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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 | Finland Chamber of Commerce |
| Activity | Non-financial counterparty |
| Are you representing an association? |  |
| Country/Region | Finland |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

Finland Chamber of Commerce appreciates the possibility to respond to the ESMA consultation on MAR review.

Finland Chamber of Commerce is an organisation promoting entrepreneurship and a favourable business environment and coordinating the operations of the nineteen independent regional Chambers of Commerce in Finland. The 19 Finnish Chambers of Commerce have more than 20,000 member companies, including SMEs.

In our response we focus on issues that relevant for issuers of securities. One of the key the objectives of the Capital Markets Union is to make it easier for companies to enter and raise capital on public markets. It is important that the functioning of MAR regime is thoroughly assessed, and any deficiencies, inefficiencies or overly burdensome requirements are addressed.

In our view, the MAR regime works for most parts as intended. However, MAR has significantly increased administrative burden and compliance costs. The transition from the Market Abuse Directive to directly applicable Regulation was not easy due to the fact that practical issues relating to the application of the Regulation could not be solved in national transposition in the same manner as would have been the case with a Directive.

In line with the objectives of the CMU, ESMA should aim at improving the MAR regime by reducing administrative burden for issuers and market participants and by clarifying certain requirements. In connection with the MAR review ESMA and the European Commission should also aim to simplify the structure of Level 1 and Level 2 legislation. Currently, the Commission has adopted 14(!) pieces of Level 2 Regulations and one Level 2 Directive under MAR. The high number of legislative texts adds to complexities and compliance burden.

Issue not addressed in the CP

We wish to highlight that in addition to the questions raised in the CP there is also one other aspect relating to share buy-backs which would merit reassessment, namely the scope of safe harbour under Article 5 of MAR.

Currently, the scope of safe harbour in share buy-backs is limited in MAR Article 5(2) to buy-backs whose sole purpose is (a) to reduce the capital of an issuer, (b) to meet obligations arising from debt financial instruments that are exchangeable into equity instruments or (c) to meet obligations arising from employee share schemes. Recital 12 of MAR rightly clarifies that trading in own shares in buy-back programmes which would not benefit from the exemptions under MAR should not of itself be deemed to constitute market abuse.

We fail to see the policy objective of limiting the application of safe harbour to buy-backs with the sole objective of those stipulated in MAR Article 5(2). Share buy-backs are one method of distributing company’s capital and covered by the EU Company Law Directive ((EU) 2017/1132). In our view, abolishment of MAR Article 5(2) would make the safe harbour more attractive, reduce compliance burden for issuers and would not hamper the MAR objectives of investor protection or market integrity.

We encourage ESMA also to assess whether the use of derivatives in buy-back programmes should be covered by the safe harbour.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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 with the need to modify the reporting mechanism under MAR Article 5(3). The issuers should be provided with a “one-stop-shop” for reporting to competent authorities under MAR. This would not hinder the supervision of MAR, as MAR and MiFID II / MiFIR already provide with an extensive mechanism for Competent Authorities to exchange information when needed.

<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>

As stated above in our response to Q7, we prefer a “one-stop-shop” for reporting to Competent Authorities. However, option 3 would not create that. MAR Article 17(3) and Article 6 of Commission Delegated Regulation (EU) 2016/522 already define the Competent Authority for reporting of delayed disclosure of inside information and all the proposed options in the CP deviate from that definition.

For issuers it would be easiest if the reporting channels under MAR Articles 5 and 17 were aligned. Such an alignment would – to our understanding – in vast majority of cases lead to the same result as option 3 proposed by ESMA, but with significantly less compliance risks for issuers.

If the proposed alignment of reporting channels under MAR Articles 5 and 17 cannot be accepted, our second preference would be option 3.

<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.

<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.

<ESMA\_QUESTION\_CP\_MAR\_10>

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

<ESMA\_QUESTION\_CP\_MAR\_11>

Yes, we agree.

<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>

No.

<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>

In general, the definition of inside information is extremely important for the application of MAR as a whole. The definition affects not only the prohibitions of insider dealing and unlawful disclosure of inside information but also the requirement to disclose inside information and the requirement to establish and maintain insider lists. A general definition like the definition of inside information always creates some interpretational issues. On the other hand, the core of the definition has remained the same since MAD was adopted and the ECJ case-law relating to MAD (which has been taken into account in the drafting of MAR) has provided further clarity. Any change to the definition would likely create new legal uncertainties and thus add costs.

However, it can be argued that if different MAR provisions were applied independently, a piece of information (e.g. information on a potential M&A transaction) would generally be considered as inside information at an earlier stage in applying the prohibition of insider dealing than in applying the disclosure requirement. This is due to the fact that even if inside information is precise enough to trigger the prohibition to dealing, is not necessarily precise enough to be disclosed, as too early, incomplete and speculative disclosure might mislead the public and create false markets. The possibility to delay disclosure is intended to address this gap, but as described later in our response (see our responses to Q25, Q26 and Q28), there are cases where it is difficult to apply the conditions relating to delayed disclosure.

The administrative burden relating to handling of inside information (i.e. establishment of insider lists, documentation relating to delayed disclosure) creates a natural incentive for issuers to apply the definition of inside information in a narrower reading than what might be preferable for a potential insider dealing case. The MAR regime already acknowledges that not all privileged information is considered as inside information (cf. rules regarding market sounding when no inside information is disclosed and prohibition for PDMRs to conduct transactions during closed window). From issuers’ point of view, privileged information which at a later stage potentially constitutes inside information is usually subject to strict confidentiality rules and non-disclosure agreements.

The reasonable investor test in MAR recital (14) provides some support to the interpretation of the criterion “of precise nature”. However, in contrast to the price sensitivity test covered by MAR recital (15) the issuer’s *ex ante* judgement whether information is of precise nature does not receive explicit protection towards *ex post* examinations. It is possible that an issuer’s reasoned *bona fide* judgement that information is not yet sufficiently precise to constitute inside information is later challenged in an insider dealing case. If an NCA or a court in an insider dealing case concludes that the information had indeed been inside information, this would automatically mean that the issuer had been in breach of MAR Articles 17 and 18 (i.e. inside information was published as soon as possible or decision of delay was not made and insider lists were not established timely) even if it had complied with those provisions as soon as it had concluded that the information is inside information.

We therefore propose to add an explicit protection (similar to recital (15)) for issuers’ *bona fide* business judgements regarding the precise nature of information when applying MAR Articles 17 and 18. Introduction of such protection would in our view not affect negatively to the objective of market integrity but would reduce legal risks and compliance costs.

<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>

We refer to our response to Q13. The definition as such is sufficient and any change to the established definition would likely create new legal uncertainties and thus add costs. However, additional protection (similar to recital (15)) for issuers’ *bona fide* business judgements should be introduced for the application of MAR Articles 17 and 18.

<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.

<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>

The fact that the disclosure requirement is linked to coming into existence of inside information is to certain extent problematic. Piece of information which is considered inside information from the viewpoint of prohibition of insider dealing is not always precise enough for disclosure (i.e. disclosure of incomplete information at an early stage might mislead the public, create false markets or prejudice the legitimate interests of the issuer). Therefore, the possibility to delay disclosure of information is crucial.

In general, the MAR conditions to delay disclosure of inside information usually enable issuers to delay disclosure of inside information where necessary. As the term “legitimate interests of the issuer” is wide and is applicable to a variety of situations, further examples to those mentioned in MAR recital (50) or ESMA Guidelines would be helpful.

However, interpretation of the condition “delay of disclosure is not likely to mislead the public” can sometimes be problematic. For example:

* In case of a planned M&A transaction where legitimate interests to delay the disclosure clearly exist it is sometimes difficult to assess the condition relating to misleading the public
* In case of decisions by authorities (e.g. tax, environment, competition) issuer may receive reasonably precise indication of the likelihood of a positive or negative decision. Such information can constitute inside information, but any disclosure is premature before the authority has issued its decision. However, the argument for meeting the condition “delay of disclosure is not likely to mislead the public” would need to be built on argument that speculative disclosure before the authority has issued its decision can mislead the public or create false markets.
* The same problem as with authorities’ decisions can also occur with regard to e.g. negative auditor’s opinion (where such negative opinion constitutes inside information).

Moreover, the distinction between delaying disclosure of information in accordance with MAR Article 17(4) and publishing inside information as soon as possible is not always clear. For example, it is sometimes necessary to confirm facts relating to a piece of information which comes into the attention of an issuer. Such piece of information may be of such nature that the conditions for delaying disclosure are not applicable (e.g. if the information is correct, delaying of such information would likely mislead the public). On the other hand, if the facts were not checked before disclosing the information, disclosure of incorrect information as inside information would also mislead the public. To our understanding fact-checking therefore currently needs to be assessed against the requirement to disclose information “as soon as possible” or against the definition of inside information (“information of a precise nature”).

Issuers would benefit from additional legal certainty in this regard (e.g. an explicit possibility to delay disclosure until fact-checking is completed or a more general possibility to delay disclosure if due to the uncertainties relating to the piece of inside information a disclosure is likely to mislead the public or create false markets).

<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>

As stated above in our response to Q25, in general, the MAR conditions to delay disclosure of inside information usually enable issuers to delay disclosure of inside information where necessary. As the term “legitimate interests of the issuer” is wide and is applicable to a variety of situations, further examples to those mentioned in MAR recital (50) or ESMA Guidelines would be helpful.

Interpretation of the condition “delay of disclosure is not likely to mislead the public” can sometimes be problematic. For example:

* In case of a planned M&A transaction where legitimate interests to delay the disclosure clearly exist it is sometimes difficult to assess the condition relating to misleading the public
* In case of decisions by authorities (e.g. tax, environment, competition) issuer may receive reasonably precise indication of the likelihood of a positive or negative decision. Such information can constitute inside information, but any disclosure is premature before the authority has issued its decision. However, the argument for meeting the condition “delay of disclosure is not likely to mislead the public” would need to be built on argument that speculative disclosure before the authority has issued its decision can mislead the public or create false markets.
* The same problem as with authorities’ decisions can also occur with regard to e.g. negative auditor’s opinion (where such negative opinion constitutes inside information).

Moreover, the distinction between delaying disclosure of information in accordance with MAR Article 17(4) and publishing inside information as soon as possible is not always clear. For example, it is sometimes necessary to confirm facts relating to a piece of information which comes into the attention of an issuer. Such piece of information may be of such nature that the conditions for delaying disclosure are not applicable (e.g. if the information is correct, delaying of such information would likely mislead the public). On the other hand, if the facts were not checked before disclosing the information, disclosure of incorrect information as inside information would also mislead the public. To our understanding fact-checking therefore currently needs to be assessed against the requirement to disclose information “as soon as possible” or against the definition of inside information (“information of a precise nature”).

Issuers would benefit from additional legal certainty in this regard (e.g. an explicit possibility to delay disclosure until fact-checking is completed or a more general possibility to delay disclosure if due to the uncertainties relating to the piece of inside information a disclosure is likely to mislead the public or create false markets).

<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>

In our view, the requirement for issuers to have systems and controls for identifying, handling and disclosing inside information is an implicit prerequisite for being able to comply with the requirements of e.g. MAR Articles 10, 11, 17 and 18.

However, we strongly disagree with the inclusion of such an explicit requirement in MAR. First, in contrast to EU legislation relating to providers of financial services, EU legislation relating to issuers typically does not extend to the organisation of the issuer’s business. The proposed requirement would deviate from this approach. From the viewpoint of enforcing MAR, it should be the outcome (i.e. reliable insider lists, timely disclosure of inside information, compliance with the principle of fair disclosure) that matters – not the procedures. We therefore fail to see the added value in introducing such a requirement. Second, any kind of explicit requirement for systems and controls adds significant compliance costs and creates legal uncertainties. These in turn would lead to additional disincentives to listing which would be against the objectives of the CMU. Third, even if ESMA and the Commission were to propose a high-level requirement which might be adaptable to the scale, size and nature of the business of various issuers, there are numerous examples where a proposed high-level provision has become overly detailed in the outcome of Level 1 negotiations (sometimes even with an additional empowerment for Level 2 legislation).

<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>

As mentioned in our response to Q13, Q25 and Q26, it can be argued that if different MAR provisions were applied independently, a piece of information (e.g. information on a potential M&A transaction) would generally be considered as inside information at an earlier stage in applying the prohibition of insider dealing than in applying the disclosure requirement. This is due to the fact that even if inside information is precise enough to trigger the prohibition to dealing, is not necessarily precise enough to be disclosed, as too early, incomplete and speculative disclosure might mislead the public and create false markets. The possibility to delay disclosure is intended to address this gap, but there are cases where it is difficult to apply the provisions relating to delayed disclosure.

The administrative burden relating to handling of inside information (i.e. establishment of insider lists, documentation relating to delayed disclosure) creates a natural incentive for issuers to apply the definition of inside information in a narrower reading than what might be preferable for a potential insider dealing case. The MAR regime already acknowledges that not all privileged information is considered as inside information (cf. rules regarding market sounding when no inside information is disclosed and prohibition for PDMRs to conduct transactions during closed window). From issuers’ point of view, privileged information which at a later stage potentially constitutes inside information is usually subject to strict confidentiality rules and non-disclosure agreements.

The reasonable investor test in MAR recital (14) provides some support to the interpretation of the criterion “of precise nature”. However, in contrast to the price sensitivity test covered by MAR recital (15) the issuer’s *ex ante* judgement whether information is of precise nature does not receive explicit protection towards *ex post* examinations. It is possible that an issuer’s reasoned *bona fide* judgement that information is not yet sufficiently precise to constitute inside information is later challenged in an insider dealing case. If an NCA or a court in an insider dealing case concludes that the information had indeed been inside information, this would automatically mean that the issuer had been in breach of MAR Articles 17 and 18 (i.e. inside information was published as soon as possible or decision of delay was not made and insider lists were not established timely) even if it had complied with those provisions as soon as it had concluded that the information is inside information.

We therefore propose to add an explicit protection (similar to recital (15)) for issuers’ *bona fide* business judgements regarding the precise nature of information when applying MAR Articles 17 and 18. Introduction of such protection would in our view not affect negatively to the objective of market integrity but would reduce legal risks and compliance costs.

Moreover, the distinction between delaying disclosure of information in accordance with MAR Article 17(4) and publishing inside information as soon as possible is not always clear. For example, it is sometimes necessary to confirm facts relating to a piece of information which comes into the attention of an issuer. Such piece of information may be of such nature that the conditions for delaying disclosure are not applicable (e.g. if the information is correct, delaying of such information would likely mislead the public). On the other hand, if the facts were not checked before disclosing the information, disclosure of incorrect information as inside information would also mislead the public. To our understanding fact-checking therefore currently needs to be assessed against the requirement to disclose information “as soon as possible” or against the definition of inside information (“information of a precise nature”).

Issuers would benefit from additional legal certainty in this regard (e.g. an explicit possibility to delay disclosure until fact-checking is completed or a more general possibility to delay disclosure if due to the uncertainties relating to the piece of inside information a disclosure is likely to mislead the public or create false markets)..

<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 with the proposal to require issuers to notify to NCAs the delay of disclosure of inside information in cases where the relevant information has lost its inside nature. The compliance costs relating to such a requirement clearly outweigh the potential benefits. Each additional disclosure requirement adds to issuers’ compliance burden and creates an additional disincentive to listing.

It has to be noted that the issuers are already subject to obligations relating to the drawing up and updating of insider lists and the maintenance of the information relating to the delay of disclosure stemming from MAR and its delegated and implementing Regulations. The NCAs already have a possibility to request information from issuer whenever they suspect market abuse (e.g. in case of unexplained movements in share price or trading volumes).

In contrast, we suggest ESMA to consider whether the notification requirement in the third subparagraph of MAR Article 17(4) could be abolished completely. In almost all cases, the fact that disclosure of inside information has been delayed, can be concluded from the press release disclosing the inside information. In our view, the abolishment of the notification requirement would therefore not hinder the supervision of MAR by NCAs. The NCAs already have a possibility to request information from issuer whenever they suspect market abuse (e.g. in case of unexplained movements in share price or trading volumes).

<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>

We agree that MAR Article 17(5) could be made more explicit in this regard. However, we note that there is no definition of control in MAR. Depending on the definition of control, the issue at stake might not be limited only to listed issuers controlling a credit or financial institution. There can also be cases where a listed issuer has a non-controlling stake in a credit or financial institution, but that stake is significant enough from the viewpoint of issuer to trigger the disclosure requirement.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_32>

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

<ESMA\_QUESTION\_CP\_MAR\_33>

We agree that additional clarity with regard to the application of MAR Article 11 is needed. However, we would not favour extending the obligatory market sounding regime to market soundings where no inside information is disclosed. It is not fully clear to us what is the policy objective for including such soundings in the MAR regime at all.

<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>

We agree that some limitation to the definition of market sounding is needed. E.g. negotiations with a limited number of counterparts should be excluded from the definition. Also soundings where no inside information is disclosed should be excluded from the scope (non-disclosure agreements should be sufficient for these soundings).

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

To our understanding, the lack of clarity in the definition of market sounding has created interpretational issues for both DMPs and persons receiving market sounding. Persons that have been contacted may have considered the contact to be market sounding even though the contacting person has had an opposite view or vice versa. In addition, the administrative burden relating to market soundings has led to a situation where a number of potential targets for market soundings have categorically declined from receiving any market sounding at all, which is counterproductive to the MAR objective of efficient markets.

It also seems to us that the market sounding regime is designed mainly for accelerated book building processes, although it is applicable to much wider range of transactions.

Moreover, from the viewpoint of persons receiving market soundings there are problems with regard to transactions for which market sounding has taken place (and inside information has been disclosed), but which have subsequently been put on hold for an undetermined period. In such cases it is unclear when information relating to such sounding ceases to be inside information. Moreover, DMPs not always inform the persons receiving market sounding that the inside information has ceased to be inside information.

<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>

We strongly disagree with the proposal to make recording facilities compulsory for all soundings. It has to be noted that MAR Article 11 is not only applicable to investment service providers but also to issuers and other legal or natural persons (i.e. secondary offerors and persons intending to make a takeover bid). A requirement to have recording facilities in place would be impractical and overly burdensome for these persons. However, we agree that whenever recording facilities are available, it should be possible to utilise these without an explicit consent from the person receiving market sounding.

Moreover, we urge ESMA to align the market sounding requirements with the requirements relating to insider lists. From the viewpoint of issuers it is inconceivable that the issuer is at the same time required to maintain both an insider list and a list of persons that have received market sounding.

<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 agree that insider lists are a practical mean for controlling inside information. The requirement also leaves sufficient discretion to issuers on how to arrange the handling of inside information within the issuer. No additional requirements relating to systems and controls is therefore required.

<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>

From the viewpoint of legal protection of persons included in the insider list it is important that insider list covers only persons that have received inside information (i.e. the number of “false positives” should be kept as small as possible).

<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>

Given the variety of situations where inside information may potentially emerge, it is practically impossible to create a system which would register whenever a person actually accessesinside information. It is more practical for issuers to maintain a list of persons who are aware of inside information (or for whom inside information has been made available).

<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>

From the viewpoint of proper management of inside information, it might be logical to expand the scope of Article 18(1) to cover any person performing tasks through which they have access to inside information. Such an amendment would likely require amendments to other paragraphs of Article 18 as well.

However, if such an extension were to be introduced, the scope should be considered carefully in order to avoid unintended consequences. Expression “performing tasks through which they have access to inside information” can be interpreted to cover not only parties that are in a contractual relationship with an issuer (e.g. auditors and debtors) but also parties that do not have any contractual relationship with an issuer, such as authorities (tax, competition, environment, securities, banking, criminal etc.) or courts.

Moreover, we note that currently the obligation to establish and maintain insider lists does not apply to e.g. natural persons or unlisted companies intending to make a takeover bid or unlisted companies negotiating with a listed issuer. In the light of the examples given in the CP, it seems a bit unclear whether ESMA’s intention was to include these persons as well in the circle of persons “performing tasks through which they have access to inside information”.

<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>

As mentioned in our response to Q40, from the viewpoint of legal protection of persons included in the insider list it is important that insider list covers only persons that have received inside information (i.e. the number of “false positives” should be kept as small as possible). In that regard, the possibility to maintain list of permanent insiders is impractical as not all persons that would possibly be classified as permanent insiders (e.g. CEO, executive and non-executive directors) receive inside information simultaneously.

<ESMA\_QUESTION\_CP\_MAR\_43>

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

<ESMA\_QUESTION\_CP\_MAR\_44>

Yes, we agree.

<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>

Updating of insider lists would be significantly less burdensome if the amount of personal details were reduced. In addition to the information required in MAR Article 18(3) it should be sufficient to gather the following information: first name, last name, company name and function as well as date of birth and/or national identification number. Taking into account the extensive investigative powers of NCAs, a reduction in the amount of personal details included in insider lists would in our view not hinder the enforcement of MAR.

Moreover, due to e.g. data protection issues, issuers have faced problems with receiving all the required details especially from persons in third countries. Reducing the amount of personal details would likely alleviate these problems as well.

<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>

Pursuant to MAR recital (58) the policy objectives of the notification requirement are mainly prevention of market abuse (particularly insider dealing) and source of information to investors (signalling effect). Against these objectives and taking into account the fact that also free shares / options are valued to their market value when calculating the threshold, the threshold seems rather low.

Due to complex calculation methods for the thresholds (cumulative within the calendar year; even free shares / options have to be valued to their market value when calculating the threshold) and the risk of high sanctions for potential breaches of the notification requirement, many PDMRs and closely associated persons have the practice to notify all transactions irrespective of whether the threshold has been reached. This should remain as a possibility in in the future as well.

<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>

Due the fact that the markets across the Member States vary significantly, it would be preferable to maintain the national option to set a higher threshold. As stated in our response to Q46, pursuant to MAR recital (58) the policy objectives of the notification requirement are mainly prevention of market abuse (particularly insider dealing) and source of information to investors (signalling effect). Against these objectives and taking into account the fact that also free shares / options are valued to their market value when calculating the threshold, the optional threshold seems rather low.

Due to complex calculation methods for the thresholds (cumulative within the calendar year; even free shares / options have to be valued to their market value when calculating the threshold) and the risk of high sanctions for potential breaches of the notification requirement, many PDMRs and closely associated persons have the practice to notify all transactions irrespective of whether the threshold has been reached. This should remain as a possibility in in the future as well.

<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>

In general, the method for calculating the threshold should be kept as simple as possible and the threshold should be carefully calibrated in order to avoid overflow notifications. Moreover, the content of the notification should be amended to allow presentation of aggregated information only.

Taking into account the policy objectives of the notification requirement, one possibility to simplify the criteria would be to exclude free shares / options received as part of remuneration from the notification requirement. It has to be noted that transparency of remuneration of most PDMRs is also covered by the remuneration policy and remuneration reporting rules of the amended Shareholders’ Rights Directive.

<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>

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<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>

There are inconsistencies in the terminology of MAR Article 19(11)-(12) and Level 2 Regulation. MAR Article 19(11) refers to transactions. ESMA’s MAR Q&A 7.9 states that transactions should be interpreted in the light of MAR Article 19(1), i.e. in a wide sense covering all types of transactions. However, MAR recital (61) refers only to trading. Similarly, the exemptions of MAR Article 19(12) and Level 2 Regulation cover only trading.

If read strictly, this would lead to an interpretation where even passive transactions such as return of pledged shares or receipt of donation or inheritance would be prohibited during the closed period. Similarly, certain active transactions such as pledging of shares and acceptance of a takeover bid seem to be prohibited.

We fail to see the policy rationale for such strict restrictions. To our understanding the policy rationale presented in MAR recital (61) is valid. MAR Article 19(11) should therefore be amended to restrict only trading on a trading venue during the closed period or MAR Article 19(12) should be extended to cover other types of transactions than trading.

<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>

In our view, the interpretation presented in ESMA’s MAR Q&A 7.2 could be included in the Level 1 text.

<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 strongly disagree with the proposal to extend the requirement of MAR Article 19(11) to persons closely associated with PDMRs. First, there are already sufficient safeguards in place to prevent abuse of inside information and to protect market integrity, i.e. prohibition of insider dealing and prohibition of unlawful disclosure of inside information. Second, the definition of a closely associated person is too ambiguous (especially point (d) of the definition) and potentially too wide for such a strict restriction. Legal uncertainties relating to the ambiguous definition of closely associated person would raise the risk of inadvertent breaches of closed window. To our understanding, the policy objective of MAR Article 19(11) is to protect market integrity in cases where PDMRs may have a better view on the results of the issuer but where the information does not amount to inside information. It would therefore be disproportionate to extend the requirement to closely associated persons.

We also have reservations with regard to extending the requirement of MAR Article 19(11) to issuers. As the prohibition of MAR Article 19(11) covers all types of transactions, imposing a closed period on issuers would unnecessarily restrict e.g. the possibility to issue new securities or to conclude M&A transactions or takeover bids where issuer’s shares are used as consideration.

<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>

To our understanding, the policy objective of MAR Article 19(11) is to protect market integrity in cases where PDMRs may have a better view on the results of the issuer but where the information does not amount to inside information. Against this background and with regard to exemptions to closed window all financial instruments should in our view be treated equally.

<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>

As stated in our response to Q53, there are inconsistencies in the terminology of MAR Article 19(11)-(12) and Level 2 Regulation. MAR Article 19(11) refers to transactions. ESMA’s MAR Q&A 7.9 states that transactions should be interpreted in the light of MAR Article 19(1), i.e. in a wide sense covering all types of transactions. However, MAR recital (61) refers only to trading. Similarly, the exemptions of MAR Article 19(12) and Level 2 Regulation cover only trading.

If read strictly, this would lead to an interpretation where even passive transactions such as return of pledged shares or receipt of donation or inheritance would be prohibited during the closed period. Similarly, certain active transactions such as pledging of shares and acceptance of a takeover bid seem to be prohibited.

We fail to see the policy rationale for such strict restrictions. To our understanding the policy rationale presented in MAR recital (61) is valid. MAR Article 19(11) should therefore be amended to restrict only trading on a trading venue during the closed period or MAR Article 19(12) should be extended to cover other types of transactions than trading.

<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>

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<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>

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<ESMA\_QUESTION\_CP\_MAR\_68>

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

<ESMA\_QUESTION\_CP\_MAR\_69>

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<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>

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<ESMA\_QUESTION\_CP\_MAR\_71>