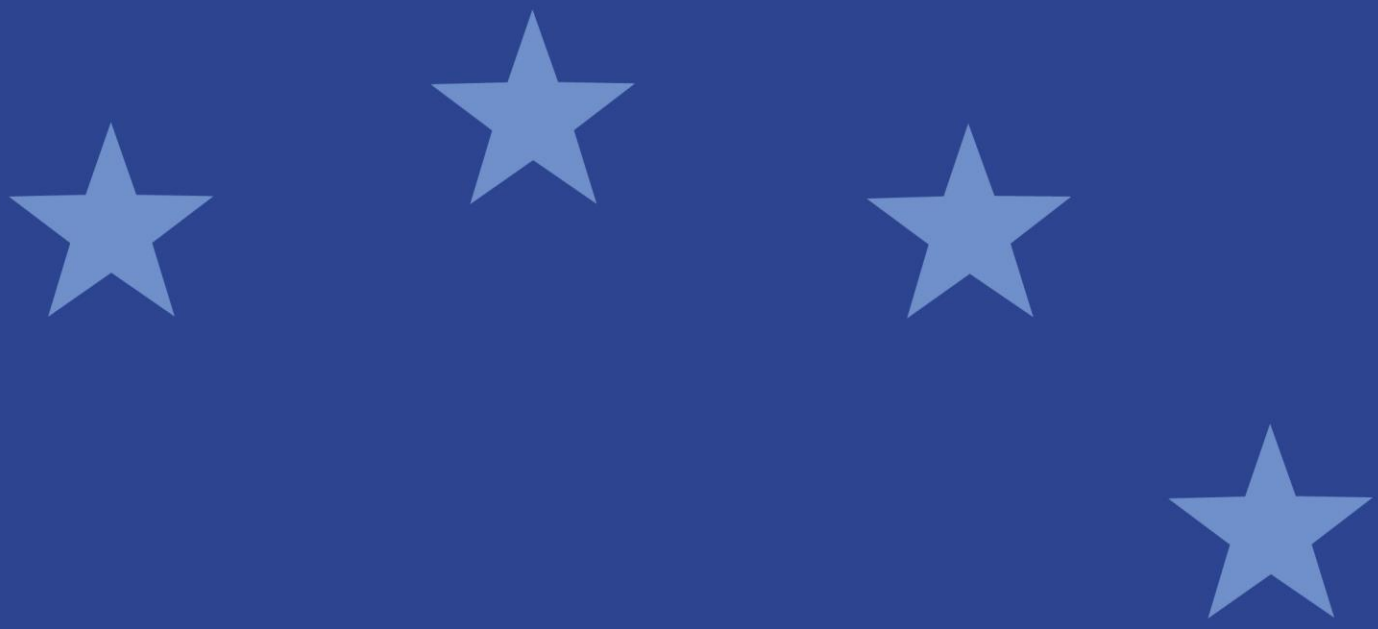
esma European Securities and Markets Authority

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	German Banking Industry Committee
Activity	Banking sector
Are you representing an association?	☒
Country/Region	Germany

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
The German Banking Industry Committee is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

We welcome the opportunity to comment during ESMA's market consultation and would like to make the following remarks.
<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>
No, we do not consider necessary to extend the scope of MAR to spot FX contracts. We agree with the concerns raised by ESMA in paragraph 20, 22, 23 and refer to them in this respect.
<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>
TYPE YOUR TEXT HERE
<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>
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<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>
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<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>
Yes, we agree. The reporting obligations should be limited to reporting to the NCA in those jurisdictions where the issuer requested admission to trading; the other alternatives result in inappropriate and disproportional compliance efforts.

In relation to Article 5(2) MAR we also would like to mention that the scope of the safe harbour provisions for buy-back programmes should not be limited as it currently is the case. In the future, the safe harbour should apply to

- all buy-backs of shares permitted under corporate law (see Article 21 et seq. Directive 2012/30/EU)
- buy-backs of debt instruments.

There does not appear any reason of market protection why issuers should only have the protection offered by the safe harbour for certain limited purposes otherwise permissible under law and why the safe harbour should be limited to buy-backs of equity securities.

The current distinction between the different purposes of share buy-back programmes appears unjustified as the market impact of a buy-back programme is generally unrelated to the purpose of the buy-back. Also, it seems that in practice, a number of regulators rightly do not consider the execution of buyback programmes which would be allowed under corporate law, as market abuse if the requirements of the safe harbour provisions are being complied with. However, a clarification to that effect would be useful and promote regulatory convergence.

Furthermore buying back outstanding debt trading significantly below its nominal value has proven to be a useful tool to reduce an issuer's debt burden and to adapt an issuer's debt exposure to more favourable market conditions when interest levels decline. Therefore, there is an economic need to execute these bond repurchases and it does not seem to be justified from a market integrity perspective not to have a safe harbour for debt buybacks as well. Accordingly, we therefore propose to extend the scope of the safe harbour rules for buy-back programmes also to the buy-back of debt instruments.
<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>
Yes, we agree. The reporting obligations should be limited to reporting to the NCA in those jurisdictions where the issuer requested admission to trading; the other alternatives result in inappropriate and disproportional compliance efforts.
<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>
Yes, we agree.
<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>
Yes, we agree.
<ESMA_QUESTION_CP_MAR_10>

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

<ESMA_QUESTION_CP_MAR_11>
Yes, we agree.
<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>
No, we do not find other aggregated data related to the BBP useful: If trading in a buy-back programme leads to the conclusion of a high number of trades, more transparency can also create confusion. Instead, it could be considered to publish the number of trades, volumes and the average market price, where appropriate, added by the minimum and the maximum market price, only daily.
<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>
The definition of inside information should be streamlined and clarified to give market participants more clarity as to what is permitted and to facilitate compliance. This relates in particular to the following:

- Clarification of the interplay between intermediate steps in a protracted process and treatment of future circumstances as inside information (Article 7(2) and (3) MAR).
  According to Article 7(3) MAR, an intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information.
  A future event may, according to Article 7(2) also constitute inside information if it may reasonably be expected to occur. According to the ECJ ruling in the
  Geltl ./. Daimler case this requires a realistic prospect that the future event will come into existence (item 49).
  However, many future events (if not most of them) are the developing in a protracted process with multiple intermediate steps. It appears there is uncertainty that these intermediate steps may even have to be treated as inside information where they derive their potential to have a price impact

from the significance or magnitude of the future event at a point in time when such event has not yet reached a “realistic prospect” to actually occur. Hence, a clarification would be useful that where the intermediate step does not have a potential to have a price impact unrelated to the future event, it does not constitute inside information before the future event has a realistic prospect.

- As long as an issuer stays maintains his own results forecast, financial results, including those for an interim reporting period during a financial year, should not constitute inside information and, thus, not trigger any publication requirements in addition to the regular financial reporting.

<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>
We believe the definition is in any case sufficient and should not be expanded. Moreover, some clarification appears useful as set out above.
<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>
No, see above.
<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.
<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>
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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>

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<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>
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Q20. 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>

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>
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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>
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Q23. 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>

Q24. 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>

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>
It should be clarified that the issuer's obligations under Article 17 MAR only apply with regard to inside information in relation to financial instruments issued by that very issuer.

Additionally, the documentation related to a decision to delay should be reviewed and streamlined; it should be clarified that issuers need to have a certain amount of discretion in their assessment.
<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>
Supervisory Board decisions: the interest of the issuer to delay disclosure of inside information as long as the approval of its supervisory board is pending should be deemed legitimate for a period of time reasonably allowing the members of the supervisory board to take a decision on a sufficiently informed basis and after due consideration and discussion among themselves.

Rumours should not terminate a permitted delay of disclosure (Article 17(8)) as long as they do not indicate that they derive from a leak within an area of responsibility where the issuer actually can ensure confidentiality. Failing specific indications of a leak in his area of responsibility, an issuer should be permitted to assume that he is still able to ensure confidentiality if he can establish appropriate measures to that effect (similar to Article 9(1)(a) MAR).

Rumours that lack accuracy with regard to the main substance of the inside information, be it that they are still very vague, be it they contain substantial inaccuracies should not indicate that confidentiality can no longer be ensured as they are likely to constitute hypothetical speculation.
<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>
We do not believe it is appropriate to require from issuers to have systems and controls for identifying, handling and disclosing inside information as an independent obligation. When it comes to the question as to whether an issuer has informed the public as soon as possible of inside information according to Article 17 (1) MAR, the existence of appropriate systems and controls may be useful to document compliance with the obligation under Article 17 (1) MAR. That should be sufficient.
<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>
Please see our response to Question 13.
<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>
A notification to the NCAs should still not be necessary when the information has lost its inside nature. This does not appear necessary in light of the other existing safeguards against market abuse such as insider lists and we are not aware of any situation where the absence of such a requirement has led to potential market abuse.
<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>
We are not aware of any situation that has made financial institutions even consider making use of Article 17(5) MAR. That said, given that the financial crisis has shown that a systemic risk may also result from an issuer controlling a credit or financial institution, we would support the proposed expansion of the scope of Article 17(5) MAR.
<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>
We are not aware of any situation where Article 17(5) has become relevant in practice. That said, in the extraordinary situation where Article 17(5) could be applicable, the condition for a delay set forth in Article 17(5)(c), i.e. that the confidentiality of that information can be ensured, should not be relevant given that the disclosure of the relevant inside information would create the risk of undermining the financial stability of the financial system. In that situation even a suspicion that confidentiality cannot be ensured should not put the entire financial system at stake. Thus, Article 17 MAR should in general not apply in these extraordinary situations.
<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>

Article 81 et seq. BRRD provide for detailed notification and communication obligations of institutions and authorities in a resolution scenario, including the requirement of the resolution authority to publish the resolution order or a notice summarising the effects of the resolution action after the resolution action has been taken (Article 83 (4) BRRD). This communication framework outlined in BRRD is required to ensure the effectiveness of resolution actions. Article 17 MAR, in particular a publication requirement prior to a decision of the resolution authority on resolution actions, conflicts with these provisions. Although MAR provides the possibility to delay publication of inside information to preserve financial stability with the approval of the competent regulator (Article 17 (5) MAR), this possibility of delay ceases once there are precise rumors. Thus, Article 17 MAR could amount to an impediment to resolution as soon as rumors around the financial soundness and the likelihood or reaching the point of non-viability arise. In light of this, the specific notification and communication provisions in the BRRD should prevail in a resolution scenario and Article 17 MAR should not apply in these special cases.
<ESMA_QUESTION_CP_MAR_32>

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

<ESMA_QUESTION_CP_MAR_33>
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<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>
The market sounding procedures as set out in Article 11 as well as the RTS and ITS adopted thereunder should (contribute to) be a safe harbour provision and not a strict obligation. The legal nature as a safe harbour (conceptually comparable to Article 5 MAR relating to buyback programmes and stabilisation) clearly follows form recital 35 and Article 11(4) as well as the general notion that market sounding is a “highly valuable tool” and “important for the proper functioning of financial markets” (recital 32 MAR). Therefore, it has (highly) been the intention of the legislator to facilitate market sounding and not to complicate it.
<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>
Based on the existing definition the market has a good understanding of the stages of interaction which fall within the definition of a market sounding. Therefore, further clarification does not seem to be required. In particular, market sounding should continue to capture where a seller seeks to gauge interest about the terms of a potential transaction. In particular, communication unrelated to a specific transaction should not be captured. This has also – rightly – been indicated in Recital 19 of MAR (19) stating that MAR is not intended to prohibit discussions of a general nature regarding the business and market developments between shareholders and management concerning an issuer. The same should also apply to communication of a similar nature with investors generally. Also communication of information after the announcement of a transaction may, if it includes the disclosure of inside information, is sufficiently covered by the general regime under Article 10 MAR.
<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>
The definition is deemed appropriate, see above.
<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>
A significant part of the institutional investor community perceives the Article 11 MAR regime as overly cumbersome and rejects to participate in market sounding due to the overly formalistic procedural requirements. To avoid that, for that reason, market sounding is becoming increasingly difficult, it appears sufficient to limit these to a general advice that the information to be disclosed may constitute inside information and the legal obligations and sanctions resulting therefrom as under Article 18(2) MAR.
<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>
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<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>
We believe that insider lists primarily serve issuers who are not also investment firms because such lists enable issuers to monitor insider information and keep insider information confidential (see recital 57 MAR cited in paragraph 164 of the Consultation Paper). Investment firms already have internal systems to detect and register employees with access to insider information (see Article 29 Delegated Regulation (EU) 2017/565). This is because they are inter alia subject to organisational requirements and obligations to monitor employee's transactions. Due to the level of detail required of insider lists maintaining such lists is a considerable - and additional – effort (for example the obligation to record (and keep up-to-date!), for example, the private telephone numbers of employees, type in the date and time in the unusual UTC format as provided for in the format templates (Annex I and Annex II Implementing Regulation (EU) 2016/347)) without adding any additional protection to the market. Against this background, we believe that simplified requirements for insider lists are needed for investment firms, independent whether this insider list is created by the investment firm as an issuer or for a client of the investment firm. Instead of insider lists, investment firms must be able to use their internal systems, i.e., simplified name list of employees with access to insider information. However, the internal monitoring systems of the investment firms have to be sufficient and meet the purposes of the insider lists (identification of those persons who have access to

insider information and determination of the point in time at which they gained access - also recital 57 MAR quoted in paragraph 164 of the Consultation Paper).In this respect, it is key that the internal systems are suitable to ensure the availability of the relevant data in the event of a request by a NCA. The internal systems of investment firms fulfil this requirement. We also like to point out, that in practice, such requests occur only in very rare cases.
<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>
In our view, the status quo (event-based insider list and permanent insider section as an option) should be maintained. MAR uses the term “access to inside information” without any restriction or expansion in one way or another (see MAR Article 18(1)(a), (3)(a),(c) and (4)(b) MAR). However, “access” is inherently broader than “possession”, “use”, or “knowledge” as employed in Article 8(1), (2), (3) and (4) MAR. That implies that “access” should be interpreted in the sense of “potential” access. This would also reflect the practice in a much more meaningful way. Without compromising the limitations of a lawful disclosure of inside information in accordance with Article 10 MAR the execution of strategic transaction or also the way how an issuer’s treasury, accounting, IR, Compliance or legal departments actually work (and have to work) imply that information may have to be exchanged quickly, team members may have to step in on short notice and teams may have to use shared drives in a meaningful way enabling issuers to properly perform their duties without undue delay and to execute transactions in an expedient manner. Bearing this in mind setting up insider lists on the basis of potential access is not only a practical requirement but also makes sure that no member of staff to be included into the list is missed and that the advice and acknowledgement according to Article 18 (2) MAR are effected in a timely manner.
<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>
We do not think it is useful to monitor actual access real time as it would not be appropriate given transaction dynamics and workflows.
<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>
It would be helpful to clarify whether external auditors should be included in insider lists and whether a distinction should be made between those, which the company itself commissions, and those that act on behalf of a supervisory authority. If they are to be included, it should also be sufficient here to include only one person on behalf exclusively with their business contact data. See out answer to question 44.

We do not recommend expanding the scope. Rather, the existing system has worked well in our view.

We do not share the concern that auditors or notaries are not included despite having access to inside information as long as they are mandated by the issuer. In fact, they do "perform tasks through which they [may] have access to inside information". Accordingly, they will have to be treated in the same manner as advisory, as is expressly set out (with regard to auditors) in BaFin's FAQ on Article 18 MAR, response to question II.3.
<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>
Basically, we consider maintaining the permanent insider section as an option of the event-based insider list useful. Nevertheless, the definition of a "permanent insider" should be reviewed. In fact there is hardly anyone who has access "at all times to all inside information within the issuer". Taken literally, the foregoing would hardly be the case even for an issuer's CEO or CFO. Instead (or at least in addition), it should be allowed to have a "functional insider list" for those persons within an issuer, who, due to the nature of their function or position, have regular access to inside information.

This however, is different where investment banks provide a multitude of services to a large number of issuers who issue publicly listed instruments. In our opinion, insider lists are supposed to only provide a starting point, rather than final corroborative evidence, for NCAs to investigate into potential insider dealing by primary insiders or the undue disclosure of inside information by primary insiders to secondary insiders. Investigations would not be hampered by the inclusion of persons with potential access to inside information only.

As regards ESMA's criticism expressed in paragraph 167 of the consultation paper regarding potential access as the trigger for the inclusion into an insider list, the smaller a department, the closer the working environment will be and, hence, the more urgent the need to include all members of the department (or a group or team thereof) as insiders. There are other examples where staff with potential access have been included in the insider list. This includes financial intermediaries who usually act for (other) issuers and may have access to inside information as a result thereof. Staff of securities firms dealing underwriting and placing of securities or M&A advisory services for example, will regularly have access to sensitive information potentially amounting to inside information relating to their clients in the course of doing their day-to-day work. These members of staff usually have to work in teams, to ensure timely delivery of their services. In principle, such potential access to inside information should be limited without affecting the flexibility and workability of their teams to perform properly in the interest of the respective client. At the same time, staff in control functions will require access to transactions, which consequently mean access to potential inside information, to carry out their functions. In these cases, it makes sense to extent the scope of "permanent insiders" to staff with the aforementioned "functional" access. Furthermore, it should be noted that having also potential insiders on an insider list only seemingly impedes the efficiency of supervision by authorities. Rather, it ensures the issuers' and service provider's compliance and minimises operational risks in the identification of and proper advice to potential insiders.
<ESMA_QUESTION_CP_MAR_43>

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

<ESMA_QUESTION_CP_MAR_44>
Yes, we agree with ESMA's preliminary view. It should be further clarified, that only the business contacts of the (natural) contact person for the respective legal person should be included. This would be consistent with the existing BaFin practice, see BaFin's FAQ on Article 18 MAR, response to question II.3.
<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 insider lists' requirements should highlight that issuers and investment firms who have alternative internal systems in place to detect and register persons with access to insider information can use these systems instead of insider lists. For these issuers and investment firms, the requirements for insider lists create only an additional burden without any practical benefit (please see also our answer to question 39). Also, we should like to note that the inclusion of sensitive personal data such as home and personal mobile telephone numbers or personal home addresses is by no means justified. It is sufficient for the protection against market abuse and for the conduct of an investigation to have an insider's business address.
<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>
The de-minimis threshold should generally be raised to Euro 20,000. This is in line with BaFin's decision on 20 October 2019. BaFin had – in context with the decision of other European national authorities – declared that the low threshold has no signal effect for the market and does not provide any additional transparency to the market but causes a high organisational and financial burden for issuers. We fully support this view.

Although this is not part of the Consultation Paper we also would like to make the following general remarks in respect of Article 19 MAR:

In our view the scope of Article 19 MAR should be limited to transactions where PDMRs actually have influence on an investment decision. According to Article 10(2)(k) Delegated Regulation (EU) 2016/522 gifts and donations made or received and inheritance received are falling within the scope of the reporting obligation of Article 19(1). Such "transactions" do not result from a conscious investment decision by the PDMR. Therefore, by their very nature, the can under no circumstances have a signaling effect to the market. Disclosing this type of transaction as "manager's transaction" to the market, is not meaningful and rather has the potential to mislead other investors.

The same applies for decisions by a portfolio manager taken independently from the "manager". In those cases, the PDMR cannot influence the "transaction" and thus cannot commit market abuse or insider dealing within the meaning of the Regulation. Therefore, such cases should be exempted from the scope of Article 19 MAR.

As a result, neither the disclosure obligation nor the closed period should apply to

- inheritage,
- automatic allocations of management incentive programmes,
- transactions by a portfolio manager independent from the PDMR.

We are also in favour for an exemption from the directors' dealings requirements for PDMRs of investment firms in relation to financial instruments issued by these investment firms where the underlying is a financial instrument of an third party (e.g. certificates, options) so that the economic chances and risks results only from the value of the underlying.. For these types of financial instruments, a transaction by a PDMR has no signalling effect on the price of the issuer's.

Article 19(3) could cause some difficulties in practice. The problem of congruence of time limits between notification by the manager and publication of these transactions by the issuer has already been the subject of discussions in the MAR legislative procedure. In particular, if the manager takes the entire notification period of three days, publication by the issuer within these three days is not feasible. This means, as is generally known, that the issuer cannot ensure that the transactions entered into are also published within the 3-day time limit. This contradiction could be resolved through a corresponding provision, as the connecting factor for timely publication by the issuer can only be the notification by the manager or a closely related person. The proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets (final compromise text) makes a corresponding amendment to Article 19(3) MAR that should be adopted unless that change will already have entered into force in the meantime.
<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>
We would prefer harmonisation across all Member States resp. NCAs.

However, if NCAs still have the option, the optional threshold should be raised to EUR 50,000. The liquidity of the financial instrument should be the key criteria in setting this threshold.
<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>
An alternative criteria can include carving out transactions that bear a lower risk of insider dealing from the disclosure obligation. This should include the list of reportable transactions set out in Article 10(2) of the Commission Delegated Regulation (EU) 2016/522, especially gifts and donations made or received, and inheritance received (Article 10(2)(k)) – see above.

Also, the term “acquisition of rights” subparagraph (f) could be defined in a more restrictive way. This term currently encompasses any delivery irrespective of discretionary decisions made by a PDMR, subscription rights and the delivery of equity-based variable compensation from the issuer to the PDMR. Failing any signaling effect, disclosure of these transactions as managers’ transactions is not meaningful and may rather be misleading as they do not have any signaling effect whatsoever.
<ESMA_QUESTION_CP_MAR_48>

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

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Q50. 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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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>
Yes we consider the threshold appropriate.
<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?

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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>
Transactions where the PDMR does not exercise any discretion on the decision and execution of any transaction, such as those executed by a portfolio manager independently, should be excluded from the scope of Article 19(11) MAR.

It should be reviewed whether an exemption according to Article 19(12) MAR should only be available upon an affirmative permission by the issuer. Alternatively, the exemption can be established through a limitation of the scope of the closed period, particularly by excluding transactions carved out from the notification obligations in Article 19(1)(a) MAR. A preclearance requirement should be left to the discretion of the issuer, and the non-compliance with the formality of a pre-clearance should no longer be exposed to administrative sanctions.
<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>
We would advocate for a clarification of Article 19(11) 11 MAR with regards to the specific duration of the closed period, as the wording “during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report” could be interpreted differently. From our point of view, concerning the purpose of Article 19 MAR, the closed period shall expire at the end of the day of the an-

nouncement. Market participants usually need some time to evaluate the announcement, which, in general, is possible only during the day of the publication. For this reason, it should be clarified that the closed period comprises also the day of the announcement.
<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>
Closed periods should not be extended to the issuer; the protection provided by Article 7, 8 and 9 MAR is sufficient. Furthermore, an extension of the closed period to persons closely associated with PDMRs is not necessary. ESMA had already expressed this view in its Final Report (ESMA's technical advice on possible delegated acts concerning the Market Abuse Regulation, 3. February 2015 – ESMA/2015/224, paragraph 140). Accordingly, the closed period should only apply to PDMRs and not to persons closely related to them.

According to recital 58 MAR, there should be an appropriate balance between the level of transparency and the number of reports notified to competent authorities and the public. Transactions by persons closely related to PDMRs have no signaling effect to the market and therefore, it is not necessary to extend the closed period provision to such closely related persons from point of view of market transparency.

Regarding the application of Article 19(11) MAR to investment funds: We are of the opinion that Article 19(1)(a) MAR (20 % threshold) should also apply to closed period requirements for investment funds. Basically, Article 19(1)(a) MAR refers only to Article 19(1) MAR and thus to the reporting obligation of PDMRs and closely related persons to them. The link does not cover Article 19(11) MAR, which stipulates the closed period for PDMRs. Nevertheless, according to the purpose of Article 19(1)(a) MAR and the basic idea of equal treatment of the reporting obligation and closed period provision, there is much to indicate that the 20% threshold is also applicable to trade restriction. Investment funds with a small percentage of affected securities (below the 20% threshold) should therefore neither be subject to the reporting obligation nor to the closed period provision.
<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>
For the scenario triggering the application of Article 19(12) the type of financial instrument does not make any difference. Hence, no distinction should be made.
<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>
Another exemption should be created mirroring the legitimate behaviours defined in in MAR Article 9(3).
<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>
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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.**

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

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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>
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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.**

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

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

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

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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.

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

<ESMA_QUESTION_CP_MAR_69>
It is certainly correct and necessary that cum ex transactions and multiple withholding tax reclaim schemes can be recognised and prevented by the competent authorities.

In our view, this issue is already addressed by the Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (so called “DAC 6”).

According to this directive, the intermediaries (credit institutions, advisors and, if applicable, investors) are required to notify the relevant national tax authorities of the tax arrangements that have been classified as relevant. The national tax authorities are required to forward information concerning another EU Member States to the latter. The information must also include any arrangements that lead to tax advantages in third countries. These provisions have to be implemented into national law by 31 December 2019 and have to be implied to all schemes for which the first step towards a cross-border tax structure subject to reporting requirements was implemented after 24 June 2018.

Therefore, it is not necessary to introduce supplementary provisions in the MAR. Instead, it should be considered whether the reports submitted to the tax authorities can – also – be used for market surveillance. This could be ensured by supplementary national provisions.

Furthermore, the term of “unfair behaviours” is very unspecific and does not give sufficient guidance to market participants. Hence it is not suitable to prevent market abuse and promote proper behaviour. Finally, in light of the specific statutory provisions mentioned above, there is no need to have such an unspecific catch-all provision.
<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.

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

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