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| 3 October 2019 |

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| Reply form for the Consultation Paper on MAR review report |
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| Date: 3 October 2019 |

Responding to this paper

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

*Instructions*

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

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_CP\_MAR\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

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

**Naming protocol**

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

ESMA\_CP\_MAR\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_MAR\_ESMA\_REPLYFORM or

ESMA\_CP\_MAR\_ANNEX1

***Deadline***

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

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

***Publication of responses***

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

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings ‘Legal notice’ and ‘Data protection’.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Afep |
| Activity | Non-financial counterparty |
| Are you representing an association? |[x]
| Country/Region | France |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

We would like to raise the Following points not addressed in the consultation paper regarding **Delegated Regulation (EU) 2016/1052 of 8 March 2016 on buy-back programmes and stabilisation measures** :

1. **Recital 2 of the Delegated Regulation could be amended to clarify that although transactions in financial derivatives cannot benefit from the exemption granted by MAR, they are not prohibited.** As a matter of fact, buy-back programmes can involve transactions on derivatives instruments. If these transactions cannot benefit from the safe Harbour of MAR they should not be prohibited. Such an amendment would mirror recital 12 of MAR which states that « *Trading in own shares in buy-back programmes and Stabilising a financial instrument which would not benefit from the exemptions under this Regulation should not of itself be deemed to constitute market abuse*. »

**Proposed amendment – Recital (2) of the Delegated Regulation**

« (2) Although Regulation (EU) No 596/2014 allows stabilisation through associated instruments, the exemption for transactions relating to buy-back programmes should be limited to actual trading in the own shares of the issuer and should not apply to transactions in financial derivatives. **However, buy-back programmes involving transactions in financial derivatives should not be prohibited.** »

1. **The drafting of article 4.4 of the Delegated Regulation is more restrictive than the drafting of article 6.2 of Commission Regulation (EC) No 2273/2003of 22 December 2003.**

|  |  |
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| **Commission Regulation 2273/2003** | **Delegated Regulation 2016/1052** |
| 2.Paragraph 1(a) shall not apply if the issuer is an investment firm or credit institution and has established effective information barriers (Chinese Walls) subject to supervision by the competent authority, between those responsible for the handling of inside information related directly or indirectly to the issuer and those responsible for any decision relating to **the trading of own shares (including the trading of own shares on behalf of clients)**, when trading in own shares on the basis of such any decision. | 4. Points (b) and (c) of paragraph 1 shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information by persons having access to inside information concerning directly or indirectly the issuer, including acquisition decisions under the buy-back programme, to persons responsible for **the trading of own shares on behalf of clients**, when trading in own shares on behalf of those clients. |

In article 4.4 of the  Delegated Regulation  (EU) 2016/1052 of 8 March 2016, **the reference to *“persons responsible for the trading of own shares on behalf of clients*” does not address all the situations in which investment firms or credit institutions may have to deal on their own shares when providing services to their clients.** Indeed, beside the situation where they may trade on their own shares *on behalf of their clients*, the situations where the credit institution or the investment firm would act as a counterparty of their clients when trading in own shares should also be mentioned.

As a consequence, during the implementation of a buy-back programme credit institutions and investment firms should not be prevented from trading on their own shares whether on behalf of clients or on proprietary account when « chinese walls » are in place. Therefore we are putting forward the Following amendment to revert to the previous regime :

**Proposed Amendment - Article 4.4 of the Delegated Regulation :**

“ 4.Points (b) and (c) of paragraph 1 shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information by persons having access to inside information concerning directly or indirectly the issuer, including acquisition decisions under the buy-back programme, to persons responsible for the trading of own shares ~~on behalf of~~ **in the context of transactions with** clients, when trading in own shares ~~on behalf of~~ **in the context of transactions with** those clients.”

<ESMA\_COMMENT\_CP\_MAR\_1>

1. Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

<ESMA\_QUESTION\_CP\_MAR\_1>

**We do not consider necessary to extend the scope of MAR to spot FX contracts**. Such an extension would raise many issues without certainty regarding the effectiveness of new regulations that would be established. In this regard, we consider that the FX Global Code of Conduct would better address specific issues relating to FX markets and support ESMA’s view that it might be advisable waiting for the Code to take full effect before deciding to amend existing legislation or develop new legislation.

Extending the scope of MAR would raise, in particular, the following issues:

* **Legal issues** regarding the definition of what would constitute price sensitive information (considering in particular that currencies can be impacted by a variety of factors including political factors) and of who would be the “issuer” and liable for managing and disclosing price sensitive information.
* **Structural issues** for both regulators and market participants. As identified by ESMA in the consultation paper, FX markets are predominantly OTC markets that would not fit into the MAR framework without significant structural changes (please refer also to our answer to Question 2).

Considering these issues and the additional burden that extending MAR would create we don’t see the benefits of such an extension. The misconduct mentioned in the consultation paper have been addressed through enforcement by the relevant competent Authorities and does not call for a strengthening of the regulatory framework.

<ESMA\_QUESTION\_CP\_MAR\_1>

1. Do you agree with ESMA’s preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

<ESMA\_QUESTION\_CP\_MAR\_2>

**We agree with ESMA’s view** regarding the structural changes that would be required to extend the scope of MAR to FX contracts. From our perspective, extending the scope of MAR to FX contracts would **impose disproportionate burden on issuers using FX contracts** to hedge their currency risks and manage their international operations. To allow Competent Authorities and market participants to monitor the transactions, significant investments would be necessary to put in place the systems and controls necessary. Issuers have been dealing since 2012 with EMIR[[1]](#footnote-2) and the related reporting obligations regarding OTC derivatives which generated additional substantial costs and impacted their hedging transactions. Additional constraints could further negatively affect risks management policies implemented by issuers and therefore their operations. **The best way forward would be to continue monitoring implementation of the FX Global Code of Conduct and, as pointed out by ESMA, wait for “*the Code to be more deeply embedded into the market*” and for its review in 2020 before considering any amendment to MAR as regard Spot FX contracts.**

<ESMA\_QUESTION\_CP\_MAR\_2>

1. Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

<ESMA\_QUESTION\_CP\_MAR\_3>

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<ESMA\_QUESTION\_CP\_MAR\_3>

1. Do you agree that the Article 30 of MAR “Administrative sanctions and other administrative measures” should also make reference to administrators of benchmarks and supervised contributors?

<ESMA\_QUESTION\_CP\_MAR\_4>

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<ESMA\_QUESTION\_CP\_MAR\_4>

1. Do you agree that the Article 23 of MAR “Powers of competent authorities” point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

<ESMA\_QUESTION\_CP\_MAR\_5>

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<ESMA\_QUESTION\_CP\_MAR\_5>

1. Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

<ESMA\_QUESTION\_CP\_MAR\_6>

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<ESMA\_QUESTION\_CP\_MAR\_6>

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

<ESMA\_QUESTION\_CP\_MAR\_7>

**Yes, we agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR.**

To benefit from the exemption provided by article 5, issuers shall report each transaction relating to the programme to the competent authority of the trading venue on which the shares have been admitted to trading “*or*” are traded. MAR thus only refers to one competent authority which is the competent authority of the regulated market where the shares have been admitted to trading or, when there has been no admission to trading on a regulated market, the competent authority of the MTF where the shares are traded.

However, in its final report on draft technical standards on the MAR[[2]](#footnote-3), ESMA adopted a very wide interpretation of the reporting requirement: ESMA “*has further considered the approach with respect to the competent authority or authorities to which to report the buyback transactions, as compared to the* [consultation paper]*, and now it is proposing in the final draft RTS that all the transactions relating to the buy-back programme are notified to all the competent authorities of all the trading venues on which the shares are admitted to trading or are traded*.” This interpretation is materialised in article 2 of Delegated Regulation (EU) 2016/1052[[3]](#footnote-4) which requires the issuer to report to the competent authority of each trading venue on which the shares are admitted to trading or are traded.

We consider that **this interpretation goes beyond the requirement of level 1 and imposes unjustified burden on issuers implementing a buy-back programme**.

<ESMA\_QUESTION\_CP\_MAR\_7>

1. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA\_QUESTION\_CP\_MAR\_8>

Although only option 3 requires reporting to one single NCA, **we are in favour of option 2** (“*Reporting to the NCAs of the jurisdictions where the issuer requested admission to trading or, where relevant, approved trading*”).

As a matter of fact, **most of our members have requested admission to trading and are listed on only one regulated market**: the regulated market of the Member State where the company is registered. In practice, this regulated market is still the most relevant market in terms of liquidity. Therefore option 2 would result for most of our members in reporting to only one NCA. Option 2 would also be consistent with the criteria for determining the Home Member State (and the Home NCA) under the Transparency Directive and the Prospectus Regulation, thus allowing companies to deal with only one NCA for all their existing reporting and filing obligations.

<ESMA\_QUESTION\_CP\_MAR\_8>

1. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA\_QUESTION\_CP\_MAR\_9>

**Yes, we agree** that information specified in Article 25(1) and (2) of MiFIR should be removed.

<ESMA\_QUESTION\_CP\_MAR\_9>

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

<ESMA\_QUESTION\_CP\_MAR\_10>

**Yes, we agree with the list of fields to be reported by the issuers to the NCA.**

<ESMA\_QUESTION\_CP\_MAR\_10>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_11>

**Yes, we agree** **that information made public regarding the buyback transactions would be more useful in an aggregated form** (aggregated volume traded and weighted average price paid for the shares in each trading session).

<ESMA\_QUESTION\_CP\_MAR\_11>

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

<ESMA\_QUESTION\_CP\_MAR\_12>

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<ESMA\_QUESTION\_CP\_MAR\_12>

1. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

<ESMA\_QUESTION\_CP\_MAR\_13>

The definition of inside information laid down in MAR has not significantly changed compared to the Market Abuse Directive. The criteria to determine inside information have thus been in force for many years and companies are familiar with these criteria. **We are therefore not in favour of changing the definition of inside information.**

However, **the broad definition of inside information laid down in article 7 of MAR can raise difficulties for issuers in determining the precise nature** of a piece of information particularly in a protracted process. Such a broad definition also leads to legal uncertainty for issuers. The definition of the precise nature of inside information, deals in essence with two aspects:

* The first aspect covers the content of non-public information which may result from “*a set of circumstances or event which exists or have occurred*”.
* The second aspect of the definition of precise information refers to information which may result from “*a set of circumstances or event which may reasonably be expected to exist or to occur in the future where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments*” .

In case of a protracted process, article 7 states that those future circumstances or events, and also the intermediate steps of the process which might bring about those future circumstances or events, may be considered precise information. An intermediate step in a protracted process is deemed to be inside information if, by itself, it satisfies the criteria of inside information.

While the first aspect mentioned above is clear, the second one can create interpretation problems. Unfortunately, European case law does not help to construe and assess a case falling under the second conditions.

A clarification would be useful to reduce legal uncertainty resulting from the low probability rate which might be inferred from the European case law to qualify potential events or circumstances as precise information. This could be made by **issuing guidance to clarify the meaning of a “precise information”**.

<ESMA\_QUESTION\_CP\_MAR\_13>

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

<ESMA\_QUESTION\_CP\_MAR\_14>

**The current definition of inside information is sufficient for combatting market abuse and should not be changed.**

We also consider that the introduction in the MAR of two definitions of inside information as put forward by some stakeholders is not appropriate. This would make the market abuse rules more complicated and raise legal and practical issues (what criteria or conditions would allow to distinguish the different types of information?).

<ESMA\_QUESTION\_CP\_MAR\_14>

1. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA\_QUESTION\_CP\_MAR\_15>

**No, we haven’t identified any information** that would be considered inside information, but which is not covered by the current definition of inside information.

<ESMA\_QUESTION\_CP\_MAR\_15>

1. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA\_QUESTION\_CP\_MAR\_16>

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<ESMA\_QUESTION\_CP\_MAR\_16>

1. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA\_QUESTION\_CP\_MAR\_17>

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<ESMA\_QUESTION\_CP\_MAR\_17>

1. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

<ESMA\_QUESTION\_CP\_MAR\_18>

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<ESMA\_QUESTION\_CP\_MAR\_18>

1. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

<ESMA\_QUESTION\_CP\_MAR\_19>

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<ESMA\_QUESTION\_CP\_MAR\_19>

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

<ESMA\_QUESTION\_CP\_MAR\_20>

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<ESMA\_QUESTION\_CP\_MAR\_20>

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

<ESMA\_QUESTION\_CP\_MAR\_21>

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<ESMA\_QUESTION\_CP\_MAR\_21>

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

<ESMA\_QUESTION\_CP\_MAR\_22>

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<ESMA\_QUESTION\_CP\_MAR\_22>

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

<ESMA\_QUESTION\_CP\_MAR\_23>

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<ESMA\_QUESTION\_CP\_MAR\_23>

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

<ESMA\_QUESTION\_CP\_MAR\_24>

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<ESMA\_QUESTION\_CP\_MAR\_24>

1. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

<ESMA\_QUESTION\_CP\_MAR\_25>

MAR has strengthened the rules regarding the delay of the disclosure of inside information. If the conditions to meet in order to delay the disclosure have not changed (immediate disclosure is likely to prejudice the legitimate interests of the issuer ; delay of disclosure is not likely to mislead the public ; the issuer is able to ensure the confidentiality of that information), more stringent requirements regarding notification of the delay and justification of the reasons for the delay have shed a new light on interpretation and compliance with these conditions.

In this regard, **we would like to highlight the following issues:**

* **The second condition mentioned above (delay of disclosure is not likely to mislead the public) should be clarified** since inside information, by definition, is expected to have a significant influence on the decisions by investors to trade on securities. In theory, any delay could potentially mislead the public. It is also very difficult for issuers to assess beforehand the potential effect of any piece of inside information on the prices of financial instruments. Issuers have pointed out, in particular, the case where information becomes obsolete. **MAR should expressly address the situation where inside information becomes obsolete and does not require any disclosure** (e.g.: where a planned M&A transaction whose announcement has been delayed pursuant to article 17 is cancelled).
* Another issue with the delay rules is the fact that **issuers have to react to rumours**. ESMA’s interpretation of this provision of MAR is that the leak of the rumour does not have to necessarily come from the sphere of the issuer in order to trigger the duty to disclose the inside information: “*Article 17(7) does not mention that the leak of the rumour has to come from the sphere of the issuer in order to trigger the duty to disclose the inside information as soon as possible.*”[[4]](#footnote-5) According to this interpretation, issuers could face the risk that a legitimately delayed information must be disclosed prematurely because of rumours stemming from external sources. **The review of MAR should address this problem by clarifying that the leak should be new, sufficiently precise, persistent and have an impact on the price of the financial instruments of the issuer to trigger the obligation to disclose inside information**, otherwise a no comment policy is possible.
* Finally, **we strongly advocate for the removal of the provision laid down in the last paragraph of article 17.4 of MAR** **requiring any issuer who has delayed the disclosure of inside information to inform the competent authority that disclosure of the information was delayed and to provide a written explanation of how the conditions allowing the delay were met**. As mentioned above, assessing in particular whether the delay will or will not be misleading is a critical issue. This could result in issuers, in order to protect themselves against any liability, either to overwhelm the competent authorities with notifications or refrain from notifying. In this regard, the “SME listing package” Regulation amends MAR by introducing an exemption for issuers whose financial instruments are only admitted to trading on an SME growth market : these issuers shall provide a written explanation to the competent authority only upon request and, as long as, they are able to justify their decision to delay, it shall not be required to keep a record of that explanation. **This exemption should apply to all issuers listed on regulated markets and MTFs.**

As regards rumours and whether issuers should comment, we are aware that some stakeholders advocate for introducing a test based on quantitative criteria (price or volume fluctuations). In our view, such a test would not make sense and we are strongly opposed to it.

<ESMA\_QUESTION\_CP\_MAR\_25>

1. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

<ESMA\_QUESTION\_CP\_MAR\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_26>

1. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

<ESMA\_QUESTION\_CP\_MAR\_27>

**We are not in favour of the inclusion of requirements in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information.** MAR has already resulted in a complex regulation with heavy bureaucratic and burdensome procedures. Introducing requirements for identifying, handling and disclosing inside information would only create unjustified additional burden. Issuers should be able to decide how to organise themselves considering their size and the nature of their business. In this regard, we support the position of EuropeanIssuers.

<ESMA\_QUESTION\_CP\_MAR\_27>

1. Please provide examples of cases in which the identification of when an information became “inside information” was problematic.

<ESMA\_QUESTION\_CP\_MAR\_28>

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<ESMA\_QUESTION\_CP\_MAR\_28>

1. Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

<ESMA\_QUESTION\_CP\_MAR\_29>

We disagree and consider that **there should not be any obligation to notify NCAs of the delay of disclosure of inside information, when this information loses its inside nature** following the decision to delay the disclosure.

<ESMA\_QUESTION\_CP\_MAR\_29>

1. Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

<ESMA\_QUESTION\_CP\_MAR\_30>

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<ESMA\_QUESTION\_CP\_MAR\_30>

1. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

<ESMA\_QUESTION\_CP\_MAR\_31>

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<ESMA\_QUESTION\_CP\_MAR\_31>

1. Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

<ESMA\_QUESTION\_CP\_MAR\_32>

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<ESMA\_QUESTION\_CP\_MAR\_32>

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

<ESMA\_QUESTION\_CP\_MAR\_33>

**Yes, we agree with the proposed amendments but on the condition that these amendments only apply where market soundings imply the transmission of inside information.** We also support in this regard AMAFI’s position.

Clarifications would also be welcome regarding the “full protection” that could be granted to disclosing market participants and mentioned in paragraph 148 of the consultation paper (“*confirm the fact that DMPs carrying out market soundings in accordance with the relevant requirements should be granted full protection*…”). Would that be an irrebuttable presumption that the DMP is not committing a market abuse?

<ESMA\_QUESTION\_CP\_MAR\_33>

1. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

<ESMA\_QUESTION\_CP\_MAR\_34>

**Yes, we consider that some limitation should be introduced. The current scope of market sounding is too wide** and we believe that policymakers should return to the original definition as illustrated in recital (33) of MAR and involving the sale of securities by an intermediary and the need to gauge potential investor interest to determine the price. In this regard, limitations could be introduced in two different ways:

**1/ By excluding certain transactions** as foreseen by the “SME listing package” Regulation regarding private placements of debt securities and in particular Euro PPs. Furthermore, the transactions referred to in article 11.2 of MAR (merger and take-over bid) should also be excluded (please refer to our answer to Question 37). We recommend **amending Article 11 to explicitly exclude from the scope of market sounding communication of information in order to offer a deal or a transaction to one or more potential counterparties.**

**2/ By restricting the market sounding regime to entities providing investment services** as defined by MiFID 2[[5]](#footnote-6). Entities providing only ancillary services should not be included in the scope (entities providing for instance advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings). This would clarify the scope of MAR in line with the interpretation adopted by the French financial markets and prudential authorities (AMF and ACPR)[[6]](#footnote-7).

<ESMA\_QUESTION\_CP\_MAR\_34>

1. What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?

<ESMA\_QUESTION\_CP\_MAR\_35>

**We consider that where interactions happen at a very early stage or, on the contrary at a very late stage, it makes no sense to apply market sounding regime.**

<ESMA\_QUESTION\_CP\_MAR\_35>

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

<ESMA\_QUESTION\_CP\_MAR\_36>

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<ESMA\_QUESTION\_CP\_MAR\_36>

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

<ESMA\_QUESTION\_CP\_MAR\_37>

Currently, article 11 sets forth that “*Without prejudice to Article 23(3), disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company to parties entitled to the securities, shall also constitute a market sounding, provided that:*

1. *the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities; and*
2. *the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger*.”

These two tests do not appear very clear. As a consequence, we recommend to provide for a more general caveat for market sounding in this context and clarify that **the market sounding rules do not include communication of information made to a limited number of persons in view of gauging their interest in and preparing a take-over bid or a merger**, provided confidentiality of the information is maintained.

At the very least, the potential discussions between a bidder and the owners of blocks of shares in a listed company which may lead to block sales to be completed prior to the launching of a tender offer or to the entering into tender commitments also prior to the launching of the tender offer should not fall within the definition of market sounding, as such discussions clearly aim at securing contractual undertakings from such shareholders instead of merely gauging their interest.

<ESMA\_QUESTION\_CP\_MAR\_37>

1. Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

<ESMA\_QUESTION\_CP\_MAR\_38>

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<ESMA\_QUESTION\_CP\_MAR\_38>

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

<ESMA\_QUESTION\_CP\_MAR\_39>

We could agree that insider lists can be a useful tool for NCAs when carrying out investigations. But if the purpose is to allow easy and rapid identification of the persons having access to inside information, we consider that **the content of such lists could be reduced to information essential to identify the persons**. We believe that where necessary NCAs have the powers to require any additional information they deem useful regarding the persons included in an insider list. **The establishment and management of insider lists have become very burdensome, especially for non-financial companies.**

<ESMA\_QUESTION\_CP\_MAR\_39>

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

<ESMA\_QUESTION\_CP\_MAR\_40>

**The management of insider lists is burdensome and time consuming considering the amount of information to be collected** **and the processes which must be put in place by issuers**, without clear evidence of the usefulness or effectiveness of these lists. In particular, some information required by Implementing Regulation (EU) 2016/347 such as the time when the inside information was identified and when the persons obtained access to inside information, as well as personal details of the concerned persons, raise issues both in practical and legal terms (privacy).

**In this regard, Afep recommends to revert to the requirements applicable under the MAD[[7]](#footnote-8)** where only a limited number of information was required on the list (first and family name of the persons, reason for being on the list and dates at which the persons are included or removed from the list) and additional information could be requested in the case of investigations by Competent Authorities and collected by issuers. In the course of any investigation, one of the most important steps for Competent Authorities is to rapidly identify the persons holding inside information. Authorities have then the powers, in accordance with article 23 of MAR, to require any additional information relevant to the investigation.

**The content of insider lists should therefore be reduced to information essential to identify the persons** holding inside information: First name, Family name, Date of birth, Professional details (address, phone number and position).

<ESMA\_QUESTION\_CP\_MAR\_40>

1. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA\_QUESTION\_CP\_MAR\_41>

We cannot answer for our members since the changes involved would vary depending on the organization of each company. **However, we are opposed to any additional requirements that would add more burden to companies.** Companies should not be required to verify who on the insider list has actually accessed inside information. Such a requirement would unduly transfer the duties of the NCAs to public companies.

<ESMA\_QUESTION\_CP\_MAR\_41>

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

<ESMA\_QUESTION\_CP\_MAR\_42>

**We agree with ESMA to expand the scope of Article 18(1) of MAR** 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, such as auditors. In France according to the interpretation of the AMF, auditors are already included in insider lists. However any amendment to article 18 of MAR in this regard **should be clearly drafted to exclude counterparties of a transaction**: for instance, in an M&A transaction the selling company should not have to include in its insider list persons working for or acting on behalf or for the account of the purchasing company.

<ESMA\_QUESTION\_CP\_MAR\_42>

1. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

<ESMA\_QUESTION\_CP\_MAR\_43>

**We consider that the permanent insider section of insider lists is useful and should be maintained** because it helps alleviate the burden of establishing and updating insider lists.

<ESMA\_QUESTION\_CP\_MAR\_43>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_44>

**Yes, we agree with ESMA and consider that article 18 of MAR should be amended** to specify that the issuer can include in its insider list one contact natural person for each legal person acting on behalf or for the account of the issuer. This practice is already implemented in France.

<ESMA\_QUESTION\_CP\_MAR\_44>

1. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA\_QUESTION\_CP\_MAR\_45>

Please refer to our answer to Question 40.

<ESMA\_QUESTION\_CP\_MAR\_45>

1. Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

<ESMA\_QUESTION\_CP\_MAR\_46>

**We suggest raising the thresholds to 50,000 euros.**

As regards the scope of the transactions to be notified, we consider that the threshold is not the only/main issue :

* **Narrow down the scope of transactions**

The notification of managers’ transactions under MAR have become over burdensome, in particular due to the extension of the scope of notification to transactions that were previously excluded under MAD and must now be notified.

Managers’ and closely associated persons’ transactions notifications should only be regarded as a preventive measure and not as a means of informing the public and investors. The paradox would be that investors would pay more attention to transactions notifications than to other regulated information disclosed by public companies (e.g. financial reports published under the Transparency Directive). The increase in the volume of notifications is thus counterproductive and diminishes the efficiency of this preventive measure. Therefore, transactions which do not provide any signal to the markets should not be notified (e.g. donations, inheritances). It should also be clarified that no notification is required for shares granted for free and stock-options at the time of their allocation: the moment shares are granted to persons discharging managerial responsibilities (PDMRs) should not be notified since there is no decision by the PDMR and hence no signalling value for the markets. The same rationale applies when the shares are vested (ie when performance conditions are met). Notification should only happen when the shares are sold. Likewise, no notification should be required when stock-options are granted. Only the exercise of the option and the disposal of the underlying securities should be notified. A different interpretation would imply a duplication of notifications and unjustified additional burden for the issuer (see table below).

**Events triggering the notification of performance shares and stock-options**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Award** | **Vesting** | **Exercise** | **Delivery** | **Disposal** |
| Performance shares | No | No |  | No | Yes |
| Stock-options | No | No | Yes | No | Yes |

Based on the same rationale, acquisition and subscription of securities offered under employee savings plan/scheme should be excluded from the scope of the notification requirement. This would be consistent with the possibility for issuers under article 19.12 (b) to exempt PDMR from the prohibition to trade during closed period “*due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme*”. In France, investments in employee savings schemes are locked for a period of 5 years to benefit from a tax-relief regime. Notifying the investment would not bring meaningful information to the markets.

Finally, full harmonisation of the content of the notifications would be welcome. As a matter of fact, and although Implementing Regulation (EU) 20165/523[[8]](#footnote-9) provides for a template, some Member States require additional information or a different format**.**

* **Exempt companies from drawing up and keeping lists of persons closely associated**

Article 19 of MAR requires companies to gather very sensitive information from PDMRs relating to their personal life and to maintain this information up-to-date. This requirement is burdensome considering the number of PDMRs and closely associated persons concerned.

To remedy this situation, we suggest reverting to the pre-MAR situation, where PMDRs would no longer be required to intermediate in transferring the information on the trades made by closely related persons to the issuer. This way, issuers would not be obliged to keep the lists of PMDRs’ closely related persons. An alternative solution would be to require issuers to draw such a list only where requested by a Competent Authority in the course of an investigation.

* **Clarify the definition of persons closely associated**

We would welcome a clarification of the definition of persons closely associated (article 3 (26) of MAR) to exclude the case of PDMR of an issuer who are also members of the board of other issuers.

<ESMA\_QUESTION\_CP\_MAR\_46>

1. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA\_QUESTION\_CP\_MAR\_47>

Please refer to our answer to Question 46 regarding the threshold.

<ESMA\_QUESTION\_CP\_MAR\_47>

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

<ESMA\_QUESTION\_CP\_MAR\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_48>

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

<ESMA\_QUESTION\_CP\_MAR\_49>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_49>

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

<ESMA\_QUESTION\_CP\_MAR\_50>

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<ESMA\_QUESTION\_CP\_MAR\_50>

1. Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

<ESMA\_QUESTION\_CP\_MAR\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_51>

1. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

<ESMA\_QUESTION\_CP\_MAR\_52>

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<ESMA\_QUESTION\_CP\_MAR\_52>

1. Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

<ESMA\_QUESTION\_CP\_MAR\_53>

**In our view, there is no element of article 19(11) that needs to be amended.**

<ESMA\_QUESTION\_CP\_MAR\_53>

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

<ESMA\_QUESTION\_CP\_MAR\_54>

**The current framework to identify the closed period is working well** and does not need to be amended.

<ESMA\_QUESTION\_CP\_MAR\_54>

1. Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

<ESMA\_QUESTION\_CP\_MAR\_55>

**We are opposed to the extension of the requirement of article 19(11) to issuers.**

We don’t see any benefits in extending closed periods to issuers. Furthermore the impact of such extension on the exemption provided by article 4.2 of delegated regulation (EU) 2016/1052 regarding share buy-back programmes is not clear and should be explained, if any.

As regards the downsides of such an extension, we insist on the fact that **corporate issuers already have a limited number of issuing “windows” throughout the year**. In practice, issuers have a “blocking” period in place before the publication of their results. Imposing a closed period of 30 days would significantly **reduce potential issuing windows especially for debt securities** (most of our members have EMTN programmes running year-round). As a result, there could be a concentration of all issuances in a narrow market time frame with **negative impacts on the markets with higher volatility, the price of the securities and the terms of issuances and the capacity of potential investors to absorb the issuances**.

<ESMA\_QUESTION\_CP\_MAR\_55>

1. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA\_QUESTION\_CP\_MAR\_56>

Article 19.12 of MAR states that: “*Without prejudice to Articles 14 and 15, an issuer may allow a person discharging managerial responsibilities within it to trade on its own account or for the account of a third party during a closed period as referred to in paragraph 11 either:*

1. *on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or*
2. *due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change”.*

Article 9 of Delegated Regulation (EU) 2016/522[[9]](#footnote-10) specifies the transactions which can be authorised by the issuer during closed periods. However, **this article lacks of clarity and issuers question whether transactions such as subscriptions to a capital increase reserved for employees or allocations of amounts paid under profit-sharing or incentive schemes to employee savings plans are included in the scope of Article 9.** Part of the issue also comes from the fact that the French Competent Authority, the AMF, published guidance recommending to apply article 19.11 of MAR and the closed period rules to all persons who have access to inside information occasionally or regularly.

**In our view, even if PDMRs hold inside information, they should be able to subscribe or take allocation decisions** since:

* The transactions mentioned above are addressed, under the provisions of Labor law, to all employees of the issuer;
* These transactions are planned well in advance and PDMRs and employees have no control over the choice of the subscription period;
* The shares subscribed are blocked for several years (generally 5 years except in the event of release), which neutralises the effects of the holding of inside information;
* In certain cases, the shares may be released by regular payments or regular deductions from wages, which precludes their sale during this period;
* There is a time gap between the date of subscription and the date of allocation of the shares in the savings plans, so that their allocation may occur at a time when the information has been made public.

**Article 9 of delegated Regulation (EU) 2016/522 should be amended** to expressly cover these transactions. ESMA should furthermore ensure consistent implementation of MAR by Competent Authorities to avoid requirements going beyond the provisions laid down in the regulation.

<ESMA\_QUESTION\_CP\_MAR\_56>

1. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

<ESMA\_QUESTION\_CP\_MAR\_57>

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<ESMA\_QUESTION\_CP\_MAR\_57>

1. Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.

<ESMA\_QUESTION\_CP\_MAR\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_58>

1. Do you agree with ESMA’s preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs.

<ESMA\_QUESTION\_CP\_MAR\_59>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_59>

1. Do you agree with ESMA’s preliminary view? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_60>

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<ESMA\_QUESTION\_CP\_MAR\_60>

1. What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of “relevant persons” would be adequate for CIUs other than UCITs and AIFs.

<ESMA\_QUESTION\_CP\_MAR\_61>

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<ESMA\_QUESTION\_CP\_MAR\_61>

1. ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.

<ESMA\_QUESTION\_CP\_MAR\_62>

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<ESMA\_QUESTION\_CP\_MAR\_62>

1. Do you agree with ESMA’s conclusion? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_63>

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<ESMA\_QUESTION\_CP\_MAR\_63>

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

<ESMA\_QUESTION\_CP\_MAR\_64>

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<ESMA\_QUESTION\_CP\_MAR\_64>

1. Do you agree with ESMA’s preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?

<ESMA\_QUESTION\_CP\_MAR\_65>

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<ESMA\_QUESTION\_CP\_MAR\_65>

1. Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

<ESMA\_QUESTION\_CP\_MAR\_66>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_66>

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

<ESMA\_QUESTION\_CP\_MAR\_67>

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<ESMA\_QUESTION\_CP\_MAR\_67>

1. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

<ESMA\_QUESTION\_CP\_MAR\_68>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_68>

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

<ESMA\_QUESTION\_CP\_MAR\_69>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_69>

1. Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_70>

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<ESMA\_QUESTION\_CP\_MAR\_70>

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

<ESMA\_QUESTION\_CP\_MAR\_71>

We consider that **the quantum of sanctions laid down in MAR are not appropriate**. More precisely, we consider that **it is not appropriate to determine the sanctions on the basis of a percentage of a company’s total turnover**, as is the case in competition matters.

Regarding in particular the sanctions applicable to legal persons for infringements to **article 14 (insider trading) and 15 (market manipulation) of MAR**, **sanctions should be determined on the basis of the profits realised or loss avoided.**

As regards the sanctions for infringements to **article 17 (disclosure of inside information)**, **determining the sanctions on the basis of a percentage of a company’s total turnover appears disproportionate**, considering the complexity of the regime imposed by MAR regarding the delay of disclosure to the public of inside information. In such cases, MAR should set a minimum and maximum amount and allow Competent Authorities to determine the sanction based on the effects or consequences of not timely disclosing inside information – and provided that there is no other breach of regulations.

Finally, as regards infringements to article 18 (insider list) and 19 (managers’ transactions notifications), we consider that the EUR 1 million floor is also disproportionate and should be lowered – provided also that there is no other breach.

<ESMA\_QUESTION\_CP\_MAR\_71>

1. Regulation (EU) n°648/2012 of the European Parliament and of the Council of 4 July 2012 amended. [↑](#footnote-ref-2)
2. 28 September 2015|ESMA/2015/1455. [↑](#footnote-ref-3)
3. Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures. [↑](#footnote-ref-4)
4. Final Report on Draft technical standards on the Market Abuse Regulation (ESMA 2015/1455, § 243). [↑](#footnote-ref-5)
5. Investment services and activities defined in Section A of Annex I of Directive 2014/65/EU of 15 may 2014 on markets in financial instruments. [↑](#footnote-ref-6)
6. Position paper dated March 14, 2018 (AMF – DOC-2018-03). [↑](#footnote-ref-7)
7. Article 5 of Directive 2004/72/EC of 29 April 2004 implementing MAD required inclusion in the list of information regarding the identity of any person having access to inside information; the reason why any such person is on the list; the date at which the list of insiders was created and updated. [↑](#footnote-ref-8)
8. Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council. [↑](#footnote-ref-9)
9. Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014. [↑](#footnote-ref-10)