate in discussions with their potential investors without compliance with onerous, and duplicative, administrative requirements.

It would also be helpful to clarify that where a potential investor has received a market sounding, follow-up conversations can be viewed as part of that sounding. Where a subsequent conversation is clearly a continuation, it would be helpful to simplify or remove the requirement to repeat scripted reminders of the wall-crossing requirements.

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

We consider that the insider list regime works effectively in practice and that, other than as set out below, no major changes are needed to make it more effective. The current insider list regime is well-understood in the UK market, with both issuers and their advisers having appropriate processes in place to enable an insider list to be produced promptly when requested by the regulator.

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?

Our view is that this is not necessary for the reasons set out below.

If ESMA moved to a regime of real time insider lists which only included those who actually had access to inside information (as opposed to potential access) this would be very burdensome and costly for both issuers and their advisers as it would require constant monitoring and updating, particularly of individuals such as members of compliance teams at financial advisers. In addition, in some instances, it may be difficult to ascertain whether someone has actually accessed inside information either because the information may be disclosed in a series of emails or documents which could be pieced together (accessing a document in relation to a project involving inside information does not necessarily mean that the person has accessed the inside information itself) or because the person may have been a member of a much larger team working on a particular workstream and it is difficult to ascertain at which precise moment that person's knowledge reached the point at which they could be said to have "accessed" the inside information.

We believe that the current system of having a list which sets out those individuals in categories with potential access (for example, compliance) which could be provided to the regulator on request with the ability to be narrowed down at a later stage in the event of an investigation to

those with actual access is a more efficient and cost effective system and is less burdensome for issuers and their advisers. As set out above, the current systems and processes in place work well and enable issuers and advisers to produce the required list to the regulator in a timely way without being overly onerous. A more complex test (based on actual access) could increase the risk of errors or omissions by providing an inappropriately small list to the regulator.

That said, seeking to narrow down lists of those with potential access should nevertheless be encouraged. It is not efficient or appropriate, for example, to have a list with everyone in the compliance department on it, particularly if there is no actual business need for these individuals to be on the list. We suggest that the issue could be dealt with by way of an additional question in the ESMA Q&A.

Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintaining the insider list) to include any person performing tasks through which they may have access to inside information, irrespective of the fact that they act on behalf of or on account of the issuer? Please identify any other cases that you consider appropriate.

We do not think expanding the scope of Article 18(1) is necessary bearing in mind the general prohibitions set out in Articles 14 and 15 which apply to all persons who have inside information regardless of whether that person is on an insider list. However, we do think that there is merit in clarifying the scope of the expression "or otherwise performing tasks" in Article 18(1)(a) as there are differing views as to how this applies and to whom. We suggest that the issue could be dealt with by way of an additional question in the ESMA Q&A giving specific examples.

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.

Yes we consider it useful to maintain a permanent insider list as it reduces the administrative burden for issuers by removing the need to add the same list of people each time to event-based insider lists. However, we agree with ESMA that these lists can be very long and agree that only an extremely limited group of individuals should meet the definition. We suggest that the issue could be dealt with by way of an additional question in the ESMA Q&A.

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

Yes we agree with ESMA that the issuer should include on its insider list a contact person for each legal person acting on behalf or for the account of the issuer having access to inside information but our view is that that person needs to be someone who has actual access rather than potential access to inside information. ESMA's view accords with that set out in paragraph A10.2 of the ESMA Q&A which states in the middle paragraph that persons acting on the issuer's behalf or account are personally responsible for the obligation to draw up, update and provide to the NCA upon request their own insider list.

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.

There has always been a tension between including enough personal information on insider lists to enable NCAs to have sufficient information in cases of suspected insider dealing and the requirement set out in Article 18(3)(a) which states that the list needs to include the identity of the person having access to inside information as this can be achieved with substantially less information than is required by CIR 2016/347. The amount of information this requires can be administratively burdensome, particularly for smaller listed issuers. Our view is that mobile numbers and National Identification numbers are examples of information which go beyond the "identity" requirement. Whilst National Identification numbers are only required "if applicable" it can be onerous for an issuer to ascertain whether these even exist in certain jurisdictions,

including outside Member States. As set out above in answer to Q41, our view is that the list should provide enough information so that NCAs can ascertain the basic information and be in a position to ask for follow up information where required in the event of an investigation.

Q46: Should the minimum reporting threshold 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?

In the UK the FCA has opted to keep the threshold at EUR 5,000. However, in practice, most companies require their PDMRs and PCAs to notify all dealings: this is to avoid the administrative burden of having to calculate whether the threshold has been crossed and to avoid the risk of making a mistake and failing to notify a dealing that should have been notified. In any event, most dealings would exceed the threshold.

If the threshold were to be increased, or NCAs were to be permitted to opt for a higher threshold up to a maximum specified in MAR, we suspect that more companies would actually apply the threshold – i.e. they would require their PDMRs and PCAs to notify dealings only once the threshold is crossed. This would certainly reduce the number of dealings that need to be notified, which would reduce the administrative burden on companies and their PDMRs. It would also reduce the number of notifications about dealings whose value is negligible and therefore arguably of little benefit to investors. However, in order to ensure that the benefit of needing to notify fewer dealings outweighs the disadvantages of having to keep a running total of dealing values for each PDMR and the risk of regulatory action if a mistake is made, the threshold would need to be set considerably higher: say, EUR 100,000.

We recognise, however, that as noted in paragraph 197 of the consultation setting the threshold considerably higher would reduce the amount of information available to NCAs and investors about dealings by PDMRs and their PCAs. We also accept that if Member States were permitted to set the threshold considerably higher this would likely result in Member States choosing to apply significantly different thresholds – for example Member State X could apply a threshold of EUR 5,000 while Member State Y applied a threshold of, say, EUR 100,000. We do not think it would be desirable to have such significant differences between Member States in the threshold that applies.

If the threshold is to continue to apply on the basis of transactions carried out by a PDMR during a calendar year, on balance we think the threshold should be left as it is. However, see below the suggestion in our answer to Q50 below that the threshold should perhaps apply instead on a per transaction basis.

Whether or not the threshold is increased or, as we suggest in our response to Q50, amended to apply on a per transaction basis, we support and agree with the response to this question of the Share Plan Lawyers group to the effect that certain types of dealings that are commonly carried out in connection with employee share plans or similar arrangements should be exempt from the obligation to notify under Article 19(11). In particular, the following types of dealings should be exempt:

- Acquisitions of securities under an employee savings scheme where those acquisitions are planned under the scheme to occur at regular intervals.
- Acquisitions of securities (including grants of rights to acquire securities in the future) under an employee savings scheme that is open to all or most employees.
- Acquisitions of securities by way of dividend reinvestment, where the PDMR/PCA has entered a standing commitment to reinvest dividends in securities.
- Sales of securities acquired pursuant to an employee scheme, where those securities are the only ones being sold by or on behalf of the PDMR/PCA at that time and are being sold to raise funds to cover taxes and/or social security contributions (or similar) and/or

exercise monies, in each case arising in connection with the acquisition of the securities (or participation in the employee scheme).

- Acquisitions or disposals of securities below a specified threshold, being a percentage of the PDMR/PCA's existing shareholding.

- Dealings where the beneficial interest in the relevant security does not change.

It may, however, be appropriate to require such dealings to be notified on an aggregated basis every six or twelve months.

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).

Please see our answer to Q46 above.

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

Please see our answer to Q46 above.

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

We agree that the current rule has the benefit of simplicity, namely that once the threshold has been reached all further dealings must be notified, whatever their size. On the other hand, it does mean that once the threshold is crossed the PDMR must notify all subsequent dealings, even if their value is negligible, which can result in investors and NCAs being provided with information that is of little or no value. We can therefore see merit in amending Article 19(8) so that the threshold applies on a per transaction basis – i.e. the obligation to notify a particular dealing arises only if the value of that dealing exceeds a specified threshold. This would mean that each PDMR (or the issuer on its behalf) would not need to keep a running total of the value of that PDMR's dealings during a calendar year and, we suggest, would result in notifications that are more useful to investors. And if a PDMR was unsure whether a particular transaction exceeded the threshold, he/she could of course avoid the risk of failing to notify a transaction that should have been notified simply by choosing to notify it.

If a "per transaction" threshold were to apply, Article 19(8) would presumably also need to include some "anti-avoidance" language designed to prevent PDMRs avoiding the obligation to notify by splitting up a large transaction that would be over the threshold into several smaller ones each of which is below the threshold. If ESMA would like to pursue this suggestion we would be happy to suggest some drafting for this anti-avoidance language.

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.

Yes we agree.

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?

No.

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?

We believe that the current framework for identifying closed periods and ensuring that PDMRs are generally prohibited from dealing during those periods is well understood by the market.

However, we do think it would be helpful to have more clarity around the types of dealings which, exceptionally, can be permitted during a closed period: see Q57 below.

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

Please see our answer to Q53 above.

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 persons closely associated with PDMRs, including any benefits and downsides.

In our view it would be unnecessary and disproportionate to extend the prohibition to issuers or PCAs.

Both issuers and PCAs are subject to the prohibition on insider dealing. Prohibiting an issuer from issuing shares etc. during a closed period would be unduly restrictive: in particular, for an issuer that is required to report quarterly it would effectively restrict the issuer from dealing for four months per year. In our view, issuers should be able to raise new equity or debt funding at any time they consider appropriate, provided they ensure that they do not commit market abuse. If the prohibition on dealing in Article 19(11) were also to apply to issuers, we think it would therefore be necessary at the same time to introduce an exemption permitting an issuer to issue new securities in a fundraising, as well as exemptions for buybacks and redemptions of securities provided that certain conditions are met. Such conditions might include, for example, that the issuer either does not have any inside information relating to the financial results that are currently being prepared, or otherwise; or that, prior to the issuer entering into any agreement to deal it has published any inside information that it does have. However, the exact scope and drafting of such conditions would require careful thought. In our view, the existing prohibition on an issuer or any other person dealing on the basis of inside information already provides sufficient protection against the risk of an issuer committing market abuse by dealing during a closed period, and it would be complex and unnecessary to introduce a new prohibition with a related conditional exemption. We also share the concerns about other potential downsides identified in paragraph 213 of the consultation.

There would also be difficulties with operating employee share schemes. These are usually operated on a cyclical basis, with grants, vestings, hedging arrangements and transfers of securities taking place at certain intervals during a company's financial year. If the prohibition were to extend to issuers, it would no longer be possible to rely on ESMA's Q&A 7.10. This confirms that when PDMRs are acting in their capacity as directors/employees of the issuer, the prohibition does not apply. This enables PDMRs to operate share plans (for example vest share incentives) during closed periods. If the closed period prohibition were to extend to issuers, it would also be necessary to have an exemption allowing the operation of employee share plans (within the ESMA Q&A 7.10 context).

We also think it would be unnecessary and disproportionate to extend the prohibition to PCAs. We agree with ESMA that there is lower risk of a PCA taking advantage of inside information that arises during a closed period to deal in the company's securities and, in any event, PCAs are of course subject to the prohibition on insider dealing. As a practical matter, the prohibition on dealing during a closed period is typically policed in the first instance by the issuer itself: although in many cases issuers require their PDMRs to notify their PCAs of the issuer's closed periods and ask them not to deal during such periods, the issuer is not usually in a position to compel the PCAs to comply and, in many cases, the PDMR themselves will not be able to compel their PCA to do so either. If the prohibition were to be extended to PCAs, we think there is a real risk that PDMRs

would be "blamed" by NCAs or investors for having failed to prevent their PCAs from dealing even when, as a practical matter, the PDMR may have been unable to control their PCA's dealings.

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.

We would support the extension of the "exceptional circumstances" exception to cover sales of all types of financial instruments.

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.

We do think there are certain other transactions that should be exempt from the prohibition in Article 19(11).

To provide some context, the prohibition applies to the same types of transactions as must be notified under Article 19(1): see Q7.9 of the ESMA Q&A. Article 10 of CDR 2016/522 gives a non-exhaustive list of transactions that must be notified. These include, among others:

- acceptance or exercise of a stock option;
- automatic or non-automatic conversion of a financial instrument into another financial instrument; and
- gifts and donations made or received, and inheritance received.

In each of these transaction types, it is quite possible – or even likely – that the PDMR will not give any instruction or consent or otherwise have any control over the dealing. Nevertheless, notification is required. Whilst we accept that it may be useful to investors to be told of such dealings, we do not think it is necessary for the prohibition in Article 19(11) to apply to them. In our view, it would therefore be helpful if ESMA could clarify in its Q&A that dealings will not be treated as transactions conducted on a PDMR's own account where the PDMR does not give any instruction, consent or otherwise have any control over the dealing. Many dealings pursuant to executive share plans take place on this basis.

Secondly, it would be helpful if ESMA could clarify in its Q&A that the prohibition in Article 19(11) does not apply to a dealing carried out during a closed period where (i) the dealing occurs pursuant to a conditional contract that was entered into before the closed period started; and (ii) the PDMR has no control over whether the condition is satisfied or whether the dealing occurs, during the closed period. The dealing should be permitted even if, at the time the contract was entered into, the PDMR was aware that the condition might be satisfied, and the dealing might therefore occur, during a closed period.

Thirdly, it would be helpful if ESMA could clarify in its Q&A that the prohibition in Article 19(11) does not apply to a PDMR doing any of the following things:

- taking up any part of their entitlement, or agreeing to take up any part of their entitlement, to new shares under a pre-emptive offer made by the issuer to all, or substantially all, of its existing shareholders, provided that a prospectus relating to such offer will have been published by the time the PDMR takes up their entitlement;
- accepting an offer to sell their shares in the issuer pursuant to a takeover offer made by a third party that is open to all, or substantially all, of the issuer's shareholders, or agreeing to accept such an offer, provided that a document relating to such takeover offer will have been sent to such shareholders by the time the PDMR accepts the offer in respect of their shares.

In addition, we support and agree with the response to this question of the Share Plan Lawyers group, who recommend that some of the existing exemptions should be modified, and certain further exemptions should be added, in order to facilitate the standard operation of employee share schemes and similar arrangements.