esma European Securities and Markets Authority

Reply form for the Consultation Paper on MAR review report

3 October 2019

European Securities and Markets Authority

Date: 3 October 2019

Responding to this paper

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

Instructions

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

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

Responses are most helpful:

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

Naming protocol

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

ESMA_CP_MAR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

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

ESMA_CP_MAR_ESMA_REPLYFORM or

ESMA_CP_MAR_ANNEX1

Deadline

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

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

Publication of responses

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

Data protection

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

General information about respondent

Name of the company / organisation	BDEW German Association of Energy and Water Industries
Activity	Non-financial counterparty
Are you representing an association?	☒
Country/Region	Germany

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
TYPE YOUR TEXT HERE
<ESMA_COMMENT_CP_MAR_1>

Q1. Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

<ESMA_QUESTION_CP_MAR_1>

The scope of MAR should not be extended to spot FX contracts.

FX spot contracts are not financial instruments pursuant Article 10 of Commission Delegated Regulation (EU) (EU) 2017/565 and see no need to include these contracts and more generally physical gas/power products into the scope of MAR. In particular, BDEW agrees with ESMA's arguments discouraging extending the scope of MAR to spot FX contracts (page 15-16).

In general, BDEW does not support the inclusion of physical products (be it spot or forward) in financial regulation will lead to duplicative regulatory obligations and/or restrictions (e.g. overlap between MAR and REMIT or MAR and BMR). Market infrastructure and dynamics may differ significantly and therefore any inclusion of physical products in the scope of MAR should be considered very carefully.

<ESMA_QUESTION_CP_MAR_1>

Q2. Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

<ESMA_QUESTION_CP_MAR_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_2>

Q3. Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

<ESMA_QUESTION_CP_MAR_3>
The difference between the MAR and BMR does not raise a market abuse risk.
<ESMA_QUESTION_CP_MAR_3>

Q4. Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?

<ESMA_QUESTION_CP_MAR_4>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_4>

Q5. Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

<ESMA_QUESTION_CP_MAR_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_5>

Q6. Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

<ESMA_QUESTION_CP_MAR_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_6>

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

<ESMA_QUESTION_CP_MAR_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_7>

Q8. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA_QUESTION_CP_MAR_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_8>

Q9. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA_QUESTION_CP_MAR_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_9>

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

<ESMA_QUESTION_CP_MAR_10>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_10>

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

<ESMA_QUESTION_CP_MAR_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_11>

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

<ESMA_QUESTION_CP_MAR_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_12>

Q13. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

<ESMA_QUESTION_CP_MAR_13>

As far as this question relates to the general definition of inside information under Article 7(1)(a) MAR, BDEW would like to highlight that the general definition seems rather wide and vague. Therefore, it would, if applied to commodity derivatives markets, impose significant uncertainties for market participants as to if and at which point of time information will constitute inside information in relation to commodity derivatives.

BDEW proposes that the general definition should be narrowed as it is open for an extremely wide interpretation. It currently creates a high level of uncertainty for issuers of securities (corporates). As a consequence, issuers are not only under the constant risk of being forced to premature disclosures. The broad interpretation also blocks issuers' possibility to raise capital, causes difficulties with employee participation schemes and generally increases compliances duties to inappropriate levels. In this context it is important to acknowledge, that commodity firms are not issuers of commodity derivatives nor EUAs and derivatives therefore traded on OTC markets and regulated markets.

BDEW considers the specific definition of inside information for commodity derivatives under Article 7(1)(b) MAR appropriate, as it recognises the structural difference between information on an issuer of securities and a commodity derivative contract or the underlying commodity markets to this contract.

However, with regard to the specific definition of inside information for emission allowances under Article 7(1)(b) MAR, BDEW sees the need for amendments to address the following issues:

It is still unclear for gas and power market participants under Article 2(7) what constitutes 'inside information' in relation to emission allowances under the definition of Article 7(1)(c) MAR, which is not already covered by the definition of inside information under Article 2(1) REMIT. It is the experience that all relevant insider information concerning emission allowances markets and derivatives thereof, as well as concerning physical and derivative gas and power markets is already sufficiently covered and published under REMIT. The emission market prices are mainly influenced by macro-economic information and EU Member States' policy decisions (e.g. EU Emissions Trading System (ETS) revision, nuclear phase out, amount of certified emission reductions (CERs) that could be taken into account in the EU). Usually industrial emitters hold little non-public information that would be relevant in relation to the price developments of emission allowances and their derivatives. Most of the planned and unplanned shutdowns of production, storage, transmission and other facilities have no or no significant effect on price formation in emission markets, as these industrial installations are not large enough to impact the wider market. In any case such non-availabilities are already covered by the REMIT definition of inside information and consequential disclosure obligations. Hence, wholesale energy market participants under REMIT have difficulties in identifying further information held by them in respect of emission allowances and derivatives thereof.

In addition, it is important to recognize, that the publication of inside information under REMIT is sufficient also for the purpose of the MAR disclosure obligation for inside information as Article 2(2) of Implementing Regulation (EU) 2016/1055 recognises it also for the purpose of compliance with the disclosure obligation under Article 17(2) MAR.

Nevertheless, wholesale energy market participants have to comply with the MAR definition at the same time although it does not cover additional price-relevant inside information. Therefore, BDEW believes that the current definition of 'inside information' in relation to emission allowances of MAR creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants and this without any obvious benefits.

Therefore, we propose to introduce a reference to the definition of inside information under REMIT into the definition of Art. 7(1)(c) MAR to avoid these adverse consequences for wholesale energy market participants. This would mean that wholesale energy market participants would have to comply exclusively with the MAR provision on insider information applying the lex specialis REMIT definition of insider information regarding emission allowances and derivatives thereof. This approach substantially reduces complexity for the real economy.

Furthermore, this current complexity is even increased by the defined thresholds under Article 7(4) and 17(2) MAR, which determine which emission allowance market participants (EAMPs) are subject to the insider regime under MAR. The thresholds for EAMPs, defined as per Article 5 of Regulation (EU) No 2016/522, are set at a rather low level, both in respect of the emission threshold of 6 million tonnes a year as well as the thermal rated threshold of 2430 MW. Especially with the threshold for the rated thermal input, it is rather

easy to exceed the threshold, even though a market participant may have only a mix of smaller CCGTs with relatively low emissions. This may also be the result of an asset owner operating many small installations independently from one another but of which the combined MW capacity exceeds the threshold set at group level. While such asset owner/operator may exceed the MW threshold in total, and therefore be subject to the disclosure obligations, the small size of some installations will likely not mean that the information about the capacity and utilization will have no or no significant price effect upon the market for emissions allowances.

Imposing additional disclosure requirements to EAMPs without relevance to investors' decisions seems unnecessary. Therefore, the threshold for an exemption of such requirements should be increased and/or apply to the existing thresholds at single power plants /resp. facilities level instead of group level.

Please also see our response to question 44.
<ESMA_QUESTION_CP_MAR_13>

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

<ESMA_QUESTION_CP_MAR_14>

Yes, all current definitions of inside information under Article 7(1) MAR are sufficient for combatting market abuse, in particular to prevent insider trading. However, as stated under Q 13, BDEW considers an even more restrictive definition as more appropriate.

<ESMA_QUESTION_CP_MAR_14>

Q15. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA_QUESTION_CP_MAR_15>

BDEW has not identified such missing (price relevant) information in any of the definitions of inside information under Article 7(1) MAR.

<ESMA_QUESTION_CP_MAR_15>

Q16. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA_QUESTION_CP_MAR_16>

No, BDEW has not identified (price relevant) information which is not covered by the current definition of inside information relating to commodity derivatives.

However, as mentioned above under Q13, it is our experience that all relevant inside information concerning emission allowances markets and derivatives as well as concerning the physical and derivative gas and power markets is already sufficiently covered and published under REMIT.

Therefore, the current MAR definition of 'inside information' in relation to parts of the commodity markets, i.e., the emission allowances as well as gas and power markets, creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants subject to REMIT. The coherence of the definition of inside information in respect of commodity derivatives under both MAR and REMIT is of utmost importance as wholesale energy market participants are both active in physical and financial markets, in particular to hedge their commercial physical positions. Hence, wholesale energy market participants should only implement one comprehensive market abuse framework covering both relevant physical and financial instruments, which should be constructed based on the same principles and policies. Information that is not (incl. own's trading strategy and plans) inside information under REMIT, should not constitute inside information under MAR either.

Therefore, we propose to introduce a reference to the definition of inside information under REMIT into the definition of Art. 7(1)(b) MAR to avoid these adverse consequences for wholesale energy market participants. This would mean that wholesale energy market participants would have to comply exclusively with the lex specialis REMIT definition of insider information regarding emission allowances and derivatives thereof as well as physical and derivative power and gas markets. This approach substantially reduces complexity for the real economy.

<ESMA_QUESTION_CP_MAR_16>

Q17. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA_QUESTION_CP_MAR_17>

The 4th element of the definition of inside information in relation to commodity derivatives, namely that relevant information must be disclosable, is retained. The definition of inside information in relation to commodity derivates and the additional criteria that it should relate to disclosable information to be made public, is important to allow commodity producers to reduce their commercial risks via commodity derivatives transactions.

The EU legislators have agreed to retain the additional condition, already mentioned in the previous MAD, that the inside information has to be reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets (hereinafter 'the disclosability criterion'). These specific reasons for this agreement, which were mentioned by the EU Commission in its legislative MAR proposal and MAR impact assessment, are still valid.

The differences between commodities derivatives and security markets justify different approaches to the regulation of (mis)use of inside information. The main difference is that commodity market participants must be able to hedge their production needs and commodity price risks. It is therefore critical, that no general disclosure obligation (i.e., requiring the disclosure of all inside information relating to commodity markets irrespective of the disclosability criterion) is in place. In particular, the disclosability criterion prevents any general disclosure obligation that requires making public all inside information.

It is not conceivable that any such obligation could be imposed, given the variety of possible underlying commodities and the global nature of the markets. Commodity firms, including energy utilities, miners, oil and gas producers, growers, refiners, farmers, etc., are all engaged in commerce and trade. That essentially involves holding information, which is relevant to existing or anticipated production and to quality, storage and supply levels.These parties will use that information in order to determine their trading and risk management needs and to fulfil their deliveries.

Otherwise, such a general disclosure obligation would dramatically restrict the ability of physical market participants to hedge. This would lead to overall increased costs of trading and production for those participants and therefore increased costs for end consumers. Hedging by commodity producers and other market participants is a commercially prudent strategy that reduces risk in the real economy; this risk management should not be disincentivised by regulation.

Similarly to REMIT, MAR should recognise that in respect of commodity producers and their group companies, one's own trading plans and strategy do not constitute inside information (see also recital 12 of REMIT[1] and section 5.2. of ACER REMIT Guidance). Industrial groups often have a company within their structure that acts as central access to the commodity markets for the entire industrial commodity group in order to externalise physical flows and related financial hedges. The overall trading plan and strategy of such industrial groups should be recognised as not constituting inside information, subject to the

[1] REMIT, recital 12: *The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. Information regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.*

condition that information barriers are in place within relevant group entities in compliance with REMIT obligations.

<ESMA_QUESTION_CP_MAR_17>

Q18. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

<ESMA_QUESTION_CP_MAR_18>

BDEW is not aware of any material hedging difficulties and from that perspective does not see a need to change the current definition of Article 7(1)(b) of MAR.

The current definition of inside information of commodity derivatives under REMIT does allow wholesale energy market participants, to effectively hedge their physical activities as (i) any information in respect of their installations is already subject to REMIT disclosure obligations and (ii) both REMIT and ACER have explicitly stipulated that one's own trading plans and strategies do not constitute insider information. This covers one's hedging strategy in respect to its physical assets.

<ESMA_QUESTION_CP_MAR_18>

Q19. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

<ESMA_QUESTION_CP_MAR_19>

The general definition of inside information of Article 7(1)(a) of MAR should not be used for commodity derivatives. The same reasons apply as explained in the response to Q13 and 17.

<ESMA_QUESTION_CP_MAR_19>

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

<ESMA_QUESTION_CP_MAR_20>

There is no need to change the scope of the current framework.

<ESMA_QUESTION_CP_MAR_20>

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

<ESMA_QUESTION_CP_MAR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_21>

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

<ESMA_QUESTION_CP_MAR_22>

It should be made clear, that hedging activities of commodity firms should not be defined as prohibited pre-hedging under MAR. From a commodity market participant perspective, pre-hedging is normal market practice. This is a legitimate and necessary practice because commodity firms should be able to implement their own plans and strategies for trading, production and hedging. Like under REMIT (see recital 12, sentence 3 of REMIT), information regarding the market participant's own plans and strategies for trading should not be considered as inside information. For example, energy utilities must be able to implement their own plans and strategies for their power production and for this purpose able to procure all necessary commodities and emission allowances at any point in time to run their power plants and to sell the power (to be) produced and this on any (spot and future) commodity markets. It allows commodity market participants for example to lock-in a price of anticipated physical oil, power or gas products transactions and to protect these anticipated physical flows from adverse price fluctuations.

<ESMA_QUESTION_CP_MAR_22>

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

<ESMA_QUESTION_CP_MAR_23>

See the response to Q 22.

<ESMA_QUESTION_CP_MAR_23>

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

<ESMA_QUESTION_CP_MAR_24>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_24>

Q25. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

<ESMA_QUESTION_CP_MAR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_25>

Q26. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

<ESMA_QUESTION_CP_MAR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_26>

Q27. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

<ESMA_QUESTION_CP_MAR_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_27>

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

<ESMA_QUESTION_CP_MAR_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_28>

Q29. Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

<ESMA_QUESTION_CP_MAR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_29>

Q30. Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

<ESMA_QUESTION_CP_MAR_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_30>

Q31. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

<ESMA_QUESTION_CP_MAR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_31>

Q32. Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

<ESMA_QUESTION_CP_MAR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_32>

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

<ESMA_QUESTION_CP_MAR_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_33>

Q34. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

<ESMA_QUESTION_CP_MAR_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_34>

Q35. What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?

<ESMA_QUESTION_CP_MAR_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_35>

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

<ESMA_QUESTION_CP_MAR_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_36>

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

<ESMA_QUESTION_CP_MAR_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_37>

Q38. Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

<ESMA_QUESTION_CP_MAR_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_38>

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

<ESMA_QUESTION_CP_MAR_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_39>

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

<ESMA_QUESTION_CP_MAR_40>

The current insider list regime is operationally very demanding, not only to keep it up-to-date but also in respect of privacy data management requirements under GDRP. For the current insider lists, firms should collect many personal details such as national identification numbers, home address, mobile numbers and personal e-mail addresses. The inclusion of personal details in the insider list seems disproportionate and inadequate to the

task of protecting the integrity of financial market, as this information could be made available rapidly upon request. Therefore, the insider list regime should be reviewed.

At first, we question whether the requirement to establish insider lists is meaningful and propose to abolish it for EAMPs. As explained under Q13, we believe that industrial EAMPs, including wholesale energy market participants, do hold in general not relevant inside information insofar. From an EAMP perspective, it is also worth noting that non-public information is ranked lower in terms of importance than macroeconomic data concerning the price of emissions. Also, insider lists are primarily a useful tool for issuers of securities, but not for users and producers of an underlying commodity or emission allowances (derivatives). Finally, it's worthwhile to note that – unlike for EAMPs – the requirement to establish an insider list in respect of commodity firms and their commodity business is rightly not required for commodity firms as they are not issuers of commodity derivatives. As EAMPs are not issuers of emission allowances also, the believe that this speaks in favour of abolishing this requirement for EAMPs as well.

Secondly, if that requirement is not abolished and as stated in Q 13, we propose to reduce the scope of EAMPs under such an obligation by either (a) set the threshold for qualifying as an EAMPS at a higher level and/or (b) that the existing thresholds should be applied at single power plants /resp. facilities level instead of group level.

Thirdly, if the requirement for EAMPs to establish insider lists were to be kept (even in a more limited scope), we propose the following changes insofar:

We propose to limit the scope of person to be included in these insider list to the senior management of firms. The current insider list regime is operationally very demanding, not only to keep it up-to-date but also in respect of privacy data management requirements under GDPR. For the current insider lists, firms should collect many personal details such as national identification numbers, home address, mobile numbers and personal e-mail addresses. The inclusion of personal details in the insider list seems disproportionate and inadequate to the task of protecting the integrity of financial market, as this information could be made available rapidly upon request. Therefore, it should be limited to the senior management of a firm as the conduct of other employees of a firm are sufficiently controlled by the firms' compliance functions.

Furthermore, we suggest that EAMPs should be allowed to maintain only one permanent insider list with all persons that might have access to inside information, without the need to keep detailed track of when these persons have access to inside information and cease to have such access, and with less personal details. The fact of inflation of the number of persons included in the permanent insider lists is linked to the highly administrative and time-consuming work to establish and keep up-to date ad-hoc/event-based insider lists. It is much more straightforward to identify a number of persons within an organisation that may have access to inside information and flag these, rather than to establish and manage both a permanent insider list and an event-based insider list separately. We do, however, not see much value added in keeping insider lists in the current format with much personal

data, whereas this information could be easily provided to NRAs upon request and raises concern as to the proportionality principle in respect of data privacy rules under GDPR.

<ESMA_QUESTION_CP_MAR_40>

Q41. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA_QUESTION_CP_MAR_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_41>

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

<ESMA_QUESTION_CP_MAR_42>

Extending the scope of insider lists to e.g. notaries, auditors or other external service provider to a firm that would gain access to inside information in the normal course of their profession seems not appropriate. This would only increase the administrative burden in respect of drawing up, keeping up-to-date and manage the current insider lists with limited value added. These persons are already bound by their professional secrecy, subject to deontological and other regulatory prohibitions and upon NRA request, these external service providers can be easily identified.

As raised under § 187, ESMA could request external service providers accessing inside information of their clients in the course of their normal professional activity to establish themselves and include in their insider lists the natural or legal persons accessing pieces of inside information whilst working for them. Such burden should not be placed on issuers or EAMPs.

<ESMA_QUESTION_CP_MAR_42>

Q43. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

<ESMA_QUESTION_CP_MAR_43>

One list with all persons that might have access to inside information is sufficient, without the need to keep detailed track of when these persons have and cease to have access to inside information. The permanent insider list could be used for this purpose.

It is BDEW's opinion, that there is no need to establish and keep up-to-date insider lists. It is much more straightforward to identify a number of persons within your organisation that may have access to inside information and flag these. However, BDEW sees the need to change the current format of insider lists with much personal data, whereas this information could be easily provided to NRAs upon request and raises concern as to the proportionality principle in respect of data privacy rules under GDPR (see answer to Q40).

<ESMA_QUESTION_CP_MAR_43>

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

<ESMA_QUESTION_CP_MAR_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_44>

Q45. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA_QUESTION_CP_MAR_45>

The MAR EAMP thresholds defined as per Art. 17(2) para. 2 MAR are set at a rather low level resulting in too many asset operators being caught by the definition of EAMP. The compliance burden with keeping an updated insider list for EAMPs is unduly high and will impact too many EAMPs without any demonstrated added value.

With respect to EAMPs BDEW is particularly missing considerations as to the objectives of insider lists. Because of the marginal potential an event at an EAMP may significantly impact the price of an emission allowance (see Q 13), the obligations should be mitigated, be specifically fitted to the needs of protecting the emission allowance market and be proportionate to that objective, rather than applying the same rules that are set for the markets in financial instruments. It would be helpful to clarify that EAMPs below the thresholds defined as per Art. 17(2) para 2 are exempt from having insider lists, because there is no insider information per definition. There should also be clarifications as to the obligations of EAMPs as members of a group. Only an EAMP (which is a member of a group), where insider information can possibly arise (because of the size of its plant above the threshold) should be obliged to hold insider lists. There is no rectification to attribute to an EAMP the plants of another group member. At the same time the EAMP should be entitled to delegate an obligation to conduct an insider list to its parent company.

<ESMA_QUESTION_CP_MAR_45>

Q46. Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

<ESMA_QUESTION_CP_MAR_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_46>

Q47. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA_QUESTION_CP_MAR_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_47>

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

<ESMA_QUESTION_CP_MAR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_48>

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

<ESMA_QUESTION_CP_MAR_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_49>

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

<ESMA_QUESTION_CP_MAR_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_50>

Q51. Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

<ESMA_QUESTION_CP_MAR_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_51>

Q52. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

<ESMA_QUESTION_CP_MAR_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_52>

Q53. Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

<ESMA_QUESTION_CP_MAR_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_53>

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

<ESMA_QUESTION_CP_MAR_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_54>

Q55. Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

<ESMA_QUESTION_CP_MAR_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_55>

Q56. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA_QUESTION_CP_MAR_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_56>

Q57. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

<ESMA_QUESTION_CP_MAR_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_57>

Q58. Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.

<ESMA_QUESTION_CP_MAR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_58>

Q59. Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs.

<ESMA_QUESTION_CP_MAR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_59>

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

<ESMA_QUESTION_CP_MAR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_60>

Q61. What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.

<ESMA_QUESTION_CP_MAR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_61>

Q62. ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the

CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.

<ESMA_QUESTION_CP_MAR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_62>

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

<ESMA_QUESTION_CP_MAR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_63>

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

<ESMA_QUESTION_CP_MAR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_64>

Q65. Do you agree with ESMA's preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?

<ESMA_QUESTION_CP_MAR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_65>

Q66. Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

<ESMA_QUESTION_CP_MAR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_66>

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

<ESMA_QUESTION_CP_MAR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_67>

Q68. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain

if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

<ESMA_QUESTION_CP_MAR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_68>

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

<ESMA_QUESTION_CP_MAR_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_69>

Q70. Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.

<ESMA_QUESTION_CP_MAR_70>

We agree with the preliminary views of ESMA that there is no need to modify MAR in this respect at this stage.

However, we would like to point out that at the moment operators of a trading venues (exchanges) still have their own rules on market manipulation and can impose fines based on their own market rules. In some cases, this could result in both exchanges and financial regulators fining a market participant for the same behavior under MAR. The reason is that exchanges shall send a suspicious orders and transactions report (STOR) to their financial regulators in case they spot potential market manipulation (see Article 16 (2) MAR). It is appreciated that exchanges should have the ability to deal with market manipulation cases and this not to guess whether the regulator will also step in to discipline again. However, BDEW believes that market participants should not be fined numerous times for the same behavior. BDEW proposes that exchanges and regulators should be prevented to fine both the same behaviour. For example, 'unintended' and 'minor offences' could be left to the exchanges to issue discipline. This would leave the regulators the more serious incidents to investigate and sanction and at the same time give market participants some clarity as to what they can expect in regard to discipline.

<ESMA_QUESTION_CP_MAR_70>

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

<ESMA_QUESTION_CP_MAR_71>

Regarding the above mentioned Article 16 (2) MAR, BDEW would like to add, that we remain unconvinced that, in the interests of market abuse control, it is really desirable to oblige all companies in the real economy to implement the requirements of Article 16 (2), even if they do not broker customer transactions or execute customer orders.

<ESMA_QUESTION_CP_MAR_71>