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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 | Swedish Investment Fund Association |
| Activity | Investment Services |
| Are you representing an association? |  |
| Country/Region | Sweden |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

SIFA thinks it is a shortcoming that Article 16(2) on market surveillance and Article 20 on investment recommendations is not part of the current review of MAR and would like to make the following comment.

Article 16(2) of MAR lays down the obligation for “any person professionally arranging or executing transactions” to establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. “A person professionally arranging or executing transactions” is defined in point (28) of Article 3(1) of MAR as a person professionally engaged in the activities of reception and transmission of orders for financial instruments, or execution of transactions in financial instruments.

The scope of this obligation has been widely discussed since the publication of ESMAs Q&A on the subject stating that fund management companies are in scope (Q 6.1 of ESMA’s Q&A on MAR). Q&A’s are not legally binding and we see different interpretations of the Article and legal uncertainty. In order to obtain a level playing field it is important with a legally binding clarification of the scope.

Some fund management companies do not themselves neither receive and transmit orders nor execute their transactions on trading venues, but uses an intermediary (investment firm or bank) for these activities. They thus engage in the same activities on the market as any other investor or client. It is difficult to see the rationale behind the interpretation that these activities should trigger an obligation for investors to monitor themselves, since the same transactions are already monitored both by the intermediary executing the transactions and the market place. It would as a consequence affect a vast variety of investors; authorities, pension funds, foundations, universities, institutes and companies.

Even for smaller firms it has proven very difficult to apply the obligation in any other way than to invest in a system, which is costly. At the same time, while the surveillance does not relate to clients’ activities on an aggregated level, but to only one investor it is difficult to calibrate a system in order to find patterns that could indicate market abuse. Since a report of suspected market abuse could be incriminating for the investor itself, such a reporting obligation also raises questions on the compatibility with the right against self-incrimination.

We therefore believe it is urgent for the legislators to clarify the scope, i.e. through clarifying what kind of activities are covered by point (28) of Article 3(1) of MAR. The activity of reception and transmission of orders could be clarified by adding a reference to the corresponding service under MiFID II. The activity of execution of transactions could be clarified as “execution of transactions on a trading venue as defined under MiFID II.

On Article 20, SIFA acknowledges that there are good reasons to regulate investment recommendations, however this must be balanced against other interests such as good and relevant investor information and transparency. The current definition of what constitutes an investment recommendation makes the scope of Article 20 so wide that management companies could experience limitations in and/or uncertainty around what can be communicated to unit holders about their managed funds. SIFA finds it natural for a management company to be transparent and ready to explain and justify to its unit holders the rationale behind their portfolio holdings and the transactions conducted by their managed funds. SIFA believes that this is essential for maintaining trust and accountability. But given the wide and unclear definition of investments recommendations, some of our members have felt the need to become more restrictive in order to keep a safe distance to what constitutes an investment recommendation. SIFA finds it obvious that this is an unintended consequence of the extended scope of the rules on investment recommendations which in turn underscores the need to include this Article in the MAR review as well.

<ESMA\_COMMENT\_CP\_MAR\_1>

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

<ESMA\_QUESTION\_CP\_MAR\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_1>

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

<ESMA\_QUESTION\_CP\_MAR\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_2>

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

<ESMA\_QUESTION\_CP\_MAR\_3>

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<ESMA\_QUESTION\_CP\_MAR\_3>

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

<ESMA\_QUESTION\_CP\_MAR\_4>

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<ESMA\_QUESTION\_CP\_MAR\_4>

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

<ESMA\_QUESTION\_CP\_MAR\_5>

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<ESMA\_QUESTION\_CP\_MAR\_5>

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

<ESMA\_QUESTION\_CP\_MAR\_6>

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<ESMA\_QUESTION\_CP\_MAR\_6>

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

<ESMA\_QUESTION\_CP\_MAR\_7>

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<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>

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<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>

TYPE YOUR TEXT HERE

<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>

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<ESMA\_QUESTION\_CP\_MAR\_10>

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

<ESMA\_QUESTION\_CP\_MAR\_11>

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<ESMA\_QUESTION\_CP\_MAR\_11>

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

<ESMA\_QUESTION\_CP\_MAR\_12>

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<ESMA\_QUESTION\_CP\_MAR\_12>

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

<ESMA\_QUESTION\_CP\_MAR\_13>

The definition of inside information set out in Article 7 of 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.

Recital 15 of 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 and further clarification is necessary.

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 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 a counterparty in a negotiation or business contract is insider information or not. 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 also a need for harmonisation within the EU.

We find it very problematic that there is currently no common EU interpretation of insider information and what it means to disclose 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 regards the company’s duty to disclose information or it regards insider-cases which are handled by the criminal justice system.

For issuers with only corporate bonds listed, our experience is 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>

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<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>

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<ESMA\_QUESTION\_CP\_MAR\_15>

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

<ESMA\_QUESTION\_CP\_MAR\_16>

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<ESMA\_QUESTION\_CP\_MAR\_16>

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

<ESMA\_QUESTION\_CP\_MAR\_17>

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<ESMA\_QUESTION\_CP\_MAR\_17>

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

<ESMA\_QUESTION\_CP\_MAR\_18>

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<ESMA\_QUESTION\_CP\_MAR\_18>

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

<ESMA\_QUESTION\_CP\_MAR\_19>

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<ESMA\_QUESTION\_CP\_MAR\_19>

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

<ESMA\_QUESTION\_CP\_MAR\_20>

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<ESMA\_QUESTION\_CP\_MAR\_20>

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

<ESMA\_QUESTION\_CP\_MAR\_21>

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<ESMA\_QUESTION\_CP\_MAR\_21>

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

<ESMA\_QUESTION\_CP\_MAR\_22>

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<ESMA\_QUESTION\_CP\_MAR\_22>

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

<ESMA\_QUESTION\_CP\_MAR\_23>

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<ESMA\_QUESTION\_CP\_MAR\_23>

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

<ESMA\_QUESTION\_CP\_MAR\_24>

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<ESMA\_QUESTION\_CP\_MAR\_24>

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

<ESMA\_QUESTION\_CP\_MAR\_25>

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 very short delays of a disclosure otherwise would allow for a more comprehensive and understandable communication, better adapted to how the market functions. 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 all 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 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 at all hours 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 would be desirable that ESMA clarifies, by publishing guidelines, the interpretation of “as soon as possible” outside market hours.

<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 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 marketing 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 under current Article 17(4) conditions, as they can link more to market expectations (where e.g. disclosure of interim reports on pre-announced days are clearly favoured 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. When is the information inside information? A premature disclosure could harm negotiations, but it can be unclear if the conditions to delay disclosure are fulfilled. Replacing a CEO or board member is also very complicated. Is the board able to 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 it should be possible to delay disclosure of information also in such circumstances, as long as the information can be kept confidential. Releasing insider information at a very early stage can mislead the market. This does not benefit either the company or the investor.

<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>

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<ESMA\_QUESTION\_CP\_MAR\_27>

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

<ESMA\_QUESTION\_CP\_MAR\_28>

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<ESMA\_QUESTION\_CP\_MAR\_28>

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

<ESMA\_QUESTION\_CP\_MAR\_29>

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<ESMA\_QUESTION\_CP\_MAR\_29>

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

<ESMA\_QUESTION\_CP\_MAR\_30>

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<ESMA\_QUESTION\_CP\_MAR\_30>

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

<ESMA\_QUESTION\_CP\_MAR\_31>

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<ESMA\_QUESTION\_CP\_MAR\_31>

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

<ESMA\_QUESTION\_CP\_MAR\_32>

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<ESMA\_QUESTION\_CP\_MAR\_32>

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

<ESMA\_QUESTION\_CP\_MAR\_33>

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 our answer to Q33 we strongly oppose 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>

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<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>

SIFA believes that one way to simplify the process would be to allow the MSR (Market sounding recipient) to rely on the assessment, i.e. the cleansing notification, made by the DMP (Disclosing market participant) when assessing whether they are no longer in possession of inside information. In most cases the MSR can quite easily verify the cleansing notification against public sources (press releases etc.). However just as suggested by ESMA (cf. point 162) the MSR may experience difficulties trying to verify cancelled transactions. This is because normally, cancelled transactions are not publicly disclosed.

<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 our answer to Q37.

<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>

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<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>

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<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>

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<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>

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<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>

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<ESMA\_QUESTION\_CP\_MAR\_43>

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

<ESMA\_QUESTION\_CP\_MAR\_44>

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<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>

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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>

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<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>

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<ESMA\_QUESTION\_CP\_MAR\_47>

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

<ESMA\_QUESTION\_CP\_MAR\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_48>

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

<ESMA\_QUESTION\_CP\_MAR\_49>

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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, our experience tells us that the threshold is well-balanced. Furthermore, we believe that, for the avoidance of doubt, it should be clarified that the threshold also applies in relation to such transactions that are referred to in the third subparagraph of article 19(7). This was clearly the intention of ESMA (cf. pages 48-49 and 56 of ESMA’s technical advice on possible delegated acts concerning the Market Abuse Regulation ESMA/2015/224) but is not that clearly readable from the text of the regulation itself.

<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>

No, we find the 20 % threshold to be the most appropriate solution.

<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>

TYPE YOUR TEXT HERE

<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>

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<ESMA\_QUESTION\_CP\_MAR\_54>

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

<ESMA\_QUESTION\_CP\_MAR\_55>

We do not find the proposal for an extension of the requirement to cover PDMRs to be proportional. No convincing evidence that there is in practice a need to extend the rules has been presented to us. In the absence of this and given the burden it would entail; no extension should take place. In this context, due consideration must be given to how wide and in some instances also unclear the definition of a PDMR is.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

Funds and fund management companies should not be treated in the same way as companies (issuers) the shares of which are traded on a trading venue. A fund management company that “issues” shares or units of a collective investment undertaking (fund) has a completely different function and position compared to a listed company that issues its own shares.

Our main concern regards UCITS ETFs, and similar funds, where the units are purchased and sold to a value that is calculated on the funds’ underlying assets (net asset value, NAV). When traded on a trading venue the market maker ensures that the price does not significantly vary from the NAV, see Article 1(2)(b) of the UCITS Directive (2009/65/EC) and the definition of UCITS ETF (point 3 om ESMA guidelines on ETFs and other UCITS issues). In the unusual event that this is not ensured, the investor has the right to sell the units directly back to the fund at the NAV-price (point 23 of ESMA guidelines). This means that investors are protected from any pricing that is not derived from the NAV.

Since the pricing is a product of the funds’ assets it is not subject to circumstances considered as “inside information”, i.e. information that is likely to have a significant effect on the price of the fund units. The situation is thus quite different from other companies (“issuers”), where business-related decisions, prospects, events, economic development etc. typically would affect the price of its shares on the secondary market.

In general, the requirements in MAR are not well suited for funds. With regard to the requirement for the publication of insider information, it is difficult to understand what kind of information about the fund itself this could be. The requirement and the examples mentioned in ESMAs Q&A on the subject do not appear to be relevant to a UCITS ETF. It should also be noted that the vast majority of UCITS ETFs are index funds where the management companies’ space for discretionary decisions is very limited.

In the case of closed periods for trading before the announcement of a financial report, this is not relevant for UCITS since the units are valued and priced on the basis of its underlying assets. An annual report does not contain information that could affect the price of the units. Moreover it refers to the value of the fund and its assets several months prior to its publication. There is also ongoing disclosure of the NAV and the assets of the fund. In this context it should be noted that senior management and other employees of a management company are required to receive variable remuneration in the form of units of the UCITS they manage (Article 14b[1][m] of the UCITS Directive).

Funds already comply with a fund specific regulatory framework aimed at preventing market abuse and facilitating supervision (Commission Directive 2010/43/EU and Commission Delegated Regulation [EU] 231/2013). These requirements are in parts more far-reaching than the MAR requirements. They include reporting and listing of all personal transactions with financial instruments. They also include more employees being subject to the reporting requirements, namely all employees and contractors participating in fund operations with access to inside information about any financial instruments. These requirements are better adapted to the real risk of market abuse related to fund management.

It should also be noted that UCITS, and other diversified funds, are excluded from MARs transaction reporting requirements due to the minimal possibility to use them for the purpose of market abuse, see Article 19(1a) and 19(7). It would not seem reasonable to have more far-reaching requirements for fund management companies than for other companies. This would give rise to remarkable consequences. For example: A is a board member of a fund management company that manages UCITS ETF (X). A’s spouse B is a senior executive of company Y (the shares of which is traded on a trading venue). B may normally buy and sell units of X without notifying the transactions according to Article 19(1a) of MAR. However, since B is married to A, both B and Y (and A) must notify their transactions in X.

The costs, risks and administrative burden associated with complying with all of the requirements of MAR would for UCITS ETFs, and similar funds, not be proportionate to the possible benefits of such requirements. Neither would it be meaningful for supervisory authorities to receive a massive amount of reports on trades with such funds.

<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>

We do not agree with ESMA’s preliminary view. See our answer to Q58.

<ESMA\_QUESTION\_CP\_MAR\_59>

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

<ESMA\_QUESTION\_CP\_MAR\_60>

We do not agree. See our answer to Q58. If PDMR obligations should apply to employees covered by the “relevant person” definition it would mean that more employees should report their transactions in UCITS ETFs than transactions in shares of a listed company where they are employed. This would *per se* be unreasonable. It should be noted that the UCITS Directive requirement, that relevant persons should report their transactions, is applicable to employees that may be in possession of inside information regarding the financial instruments that the fund invest in (the underlying assets) and not the fund itself. They should therefore report their transactions in all financial instruments, except for transactions in fund units. Fund units are carved out due to the fact that they are not likely to be used for market abuse.

<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>

See our answer to Q 60.

<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>

Other entities should not be covered.

<ESMA\_QUESTION\_CP\_MAR\_62>

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

<ESMA\_QUESTION\_CP\_MAR\_63>

We agree that MAR should not create an unlevel playing field between different fund types depending on their legal personality. However, we do not think a reference to “units” of CIUs should be added to Article 19(1) of MAR. Instead UCITS ETFs that are traded at a unit price that is merely calculated on the net asset value of its underlying assets should be exempted from MAR. Including units of UCITS ETFs in the scope would create an unlevel playing field to UCITS not traded on a venue. It should also be noted that one unit class of a UCITS could be traded on the secondary market and another could be subject to direct purchase and redemption with the fund. This could be an effective way to distribute the UCITS, for example cross-border. However, the admittance of funds to trading on a venue would be effectively prevented by the administrative burden that MAR will comprise, without benefits.

<ESMA\_QUESTION\_CP\_MAR\_63>

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

<ESMA\_QUESTION\_CP\_MAR\_64>

We do not agree with ESMA’s preliminary view. See our answer to Q58. We cannot see that this requirement could be relevant to fund units the price of which is calculated on the net asset value of their underlying assets. What kind of information about the fund itself could be considered inside information (“information that is likely to have a significant effect on the price of the fund units”)? Since this information should be related to the fund itself, and not to the underlying financial instruments.

<ESMA\_QUESTION\_CP\_MAR\_64>

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

<ESMA\_QUESTION\_CP\_MAR\_65>

All employees and contractors of a fund management company that have access to inside information or other confidential information on funds or clients are already covered by the fund specific requirement to report all their transactions in financial instrument (Commission Directive 2010/43/EU and Commission Delegated Regulation [EU] 231/2013). This requirement go further than the obligation of Article 18 of MAR. There should not be a duplication of obligations.

<ESMA\_QUESTION\_CP\_MAR\_65>

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

<ESMA\_QUESTION\_CP\_MAR\_66>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_66>

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

<ESMA\_QUESTION\_CP\_MAR\_67>

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<ESMA\_QUESTION\_CP\_MAR\_67>

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

<ESMA\_QUESTION\_CP\_MAR\_68>

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<ESMA\_QUESTION\_CP\_MAR\_68>

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

<ESMA\_QUESTION\_CP\_MAR\_69>

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<ESMA\_QUESTION\_CP\_MAR\_69>

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

<ESMA\_QUESTION\_CP\_MAR\_70>

Since MAR entered into force, the Swedish FSA 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 have already been made public, for example through the application of flagging rules or press releases from relevant companies. In this context, it should also be considered that the obligations are complicated to apply, not least for private individuals without significant experience. When comparing sanctions imposed by other competent authorities in the EU, it is obvious that the Swedish FSA has made a very strict interpretation of MAR. The number of cases where sanctions have been imposed are by far the highest in Europe. Against this background, there is obviously a need for guidance at EU level to achieve a level playing field.

<ESMA\_QUESTION\_CP\_MAR\_70>

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

<ESMA\_QUESTION\_CP\_MAR\_71>

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<ESMA\_QUESTION\_CP\_MAR\_71>