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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

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| --- | --- |
| Name of the company / organisation | Spanish Banking Association |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Spain |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

<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>

We believe that the FX spot should NOT be included within the scope of MAR, considering the following reasons:

* First of all, the FX Spot is already covered in the FX Global Code, which is broadly followed by the financial industry, although it is a best practice. Thus, the inclusion of the FX Spot in MAR would not reduce the risk of market abuse in relation to FX Spot transactions, because the most relevant market players are already adhered to the FX Global Code. Thus, its inclusion under MAR will create an overlap with the FX Global Code.
* On the other hand, AEB members have included FX Spot transactions in their Market Abuse Program, so that this type of transactions are monitored through the trade surveillance, communication surveillance or in the training initiatives on market abuse.
* In addition, consideration must be given to the practical difficulties and high costs that this could entail as they are not subject to the MiFID/MiFIR regulations either (they are not subject to the maintenance and reporting obligations set out in Articles 25 and 26 MiFIR).

<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>

We agree with ESMA's view about the structural changes needed in case MAR was applied to FX Contracts.

Supervision, control and traceability are key aspects to ensure that these contracts are correctly monitored. NCAs should work hand in hand with interbank counterparties in order to gather as much information as possible under standard reports and MiFID II should also be adapted to take FX Spot contracts into consideration.

Taking into account how regulation has been applied to the financial industry, one of the key aspects, is the cost for including those contracts into MAR regulation, related to reporting, commitment of resources and technology investments.

Additionally, the diversity of market participants make this task especially sensible in order to avoid discriminatory decisions among them.

The incorporation of FX spot transactions into MAR requires the revision of many MAR related items (list of FX spot transactions subject to MAR, Insider Information definitions and the assessment of how obligations like insider lists or black-out periods would need to work in relation to FX spot) so, at a minimum, it is not a simple task

Apart from the revision of MAR it would also be required to make necessary amendments to the MiFID/MiFIR regulations, specifically to the articles commented on Q1, 25 and 26 MiFIR.

<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>

Different views among entities

<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>

We think that administrators and supervised contributors to benchmarks, having the capacity to actively manipulate benchmarks, should also be subject to MAR sanctions.

Yes. Administrators and supervised contributors to benchmarks are able to manipulate benchmarks, so they should also be subject to MAR sanctions.

After the entry into force of the BMR, the definitions of administrator and supervised contributor are part of EU law, which makes it easier for the regulator to include them in MAR, in order to create a harmonized regulatory framework in relation to benchmarks.

<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>

Yes, as per answer to Q4. Administrators and supervised contributors to benchmarks should be covered specifically by the provisions of Article 23, so that it would be clearer under MAR that NCAs have the powers to exercise their supervisory and investigation functions with these type of firms when they deem it necessary.

<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>

Yes, as per answer to Q4.

Normally, the persons in charge of sending the data within the organizations considered as contributors, do not have management responsibilities. The same applies to the advisors within the index administrators.

We understand that it might be appropriate to include a reference to these two figures in Article 30 MAR, provided that in the conduct of such individuals there has been an intention to manipulate the market.

<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 there is a need to modify the current reporting mechanism under Article 5(3) of MAR because it is too burdensome for issuers and there is a need to streamline it. Additionally, the issuer is at a risk of not reporting the information to all the NCAs of each trading venue on which the shares are admitted to trading or are traded because the issuer may not necessarily be aware of their shares being traded on a certain trading venue, so full compliance with the current reporting mechanism is very challenging for issuers.

<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>

Different views among entities

<ESMA\_QUESTION\_CP\_MAR\_8>

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

<ESMA\_QUESTION\_CP\_MAR\_9>

Yes, we agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR, as the information is already reported under MiFIR, so there is an overlap of reporting obligations which is costly for issuers without improving market transparency or being beneficial for the interests of investors.

<ESMA\_QUESTION\_CP\_MAR\_9>

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

<ESMA\_QUESTION\_CP\_MAR\_10>

Yes, we agree, as it includes the most relevant information about the trades.

<ESMA\_QUESTION\_CP\_MAR\_10>

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

<ESMA\_QUESTION\_CP\_MAR\_11>

Yes, we agree with ESMA’s proposal, as it simplifies the current reporting burden of disclosing the information on the issuer’s trades one by one, without undermining the interests of investors and the transparency of the markets.

We agree that, for all market participants, it is more useful to present the data in aggregate form.

<ESMA\_QUESTION\_CP\_MAR\_11>

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

<ESMA\_QUESTION\_CP\_MAR\_12>

No, we consider that the aggregated volume traded, and the weighted average price paid for the shares in each trading session is the most useful information for investors and markets.

<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>

From our point of view and based on our experience, there are no perceived difficulties in defining what is inside information and from what moment it is considered as such under the definition of MAR.

Furthermore, in certain occasions in which the information is not yet inside information but is certainly sensible, in order to be cautious, we have mentioned to the investor’s gatekeeper that we believed that the information we were disclosing was not inside information but that we recommended to verify it internally with its own compliance department ahead of clearing the investor to discuss with us.

<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>

Yes, we do consider that the definition of inside information is sufficient and clear given that MAR explains the extent of what “significant effect” represents.

<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. We have not identified any information that could be considered as inside information not covered in article 7 of MAR, as the definition is broad and flexible enough to ensure this definition is as wide as needed.

<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>

No it has not been identified.

<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>

We understand that the definition and scope of "inside information" is balanced with the intended objectives, i.e. to carry out its commercial activities.

<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>

We understand that the current definition in Article 7(1)(b) allows for the performance of these activities.

<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>

We understand that the current definition in Article 7.1. a) can be used for commodities.

<ESMA\_QUESTION\_CP\_MAR\_19>

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

<ESMA\_QUESTION\_CP\_MAR\_20>

We believe that the scope of Art. 7.1.(d) should be **extended to all persons aware of information** concerning *pending* orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

It would also be necessary to extend the definition to individuals other than the persons responsible for the enforcement of the order.

<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>

Different views among entities

<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>

The main risks of pre-hedging derive from the potential conflicts of interest that may arise from this activity. It is an activity that could benefit the organization more than the client. In order to avoid these risks, most organisations have codes of conduct that prevent these types of activities from being carried out. Also, in the specific area of conflicts of interest, organizations have policies and procedures that establish how to manage the conflict if it occurs, how to avoid it and, if it cannot be avoided, how to disclose it to the client.

We believe that pre-hedging could generate market abuse and/or conduct risks, mainly front running, because the trader can use this information inappropriately for example by trading on own account or as a Principal for the investment firm.

AEB members have in its trade surveillance roadmap the inclusion of RFQs in its trade surveillance monitoring tool in order to be able to detect the unfair use of this information. Meanwhile, AEB members an entity adhered to the FX Code, has implemented specific controls on RFQs in FX transactions with the purpose to validate that RFQs are not used as a pricing input.

In relation to measure that could be used in MAR and developing regulation or other legislation to address these risks, a specific measure could be to regulate the flow of information between the sales and trading areas, so as the sales person could only communicate to the trader in an RFQ a limited set of information. For example the identity of the client should not be disclosed (but only a tiering so that the trader can manage the risk). This would allow the trader to manage the trading book risks appropriately and benefiting clients providing higher liquidity and the quality of executiin expected, while reducing market abuse and conduct risks that could arise as a consequence of the pre-hedging behaviours.

<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>

Pre-hedging provides many benefits to clients and the markets in general. It improves liquidity and optimize risk-management. This allows market makers to provide better prices and execution to their clients, and reduces volatily in financial markets.

With regard to the benefit for the market, the reduction in the impact that large orders could have on the market is noteworthy.

<ESMA\_QUESTION\_CP\_MAR\_23>

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

<ESMA\_QUESTION\_CP\_MAR\_24>

All financial instruments under the scope of MAR.

<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>

As a general comment, these three conditions have allowed AEB members to delay the disclosure of inside information where necessary and with sufficient security to avoid confusing the market with information that is not precise enough.

The mechanism set out in Article 17.4 MAR is sufficiently clear as to the procedure to be followed and the necessary requirements for delaying the public dissemination of inside information.

However, the determination of whether the conditions under which insider trading may be delayed are met may be somewhat complex and sometimes differ in approach with the supervisor

<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>

The process of preparing annual accounts can be mentioned as an example

<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>

From our point of view, it should be left to the discretion of each of the entities. Those additional systems and controls can lead to an increase in costs.

In some cases, due to the broad nature of the activities carried out by the firm(both customer services and corporate operations), as well as the structure of the business, it is a priori very complex to establish a numerus clausus list of operations that may be considered inside information in accordance with article 7 MAR.

<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>

The identification of inside information is problematic when it is difficult to determine the threshold above which it should be considered that the influence it could have on the prices of financial instruments or related derivative instruments is appreciable. It is not always possible to quantify the impact of certain information on prices.

<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>

If there is not an impact on the market, we consider unnecessary to notify the NCA in those cases in which the relevant information lost its inside nature following the decision to delay the disclosure.

<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>

Article 17.5 MAR should include reference to listed issuers that are not a financial or credit institution, but that directly or indirectly control a credit or financial institution.

<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>

Difficulties may be encountered in interpreting Article 17.5(b) MAR ("it is in the public interest to delay dissemination"). It may sometimes be difficult to determine what is in the public interest because there may be competing interests between different market participants or other actors.

For example, there may be significant divergences between the interests of the issuer, the issuer's shareholders and society in general.

<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>

The requirements in art. 11 MAR to conduct market soundings are very burdensome to market participants. More than endorsing their clarification, confirmation or harmonisation without a specific ESMA proposal, we would prefer for some of the requirements simply to be removed, in order to make the soundings something that is really helpful to market participants.

<ESMA\_QUESTION\_CP\_MAR\_33>

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

<ESMA\_QUESTION\_CP\_MAR\_34>

We consider it necessary to clarify further those transactions that fall within the scope of market soundings, either by limiting the definition (excluding certain types of transactions), or by providing further examples of transactions that may be the subject of market research or of the requirements/conditions to be given to them.

Certain transactions, such as Private placement of debt securities, small amount deals which do not impact the market or sovereign issuances, could be excluded of the definition of market sounding

<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>

The stages in the definition of Market Soundings should be from the initial contact with the potential investor with whom we share the information of a transaction without any relevant data on its terms, until those terms and conditions are finally disclosed to the market by means of a public announcement of the transaction/material information.

The definition of market soundings, strictly speaking, should include the moment the issuer (or third party acting on its behalf) provides the investor with inside information. The whole process of analysing and assessing the investor's interest in the transaction should also be included in the definition in the strict sense of market research. Finally, the investor's decision on the basis of the information provided should also be included in that definition, because of the impact it could have on the transaction and, consequently, on the prices of the financial instrument.

We do not think that further clarity is required as we believe that market players have this understanding of the stages of interaction which fall within the definition of a market sounding.

<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>

We propose to extend it in order to cover for example a scenario when a deal is dropped and thus not publicly announced, and therefore the market sounding obligations cease. In this regard we suggest an indication being made in the sense that, after a certain number of days after the last intended public announcement date, the market sounding obligations cease to exist.

<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>

As per our experience, in current bull markets there is no need to rely much in market soundings. The real impact will be seen in bear markets, when the lack of conviction may lead to more market soundings. For the moment, we are seeing reluctance from investors to be sounded, asymmetric interpretations from various parties (mainly DMP and Investors), and increase in administrative workload. All of these results in lack of agility to gather quality information, in a moment where market is conducive enough, hence disincentivizing market soundings.

<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>

From our point of view it would be very useful that ESMA publishes standard scripts covering different situations in order to avoid each bank having to come up with its own script when contacting an investor.

Also, it would simplify and improve the market soundings procedure if it was obligatory to carry out the same only through the channels authorized by each of the entities, which, in any case, must be recorded. This would allow, in any case, the monitoring of this type of operations.

<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>

Yes, we do. Insider lists are very useful since they allow issuers: (i) to establish warnings when employees request pre-approval on PAD (personal account dealing) trades; (ii) to establish warnings when insider dealing or insider dealing attempts occur; (iii) to manage flows and confidentially of inside information checking if there has been an improper wall crossing and/or if need-to-know basis principle has been complied with; and (iv) to carry out an investigation by the trade surveillance team regarding an alert arisen as a consequence of an employee trading warning, so as to check if the employee had access to the information.

<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 per our experience and internal proceedings the regime would not need an amendment since we rely on insider lists based on the need-to-know basis principle. In this sense, for example, not all Compliance department is included within the list, only those with access to the Control Room where inside information files are registered. Same approach is followed by other separate areas within the entity (separate areas are designed to maintain information barriers/Chinese walls) and teams are aware that the knowledge of projects or transactions containing inside information must be strictly confined to the individuals inside and outside the organization for whom it is absolutely necessary.

<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>

With slight modifications, mainly in terms of the procedure and process for managing lists of insiders, the competent authority could be provided with the lists of insiders of those individuals who have actually accessed inside information.

We do consider that having insider lists divided into separate sections relating to different inside information, as per article 2 of Commission Implementing Regulation (EU) 2016/347, is not realistic and it should be revisited.

On the one hand, we consider that, as per whereas 16 of MAR, when a process occurs in stages, each stage of the process could constitute inside information so various inside information files should be registered therefore. Since not all participants have the same information, we think that registering various inside information files is the appropriate approach, rather than different separate sections (“event-based insider lists”). This allows also to avoid an inflation in the persons included in lists.

On the other hand, when dealing with a transaction considered inside information, assessing the different stages is not a very difficult task (e.g. a bond issuance mandate: if the entity is assessing the issuance and after that it acts as an active book runner, people working in the issuance mandate would have no access to the final offering price, so at least 2 inside information files should be registered), while establishing what constitutes “each piece of inside information” within same deal is very diffuse.

Whenever we have received a Supervisor requirement with regard to the list of persons with access to the information and, within the project/deal, list of persons with access to specific information, such as the pricing of the deal, we have always been able to provide the Supervisor with all that information since we have registered different inside information files relying on different stages of the deal.

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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>

Different views among entities

<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>

Please see answer to Q41.

We do not consider the maintenance of a list of permanent initiates to be particularly useful. In large organizations, it is not always the case that there is a small group of people who have access to and manage inside information in all operations.

From our point of view and from our experience, it is much more appropriate to comply with the requirements of market abuse regulations to initiate all individuals who have managed inside information at the time of effective access to it.

We do not consider that event-based insider lists are the best manner to manage insider lists. Having said that, with regard to the permanent insider section, it is obvious that when inside information is related to the issuer, some people (CEO, Chairman, Board of Directors, etc) are always informed of it at a specific moment so they must be included within the inside list as soon as they are informed.

We register many inside information files related to the issuer (about dividends, corporate events, financial results, etc), and the persons mentioned by ESMA regarding the permanent insider section are always included as insiders in the relevant files.

<ESMA\_QUESTION\_CP\_MAR\_43>

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

<ESMA\_QUESTION\_CP\_MAR\_44>

Absolutely, please see answer to Q42. We agree with ESMA's preliminary view. Each legal entity has to manage its company's list of insiders in which it will only include individuals under its perimeter (either by employment or contractual relationship).

<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>

We do consider that setting specific trading windows after the publication of financial results should be considered for the persons mentioned by ESMA regarding the permanent insider section (top management, etc).

<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 *Comisión Nacional del Mercado de Valores* (CNMV) in Spain has already increased the threshold to EUR 20,000 which was introduced by Royal Decree 19/2018 of 23 November 2018. The CNMV considers that the EUR 20,000 threshold is appropriate for the interests of the stakeholders involved considering the conditions in the Spanish markets. Therefore, we consider as well that the threshold established by the CNMV is adequate to ensure sufficient and suitable transparency to the market.

However, regardless of the account, uniformity should be ensured across the territory of the European Union by establishing a single threshold for notification to all supervisors.

<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>

Different views among entities

<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>

<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>

As an alternative criteria, the subsequent notifications could be based in the same amount of threshold established by the NCAs for the first notification that the PDMRs and persons closely associated with them shall do within a calendar year, i.e., once the subsequent transactions reach again the total amount of EUR 20,000, the obligation to notify shall apply.

In this regard, the administrative burden imposed, especially to the persons closely associated, could be reduced.

<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>

It is considered as appropiate.

<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>

<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>

We consider that article 19(11) of MAR is clear, useful and appropriate. Actually, AEB members have imposed the blackout period to all persons covered by AEB members Internal Standards of Conduct as a best practice.

However, it would be appropriate to exclude from this restriction those cases in which trading on one's own account can take place automatically, i.e. without mediating the action or will of the individual.

<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>

This framework for the identification of the restricted period is sufficiently clear in its practical application.

<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>

<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>

If article 19(12) sets article 11 waivers, then we consider that the extension should cover the same instruments that article 11 addresses, i.e. shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them.

<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>

We perceive that no additional considerations should be taken into account bearing in mind the regulation of MAR and the Commission Delegated Regulation (EU) 2016/522 of 17 December 2015.

<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>

Yes, we do. As mentioned above, the price of the CIUs is basically their net asset value, which is calculated considering the valuation of their portfolio (normally highly diversified in accordance with the applicable legislation (subject to very strict valuation rules) —diversification is compulsory in accordance with UCITS legislation and with other local applicable legislation for AIF—. Even in those cases where the CIUs are admitted to trading on a regulated market or MTF, the secondary market price of the CIU’s units or shares is normally either the NAV (in many cases when we are talking about MTF) or closely tied to its NAV (such as for ETF).

<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>

No, we understand that PDMR obligations are adequately covered for CIUs in their specific legislation, as indicated below.

As ESMA mentions in its consultation paper, “*CIUs have in common, with the exception of totally self-managed CIUs, the significant role played by an external management company whereby these management companies are responsible for (i) the management of the CIU and (ii) ensuring compliance with the applicable laws. In the performance of that activity, management companies are subject to their own regime under national or EU law”.*  ESMA is, hence, fully aware that managerial decisions taken by the CIU itself have no real impact on the share/unit market price considering that this is very tied to the net asset value. As mentioned above, in case of CIUs that have appointed a management company, the managers of the relevant CIU have a very limited role in the day to day of the CIU itself, since all decisions concerning the management of the portfolio, its valuation, calculation of net asset value, etc. are taken by the relevant management company. Therefore, as a matter of fact, it is not relevant if there are personal transactions prior to the announcement of half-year or year-end reports, since they have no impact on the price and the board of directors, managers and closely related persons have no relevant or inside information at all they could benefit from for their own personal transactions.

In addition to that, all ESMA’s concerns are covered by the specific legislation. Taking the comparison between MAR, UCITS and AIFMD:

* Notification of personal transactions: UCITSD and AIFMD do not only establish obligations to inform about personal transactions by relevant persons (articles 13(2)(b) and (c) of Commission Directive 2010/43/EU and 63(1)o of Regulation 231/2013) but also by other persons which could have been advised or warned by such. This would ultimately cover closely associated persons which might have so received any relevant information. If they have not, it is really not relevant if they are close to the relevant person or not, since they have no better information than any other investor.

It should also be taken into account that Management Companies are also bound by very strict rules of conduct in order to grant the Management Company’s duty to act in the best interests of the CIUs and their shareholders/uniholders’. Among such rules of conduct there are specific ones concerning, as ESMA mentions, personal transactions but also policies and procedures for preventing malpractices that might affect the stability and integrity of the market, transparency, etc. Conflicts of interests’ policies and procedures cover, among others, transactions by persons closely associated to relevant persons.

It should also be taken into account that some local regulations are even stricter than those Directives.

* Besides the decisions concerning conflicts of interest, Management Companies may be bound by their applicable legislation to communicate to their supervisory authorities:
  + Any holdings in the CIUs above certain thresholds and
  + Any subscription and redemption of an important amount (above a certain threshold of the Net Asset Value of the CIU).

In addition to that, they are obliged to communicate to the CIU’s unitholders or shareholders any event that might reasonably affect their will to subscribe or redeem shares.

* Both UCITS and AIF are subject to ongoing disclosure of their NAV, half-yearly and annual reports and far more information than any other kind of financial instruments.

Considering all the above, we don’t see that PDMR obligations should apply to CIUs and their management companies, since all MAR concerns are duly covered by their special legislation, drawn up taken into account the specialties of this kind of instruments.

And even less to CIUs that have appointed a Management Company, since they have no information at all about the investment of the portfolio, its valuation, net asset value calculation, etc. Prohibition of transactions by their board of directors, if any, during certain periods, would jeopardize their ability as shareholders to take their investment decisions without any relevant grounds.

<ESMA\_QUESTION\_CP\_MAR\_59>

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

<ESMA\_QUESTION\_CP\_MAR\_60>

No, considering that, as mentioned and explained above, managerial decisions have no real impact on the share/unit net asset value (typically the market price), as long as it is calculated considering the financial instruments in the portfolio, which determine the calculation of the net asset value.

As mentioned above, even in case ESMA finally decides to rule a PDMR obligations for management companies, “relevant persons” within CIUs with legal personality managed by an external management company should not be considered as PDMR, as explained above, since, even though they are indeed within the definition (even members of the administrative body), they have no real impact on the management of the company, which has been entirely delegated to the relevant Management Company. The prohibitions within MAR would unnecessarily limit their ability to make transactions as shareholders of the CIU.

<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>

Within the European Union, all CIUs can be catalogued as UCITS or AIFS.

In relation to CIUs with legal personality that have appointed a external management company, and as indicated in the preceeding paragraphs, PDMR within the CIU should be clearly left out of the scope considering their limited impact on the CIUs day to day and performance and the lack of proportionality these limitations imply to their ability to subscribe and redeem their shares as shareholders of the CIU when there are no real grounds for such prevention.

<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>

Absolutely not. The grounds would be basically the same (their activity has no effect at all on the calculation of the price) and they are not linked to the day to day management of the CIU. Any potential impact on their activity as investors, for example, would be captured, if applicable, by the relevant legislation which takes better into account the CIUs particularities.

<ESMA\_QUESTION\_CP\_MAR\_62>

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

<ESMA\_QUESTION\_CP\_MAR\_63>

There should be a level playing field, indeed, but they should all be left out of scope for the reasons above mentioned.

<ESMA\_QUESTION\_CP\_MAR\_63>

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

<ESMA\_QUESTION\_CP\_MAR\_64>

Please, note that, in compliance with their applicable legislation, CIUs or their Management Companies, as the case may be, are already subject to very strict disclosure obligations of any events that may affect the shareholder/unitholder will to subscribe or redeem shares.

<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>

We agree with ESMA’s preliminary view that there is no need to amend MAR in this respect.

Please, note that, taking the specific cases identified as potential “inside information” under question 5.7 of ESMA’s Q&A (which we would also like to be reconsidered in light of our comments below):

* Such information may not always have an impact on the NAV.
* Most situations are subject to immediate disclosure in accordance with the applicable special legislation. Therefore, it becomes public immediately.
* In case there is any information which should be clearly considered as inside and confidential, it would be subject to the applicable precautions considering the stock markets regulations.

<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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The introduction of a new standardised system for transmitting such data to the competent authorities would entail major changes throughout the industry, as well as within the authorities themselves. We would have to consider a medium/long term for changes and effective implementation. We also consider that all this development and implementation would entail high costs for all market participants.

<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>

Consideramos que el desarrollo e implantación de un mecanismo regular de reporting supondría unos costes elevados para todos los participantes de mercado.

<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>

<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>

No, we are not in favor of amending Article 30(1) second paragraph of MAR in the sense proposed by ESMA.

<ESMA\_QUESTION\_CP\_MAR\_70>

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

<ESMA\_QUESTION\_CP\_MAR\_71>

The current system of the MAR is adequate to ensure that NCAs are able to sanction eventual infringements under that Regulation. It seems more cautious to assess in the future whether this recent system is adequate or contains shortcomings.

However, in order to achieve greater harmonisation in the prevention of market abuse at European level, it is essential to ensure that the administrative sanctions and penalties imposed will be enforced.

However, it requires a commitment on the part of all EU member states that goes beyond the possible necessary regulatory reforms

<ESMA\_QUESTION\_CP\_MAR\_71>