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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 | Spotlight Stock Market  |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |[ ]
| Country/Region | Sweden |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

Spotlight is glad for the opportunity to comment on the current market abuse legislation.

Our general view is that in order to have a well-functioning market, high investor confidence is essential. Therefore, having a regulation that safeguards the investors interests is key. However, the regulation must at the same time be comprehensible and possible for issuers to comply with, without imposing to high barriers that deter them from being listed and without making it too hard for listed companies to run their day-to-day business.

In Sweden, we have over 800 companies of different sizes listed. The vast majority are SME- or micro-cap companies listen on MTFs. We have over the past 20 years seen a significant growth in this market and the number of issuers.

Spotlight is one of the MTFs in Sweden, with 177 companies listed. Spotlight was founded over 20 years ago with the same mission as today: to make it simpler, safer and more visible for growth companies to be listed. We know that in order to attract investors a high level of transparency and predictability is essential.

With MAR, one common legislation for all listed companies was introduced. In this context it is important remember that the administrative burdens put upon the issuers will be especially burdensome on SME and microcap companies and a one-size-fits-all approach is not always desirable.

We would in this introduction also like to take the opportunity to comment on a topic not covered by the questions below. In MAR, article 2 (1a,1b) where the scope is set, it is stated that MAR applies to *financial instruments admitted to trading on a regulated market (or MTF) or for which a request for admission to trading on a regulated market has been made.* Our opinion is that MAR should be applicable when a financial instrument is admitted to trading on a trading venue rather than upon request for admission or when listing Is approved. The reason being that for example PDMRs affected by the regulation might not be aware of when the issuer formally has applied for listing and/or when the trading venue decides to approve the issuers application.

<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>

Spotlight Stock Market do not wish to enter an opinion on whether or not the scope of MAR should be extended to spot FX contracts. However, we are of the opinion that should such an extension be realised, it is of the utmost importance that the lawmakers and ESMA take into consideration the very different characteristics of the FX-market compared with for example the stock and bond markets. We believe there is a need for clarification in several instances of the existing MAR with regards to at least the stock market. If concepts of MAR would need to be revised and adapted to make them workable for FX contracts as well, it is important not to make it on the expense of the clarity or applicability in relation to the stock market. The impact of any adjustment of MAR to encompass FX contracts must be thoroughly assessed beforehand, as to ensure no unintended negative effects on the financial instruments already included in the scope of MAR.

<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>

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<ESMA\_QUESTION\_CP\_MAR\_5>

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

<ESMA\_QUESTION\_CP\_MAR\_6>

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 ESMA’s view that the current reporting obligation under Article 5(3) of MAR is too burdensome. As the current wording of Article 5(3) imposes a disproportionate burden on the issuers, it should be modified.

In addition to the reasons for a modification given in Section 56 – 66, pages 24 – 26 of the MAR Review Report, we would like to add the following.

The shares of a large number of publicly listed European issuers are traded on venues without the issuer's request or approval. To our understanding, there exists no common, easily accessible, understandable and reliable system for the issuers to identify the competent authorities of these trading venues. It is not reasonable to expect for the issuers to fully comply with the current reporting obligation under these conditions

<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>

No, we believe option 2 is appropriate. For both option 2 and 3 there is the benefit of a single reporting point, unless in option 2, the issuer has applied or approved to have their financial instruments listed on more than one trading venue, which makes it easier for the companies to report. However, in option 3 the issuer must keep track of which market is most relevant in terms of liquidity, which is unnecessary administrative burden for the company. Since liquidity can change it is possible that the most relevant market can change and thus the company must change its reporting to another market. Such a change would also make it harder for an investor to track this information. It is better for both the listed companies and the investors to keep the reporting in one place, which should be the case using option 2.

<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

<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>

We agree in part with the list of fields suggested by ESMA. We do not consider field 3 (trading venue transaction identification code) to be necessary information and could therefore be excluded from the list. Likewise, we find that field 12 (buyer decision maker code) could be left out of the reporting, as field 7 (information on the buyer) should be sufficient.

<ESMA\_QUESTION\_CP\_MAR\_10>

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

<ESMA\_QUESTION\_CP\_MAR\_11>

Yes, aggregated volume traded, weighted average price paid, date of the buy backs, total number of shares that the company has repurchased and total number of shares in the company should be enough information to the investors.

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_12>

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

<ESMA\_QUESTION\_CP\_MAR\_13>

The definition of inside information set out in Article 7 MAR has in recent decades mainly been developed throughout codification of the case law of the Court of Justice of the European Union (EJC), and predominantly the court's clarifications in C-19/11 Markus Geltl v. Daimler AG. In cases where the definition of inside information has been interpreted, the EJC has mainly considered how the outcome of various alternative interpretations would affect the underlying purpose of the provisions – i.e. to preserve public confidence in the capital market. The ECJ has not in any case explicitly taken into account whether – or to what extent – the definition of inside information enables individuals to determine precisely which information shall be deemed to be inside information and when.

Against the background of the absence of subjective elements in MAR, the Swedish legislature has, in preparatory works to national supplementary provisions to MAR, interpreted MAR as imposing a strict liability on persons in relation to administrative sanctions for breaches of MAR. This means that sanctions shall be issued against persons who have acted in conflict with MAR, regardless of whether a person has made a reasonable interpretation of whether certain information is inside information, if another interpretation is deemed to be correct.

Preamble 15 MAR provides that *[e]x post information can be used to check the presumption that the ex ante information was price sensitive but should not be used to take action against persons who drew reasonable conclusions from ex ante information available to them.*

Thus, it is clear that MAR at least provides one exemption from any strict liability imposed on persons subject to the regulation: If a court or other public authority uses *ex post*information to verify an assumption that certain information was price sensitive, a sanction should not be issued against a person who has drawn a reasonable conclusions from the *ex ante* information that was available to that person.

In light of the fact that the definition of inside information seemingly has not been written to enable a precise determination of which information shall be deemed to be inside information, and when, it is requested that it is assessed in relation to which liabilities under MAR a strict responsibility shall be imposed on the persons subject to the regulation. Further clarification is necessary.

Besides the above, it is often a complex assessment to determine when information qualify as inside information within the meaning of MAR, not least in a sequence of events.

One example is insider information in connection with the drafting of a financial report. The drafting of a financial report is a developing process considering that more and more information is added to the report draft in an ongoing process. It is very hard for a company to assess if and when the draft of the report becomes inside information in accordance with MAR.

In some cases, for instance regarding investment companies with mostly listed assets, it is doubtful that even the finished report could be regarded as insider information since information regarding the company’s assets are publicly available every day.

Another example is if the name of your counterparty in a negotiation or business contract is always considered to be insider information. According to the Swedish FSA this is to be the presumption, unless the company can prove that it is not. Such a strict interpretation would make it very hard especially for SME companies to close deals with larger companies, which often require non-disclosure of their identity. It is our opinion that in many cases the order value, a description of the product or service delivered, a description of the counterparty and the market were the product or service is delivered would be of more value when making an informed investment decision than the name of the counterparty. In this specific issue there is need for guidance and a harmonisation within the EU.

Another important issue is the interpretation of *as soon as possible*. We find it very problematic that there is currently no unison EU interpretation on what it means to disclose insider information *as soon as possible*. Dually listed companies face real problems when the FSAs in different countries have very different views on what *as soon as possible* means in practice (for example, UK FCA compared to the Swedish FSA). We also think that it is a problem that the interpretation of insider information differs greatly whether it is regarding the company’s duty to disclose information or if it is regarding insider-cases which are handled by the criminal justice system. When it comes to the duty to disclose information the barrier to decide if it is insider information or not is considerably lower than in the criminal justice system. It is also worrying if a strict liability (as mentioned earlier in the response) is imposed on issuers which have never been the case (and should not be) in the criminal justice system.

For issuers with only corporate bonds listed, it is our understanding that less information is of price sensitive nature for corporate bonds in relation to what would be price sensitive for listed shares. We would appreciate if ESMA could provide further guidance and examples of what type of information should typically be deemed to be inside information in relation to listed bonds since most guidance available today relates to listed shares.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_23>

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

<ESMA\_QUESTION\_CP\_MAR\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_24>

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>

There might be situations, as ESMA points out in the consultation, where inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. Examples of such situations are provided in response to Q26.

In summary, the examples provided describe situations where delays of a disclosure otherwise would allow for a more comprehensive and understandable communication, better adapted to how the market functions.

In general, we fear that too much focus is on the notion of *as soon as possible* rather than that the information needs to be correct, relevant, clear and sufficiently detailed to allow an assessment of the significance of the information for the issuer. There is a substantial risk that disclosing information that is insufficiently mature will mislead investors.

The current conditions for delaying disclosures offer only limited room for such considerations, and it would be welcome if they were reviewed in this context.

One difference from when MAR was implemented compared to the rules applicable in Sweden pre- MAR implementation is that an issuer today cannot wait to disclose inside information until the next day, before the market opens, if the inside information occurred after the market closed. In certain circumstances we believe that it would be more appropriate for the issuer to be able to further evaluate the information, during an evening/night or during a weekend, before disclosing the information to the market, provided that the information becomes inside information after the market closes on the day of occurrence and that the information is disclosed prior to the market opens again on the next day of trading. Today the issuers can postpone disclosure in this way through the rules on delayed disclosure, but these rules might not always be applicable in these situations. If the company can keep the information confidential, in general the information cannot be used for market abuse or otherwise used by investors when the market is closed. We believe the risk with allowing issuers to wait to disclose the information until the next trading day to be low. It also constitutes a heavy administrative burden with high costs on companies to disclose information at all hours, without it having a positive effect on the transparency on the market or any benefits for the investors. Many SME’s have a very slim permanent organization and are in many aspects depending on external consultants. To be obliged to be able to reach them 24/7 would be extremely costly and with no apparent purpose. A too strict interpretation of this rule might in fact make it too expensive for SME companies to be listed. It is important to understand that to strict requirements on disclosure and speed in communication might lead to less transparency if companies in general chose financing through private equity rather than through a listing, due to requirements that makes it very difficult to run their day-to-day operations. As mentioned under Q13 it is also clear that the interpretation of *as soon as possible* differs among the competent authorities within the EU. Due to the above it would be desirable that ESMA made a clarification by publishing guidelines for the interpretation of “as soon as possible”.

<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>

Several examples (of a parallel nature) can be made:

An issuer encounters a production problem that – after proper investigation – is considered inside information. The problem and its immediate effects can be disclosed, but there might be supplementary information, e.g.  on accrued reserves, planned remediation, recalls, authority interaction, insurance protection or other factors, that the market requires to contextualize the problem and which (by the very nature of corporate crisis management) may not be ready for disclosure at the precise same time.

Interim report preparations reveal a deviation from market expectations in a business area of an issuer that is significant enough to qualify as inside information. Other business areas of the issuer are not as advanced in preparations, but the deviation may be partly offset by the other areas on an aggregated level. An immediate disclosure of the inside information (which will then need to focus on the deviation, as remaining information do not yet have disclosure quality) and the interim report following shortly thereafter may well confuse the market, rather than keeping it up to date at all times.

In the above examples the correct choice from a market functioning standpoint is probably to delay disclosure for a very short period, and then approach the market with a more comprehensive release. However, the reasons for doing so may not fit neatly under current Art 17.4 conditions, as they can link more to market expectations (where e.g. disclosure of interim reports on pre-announced days are clearly favored among investors) or the market’s capacity to deal with unexpected and complex information (where e.g. sequential disclosures on the same subject in a short timespan may create an unclear picture and perceptions of biased or unfair trading).

Other examples are negotiations with potential customers or suppliers where it can be difficult to determine when the information becomes insider information. A premature disclosure could harm negotiations, but it is often questionable if the conditions to delay disclosure are fulfilled. Discussions regarding the replacement of a CEO or board member is also complicated under current MAR regulations. To what extent can the board discuss the matter and/or contact potential candidates before disclosing information about the fact that the CEO/board member will be replaced? In our opinion there is a need to review or clarify what constitutes *legimate interests of the issuer,* and if this notion could be wider as long as the company can make sure that information can be kept confidential. With regards to the requirement that disclosure can only be delayed if it is not likely to mislead the public, we want to empasise again that disclosing insider information at a very early stage can also be misleading to the public.

<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 practice, Art. 17 and in particular 17.4 (c) already provides a requirement for having systems and controls for e.g. handling of inside information. In addition, systems for identifying and disclosing inside information are also part of most, if not all, listed issuers’ governance infrastructure and/or a requirement by the listing venues. Hence, a systems and controls requirement may not bring much change to already established practices and will not make it easier for the companies to handle insider information.

<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>

Preparation of financial reports is one example. When does the information you compile become sufficiently concrete to consider the work material as inside information? Another example is business negotiations, at what stage can the negotiations reasonably be expected to lead to an agreement and what circumstances should be considered as intermediate steps and thus be disclosed?

<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 understand that ESMA want to receive more information regarding delayed disclosure of inside information which was never published because of the information ceased to be deemed insider information. However, the additional administrative burden this would put on the issuer does seem to outweigh the use of it for either supervisory purposes or investigative purposes. In the latter case it should be sufficient with the company’s insider list.

<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>

TYPE YOUR TEXT HERE

<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>

In our view, MAR read in conjunction with Recital 35 supports no other interpretation than the one which, understandably, is widespread across the EU, i.e. that Article 11 of MAR is a safe harbour from Article 10 of MAR, not a stand-alone obligation. See, for example, *Market Abuse Regulation (EU MAR) Q&A (Updated 22 May 2018), Prepared by the City of London Law Society and Law Society Company Law Committees’ Joint Working Parties on Market Abuse, Share Plans and Takeovers Code*, Part B Question 5, Ventoruzzo & Mock (eds.), *Market Abuse Regulation — Commentary and Annotated Guide*, 2017, p. 306, and Klöhn, *Marktmissbrauchsverordnung*, 2018, pp. 367, 392, 395 and 398.

In addition, the “main goal” of introducing the market sounding provisions in MAR was not to ensure “the possibility for NCAs to obtain a full audit trail”. The purpose, as set out in Recital 35, was to provide a safe harbour and thereby to encourage market participants to adopt stringent processes for market sounding, largely in line with was already market practice in Europe before MAR.

To our understanding, and in our experience, Article 11 is very frequently complied with by professional advisers (banks, etc.) when carrying out market soundings in behalf of clients. Sometimes minor deviations are made, as and when prompted by the circumstances, including practical and technical realities. As mentioned, complying with market sounding (wall-crossing) procedures largely in line with Article 11 was market practice already before MAR.

However, there are no doubt situations where the highly formalised procedures set out in Article 11 are not capable of being fully complied with. This is largely they case when issuers and potential takeover bidders act on their own behalf and not through advisers. For example, if the issuer wishes to sound its largest shareholder (say, a long-term family office or private, industrial holding company) ahead of a potential capital raise (for example, a rights offering), this would typically be done by way of the issuer’s chairman or CEO meeting or telephonically speaking with the chairman or CEO of the owner to discuss the matter at hand. Clearly, such a discussion cannot be commenced by the issuer chairman reading a formalised sounding script to the other individual. Several other scenarios can easily be laid out, illustrating why Article 11 cannot be made obligatory. Not least, if Article 11 were amended accordingly, many completely legitimate discrete approaches ahead of potential takeover bids could not take place, thereby risking that value-creating transactions will never happen.

Therefore, our view is that no “clarifications” along the lines of what Esma suggests should be made. First, they are not clarifications and, secondly, compelling reasons speak in favour of not amending MAR is these regards. Consequently, no new sanctions should be introduced either.

<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>

As stated in A33 we strongly oppose to amending MAR so as to make Article 11 a stand-alone obligation rather than a safe harbour. However, of course, if Article 11 were to be turned into a stand-alone obligation, the scope would have to be significantly narrowed in order not to render certain legitimate sounding measures in practice illegal. One way of achieving this could be to exclude, altogether, soundings carried out by the issuer or potential takeover bidder itself as opposed to soundings carried out by its professional advisers.

<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>

Because Article 11 of MAR is a safe harbour, not a stand-alone obligation (see A33), the highly formalised procedures prescribed in Article 11 are not necessarily problematic. However, understandably, some financial advisers frequently conducting market soundings on behalf of clients may wish to adopt a policy to the effect that Article 11 should always be strictly complied with so that the adviser always stays in the safe harbour. This causes an inflexible practice where the focus is on satisfying detailed formal requirements rather than applying sound judgement and due care. We believe MAR would benefit from the inclusion of a clarification to the effect that market soundings carried out wholly or partly outside Article 11 are entirely permissible, but that a cautious and careful approach should of course always be taken when disclosing inside information so that the action taken does not amount to a breach of Article 10.

<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>

See answer on question 37

<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 with ESMA’s preliminary view regarding the usefulness of an insider list allowing NCAs to identify who has access to inside information and the relevant timeline, which is of great value in insider investigations.

The insider list is also helpful for issuers and others to manage the flows and confidentiality of inside information.

We have doubts regarding the usefulness of the permanent insider list. In addition to be a tool for inside investigations and a way for companies to manage insider information, an event driven insider list will have a preventive effect on the people included in the list. A permanent list will not have the same effect.

However, too much information is included in insider lists and results in a unproportionally heavy administrative burden and costs for issuers and others. Only relevant data to identify the persons should be included, and information should not be excessive in relations to the purpose of the Insider list..

<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>

As stated above we are of the opinion that the list could be simplified.

Furthermore, as a more technical note, the insider list regime today requires that quite comprehensive information is collected from all persons included on the list. This is an administratively burdensome exercise, which only seem to serve the purpose of allowing identification of relevant individuals. This is possible to secure with easier means and it might be considered to ease the administrative burdens of issuers and go back to the pre-MAR rules or, alternatively, allow issuers more freedom over which information is collected from insiders, as long as the identification of each of them can be secured.

Our opinion is that the usefulness of permanent insider lists is questionable. It is a risk that persons included do not have all insider information at all times. If permanent insiders buy or sell shares in the company when they do not have insider information, but others on the list have insider information, it will harm both the permanent insider and the company. Permanent insider lists are also of little value in insider investigations as they do not state when the insider got access to the relevant inside information. This might cause investigators of market abuse (competent authority or law enforcement) to have to resort to further actions to access further information of who really had access to the inside information and when.

We are very positive to the initiative in the upcoming SME-regulation where ESMA will be tasked to develop a simplified insider list. We believe it could also be considered by the lawmakers whether it could be used for all companies.

<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>

As mentioned above we support ESMA’s view that the insider lists should only include persons who have the possibility access to inside information, and not those who have not. This means that permanent insider lists should not be used.

However, to require that an insider list should contain only persons who actually did access inside information during a specific time period, and not only people who had the possibility to access to the information (but might not in reality have accessed it), would lead to technical challenges and increased costs for all companies.

It might be practically impossible to track the exact time when everyone on an insider list actually gained access to the information. To exemplify, inside information related to e.g. an issuer’s earnings may be kept in a restricted part of the accounting system, where access is carefully monitored. It is quite easy to track when an authorized user can access such information (when the relevant figures are uploaded or compiled and unblocked), and perhaps possible to track when relevant individuals log into such system the first time after upload, but it is undoable to track when someone actually reads the relevant figures. To make insider lists workable, there is a need to work with potential access to a limited extent.

We think that the costs associated with requiring issuers to have technical solutions with some sort of “tracking” built in to be able to determine who has actually read information that they have access to would widely exceed the benefits. Especially since this would require investments in a multitude of systems used by the companies. Many of the Swedish listed companies are micro-cap companies, i.e. on the lower end of the scale of the SME-definition and for them this would mean unreasonable costs and additional administrative burdens.

Regarding systems and controls it is important to bear in mind the companies differ in size and state of development. In this case we are convinced that one size does not fit all. It is more important to focus on outcome than on pan European detailed regulation. Therefore, issuers should be given the possibility to have the systems and controls appropriate for their organisation.

<ESMA\_QUESTION\_CP\_MAR\_41>

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

<ESMA\_QUESTION\_CP\_MAR\_42>

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

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

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

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

<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 above we are not in general in favour of the permanent insider list. However, it is too early to **abolish** it. The permanent insider list may be useful for some issuers if the list is used for only a very limited group of employees. Before the permanent insider list is suspended, the content of the insider list should be reviewed and a simplified list should be presented, with only relevant data included.

<ESMA\_QUESTION\_CP\_MAR\_43>

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

<ESMA\_QUESTION\_CP\_MAR\_44>

We agree with ESMA’s preliminary view. Article 18 of MAR should be revised to specify that the issuer should only include one contact natural person for each legal person acting on behalf or for the account of the issuer having access to inside information and each one of those legal persons should include in their own insiders list the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. one contact person per external provider).

<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>

In our opinion there is an urgent need to reduce the administrative burden for issuers regarding insider lists. One step to reduce the burden should be as mentioned in A44 to specify that the issuer should only include one contact natural person for each legal person acting on behalf or for the account of the issuer having access to inside information and each one of those legal persons should include in their own insiders list the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. one contact person per external provider).

But further measures should be taken to reduce the burdens for issuers in line with the principle of proportionality. We are of the opinion that far more information is included in the Insider list than necessary. The insider list should include information which identify the person who has access to insider information and by stating the specific date and time on which a piece of information became inside information and also the date and time when the relevant persons gained access to it. However, the insider list requires the issuers to include a lot more information and we are of the opinion that the list could be simplified and thereby reduce the administrative burden for issuers and others without endanger the list as a tool for investigating possible market abuse.

The requirements to include date of birth, personal address and birth surname are excessive and without reason. Therefore, they should be abolished.

We see the convenience for competent authorities to include items such as telephone numbers and work-email addresses, which are nice to have for investigatory purposes. However, it is important to take proportionality and the administrative burden of the issuers into account. Most of the insider lists are never requested by the competent authorities of MAR or MAD, and of those requested, we are doubtful having telephone number or email addresses in the insider list, as opposed to gathering them from alternative sources, hampered the cases.

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<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>

The reporting threshold should be increased to Euro 20,000 and this threshold should be made mandatory with no possibility for member states to opt for a lower threshold. The current threshold of Euro 5,000 has done nothing but increase disclosure of insignificant transactions that do not give any meaningful signals to the market. Because of the insignificant Euro 5,000 threshold, it has become the practice of managers to report all of their transactions regardless of the threshold so as to avoid or reduce the risk of failure to report notifiable transactions. The current threshold is clearly disproportionate and has done little or nothing to alleviate the administrative burden on managers.

Furthermore, and unrelated to the reporting threshold, the scope of transactions subject to notification has been defined in an excessively broad manner. The list of transactions triggering the disclosure requirement should be amended in order to limit it to transactions that would give meaningful signals to the market. Transactions with no nexus to an active investment decision by a PDMR should be excluded from the scope. These include transactions where the PDMR’s involvement is purely passive, such as gifts and donations received, and inheritance received and automatic conversion of a financial instrument into another financial instrument.

There are also situations where it is unclear when reporting should take place. According to article 10.2 g) in the Commission Delegated Regulation (EU) 2016/522, subscription to a capital increase is a transaction that causes a notification obligation. It is, however, unclear what action in a share issue that is deemed to be the transaction. Is it the subscription of shares on a subscription list that triggers the notification obligation, or is it the payment of the subscribed shares, the board's allocation decision, the registration of the share issue with the Swedish Companies Registration Office or is it when the shares are delivered to the owner-registered account/custody account?

The Swedish FSA has provided advice on which action in the process of a share issue that will trigger the notification obligation. According to the FSA’s Q&A, the following apply.

If paid shares subscribed (PSS) (*Sw: BTA*) are delivered to the subscriber’s owner-registered account/custody account, the notification obligation arises on the date that PSS is delivered to the owner-registered account/custody account. The conversion of PSS to shares does not trigger any notification.

If a subscriber receives the shares to which the *subscription right* *(Sw: teckningsrätten)* refers directly, i.e. without first obtaining PSS, the notification obligation arises on the day the shares are delivered to the owner-registered account/custody account.

The obligation to notify the allocation of shares without *subscription rights* as well as PSS in connection with the share issue arises when the shares are delivered to the owner-registered account/custody account.

The question is whether the FSA's position above in (ii) refers to shares in a rights issue (*Sw: företrädesemission)* as well as to shares in a private placement (*Sw: riktad nyemission)*? In this context, we must understand what the FSA means when stating the *subscription right* *(Sw: teckningsrätten)* in (ii) – is it the right to subscribe for shares in general, (i.e. the right to subscribe for shares in rights issues as well as in private placements) or is it specifically the pre-emptive right when using subscription rights that shareholders have in a rights issue?

In our opinion, *subscription right* (*Sw: teckningsrätten)* in this context means those who are entitled to subscribe for shares (*Sw: rätten att teckna aktier*), i.e. FSA's position covers all types of share issues. From our point of view there are no significant differences between private placements and rights issues of Euroclear-affiliated instruments regarding the matter of when subscription of shares will give rise to a notification obligation. Thus, the notification obligation of Euroclear-affiliated instruments in both private placements and rights issues should arise when the instrument is delivered to an owner-registered account or a custody account.

In the light of the list in Article 10.2 g) of the commission delegated regulation (EU) 2016/522 (“subscription to a capital increase”), the FSA has in in its decision FI Dnr 17-2045 argued that the reporting period after the subscription of Euroclear-affiliated shares in a private placement started in connection with the actual signing of the subscription list by the subscriber. The decision has, following the appeal on April 16, 2018, been confirmed by the Stockholm Administrative Court, case no. 16243-17.

The FSA's stance - which is thus also shared by the court - is problematic since the signing and submission of a subscription list in a share issue does not constitute a *transaction*. Instead, such a measure can be compared with the submission of an offer to the company to subscribe for the shares in question, which then can be accepted or rejected by the company (by withdrawing a resolved but not completed share issue). A situation where a subscriber is assigned a smaller number of shares than what is applied for in the subscription list may also occur. Thus, the signing of the subscription list does not mean that a subscription of shares has been made.

In our opinion there is a lot indicating that the intention with including subscription to a capital increase in the list in Article 10.2 g) of the commission delegated regulation (EU) 2016/522 is to shed some light on the fact that an acquisition of shares through subscription is a kind of acquisition that must be reported – when the subscription is materialised. The stance of the FSA in this specific matter can in our opinion be questioned partly as it means that a PDMR is required to report a measure that is not laid down in MAR (no transaction has taken place at the time of the signing and submission of the subscription list), partly since the reporting time period for share issues would start earlier in the process than for the other transactions exemplified in Article 10.2 of commission delegated regulation (EU) 2016/522, all of which are by nature definitive transactions.

In summary, we ask for clarification on at which point in the process of share issues that the reporting obligation for a PDMR arises in connection with the subscription of shares, both in respect of rights issues and private placements.

<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>

It is more appropriate for ESMA to raise to EUR 20,000 than for different NCAs to have their own limits. It is better to have harmonized rules on all markets. An important issue to address is also that the fines for breaching the rules should be harmonized as well, which does not seem to be the case today. In Sweden we have seen examples of extremely high fines for breaching these rules that does not seem to be reasonable in comparison to fines against other similar breaches

<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>

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<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>

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<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>

Yes, but it is unhelpful and confusing that no similar threshold has been introduced in respect of Article 19(11). We assume that this is just a mistake. If the 20% threshold is not breached, an investment in a CIU will be excluded from the notification obligation in Article 19(1), and clearly it must be intended that such investment would not be subject to the prohibition under Article 19(11).

<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>

TYPE YOUR TEXT HERE

<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>

Article 19(11) should be amended so as to enable persons discharging managerial responsibilities (PDMRs) to undertake certain dealings without having to rely on the issuer permitting such dealings (assuming that the issuer in each case is entitled to permit the dealings under Article 19(12)) where a rights issue or public takeover offer is made during a closed period to all shareholders. Such dealings include:

1. undertaking to subscribe, or subscribing, for their pro rata share of the rights issue; and

2. undertaking to accept, or accepting, a public takeover offer.

In rights issues and public takeover offers PDMRs are treated in exactly the same way as other shareholders and there is no reason whatsoever to impose restrictions on the dealings set out above. Such restrictions may even be harmful to market efficiency. Subjecting PDMRs to these restrictions may prevent the rights issue or public takeover offer from being implemented, if one or more PDMRs (or closely associated persons on whose behalf the act) hold significant stakes in the issuer.

Furthermore, it should be clarified that transactions executed under a discretionary asset management mandate are excluded from the prohibition. The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. Since, the PDMR has no possibility to influence the asset manager and to make any investment decision, there cannot be any reason why such transaction would be captured by Article 19(11).

*Exemption to trading within the closed period*

According to Article 19.12 b) MAR, an issuer may allow a PDMR to trade during a closed period due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

The Commission has stated in Article 9 in the commission delegated regulation (EU) 2016/522 what is meant by the characteristics of the trading during a closed periodby confirming some, non-exhaustive, circumstances which may cause exemptions to be granted. Article 9 f) states that an exemption may be granted if a PDMR acquires the right to shares and the final date for such an acquisition according to the issuer's articles of association falls during the closed period, provided that the PDMR submits evidence to the issuer of the reasons for the acquisition not taking place at another time, and the issuer is satisfied with the provided explanation.

The FSA has clarified a few things concerning exemptions to trading during the closed period in connection with share issues. Regarding rights issues, the FSA states that a PDMR with the issuer's consent can subscribe for shares in a rights issue based on the subscription rights obtained from existing holdings.

It is further stated that, depending on the circumstances, it may be possible to grant exemptions for subscription of shares in a share issue for a closed period, provided that the PDMR submit evidence to the issuer, if the reasons why the acquisition did not take place at another time and that the explanation that is given is satisfactory.

It is unclear whether the FSA with a *share issue* *(Sw: nyemission)* in this statement means private placement or all new issues of shares, i.e. also rights issues. If the FSA aims to include all types of share issues, the question arises as to whether it is possible to grant exemptions for subscription of shares without the support of subscription rights in a rights issue (see above clarification on subscription with the support of subscription rights, which seems to indicate the opposite)

We ask for clarification of when an exemption to subscribe for shares can be made, i.e. can exemptions also be granted when subscribing for shares without the support of subscription rights in a rights issue and when subscribing for shares in a private placement.

<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>

TYPE YOUR TEXT HERE.

<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>

Article 19(11) as currently drafted already goes a long way to prevent insider dealing, as it captures not only transactions conducted by PDMRs on their own account, but also transactions conducted for the account of a third party, directly or indirectly. ESMA’s concern that it does not capture cases where a closely associated person trades on the basis of inside information provided by the PDMR and where a PDMR in possession of inside information recommends a closely associated person to trade is fully addressed by Article 8 that prohibits such trading. An extension of the closed period to closely associated persons would place additional burdens on both PDMRs, closely associated person and issuers and create new obligations for individuals which they can be personally liable for breaching, where there is no harm to market integrity. Against this backdrop, Article 19(11) as currently drafted strikes an appropriate balance between fulfilling the purpose of the prohibition in Article 19(11) (which is to is to prevent insider dealing by PDMRs) on the one hand, and not unnecessarily placing burdens on PDMRs, their closely associated persons and issuers (and subjecting them to hefty fines in circumstances where it would be unreasonable to do so) on the other.

We agree with the downsides identified by ESMA of extending the closed period to issuers. We believe that these downsides would materially harm market efficiency by preventing debt and equity offerings as well as investments and acquisitions by issuers.

<ESMA\_QUESTION\_CP\_MAR\_55>

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

<ESMA\_QUESTION\_CP\_MAR\_56>

Article 19(12)(a) should be amended to enable the issuer to permit a PDMR, on a case-by-case basis, to sell also other financial instruments than shares, where there are exceptional circumstances which require the immediate sale. As ESMA has pointed out, the sale of financial instruments other than shares may also be functional to the solution of the same severe financial difficulties conditions which are considered by Article 19(12)(a) of MAR. There is no reason whatsoever to differentiate between shares and other financial instruments in this context.

<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>

ESMA believes that there is merit in exploring whether market participants consider that there are cases, currently not explicitly covered by the criteria under Article 19(12)(b), which should be added to the exemptions. We note that ESMA in this context makes reference to cases in which, at the time in which a contract was entered into, it was not possible to foresee that such contract would require the acquisition or the subscription of financial instruments (the “transaction” pursuant to Article 19) within a closed period. ESMA goes on to state that in this respect, it is relevant to point out that exemptions to the closed period are not appropriate where the PDMR would be able to make an investment decision in such time-span.

If it is ESMA’s view that contracts entered into outside a closed period that require completion of the relevant transactions during a closed period are captured by the closed period requirement, then this would be an inaccurate interpretation of Article 19(11). The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. Where the decision to trade is made outside the closed period, the PDMR is not trading during the closed period. Nor is there any conduct by the PDMR during the closed period, since the contract requires the acquisition or sale of financial instruments during the closed period. This situation should therefore not be added to the scope of the exemptions under Article 19(12), as it could mistakenly be taken to mean that such transactions would otherwise be captured by Article 19, which obviously cannot be the case. Reference is also made to Article 9(3) which makes it clear that performing a contractual obligation entered into prior to possessing inside information is not insider dealing.

Clarification of financial instruments in scope of Article 19

We have also identified another point where clarification of Article 19 is needed, namely which financial instruments fall within the scope of Article 19. It seems that different competent authorities have taken different views when determining whether a PDMR of an issuer that have only debt financial instruments admitted to trading on an EU trading venue, must notify the issuer and the competent authority of transactions in the (unlisted) ordinary shares of the issuer.

In Germany, the competent authority has clarified that the notification requirement under Article 19 of MAR applies to transactions (i) in shares or debt instruments of the issuer that are traded on a regulated market or on an MTF/OTF at the request or with the approval of the issuer (with reference to Article 2(1)(a) to (c) and Article 19(4)); or in derivatives or other financial instruments relating thereto (with reference to Article 2(1)(d)).

Similarly, in the UK, the competent authority has clarified that the notification requirement under Article 19 of MAR only applies to transactions in financial instruments of the issuer which are either (i) subject to a request for or approval of admission to trading on an EU trading venue, or (ii) linked to financial instruments which are themselves subject to a request for or approval of admission to trading on an EU trading venue. Dealing in instruments that do not fall into either of these categories is not subject to Article 19.

Unlike the competent authorities in Germany and the UK, the Swedish competent authority and Swedish Administrative Courts have held that Article 19 applies to transactions in all financial instruments issued by an issuer, where the issuer has requested or approved admission of any of its financial instruments to trading on a regulated market or an MTF/OTF.

The obligation to disclose in Article 19(1) applies to transactions in “the shares or debt instruments of that issuer” or “derivatives or other financial instruments linked thereto”. The reference to “shares or debt instruments” in Article 19 (1) should obviously be interpreted in light of the scope of MAR as set out in Article 2(1). As a result, the obligation to disclose in Article 19(1) only applies to shares or debt instruments which either (i) are traded on an EU trading venue, or for which a request for admission to such trading has been made (and therefore fall within paragraphs (a), (b) or (c) of Article 2(1)); or (ii) are financial instruments the price or value of which depends on or has an effect on the price or value of a financial instrument traded on an EU trading venue (and therefore fall within paragraph (d) of Article 2(1)).

The price or value of an ordinary share does not depend on or have an effect on the price or value of a debt instrument issued by the same issuer (at least where the debt instrument has no equity element). Therefore, dealings by PDMRs and their PCAs in ordinary shares of a debt issuer do not fall within the scope of Article 19, unless those shares are themselves traded on an EU venue (Article 2(1) a)-c)).

Against this backdrop, we are of the view that the correct interpretation of Article 19(1) (a) is that dealings by PDMRs and their PCAs in ordinary shares of a debt issuer do not fall within the scope of Article 19, unless those shares are themselves traded on an EU venue (Article 2(1) a)-c)). However, as there currently are differing views among competent authorities on this point, clarification is needed.

The prohibition against insider dealing

The definition of insider dealing in Article 8 in MAR includes, inter alia, when a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments (e.g. shares) to which that information relates. Article 14 in MAR states, inter alia, a prohibition against insider dealing.

Subscription of shares

When it comes to the prohibition against insider dealing, the question also arises which measures in the process of subscription of shares that are forbidden to take if the subscriber has inside information? Is it the subscription of shares on a subscription list that is prohibited, or is it also required that the board has resolved on the allocation of the subscribed shares for the subscription to be deemed to have taken place definitively? Or maybe some additional steps also are required for the subscription to be considered concluded in this context and to be prohibited, if the subscriber has inside information?

Are there any other steps that are prohibited to take when you have inside information, e.g. to receive the subscribed and allocated shares in the owner-registered account/custody account?

In our opinion, it must only be actions taken by the subscriber that may be prohibited to take when in possession of inside information, i.e. the actual subscription of shares (by payment or by subscription on a subscription list). After all, the subscriber cannot control the timing of certain actions that are beyond his or her control, e.g. the board's decision on the allocation of the shares, registration of the new share issue with the Swedish Companies Registration Office and delivery of the shares to the subscriber's owner-registered account/custody account.

We ask for clarification on what action or actions in the process of subscription of shares that, according to MAR, is/are prohibited to take when the subscriber is in the possession of inside information.

<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>

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<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?

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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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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>

Regarding the cross-market order book, whether it is to be used by competent authorities for real time surveillance or to be reported at end of the day to be used the way transactions from TRS are used, we believe the size of the data will be so large that it is doubtful if it can be handled in any efficient manner. We do not think this proposal will come out favorable in a cost benefit analysis, and therefore suggest that no change be made in this area.

<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>

Since MAR entered into force, the Swedish FSA (*Sw.* Finansinspektionen) has imposed sanctions on private individuals and companies to a large extent, for example regarding late reporting of PDMR transactions. In many cases, very high amounts have been determined even though the transactions already having been made public, for example through the application of flagging rules or press releases from relevant companies. Thus, in many cases, the sizes of the sanction fees that have been determined have not been in proportion to the severity of the infringement. In this context, it should also be more explicitly considered that the regulations are complicated to apply, not least for private individuals without significant experience of the regulation.

When comparing sanctions imposed by other competent authorities in the EU, it is obvious that the Swedish authority has made a very strict interpretation of MAR. Furthermore, the amount of cases when sanctions have been imposed are by far the highest in Europe. In some cases, severe sanctions have been imposed where other countries’ supervisory authorities have deemed written criticism to be enough. Against this background, the need for guidance at EU level is very high.

Thus, in order to achieve a more unified application of MAR, it is of utmost importance that it is clearly stated that all circumstances in the individual case must be considered when deciding on the imposition of sanctions, as well as the size of the sanction fee. It should also be made clear that the basis for the assessment should always be the concrete and potential effects of the breach on the financial system. Furthermore, clear guidelines should be laid down to clarify how the sanction fees should be calculated.

<ESMA\_QUESTION\_CP\_MAR\_70>

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

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