Response to ESMA Consultation Paper - MAR review report

FINANCE DENMARK

Memo

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Introduction

Finance Denmark[1] welcomes the opportunity to respond to ESMA's consultation paper regarding the MAR review report.

Besides the issues that are included in the consultation paper from ESMA, Finance Denmark has a few additional issues that we would like to address to ESMA's attention. These are described below.

Investment firm's ability to execute client orders:
MAR Article 16(2) states that *Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. Where such a person has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person shall notify the competent authority as referred to in paragraph 3 without delay.*

MAR recital 30 states that *The mere fact that market makers or persons authorised to act as counterparties confine themselves to pursuing their legitimate business of buying or selling financial instruments or that persons authorised to execute orders on behalf of third parties with inside information confine themselves to carrying out, cancelling or amending an order dutifully, should not be deemed to constitute use of such inside information.*

In Denmark we are in a situation where the Danish FSA has issued official guidelines on the interpretation of Article 16 in MAR. The Danish FSA is of the opinion that the mere execution of a client order will suffice as aiding and abetting and therefore a criminal offence where the investment firm/dealer has reasonable suspicion that the customer intent to commit market abuse. Finance Denmark believes that only an activity beyond the mere execution will suffice as aiding and abetting of a criminal offence. This view is supported in Article 16(2) where

[1] Finance Denmark is a business association for banks, mortgage institutions, asset management, securities trading and investment funds in Denmark. EU Transparency Register – registration number 20705158207-35

especially the obligation on dealers to report any suspicious activity by their customers in MAR Art 16 suggest that the mere execution by them of such orders cannot be illegal in itself as the reporting obligation would be contrary to the ban on self-incrimination that follows from human rights law. This understanding is further supported by recitals 30 and 39 and complements MAR Art 9, section 2, litra b. The intentions laid forth in recital (30), whereby investment firms are able to pursue their legitimate business of buying and selling financial instruments, provides a protection towards investment firms and its employees. Finance Denmark see a need that the above was explicitly expressed in an Article under MAR. This would prevent investment firms in some jurisdictions, e.g. as for Denmark, from being forced to implement more stringent order execution procedures than others, based on the fear that its employees and/or itself can be prosecuted for aiding and abetting to prohibited market abuse behavior from the mere loyal execution of client orders. By explicitly expressing the intentions laid forth in Article 16 and recitals 30 and 39 of MAR in an Article, the basis for a sufficient level of supervisory convergence will be provided.

Investment recommendations:

Finance Denmark is if the view that currently there is not sufficient alignment between the rules on investment recommendations under MAR on one hand, and the rules on investment research and marketing communications and research unbundling under the MiFID II regime. We find that there is an inherent conflict between the obligations under MAR to provide the recommendations free of charge under some circumstances, and the requirements under MiFID II to ensure that research are subject to a separate identifiable payment. Furthermore, we find that the obligations under Article 4 of Commission Delegated Regulation (EU) 2016/958 are not well-suited for the presentation of investment strategies.

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.

Finance Denmark believes that the scope of MAR should not be extended to cover spot FX contracts at present. Finance Denmark believes that market participants should have sufficient time to adopt to the FX Global Code of Conduct. We support the FX Global Code of Conduct, which is a worldwide global Code.

The spot FX markets are global and reach beyond the environment of the financial industry in the sense that transactions may take place outside banks, investment firms or trading venues. With market participants and currencies from all over the world, the sensitivity and liquidity can vary greatly in different currencies and markets. We believe that the EU should not prematurely move in any direction that would risk causing disadvantage to the EU markets and EU market participants in relation to the global FX markets. The risk that market participants are discouraged from conducting business on the European markets may be higher since the spot FX is a standardized product available everywhere, and such a move would likely have a large impact on the liquidity in the FX markets as a whole. FX transactions are in many situations merely a consequence of another financial or business transaction such as e.g. purchase of goods or services, payments etc. This means that disturbances to the FX markets could potentially affect other areas not only in banking and the financial industry, but to various financial products as well as the business of companies which operate or trade in different countries.

Furthermore, Finance Denmark agrees with ESMA that significant analysis and changes to MAR and the MiFID II regime will be required in order to include spot FX contracts within the scope of both regulatory frameworks. Present efforts should be focused on strengthening and improving the functionality and legal certainty of existing regulatory frameworks as they are, rather that expanding their scope.

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.

Finance Denmark agrees with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts. However, while ESMA seems to focus mostly on the structures of reporting, it should be

stressed that the entire MiFID II regime would need to be revisited if spot FX contracts would be classified as a financial instrument, including transparency rules, client reporting rules, best execution rules etc.

Finance Denmark believes that misconduct issues are primarily a product of governance deficiencies. It is our opinion that regulation of spot FX should therefore, at least at initial stage when the outcome is unknown, be focusing on governance and conduct of persons professionally arranging or executing transactions on the spot FX markets.

Traditional spot FX dealing by voice stands for a small portion of the market and is generally conducted OTC either as interbank transactions or with at least one counterparty being a supervised entity. Most spot FX transactions are executed automatically through electronic platforms and through systems in which prices are often generated automatically. There are a number of different service providers and electronic platforms for spot FX transactions, as well as FX brokers. These service providers are often banks or other supervised entities subject to MiFID, bank regulations, but some service providers on the spot FX markets are out of scope of any financial regulations.

We believe that if spot FX should be regulated, it should be on a structural level and not on transactional level. Perhaps the purpose of potential regulation can be fulfilled by demanding that any currently unregulated person which is professionally arranging or executing transactions in spot FX establish proper internal governance and rules of conduct. Any potential regulation should be carefully considered and not discourage developments within fintech, since the whole financial industry often benefit from new technology and electronic solutions.

Finance Denmark also notices that contrary to what is the case with a financial instrument, a spot FX transaction does not have an issuer, and we therefore find it hard to see how the rules relating to disclosure of inside information would be applied to spot FX.

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?

Finance Denmark agrees with ESMA's analysis that MAR and BMR are complementary to each other as well as the analysis on the scope of the two definitions of benchmark in MAR and BMR respectively.

We do not find that the difference in the scope of definitions raise any particular risks of market abuse and do not currently see any need of change in MAR.

The two regulations should continue to complement each other, and we support that any possible change in MAR should be coordinated and coherent with the outcome of the upcoming BMR review in 2020.
It is our opinion that the current scope of MAR should be maintained to only cover behaviours in relation to benchmarks where these benchmarks have an impact on financial instruments traded in a regulated market or other market covered by Article 2(1)(b) or (c).

As ESMA concludes, the scope of BMR is wider and is not tied to only financial instruments. We believe it may be impractical to apply the same broad scope to manipulation of benchmarks under MAR and question the potential benefit. Further, this would go beyond Article 1's stated objective of ensuring integrity of financial markets.

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?

As the BMR is a fairly new regulation and not yet fully implemented, Finance Denmark is of the opinion that at this point in time there is no need to implement changes in MAR that relates to BMR. Such a change should await the upcoming review of BMR that will take place in 2020.

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?

Finance Denmark refers our answer to Q4.

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?

Finance Denmark does not agree with ESMA on this point. In the BMR a range of governance and control requirements are laid down, to which the contributors and administrators must comply. If a reference to submitters and assessors is added to Article 30(2), letters (e), (f) and (g) this would mean that administrative sanctions and other administrative measures not only apply on a managerial level but also towards ordinary employees. We believe that it is the responsibility for persons discharging managerial responsibilities to ensure that the internal set-up is in compliance with the regulation, and therefore sanctions for not complying with the regulation should be on managerial level.

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

Finance Denmark welcomes a simplification of the reporting mechanism under Article 5(3). In practice is has shown to be challenging to comply with the regulation, since it can be very difficult to identify all the trading venues where the issuers shares are being traded. Especially when it comes to MTF's it can be difficult since it can change on a daily basis.

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.

Finance Denmark proposes a combination of Option 2 and Option 3. Meaning that, as a main rule the reporting should be to the NCA of the jurisdiction where the issuer requested admission to trading or has approved trading. If there are several jurisdictions, the reporting should only be to the NCA in the jurisdiction where primary trading is done. This way the issuer only has one point of entry, and if needed the NCA's can share the information on request.

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.

Finance Denmark supports a simplification of the reporting requirements. Finance Denmark agrees with ESMA that there is no need to require issuers to report to NCAs the information under MiFIR Article 25(1) and 25(2) related to buy-back programmes since the NCAs already have access to the information under MiFIR. For this reason, Finance Denmark supports to remove the reference to MiFIR Article 25(1) and 25(2) in MAR Article 5(3).

Furthermore, we do not see the need to align the reporting mechanism under Article 5(3) and 5(4) of MAR with Article 26 of MiFIR. All transactions under a buy-back or stabilisation program are already reported in accordance with Article 26 of MiFIR, and the reference under MAR only means that the NCA's will receive the same data twice. The reporting should be kept to a minimum bearing in mind that the relevant NCA should be able to identify the transactions in their transaction reporting system.

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

In general, Finance Denmark supports the idea of reducing the number of reporting fields to the NCAs in relation to buy-back programmes. That said, the institutions have today a set-up for the TRS reporting, and they have implemented systems and programmes that can support the reporting to the NCAs in relation to buy-back programmes. If there will be changes to this reporting it will require development of new reporting systems and programmes in the institutions which will have a cost.

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

Finance Denmark agrees with ESMA and supports that the data disclosed to the public should be in an aggregated form, such as aggregated volume traded, and the weighted average price paid for the shares in each trading session.

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

At this point Finance Denmark does not have further comments on this subject.

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?

Finance Denmark agrees with ESMA that identification of inside information can be very complex. Normally the process for identifying circumstances or events which may comprise inside information is less problematic. The experience is rather that the legal assessment of at what moment the information shall be deemed to be of a "precise nature" according to Article 7 may be problematic, especially in cases where the relevant circumstance or event is part of a protracted process which may result in a particular future event but which is not within the control of the issuer (e.g., investigations or reviews by public authorities). For that reason, Finance Denmark recommends that ESMA develop a set of guidelines to support the interpretation of inside information.

Such guidelines could in addition describe in more details what it takes, for information to have significant effect on the relevant prices of financial instruments etc. and when an effect is significant. Such guidelines could also include/introduce financial thresholds based on e.g. P/L effect for the issuer.

Another issue that could be addressed in guidelines is a description of when information is public/not public. We can all agree that an announcement from an issuer on a market place will met the criteria for information being public. But what about information from other sources? How wide spread must a piece of information be for it to be public and therefore not constitute inside information. Will a ruling from an open court, that has effect on the price of a financial instrument be considered as public and therefore not inside information or will it be considered as inside information until an announcement from the issuer is made?

In general, when talking about inside information the focus is normally on equities. More guidance on inside information in relation to other financial instruments, such as bonds, derivatives etc. could also be beneficial to have.

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

Finance Denmark does not see a need for changing or clarifying the definition of inside information on level 1. As mentioned in Q13 Finance Denmark recommends that ESMA develop a set of guidelines on the interpretation of inside information. Please see our answer to Q13.

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?

Finance Denmark has not identified information that we consider as inside information, which is not covered by the current definition of inside information.

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?

Finance Denmark does not have comments to this question.

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?

Finance Denmark does not have comments to this question.

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.

Finance Denmark does not have comments to this question.

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?

Finance Denmark does not have comments to this question.

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

Finance Denmark does not see a need to extend the scope.

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

In the assessment of whether certain information constitutes inside information, the likelihood of a significant effect on the price of a financial instrument shall be assessed. For the purpose of assessing potential price movements, the liquidity of a financial instrument or market is one of the determining factors and subsequently it should already under current regulation be part of the assessment.

Finance Denmark strongly believes that any potential regulation or guidance in this area should be of a safe harbor character since the circumstances in each case might vary greatly between different markets and types of financial instruments and transactions. It is important that any regulation or guidance does not disrupt liquidity or prevent the possibility of conducting transactions or making markets.

Q22. What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?

Finance Denmark is of the opinion that pre-hedging is a vital element in order to ensure liquidity in the financial markets, as well as an important tool for a bank or investment firm to effectively manage its risk. Pre-hedging is to the benefit of customers by enabling investment service providers to offer competitive pricing and may in certain cases be necessary in order for certain transactions to even be possible to execute. Any regulation should be carefully considered, and pre-hedging should not be deemed as misuse of client information, provided that the pre-hedging is performed in pursuit of the legitimate activities in the provision of investment services or as market maker or liquidity provider. We would like to emphasize that if pre-hedging of orders and transactions be further limited, there is an apparent risk that the market for certain financial instruments will disappear to the detriment of the investors and the market.

Finance Denmark supports transparency in trading practices by disclosing to the customer, where appropriate, that pre-hedging might be necessary before an exact price can be offered.

MiFID II/MiFIR conduct rules include the obligation for investment firms to act honestly, fairly and professionally in a manner which promotes the integrity of the market (Article 24 of MiFIR) and to act in accordance with the best interest of clients (Article 24 of MiFID II). These rules address the risk of inappropriate behaviour in the interdealer market and in customer facing activities. Trading venues also conduct monitoring to detect any inappropriate behaviour that may jeopardize the fair and efficient operation of the market. Investment firms are also required to include pre-hedging activities in their own monitoring and surveillance according to Article 16 of MAR.

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

Finance Denmark believes that pre-hedging is conducted in the interest of and for the benefit of the customer to enable the investment firm to be able to provide a price or quote and ensure successful execution and completion of a transaction.

It is important to note that pre-hedging is a by-product of other transactions which might not be possible to conduct unless it is possible to pre-hedge this risk, for example bond issuances and M&A transactions or illiquid currencies, rates or financial instruments. If a bank would assume risk in a customer transaction that it will not be able to hedge, it would increase risks in the trading book and increase cost of funds. This may discourage banks or investment firms from conducting transactions thus impacting the liquidity and the risks in the whole financial system.

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

Financial instruments trading in OTC markets where investment firms trade in principal capacity.

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.

Finance Denmark welcomes ESMA's initiative to look at the conditions to delay disclosure of inside information.

In general Finance Denmark finds the process for delaying inside information very extensive and requires a lot of administrative resources.

The introduction of MAR – and the abandonment of the former regime where occurrence of inside information usually happened simultaneously with disclosure - has prompted the need to delay disclosure. Delay of disclosure is a narrow exemption from the obligation to disclose ASAP. It would be beneficiary to have the exemption broadened (or even made the rule), so the more interests were considered "legitimate", e.g. general timing interests and internal governance procedures. In our view, this would not deteriorate the information provided to the market. Rather it would minimize the risk of misleading the market, by providing information about events, which may be likely to occur – but about which uncertainties still exists.

The ESMA MAR Guidelines regarding delayed disclosure of inside information (the "Delay Guidelines") generally encompass situations related to M&A activities or financial difficulties when providing examples of situations in which it could be in the legitimate interest of the issuer to delay the disclosure.

It would be beneficial if the Delay Guidelines could be further developed to also include different types of issuers, as well as examples of other situations in which inside information may arise and there may be a legitimate reason for the issuer to delay the disclosure. Such situations could for example include ongoing, protracted, inspections or reviews by public authorities in which the outcome of such investigation or review would likely be jeopardised by immediate public disclosure. It could also be a situation where an issuer is listed on multiple venues in different time zones and where delayed disclosure would be beneficial to protect the integrity of the financial markets.

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.

Finance Denmark would like to address ESMA's attention to cases, where the issuers' view of what constitutes "legitimate interests" differed very much from the view of the regulator (inter alia related to dismissal of leading employees), which has led to unnecessary uncertainties in relation to what constitutes "legitimate interests", both on the part of the issuer and the regulator.

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?

Finance Denmark is of the opinion that it is not necessary to include a specific requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information as an issuer already today must, in practice, have such systems and controls in place to comply with their obligations under article 17 MAR. Contrary to the situation under article 16 MAR, article 17 MAR is applicable to a large group of issuers varying in scale, size, and nature of business which. In our opinion, it would have to render any requirement in MAR and supporting guidelines to be of such high-level and generic nature that it would only create unnecessary complexity and uncertainties for the issuers without any corresponding gain in the efficiency of their controls and systems compared to the current situation.

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

Normally the process for identifying circumstances or events which may comprise inside information is less problematic. The legal assessment of when the information at hand shall be deemed to be of a "precise nature" according to Article 7 MAR may in some cases be problematic if the circumstances or event is part of a protracted process that may result in a particular future event, but which is not within the issuer's control.

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.

In Denmark an issuer or emission allowance market participant is not obliged to inform the Danish FSA that disclosure of the inside information was delayed. In Denmark it is only to be provided upon request of the Danish FSA.

Finance Denmark does not see a need for extending the scope of MAR Article 17(4) to also include notification to NCA' 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. In Denmark this will be an additional administrative burden which we do not see the need for. When information subsequently loses the element of price sensitivity and the information therefore ceases to be inside information, we do not see it as being in scope for MAR. We furthermore note that the NCAs and/or other public authorities already as of today has far-reaching authority to request information on an *ad* hoc basis in connection with any investigation or criminal proceeding relating to insider dealing or other market abuse.

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.

Finance Denmark supports an amendment of Article 17(5) MAR in order to clarify that in case a listed issuer which is not a credit or financial institution, but which is directly or indirectly controlling a listed or non-listed credit or financial institution, receives information regarding financial difficulties in a credit or financial institution, it should be able to delay the disclosure of such information on the same basis as the credit or financial institution under Article 17(5). This would be in line with the goal to achieve the overarching principle of said Article; i.e., to safeguard the financial stability of the Institution and of the financial system.

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.

Finance Denmark does not have any comments to this question.

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.

Finance Denmark does not have further examples. However, there have been situations in which supervisory authorities have implied that they expect an issuer to abstain from the disclosure of certain information received by it from such authorities (e.g., as part of an ongoing inspections), which results in a difficult position for the issuer (especially when such authority is also the competent authority under MAR).

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

Finance Denmark welcomes a clarification of Article 11 of MAR, since there appears to be different interpretation of the said Article.

Finance Denmark does not share the view that ESMA has stated in point 142. In point 142 it is stated that ESMA is of the view that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11 and when they do so, they can benefit from the described protection. Finance Denmark is not of the opinion that there is an obligation to follow the requirements set out in Article 11. Article 11 is to be viewed as a safe harbour regulation. This is also supported by recital 35 stating that *There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information, but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation, and all disclosing market participants should be under an obligation to record in writing their assessment, before engaging in a market sounding, whether that market sounding will involve the disclosure of inside information*. Finance Denmark agrees with ESMA that if a DMP seek to have the protection as described in Article 11, the DMP will have to follow all the requirements laid down in Commission delegated regulation 2016/960.

Finance Denmark is of the opinion that the market sounding procedures should continue to be optional for an issuer, a secondary offeror of a financial instrument, an emission allowance market participant and a third party acting on behalf or on the account of the above mentioned. If they choose to use the market sounding regime in MAR, it cannot be questioned whether they have disclosed inside information or not. On the other hand, if they choose to market sound in other ways, they do not gain the protection given in Article 11 in MAR. Finance Denmark supports to keep the flexibility. For that reason, Finance Denmark does not support ESMA's proposed amendments.

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?

Finance Denmark would like to raise ESMA's attention to the challenges that has been experienced with market sounding in relation to investors (buy-side). Often investors do not want to be sounded due to the restrictions being imposed on them. This can be an issue for the investment firms when they seek to gauge the interest of potential investors in a possible transaction.

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?

Finance Denmark does not have any comments to this question.

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?

Finance Denmark believes that Article 11(1) with advantage could be clarified with adding "expected" before *prior to the announcement of a* transaction. The reason for this suggestion is, that it is not always the case that a public announcement will follow a market sounding, for example if the transactions does not take

place. In cases where a sounding is not followed by an announcement the regulation must give some guidance on for how long clients being sounded are in possession of inside information.

Q37. Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

As stated above in Q34, the use of the market sounding regime is limited due to the restrictions imposed on the investors. Hence, it would be helpful if the burdens on the RMPs are reduced so that the RMP are more inclined to be market sounded and/or that certain interactions are excluded from the regime (as is the case for the private placement exemption).

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)?

The market sounding procedures may also be used, even though the market participant considers that the market sounding will not involve disclosure of inside information. The procedure to be followed in these situations are limited compared to the case where inside information will be disclosed. Finance Denmark is of the opinion that there is no need for setting up procedures for the cases where no inside information will be disclosed. Finance Denmark believes that market sounding only relates to inside information and therefore there is no need for having market sounding procedure sin place when not disclosing inside information.

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

Keeping an insider list is an extensive task since it requires a lot of information to be maintained. Finance Denmark is of the opinion that too much unnecessary information is included in the insider list and the requirement of information have resulted in administrative burden and costs. The main purpose with the information in the insider list template must be, that the information gives the national competent authorities the possibility to identify the relevant private individuals who have received inside information. I.e. only adequate, relevant data should be included, and information should not be excessive in relation to the purpose

of the insider list. By comparison in the TRS reporting the national identification number is assessed sufficient to identify a private individual.

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

Please see our comments to question 39.

Finance Denmark recognizes the difference between actual access and potential access to inside information and welcome the possibility to exclude persons from insider lists where possible. To be clear, however, we do not believe that having individuals listed as insiders due to potential access in any way reduces the usefulness of the insider list, as long as the reason for each individual to be listed as an insider is correctly detailed in the "Function and reason for being insider" field in the insider list.

We believe that ESMA should allow issuers to include or exclude individuals with potential access to inside information as they please, as the administrative burden to check which individuals with potential access actually have "gained access" may be heavy for some issuers where technological or administrative means are lacking, but very light for other issuers with effective measures of access logging and reporting already in place. Issuers should therefore be free to decide for themselves which solution would be most beneficial for them.

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?

Finance Denmark refers to the answer to Q40.

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.

Finance Denmark is opposed to the notion of expanding the scope of Article 18 (1) of MAR, as the regulation already obligates the Issuers or any person acting

on their behalf of or on their account to maintain insider lists. From a market viewpoint, independent auditors and notaries as mentioned in point 176 of the MAR Review will be included in either the list of the issuer, the financial institution (acting on their behalf of or on their account) or another advisor (acting on the issuers behalf or on their account) in accordance with Article 18 (1) of MAR and the spirit of Recital (57) of MAR, if they gain access to inside information.

Expanding on the above a requirement for independent third parties to draw up insider lists themselves does not seem to add further value to the setup and governance surrounding the insider list regime. Consequently, adding additional requirements to further scope out indirect insiders would be imposing a regulatory obligation already covered by Article 18 (1) of MAR.

For the avoidance of any doubt, we strongly oppose that ESMA changes the overall scope of Article 18 (1) of MAR to encompass any person with insider information and not "only" issuers and persons acting on their behalf of or on their account.

In a worst-case scenario, we see a risk of local authorities interpreting third parties very broadly. This would potentially require us to place staff working in market functions on insider lists, if they handle e.g. orders from clients of a certain size or block trades that would be seen as inside information. To handle such insider lists (based on our activities), we would either need to invest heavily in systems to be able to handle the dynamics of the restriction activities or have a full time restriction for every Sales and Dealer in Equities/FI&C. It would increase our costs in an environment, where our model is already significantly under pressure. On top of this, we would be concerned about any spill-over effects towards the clients. This would also place a very heavy administrative burden on the companies required to maintain insider lists, without it adding any value when it comes to e.g. monitoring and trade surveillance.

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.

Finance Denmark supports keeping the permanent insider lists. It supports efficient information flows with senior management when discussing insider matters thus enabling effective decision-making. By not having a permanent insider list or

making the interpretation too narrow this can increase the operational risk associated with this process (i.e. increase risk that all individuals are not being added on the relevant event based insider lists). It may also hinder effective and timely senior management communication or decision-making as individuals will be unsure of who can be included in conversations and whether they can/have been wall crossed.

However, it will be positive to have ESMA clarify who should be added to the permanent insider list in order to provide greater consistency in the way this is interpreted across the market. We find that ESMAs comment in paragraph 183 (b) is very narrow and we could advise that a broader interpretation of permanent insider's is applied. In practice, the Executive Board members and Board of Directors are typically considered to be permanent insiders. This encompasses a wider group of individuals that those mentioned by ESMA in paragraph 183 (b)., e.g. members of the executive board that are business unit representatives. The interpretation of the permanent insiders should therefore be based on the scale, complexity and roles within organisations.

In conclusion, bearing in mind, that the permanent insider list should never substitute the ad hoc lists, we strongly oppose the notion set forth by ESMA in comment 183 (b), that only the CEO and in certain specific cases the CFO, Chairman of the board, Head of Legal and STO should be on the list. In our view, it must be allowed to have the all members of the executive board and board of directors on the list, to ensure that information may flow freely amongst key decision makers, and also to mitigate the risk of unlawful disclosure amongst the members of the executive board and the board of directors and/or necessitating members of those bodies to be excluded from meetings and discussion of important issues.

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

Finance Denmark agrees with ESMAs preliminary view and supports a specification stating that the issuer should only include one contact natural person for each legal person acting on behalf or for the account of the issuer having access to inside information.

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.

Finance Denmark refers to the comments to Q39 above.

Further, Finance Denmark suggests that to ease the administrative burden on keeping lists less information should be required, but still enough to identify the persons/legal person (identified by company registration number) on the lists. This suggestion is also to align with information that is provided in relation to MIFID II. Our suggestion is to have the following fields, name, national ID, work phone, work e-mail, reason for becoming insider and time of becoming insider.

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?

As ESMA has mentioned in the consultation paper the Danish FSA has increased the threshold to 20,000 Euro. Finance Denmark supports a general increase of the threshold to at least 20,000 Euro across the EU, as this will make it easier for undertakings operating within different EU member states when handling the reporting requirement. Finance Denmark supports one single threshold throughout the EU without any national option to increase the threshold further.

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).

The NCA's should not have an option to keep a higher threshold, cf. comments in Q46 above, and it would be administrative burdensome for issuers operating in several EU countries to oversee different thresholds. By having the same threshold in every country, firms can rely on just one internal instruction applicable.

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

Finance Denmark does not have comments to this question.

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

Finance Denmark does not have comments to this question.

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

Finance Denmark has not identified any alternative criteria, besides having one threshold, on which subsequent notifications could be based.

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.

Finance Denmark finds that the 20% threshold is appropriate. However, we would also appreciate to include a corresponding threshold in Article 19(11) MAR in order to clarify the connectivity between Article 19(1) (i.e., the scope of the notification obligation) and Article 19(11) (i.e., the closed period) since it cannot be correct that a non-notifiable transaction under Article19(1) should be in scope of the closed period prohibition.

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?

Finance Denmark does not have comments to this question.

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?

Finance Denmark proposes that Article 19(11) MAR is amended in order to exclude dealings by a PDMR in conjunction with certain corporate events in which a PDMR is not treated differently than any other shareholder, for example when (i) subscribing (or undertaking to subscribe) for the PDMR's pro rata share in a rights issue or (ii) accepting (or under- taking to accept) a public takeover offer.

Furthermore, we also propose that all transactions executed under a discretionary asset management mandate are excluded from the prohibition to trade

during the closed period since the PDMR has no possibility to influence or affect any transactions by the asset manager.

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

Finance Denmark does not see a need for clarification.

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.

Finance Denmark does not support an extension of Article 19 (11) to issuers. Extending a blanket prohibition would further limit transactional windows significantly. Considering that issuers need approximately a week following a trade date for settlement of the securities, a thirty days closed period before each quarterly reporting will effectively close issuance windows for blackout by 4-5 months each year. As markets are volatile, a reduction of the issuance window will materially increase execution risks. This is especially of importance for frequent issuers. As publication of quarterly results is often done within 30 days after the quarter end, there may not be information available at such an early stage that could be considered precise information about the upcoming quarterly result. Hence, we see no reason for prolonging the silent period blackout which issuers already apply too.

Finance Denmark does not support an extension of Article 19(11) to also include persons closely associated with PDMRs. This will, as also mentioned by ESMA, place extra burdens on the PDMRs and the issuers. Also, in MiFID II personal transactions covers relevant persons which does not include closely associated persons.

The administrative set-up that will be required to apply to such a rule would not be proportionate with the purpose of the rule.

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.

Finance Denmark supports the suggestion from ESMA to extend the immediate sale provided by Article 19(12)(a) to cover other financial instruments that just shares. We do not see a need to differentiate between shares and other 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.

Finance Denmark proposes that ESMA looks into the possibility to extend the exemption to also include situations where a person having a pension scheme are forced to sell financial instruments in order to be able to pay the required taxes by year-end.

With reference to ESMA's statement relating to cases when a contract relating to a certain issuer's financial instrument was executed by a PDMR outside of the closed period but require completion during the closed period, we would like to highlight that such delivery of financial instruments should already under the current MAR regime be allowed. Hence, it should not be added to the list of exemptions under Article 19(12) since such transactions are not at all within the scope of Article 19 MAR. Where a decision to trade is made outside of the closed period, the PDMR is not trading during the closed period, nor is there any other conduct by the PDMR during the closed period as the contract requires the acquisition or sale of the relevant financial instruments (cf. Article 9(3) MAR which states that performing a contractual obligation entered into prior to possessing inside information shall not be considered insider dealing).

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.

Finance Denmark is of the opinion that CIUs should be subject to the rules in MAR applicable to issuers admitted to trading on a SME growth market. A CIU rarely possess inside information why the lighter regime will be sufficient. This will entail a less cumbersome obligation, c.f. article 17 (9) and 18 (6) of MAR.

Finance Denmark does not find a need to extend the rules in article 19 to the PDMRs in the management companies. As stated above, a CIU, and therefore the management company, rarely possess inside information concerning the CIU. The regime of PDMR obligations is a big administrative task, which the investors will pay for, and we do not find it to be proportionate to the information the market will achieve.

ESMA has listed a number of non-exhaustive examples of inside information in CIUs in its Q&A on MAR. However, Finance Denmark believes that further guidance is appropriate within this area. The assessment of whether a piece of information is to be categorized as inside information will always be based on a specific legal assessment. Nevertheless, Finance Denmark finds it useful list further specific examples of situations of inside information within CIUs, based on the different types of risks CIUs encounters.

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.

Finance Denmark does not see a need for MAR Article 19 to cover PDMR obligations to CIUs and their management companies as also stated above to Q58.

The purpose of the reporting obligations in Article 19 is twofold. It is to ensure transparency towards investors and prevent market abuse, in particular insider dealing. Insider dealing may occur when a manager acts based on inside information of the CIU. However, inside information rarely occurs in CIU's and insider dealing is illegal regardless of the obligation to report transactions to the authorities or not. As stated in the ESMA consultation paper, the price of a unit in a CIU is closely related to the portfolio's net asset value (NAV). Therefore, individual events will rarely have an impact on the portfolio's overall value.

It is essential that an appropriate balance is struck between the degree of transparency and the number of notifications made to the market. Finance Denmark

is concerned that the extension of the reporting obligation potentially creates information overload for the investor. Furthermore, extending the requirement entails several additional administrative compliance costs, which are ultimately passed on to the investor.

However, should there be rules on PDMR obligations for CIUs and management companies, these might only be relevant for private equity funds admitted to trading, when the fund acquires control of a non-listed company, c.f. Article 26 etc. in the AIFMD (2011/61). Deciding on such a rule should depend on the amount of CIUs meeting these criteria.

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

Finance Denmark does not agree with ESMA on their preliminary view, and we do not see a need to extend the scope of PDMRs.

Finance Denmark believes that if the definition of "relevant persons" in UCITS/AIFMD were mirrored to the PDMR definition, the scope and PDMR obligations would be widened substantially and would also include employees of a management company, cf. e.g. Article 3(3)(b) of the UCITS directive. Please also see our comments to Q59 above.

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.

As stated in Q59 Finance Denmark is of the opinion that the PDMR obligations should not apply to CIUs and management companies. Within the EU it is important that the same rules apply to European CIUs (UCITS and AIFs) as well as non-European CIUs.

The PDMR obligation should only be applicable for persons with the ability to impact the pricing of the financial instruments, which is not the case for a managing person in a management company as the Net asset value depends on the underlying financial instruments held by a listed fund. Using the definition of "relevant person" in the UCITS/AIFMD would widen the scope significantly, as employees of the management company would also be in scope.

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.

As stated in Q59 Finance Denmark is of the opinion that the PDMR obligations should not apply to CIUs and management companies. As inside information in CIUs rarely occurs, it would not be proportionate to also include depositories and other entities on which the CIU has delegated the execution of certain tasks in the PDMR regime.

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

Finance Denmark is of the opinion that the PDMR obligations should not apply to any CIUs and management companies.
Finance Denmark agrees with ESMA that Article 19(1)(a) should be changed if units in CIUs should be covered, but we do not support such a change.

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

Finance Denmark supports a clarification on the responsibility to the publication of inside information.

For CIUs without legal personality we support that the management company acting on their behalf is responsible for the disclosure of inside information.

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?

Finance Denmark agrees with ESMA's preliminary views that specific obligations are needed for elaborating insider lists related for CIUs. Such obligations should be similar to the ones applicable for financial instruments admitted to trading on an SME growth market, cf. Article 18(6). This would be in line with the principle pf proportionality since inside information in an CIU only rarely occurs.

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.**

Finance Denmark does not have any comments to this question.

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

Finance Denmark does not have any comments to this question.

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.**

Finance Denmark does not have any comments to this question.

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

Finance Denmark supports that NCAs have possibility to cooperate and share information with tax authorities upon request, including an exchange of information across EU.

Without any suggested rules it is difficult to provide concrete comments related to possible obligations for regulated entities. New regulation should not increase administrative, reporting or monitoring requirements to regulated entities.

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.

Finance Denmark agrees with ESMA that there is no need to modify MAR Article 30(1). The use of criminal sanctions should be on Member States own discretion and not regulated in MAR.

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

Finance Denmark does not have comments to this question.