



European Securities and  
Markets Authority

# Consultation Paper

**MAR review report**



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments 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.

ESMA will consider all comments received 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 close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 heading [Legal Notice](#).

### Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. This consultation paper is primarily of interest to issuers of financial instruments admitted to trading or trading on a trading venue, investment firms, asset management companies and persons discharging managerial responsibilities in the above-mentioned issuers, but responses are also sought from any other market participant including trade associations and industry bodies, institutional and retail investors, consultants and academics.

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## Acronyms and definitions used

ACER	Agency for the Cooperation of Energy Regulators
AIF	Alternative Investment Fund
AIFMD	Alternative Investment Fund Managers Directive - Directive 2011/61/EU of the European Parliament and of the Council
BBP	Buy-Back Programme
BMR	European Benchmarks Regulation - Regulation (EU) 2016/1011 of the European Parliament and of the Council
BRRD	Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
CBA	Cost-Benefit Analysis
CDS	Credit Default Swap
CFTC	Commodity Futures Trading Commission
CIU	Collective Investment Undertaking
CP	Consultation Paper
CRD	Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRR	Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms
EAMP	Emission Allowance Market Participant
EC	European Commission
ESMA	European Securities and Markets Authority
ETF	Exchange-Traded Fund
EU	European Union
EuSEF	European Social Entrepreneurship Fund
EuVECA	European Venture Capital Fund
FEMR	Fair and Effective Markets Review
FX	Foreign Exchange
IAAS	International Auditing and Assurance Standards
IR	Interest Rate

ISIN	International Securities Identification Number
ISO	International Organization for Standardization
IT	Information Technology
LEI	Legal Entity Identifier
MAD	Market Abuse Directive - Directive 2003/6/EC of the European Parliament and of the Council repealed by Market Abuse Regulation (MAR)
MAR	Market Abuse Regulation – Regulation 596/2014 of the European Parliament and of the Council
MIC	Market Identifier Code
MIFID II	Markets in Financial Instruments Directive II – Directive 2014/65/EU of the European Parliament and the Council
MIFIR	Markets in Financial Instruments Regulation – Regulation (EU) 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
MTN	Medium-Term Note
NCA	National Competent Authority
OTC	Over-the-Counter
OTF	Organised Trading Facility
PDMR	Person Discharging Managerial Responsibilities
PRIN	Principles for Business
Q&A	Questions and Answers
REMIT	Regulation (EU) 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency
RTS	Regulatory Technical Standards
SMSG	Securities and Markets Stakeholder Group
STOR	Suspicious Transaction and Order Reports
TD	Transparency Directive
TFEU	Treaty on the Functioning of the European Union
TREM	Transaction Reporting Exchange Mechanism
UCITSD	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
XML	Extensible Markup Language



WHT

Withholding tax

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## 1 Executive Summary

### Reasons for publication

Article 38 of MAR requires the European Commission (EC) to present a report to the European Parliament and the Council to assess various provisions of MAR. In light of Article 38 of MAR, the EC addressed to ESMA a formal request for technical advice on the report to be submitted by the EC pursuant to Article 38 of MAR<sup>1</sup>. This consultation paper (CP) originates from the EC's mandate to ESMA, and it covers three types of topics:

- Topics originally included in Article 38 of MAR, i.e. the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation; the definition of inside information; the appropriateness of the trading prohibition for persons discharging managerial responsibilities (PDMRs); a possible cross-market order book surveillance framework and the scope of the benchmarks provisions.
- A set of connected topics arising from the EC's mandate on the scope of MAR, that includes buy-back programmes, the delayed disclosure of inside information, the usefulness of insider lists; different aspects of PDMR notification requirements; and cross-border enforcement of sanctions.
- Issues closely linked to some of the above-mentioned topics, raised by ESMA.

### Contents

Section 3 looks at the scope of MAR, analysing whether it should be extended to spot FX contracts and analysing the issues related to benchmark provisions in MAR. Section 4 addresses the reporting and transparency obligations derived from buy-back programmes (BBPs) not only addressing the EC's mandate *stricto sensu*, but also revising other related obligations that a BBP entails. Sections 5, 6, 7 and 8 address inside information from different angles: the definition itself, the delayed disclosure of inside information, a revision of the protections created by the market soundings regime and the reassessment of the usefulness and user-friendliness of insider lists.

Section 9 assesses the MAR thresholds and requirements for PDMRs and the scope of application of the trading prohibitions.

Section 10 focuses on the different impacts derived from considering collective investment undertakings within the scope of MAR. Whereas the EC's mandate only addresses PDMRs, this CP also analyses other potential impacts of considering CIUs admitted to trading or traded on a trading venue within the scope of MAR, namely the obligation to disclose inside information and insider lists.

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Finally, sections 11 and 12 refer to three different angles of market surveillance by national competent authorities: the possibility of establishing a pan-European cross-market order book surveillance framework, the possible ways to address multiple withholding tax reclaim schemes involving financial markets, the issues related to the lack of administrative sanctions, but only criminal offences, in certain jurisdictions and issues related to the cross border enforcement of sanctions.

## Next Steps

Based on feedback received from stakeholders, ESMA will develop the final review report. ESMA intends to submit the final report to the EC in the spring of 2020.

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## 2 Introduction

1. MAR requires the EC to present a report to the European Parliament and the Council on at least the following areas: the appropriateness for introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation (where a prior ESMA's mapping is necessary); the definition of inside information; the appropriateness of trading prohibitions for PDMRs (and also on the thresholds foreseen where the issuer's shares or debt form part of a collective investment undertaking or provide exposure to a portfolio of assets); the possibility for establishing a Union framework for cross-market order book surveillance in relation to market abuse; and the scope of the benchmark provisions.
2. Additionally, the EC mandate includes a set of additional elements addressed in this CP: whether spot FX contracts should be covered by MAR; the scope of the reporting obligations under the exemption for BBPs; the effectiveness of the mechanism to delay disclosure of inside information; whether the regime for PDMRs should be applied to collective investment undertakings; the appropriateness of the thresholds to notify PDMR transactions; and the cross-border enforcement of sanctions.
3. In preparing this CP, ESMA identified several other topics closely linked to those mentioned above that should be addressed jointly, such as the transparency of transactions related to a buy-back programme, clarifications on the financial stability delay for credit or financial institutions, the content of the insider lists and the permanent insider section, the exemptions to the closed period regime for PDMRs, the disclosure of inside information and the extension of insider lists for CIUs admitted to trading or traded on a trading venue.

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<sup>1</sup> Formal request to ESMA for technical advice on the report to be submitted by the Commission under Article 38 of Regulation (EU) No 596/2014 on Market Abuse, available at the following link: [https://www.esma.europa.eu/sites/default/files/library/esma\\_art\\_38\\_mar\\_mandate.pdf](https://www.esma.europa.eu/sites/default/files/library/esma_art_38_mar_mandate.pdf).

4. Finally, ESMA also considered necessary to review MAR in light of journalistic investigations reporting the existence in some EU Member States of alleged large-scale tax frauds known as “Cum/Ex” schemes. As indicated in the ESMA Report regarding its preliminary findings on multiple withholding tax reclaim schemes<sup>2</sup>, it is necessary to analyse whether national competent authorities (NCAs) should be enabled to take action against multiple withholding tax reclaim schemes.

## 3 Scope of MAR

### 3.1 Spot FX contracts

#### **Mandate from the Commission:**

Whether spot FX contracts should be covered by MAR

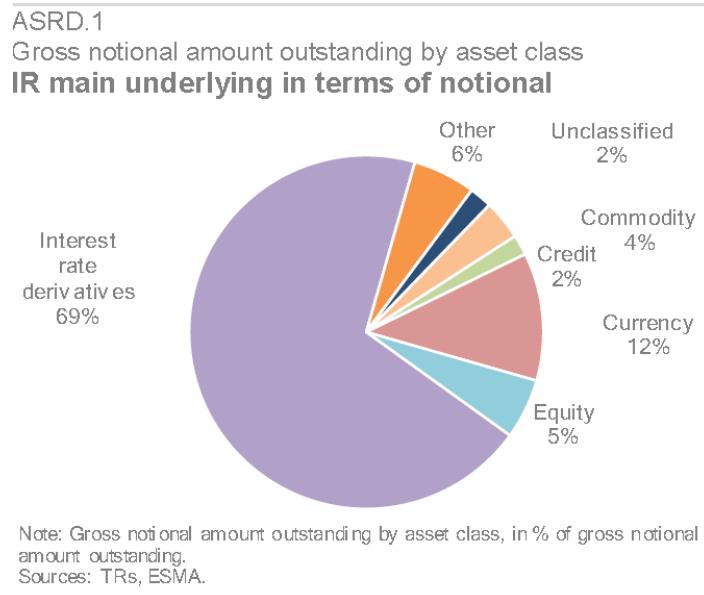
The scope of application of MAR as defined by its Article 2 does not include foreign exchange spot transactions. Given the size of the spot FX market, the Commission would appreciate ESMA’s input on whether there is a need for that market to be covered by the market abuse regime. In its assessment, ESMA should give due regard to whether national competent authorities ('NCAs') have the necessary regulatory tools to effectively and efficiently supervise and sanction market abuse on spot FX markets and whether extending the scope of MAR to these markets would prove to be the most appropriate way of remedying supervisory gaps, if any exist. To that effect ESMA is encouraged to analyse and take into account the particularities of the spot FX market and how well these would mesh with the MAR framework.

5. The scope of MAR is set out in Article 2(1), applying mostly to financial instruments admitted to trading or traded on a trading venue. For certain limited provisions, Article 2(2) of MAR extends the application to spot commodity contracts and certain financial instruments that might impact the price of a spot commodity contract.
6. Therefore, the references in Article 2(3) and (4) to ‘transaction’, ‘order’, ‘behaviour’, ‘actions’ and ‘omissions’ should be understood as referring only to those instruments (e.g. a transaction in an instrument referred to in Article 2(1) or (2)) and cannot be interpreted in a way that would result in extending the scope of MAR to instruments which the legislation did not intend to capture.
7. As opposed to spot commodity contracts, MAR does not introduce any specific reference to spot FX contracts.

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<sup>2</sup> Report – Primary findings on multiple withholding tax reclaim schemes of 2 July 2019, ESMA70-154-1193, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-154-1193\\_preliminary\\_findings\\_on\\_multiple\\_withholding\\_tax\\_reclaim\\_schemes.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-154-1193_preliminary_findings_on_multiple_withholding_tax_reclaim_schemes.pdf).

8. This is consistent with the identification of spot FX contracts (including certain derivatives) as non-financial instruments in Article 10(1)(a) of Commission Delegated Regulation (EU) 2017/565. In preparing this CP, ESMA has based its analysis on that identification.
9. Consequently, spot FX contracts currently are out of the scope of MiFID II/MiFIR and MAR, and out of the supervisory scope of NCAs. Moreover, the size, nature, and functioning of the Spot FX market need to be carefully considered, as regards whether and how, the spot FX market could be included within the scope of MAR (and if so, under the scope of obligations to maintain records under Article 25 and to report transactions under Article 26 of MiFIR).



Source: ESMA Annual Statistical Report EU Derivatives Markets 2018

### OTC foreign exchange turnover

Net-net basis,<sup>1</sup> daily averages in April, in billions of US dollars

Table 1

Instrument	2001	2004	2007	2010	2013	<b>2016</b>
Foreign exchange instruments	1,239	1,934	3,324	3,973	5,357	<b>5,067</b>
Spot transactions	386	631	1,005	1,489	2,047	<b>1,652</b>
Outright forwards	130	209	362	475	679	<b>700</b>
Foreign exchange swaps	656	954	1,714	1,759	2,240	<b>2,378</b>
Currency swaps	7	21	31	43	54	<b>82</b>
Options and other products <sup>2</sup>	60	119	212	207	337	<b>254</b>
<i>Memo:</i>						
Turnover at April 2016 exchange rates <sup>3</sup>	1,381	1,884	3,123	3,667	4,917	<b>5,067</b>
Exchange-traded derivatives <sup>4</sup>	12	25	77	145	145	<b>115</b>

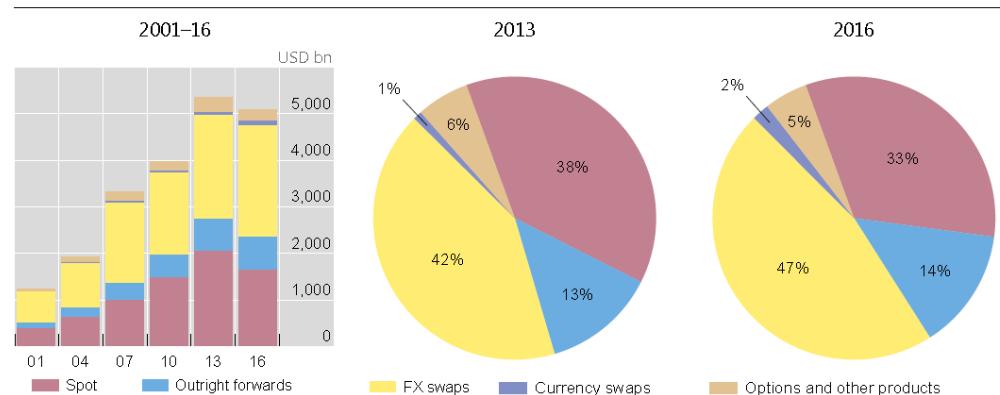
<sup>1</sup> Adjusted for local and cross-border inter-dealer double-counting (ie "net-net" basis). <sup>2</sup> The category "other FX products" covers highly leveraged transactions and/or trades whose notional amount is variable and where a decomposition into individual plain vanilla components was impractical or impossible. <sup>3</sup> Non-US dollar legs of foreign currency transactions were converted into original currency amounts at average exchange rates for April of each survey year and then reconverted into US dollar amounts at average April 2016 exchange rates. <sup>4</sup> Sources: Euromoney Tradedata; Futures Industry Association; The Options Clearing Corporation; BIS derivatives statistics. Foreign exchange futures and options traded worldwide.

Source: BIS Triennial Central Bank Survey of foreign exchange turnover in April 2016 – September 2016 issue

### Foreign exchange market turnover by instrument

Net-net basis,<sup>1</sup> daily averages in April

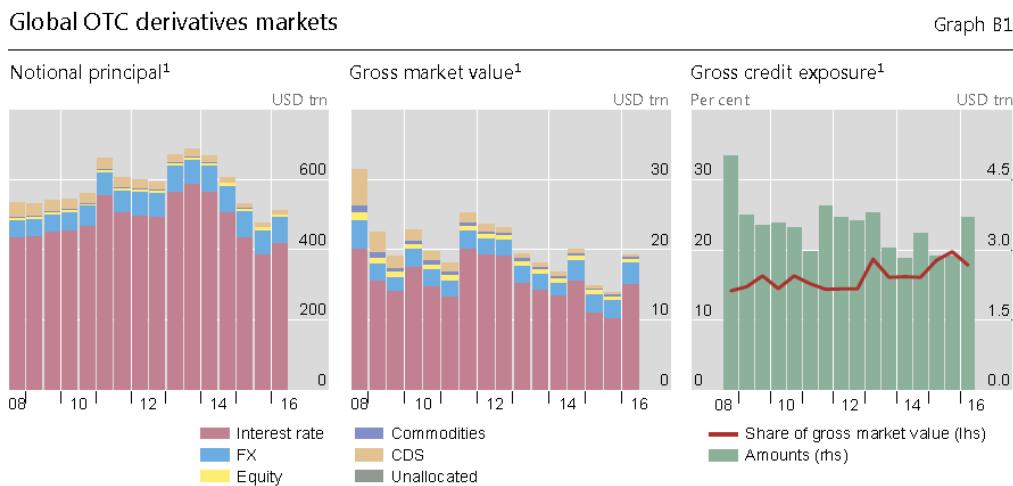
Graph 2



<sup>1</sup> Adjusted for local and cross-border inter-dealer double-counting.

Source: BIS Triennial Central Bank Survey. For additional data by instrument, see Table 1 on page 9.

Source: BIS Triennial Central Bank Survey of foreign exchange turnover in April 2016 – September 2016 issue



Further information on the BIS derivatives statistics is available at [www.bis.org/statistics/derstats.htm](http://www.bis.org/statistics/derstats.htm).

<sup>1</sup> At half-year end (end-June and end-December). Amounts denominated in currencies other than the US dollar are converted to US dollars at the exchange rate prevailing on the reference date.

Source: BIS statistical release OTC derivatives statistics at end-June 2016 – November 2016 issue

10. ESMA has identified a number of arguments in support of the inclusion of spot FX contracts under the scope of MAR.
11. Firstly, whereas NCAs currently exercise their capacity to monitor the capital, reputation of the management body, systems and controls and activity of regulated entities, only the national legislative framework of one Member State enables the relevant NCA to act against misconduct of authorised firms in their regulated activities and their ‘ancillary activities’ carried out ‘in connection with’ or ‘held out for the purposes of’ regulated activities, like can be the case for spot FX activities.
12. Furthermore, in November 2014 the misconduct related to the G10 spot FX market became publicly known due to the fines imposed by the UK FCA, the Swiss FINMA, the US Commodity Futures Trading Commission (CFTC) and the US Office of the Comptroller of the Currency<sup>3</sup>.
13. ESMA also notes that the UK FCA, Bank of England and HM Treasury in their Fair and Effective Markets Review<sup>4</sup> (“FEMR”) concluded, back in 2015 before the FX Global Code was developed and voluntary adhered to by significant proportion of the market, that a new statutory civil and criminal market abuse regime should be created for spot FX that should include some of the key features of the current MAR-MiFID II scheme (sanctions for abusive behaviour<sup>5</sup>, record-keeping obligations for firms, the obligation to report suspicious

<sup>3</sup> <https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-£11-billion-fx-failings-and-announces-industry-wide>.

<sup>4</sup> <https://www.bankofengland.co.uk/report/2015/fair-and-effective-markets-review--final-report>.

<sup>5</sup> The identification of behaviours that are ‘unacceptable’ in page 51 of the report include conducts assimilable under the MAR regime: colluding to manipulate the market or seeking to mislead market participants; engaging in trading behaviour that gives a

transactions and orders). The open FEMR recommendations relating to new legislation would be kept under review as noted in 2018 in a report on the progress of FEMR<sup>6</sup>.

14. An additional element that might also support an extension of MAR is the connection between the spot FX market and the markets in financial instruments and more specifically in FX derivatives. Those interlinkages have been discussed, for instance, in a recent report by the Markets Committee of the Bank for International Settlements titled '*Monitoring of fast-paced electronic markets*'<sup>7</sup> (*"the rise in the frequency of data feed updates on primary venues for spot FX had immediate spill-overs to the wider set of trading venues and instruments, such as quoting activity for Chicago Mercantile Exchange currency futures"*). In addition, in academic literature<sup>8</sup> the joint evolution of FX spot and forward market liquidity conditions is measured as well.
15. On the other hand, there are arguments discouraging extending the scope of MAR to spot FX contracts.
16. Firstly, ESMA notes that the publication of the FX Global Code of Conduct ('the Code') developed by central banks and market participants from sixteen jurisdictions around the globe has already achieved progress in promoting higher standards in the wholesale FX market. The Code sought to specifically address previous conduct issues in the spot FX market around conflicts of interest, handling of confidential information and transparency (i.e. disclosure) as regards how market participants executed and managed FX transactions.
17. Given that a significant proportion of the market has already signed Statements of Commitments to the Code<sup>9</sup> and the upcoming review of the Code in 2020 by the Global FX Committee<sup>10</sup>, it might be advisable waiting for the Code to be more deeply embedded into the market and for those further developments to unfold before promoting an amendment of MAR in this respect.
18. Secondly, ESMA also recognises the practical difficulties that expanding the scope of MAR to the spot FX market may impose.
19. The spot FX market does not currently have the characteristics which would enable it to fit within and meet MAR's framework and requirements. ESMA's preliminary view is that before MAR could be applied, the spot FX market might need to develop features required by MiFID II to trading venues and market participants regarding systems and controls, transparency, conduct requirements, and reporting obligations. As opposed to the markets

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misleading impression of the available supply of, or demand for, a financial instrument or secures the price at an artificial level; spreading rumours that are known to be false [...].

<sup>6</sup> <https://www.bankofengland.co.uk/-/media/boe/files/report/2018/fair-and-effective-markets-review-progress-report.pdf?la=en&hash=E3F55D5C0600F927F1E767EAA818C4E571E72FD9>

<sup>7</sup> <https://www.bis.org/publ/mktc10.htm>

<sup>8</sup> [https://www.cb.cityu.edu.hk/ef/doc/GRU/HFT%202017/Krohn\\_Sushko\\_FXspot\\_fwd\\_liq\\_Nov2017-2.pdf](https://www.cb.cityu.edu.hk/ef/doc/GRU/HFT%202017/Krohn_Sushko_FXspot_fwd_liq_Nov2017-2.pdf)

<sup>9</sup> [https://www.globalfxc.org/global\\_index.htm](https://www.globalfxc.org/global_index.htm)

<sup>10</sup> <https://www.globalfxc.org/press/p190710.htm>

in financial instruments, the spot FX market is predominantly an OTC market, where most of the existing trading platforms may not meet the requirements to be considered as MiFID II<sup>11</sup> trading venues. Moreover, since it is mainly an OTC market, the price determination is not necessarily made through the interaction of demand and supply in a trading venue. On the contrary, the prices offered in the spot FX market may rely on the relationship and credit worthiness of the counterparties.

20. ESMA also considers that, even if it were considered necessary extending MAR to spot FX, the above-mentioned characteristics would rule out a 'mechanical' extension of MAR to spot FX contracts, leading to a situation where some of the key concepts of MAR would need to be revised and adapted to make them workable under this new environment. As examples of this situation, it can be questioned who could be considered as the 'issuer' for spot FX contracts, which parameters should be taken into account to identify and publish 'inside information' or which should be the entities exempted from the requirements of MAR.
21. In case the scope of MAR were extended to spot FX contracts in the same terms as for spot commodity contracts (i.e. expanding the prohibition of market manipulation to cases where a transaction, order or behaviour in a spot FX contract/financial instrument has or is likely or intended to have an effect on the price or value of a financial instrument/spot FX contract<sup>12</sup>) it is arguable that the delineation between what might be contracts that impact or do not impact on financial market transactions may be more difficult for spot FX compared to spot commodity, potentially leading to a situation where those effects could be detected in a wide range of transactions undertaken without a manipulative purpose, and as a consequence, this identification might be difficult to operate in practice.
22. As an additional layer of complexity, if MAR were expanded to spot FX contracts, NCAs would need to receive information on transactions and should have the capacity to obtain information on orders regarding spot FX contracts, in order to perform monitoring and market surveillance for insider dealing and market abuse purposes as envisaged under Articles 25 and 26 of MiFIR. Given the sheer number of orders and transactions generated in the spot FX market, ESMA notes the significant costs that such extension would entail for NCAs and market participants.
23. The above regimes, in particular the regulations and technical standards relative to various data reporting and record keeping requirements (e.g. transaction reporting, instrument reference data, orderbook data, etc.), currently do not cover spot FX contracts and would need to be revisited to adapt them to the particularities of such contracts and transactions (e.g. with regard to common identifiers of contracts/transactions and attributes describing them) and to ensure an adequate supervisory regime in line with financial instruments within the scope of MAR and MiFID.

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<sup>11</sup> Article 4(1)(21) to (24) of MiFID II.

<sup>12</sup> Article 2(2) of MAR.

**Q1: Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.**

**Q2: Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

### 3.2 Scope of application of the benchmark provisions

#### Mandate from the Commission:

##### Scope of application of the benchmark provisions

24. MAR contains several references to benchmarks and importantly the prohibition to manipulate the calculation of benchmarks<sup>13</sup>. Two years after the publication of MAR in the Official Journal a new, dedicated EU Regulation was finalised and published: Regulation (EU) 2016/1011 (Benchmarks Regulation or BMR<sup>14</sup>). The ultimate scope of BMR is to regulate any aspect related to the provision of benchmarks to ensure the accuracy, robustness and integrity of benchmarks and of the benchmark determination process.
25. BMR therefore covers in relation to administrators of benchmarks, inter alia: governance and conflict of interest requirements, oversight function requirements, record keeping requirements, obligations related to input data and methodology, code of conduct and requirements for contributors to be defined by administrators. BMR also introduced new requirements for EU supervised entities that use benchmarks, as well as new requirements for so-called supervised contributors, so it does not limit itself to obligations relating to the administration of benchmarks.
26. Article 38(e) of MAR states that the report on the application of MAR should assess the scope of application of the benchmark provisions in MAR. In order to do so, reference is made in this section to the new regulatory framework ruling benchmarks, i.e. BMR, as a thorough understanding of the interplay between the two regulatory framework is necessary to fulfil the mandate in Article 38(b) of MAR.
27. The main reasons why provisions related to benchmarks were introduced in MAR are included in Recital 44 of MAR, which explains that:

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<sup>13</sup> Other EU laws dealt with certain aspects related to benchmarks before the Benchmarks Regulation (Regulation (EU) 2016/1011): Directive 2014/65/EU contains certain requirements with respect to the reliability of benchmarks used to price a listed financial instrument. Directive 2003/71/EC contains certain requirements on benchmarks used by issuers. Directive 2009/65/EC contains certain requirements on the use of benchmarks by undertakings for collective investment in transferable securities (UCITS). Regulation (EU) No 1227/2011 contains certain provisions which prohibit the manipulation of benchmarks that are used for wholesale energy product.

<sup>14</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1011>

*"(...) specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. (...) It is necessary to complement the general prohibition of market manipulation by prohibiting the manipulation of the benchmark itself and the transmission of false or misleading information, provision of false or misleading inputs, or any other action that manipulates the calculation of a benchmark, where that calculation is broadly defined to include the receipt and evaluation of all data which relates to the calculation of that benchmark and include in particular trimmed data, and including the benchmark's methodology, whether algorithmic or judgement-based in whole or in part".*

### **3.2.1 Prohibition of (attempted) manipulation of benchmarks**

28. Article 2(1) determining the scope of MAR generally states that MAR applies to "*behaviour in relation to benchmarks*". The term behaviour is not specified further in MAR and is used again in Article 12(1)(d), which states that market manipulation should comprise:

*"transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark".*

29. It is important to note that the prohibition to engage in or attempt to engage in benchmark manipulation is not included in BMR. Therefore, the two Regulations can be considered complementary, with MAR dealing with the core prohibition of (attempting) benchmark manipulation while BMR covering virtually every aspect related to benchmarks provisions and calculation as well as benchmarks' use by supervised entities.

30. This is confirmed by the reference to MAR made in Article 14 of BMR "*Reporting of infringements*". This Article requires administrators of benchmarks:

- (i) to establish systems and controls to ensure the integrity of input data to identify and report to the NCA any conduct that may involve manipulation or attempted manipulation of a benchmark under MAR;
- (ii) to monitor input data and contributors to notify the NCA and provide all relevant information where the administrator suspects that, in relation to a benchmark, any conduct has taken place that may involve manipulation or attempted manipulation of the benchmark under MAR, including collusion to do so (*administrators of non-significant benchmarks may choose not to apply this second point*).

31. These provisions of BMR make reference to manipulation or attempted manipulation of a benchmark under MAR and not under BMR because BMR does not include an explicit provision dealing with manipulation of benchmarks.
32. This highlights that the two regulatory frameworks are complementary because the ultimate scope of MAR in relation to benchmarks, the prohibition to engage in or attempt to engage in benchmark manipulation, is not covered by the BMR as it was already covered by an existing EU Regulation.
33. To be noted that, as part of the upcoming EU Regulation on the “ESAs review”<sup>15</sup>, ESMA will be required to develop new draft technical standards specifying the characteristics of the systems and controls referred to in Article 14(1) of BMR. ESMA should submit these draft technical standards to the European Commission by October 2020.

### **3.2.2 Definition of benchmark in MAR**

34. MAR includes a definition of benchmark in Article 3(1)(29). Also BMR includes a definition of benchmark, composed of two elements: the definition of index (Article 3(1)(1) of BMR), and the definition of benchmark (Article 3(1)(3) of BMR), which makes direct reference to the one on index. The definition of MAR and the ones in BMR are included in the below table.
35. It can be argued that the definition of MAR is broadly covered by the definition in BMR, while the latter is broader as it makes reference not only to financial instruments, but also to financial contracts and investment funds.

	MAR	BMR
Definition of benchmark	benchmark means any rate, index or figure, made available to the public or published that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates or other values, or surveys,	‘benchmark’ means any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees.

<sup>15</sup> [www.europarl.europa.eu/doceo/document/TA-8-2019-0374\\_EN.pdf?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0374_EN.pdf?redirect)

	<p>and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined.</p>	<p>Index means any figure:</p> <ul style="list-style-type: none"> <li>(a) that is published or made available to the public;</li> <li>(b) that is regularly determined:           <ul style="list-style-type: none"> <li>(i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and</li> <li>(ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.</li> </ul> </li> </ul>
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36. Both, the definition in MAR and the definition in BMR refer to “financial instruments”. While this term is formally defined differently in the two Regulations, in substance they are very similar. Both define financial instruments as those instruments specified in Section C of Annex I of Directive 2014/65/EU<sup>16</sup>.

37. Article 2 “Scope” of MAR specifies that MAR applies to financial instruments: (a) admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made; (b) traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made; (c) traded on an OTF; (d) not covered by previous points, the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

38. ESMA wishes to point out that the definition of financial instrument in BMR also refers to financial instruments “*traded via a systematic internaliser*”<sup>17</sup>. However, the BMR definition does not refer to the financial instruments covered in point (d) of MAR Article 2(1)(d) (the last sentence of the previous paragraph). Therefore, the definition in MAR applies to a wider range of OTC financial instruments. However, some of the financial instruments

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<sup>16</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>

<sup>17</sup> As defined in n point (20) of Article 4(1) of Directive 2014/65/EU

included under MAR Article 2(1)(d) may also be caught by the BMR definition of financial instruments “traded via a systematic internaliser”.

39. Therefore, the scope of the two definitions appears to be broadly the same, apart from the BMR definition including financial contracts and investment funds.
40. Investment funds are defined in BMR as AIF (alternative investment funds) and UCITS<sup>18</sup>. UCITS and AIF are financial instruments listed in Section C of Annex I of Directive 2014/65/EU. However, there may be AIFs and UCITS not traded on trading venues which are not covered by the scope of MAR. Therefore, with respect to investment funds, the MAR definition: (i) already covers AIFs and UCITS that are listed on trading venues (consistent with the general scope of MAR which is focused on financial instruments traded on a trading venue); (ii) does not cover those AIFs and UCITS not listed on trading venues which are included in the scope of BMR (*although it is possible that these not listed investment funds refer to benchmarks used by financial instruments covered by the scope of MAR*).
41. Financial contracts are defined in BMR as credit agreements for consumers<sup>19</sup> (e.g. loans). MAR makes no reference to retail contracts such as these credit agreements. However, it should be noted that credit agreements are loans which may refer to a benchmark in the form of an interest rate whose value is updated regularly according to the terms of the credit agreement. Interest rates are the most common benchmarks used, as highlighted by the fact that all the benchmarks classified as critical under BMR are interest rates<sup>20</sup>. If a credit agreement refers to interest rates that are also used in some financial instruments as defined under MAR Article 2(1)(d) then such rates would also be covered by the scope of MAR.
42. Against this background, the two definitions of benchmark in MAR and BMR appear to cover approximately the same universe of benchmarks although they are not fully overlapping with reference to AIFs and UCITS not traded on trading venues, credit agreements for consumers and financial instruments traded via systematic internalisers.
43. Finally, ESMA wishes to point out that the BMR is subject to a review by the European Commission, due by 1 January 2020. The review of BMR may suggest amending the scope of the BMR. So, any possible change in MAR in relation to benchmarks should be coordinated and coherent with the outcome of the BMR review.

**Q3: Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?**

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<sup>18</sup> See BMR Article 3(1)(19)

<sup>19</sup> See BMR Article 3(1)(18)

<sup>20</sup> See the list of critical benchmarks under BMR: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0482>

### 3.2.3 Sanctions against (attempted) benchmark manipulation and powers of NCAs

44. The administrative sanctions and measures that NCAs should be able to impose against (attempted) manipulation of benchmarks are included in Article 30(2) of MAR. Points (d), (e), (f) and (g) of this Article refer to investment firms and to persons working within investment firms and comprise:

- "(d) withdrawal or suspension of the authorisation of an investment firm;*
- (e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;*
- (f) in the event of repeated infringements of Article 14 or 15, a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;*
- (g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;"*

45. In relation to (attempted) manipulation of benchmarks, the reference to investment firms does not capture administrators of benchmarks and contributors of input data, unless they are investment firms (but often investment firms are users of benchmarks, not providers). This is natural because, at the time MAR was drafted, the concept of administrators of benchmarks and contributors to benchmark were not yet defined in EU law, as they were introduced by BMR in 2016.

46. However, now that these definitions are part of EU law, to make points (d), (e), (f) and (g) of Article 30(2) more effective vis-à-vis the prohibition to manipulate benchmark it could be argued that they should refer also to administrators of benchmarks (defined in Article 3(1)(6) of BMR) and supervised contributors to benchmark (defined in Article 3(1)(10) of BMR).

47. Any new reference to administrators and supervised contributors should take into account their nature and the language used should reflect the regulatory framework surrounding them. In particular, in point (d) reference to both "authorisation" and "registration" could be made in relation to administrators, while for supervised contributors reference could be made to suspend them for their role as contributors.

48. It is possible that an infringement of MAR by a benchmark administrator would relate to a control failure covered by the BMR, where the action of withdrawal or suspension of authorisation or registration can be taken by competent authorities under Article 26 of BMR.

Therefore, if Article 30 is modified, attention should be paid also to the interplay with the similar provisions within BMR.

49. ESMA also points out that, under MAR, the maximum administrative pecuniary sanctions applicable to (attempted) manipulation of benchmarks should be at least: for natural persons EUR 5 000 000, and for legal person EUR 15 000 000 or 15 % of the total annual turnover of the legal person. The values included in MAR are higher than the administrative pecuniary sanctions included in BMR (which, for instance, in relation to legal person include maximum administrative pecuniary sanctions of at least EUR 1 000 000 or 10 % of its total annual turnover).

**Q4: Do you agree that the Article 30 of MAR “Administrative sanctions and other administrative measures” should also make reference to administrators of benchmarks and supervised contributors?**

50. Similar consideration can be made for the powers of NCAs under Article 23 of MAR. While this Article clearly applies also to the (attempted) manipulation of benchmarks, there is no reference to administrators of benchmarks or supervised contributors. In particular, point (g) of Article 23(2) states that NCAs have the power:

*“(g) to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions.”*

51. This power would improve its effectiveness vis-à-vis (attempted) market manipulation if reference is made also to administrators of benchmarks or supervised contributors, because otherwise there is a risk that these types of market entities, and in particular benchmark administrators, are not covered by the powers of NCAs<sup>21</sup>.

**Q5: Do you agree that the Article 23 of MAR “Powers of competent authorities” point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?**

52. BMR introduces also the concepts of “submitter” and “assessor” (Article 3(1)(11) and (12) of BMR, respectively). A submitter is a person employed by a contributor for the purpose of contributing input data to an administrator, while an assessor is an employee of an administrator of a commodity benchmark responsible for applying a methodology / judgement to input data and other information to reach an assessment about the price of a certain commodity.
53. The definition of submitter is covered by the one of supervised contributors, while the definition of assessor is covered by the one of administrators of benchmarks. Therefore

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<sup>21</sup> To be noted that a similar provision in BMR (Article 41(1)(f) of BMR) makes reference to supervised entities as defined in BMR (Article 3(1)(17)).

the above suggestions to add references to supervised contributors and administrators in a number of MAR provisions implicitly cover also the concepts of submitters and assessors.

54. However, Article 30(2) of MAR, letters (e), (f) and (g) refers to "*person discharging managerial responsibilities*", a concept defined in Article 3(1)(25) of MAR. It is likely that often submitters within a supervised contributor are not persons discharging managerial responsibilities within the same supervised contributors. Likewise, an assessor within an administrator of commodity benchmarks is not always classifiable also as a person discharging managerial responsibilities within the same administrator of commodity benchmarks.
55. Against this background, it is suggested to add references to submitters within supervised contributors and assessors within administrators of commodity benchmarks in points (e), (f) and (g) of Article 30(2) of MAR. The possible amendments to the text could add the possibility of (temporarily or permanently) banning submitters from submitting input data to administrators of benchmarks, as well as (temporarily or permanently) banning assessors within an administrator of a commodity benchmark to assess the price of the underlying commodity (points (e) and (f) of Article 30 of MAR). Also, the amendments could extend the possibility to impose a ban from dealing on own account to submitters and assessors too (points (g) of Article 30 of MAR).

**Q6: Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?**

## 4 Article 5 MAR - Buy-back programmes (BBPs)

### Mandate from the Commission:

Scope of reporting obligations under the exemption for buyback programmes

Under Article 5(3), in order for its buyback programme to benefit from the exemption from application of certain provisions of MAR, the issuer must report each transaction relating to the buy-back programme not only to the NCAs of the trading venues on which the shares are admitted to trading but also to those of each trading venue where they are traded. This reporting obligation is reiterated in the Commission Delegated Regulation (EU) 2016/1052, which lays down technical standards for the conditions applicable to buy-back programmes. Since issuers are not necessarily aware of their shares being traded on a certain venue, full compliance with the reporting requirements might prove to be challenging for the issuers. In light of that consideration, the Commission would like ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

56. According to Article 5(3) of MAR, in order for its Buy-Back Programme (BBP) to benefit from the exemption from application of certain provisions of MAR, the issuer shall report to the NCA of the trading venue on which the shares have been admitted to trading or are traded each transaction relating to the BBP, including information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of MiFIR and subsequently disclosed the trades to the public.
57. Article 2(2) of Regulation (EU) 2016/1052, provides that the issuer shall report to the NCA of each trading venue on which the shares are admitted to trading or are traded no later than by the end of the seventh daily market session following the date of the execution of the transaction, all the transactions relating to the buy-back programme, in a detailed form and in an aggregated form. The aggregated form shall indicate the aggregated volume and the weighted average price per day and per trading venue.
58. Some MTF or regulated market operators permit trading of financial instruments in their trading venues at the initiative of market participants willing to trade them, without the request, approval or acquiescence of the issuer. In those cases, since issuers may not necessarily be aware of their shares being traded on a certain venue, full compliance with the reporting requirements in Article 5 of MAR might be challenging for them.
59. ESMA understands that the EC has requested ESMA to reflect on the scope of the reporting obligation under Article 5(3) of MAR (i.e. to which NCAs issuers must report) and not on the content of the information to be reported or on the content of the information to be disclosed to the public.
60. However, in light of the experience gained since the entry into force of MAR, ESMA believes that the review of MAR is also an opportunity to reflect on the merit of modifying the content of the information that issuers must report under Article 5(3) and on the information that has to be published under Article 5(1)(b) of MAR.
61. Therefore, ESMA's report on Article 5(3) of MAR is intending to address both the scope of the reporting obligation, as requested by the EC, and the content of the information to be reported.

## 4.1 Reporting obligations of BBPs

62. When reflecting on the modification of the reporting mechanism under Article 5(3) of MAR, ESMA considered the following options:
  - a) Option 1: No modification of the reporting obligation of BBPs;
  - b) Option 2: Reporting to the NCAs of the jurisdictions where the issuer requested admission to trading or, where relevant, approved trading;
  - c) Option 3: Reporting to the NCA of the most relevant market in terms of liquidity under Article 26(1) of MiFIR. This NCA would, upon request, forward the

information to the NCAs of the trading venues where the shares are admitted to trading, as well as to the NCAs of the trading venues where the shares are traded.

63. ESMA is of the view that the current reporting obligation under Article 5(3) of MAR is burdensome and that there is merit in streamlining it. Therefore, ESMA decided not to pursue Option 1.
64. The objective of Option 2 is to reduce the number of NCAs to which issuers have to report the information requested under Article 5(3) of MAR. In particular, under Option 2, issuers do not have to report to the NCAs of the trading venues where their shares are traded, which is already a challenge under the current reporting mechanism because issuers might not be aware of all the trading venues where their shares are traded. Therefore, under Option 2, the reporting obligation would be less burdensome than under the current framework but NCAs of the trading venues where the shares of the issuers are traded (without the consent of the issuers) would not receive the information.
65. Under Option 3, issuers would report to only one NCA (hereafter referred to as the 'relevant NCA') which would be defined as the NCA of the most relevant market in terms of liquidity under Article 26(1) of MiFIR. After receiving the information from the issuer, the relevant NCA would pass the information on to another NCAs upon its request provided that the shares have been admitted to trading or are traded on a trading venue under the jurisdiction of the requesting NCA. Option 3 has the merit of further simplifying the reporting mechanism with a single reporting point, while ensuring at the same time an appropriate level of transparency because NCAs that are interested would also receive the information via the relevant NCA.
66. Against this backdrop, ESMA's preliminary view is that Option 3 is the best Option for the reporting mechanism of BBPs under Article 5(3) of MAR.

**Q7: Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.**

**Q8: If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.**

## 4.2 Simplification of the reports for BBPs

67. According to Article 5(3) of MAR, issuers shall report to NCAs each transaction relating to BBPs, including the information specified in Article 25(1) and (2) and in Article 26(1), (2) and (3) of MiFIR. Article 2 of Regulation 2016/1052 further specifies the reporting obligations by providing that issuers shall report, no later than by the end of the seventh daily market session following the date of the execution of the transaction, all the transactions relating to the BBPs, in a detailed form and in an aggregated form.

68. Information under Article 25(1) and (2) of MiFIR is information that investment firms must keep a record of for five years and must make available to ESMA and CAs. The scope of this obligation covers all transactions including transactions in BBPs. Therefore, Article 5(3) of MAR requires issuers to report to NCAs information that investment firms must keep a record of and make available to NCAs under Article 25(1) and (2) on MiFIR. ESMA believes there is no need to require issuers to report to NCAs information under Article 25(1) and (2) of MiFIR related to BBPs because NCAs can have access to it under MiFIR. Therefore, ESMA is of the view that the reference to Article 25(1) and (2) of MiFIR should be removed from Article 5(3) of MAR.
69. Article 26 of MiFIR determines the obligation of investment firms to report transactions in financial instruments to CAs. In this respect ESMA sees value in maintaining the current requirement for issuers to send directly the transaction reports related to the BBPs to the relevant NCA because the current transaction reporting system was not intended for identifying BBPs.
70. However, part of the information submitted under Article 26(3) of MiFIR and Commission Delegated Regulation (EU) 2017/590 is irrelevant for these purposes.
71. In that context, ESMA's preliminary view is that the report to be provided by the investment firm to the issuer, and the issuer to the NCA should be harmonised at European level, containing only a subset of the fields referred in table 2 of Annex 1 of Commission Delegated Regulation (EU) 2017/590, in particular the following fields:
- field 3: trading venue transaction identification code;
  - field 4: executing entity LEI;
  - field 7: buyer identification code;
  - field 12: buyer decision maker code LEI;
  - field 28: trading date time;
  - field 30: quantity;
  - field 33: price;
  - field 34: price currency;
  - field 36: venue (MIC code); and
  - field 41: instrument identification code (ISIN)
72. Additionally, ESMA considers that the requirements to submit the transaction reports no later than by the end of the seventh daily market session following the date of execution,

in a detailed form and in an aggregated form could be moved from Article 2(2) of Commission Delegated Regulation (EU) 2016/1052 to the Level 1 text.

**Q9: Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.**

**Q10: Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.**

### **4.3 Transparency of transactions related to a BBP**

73. As a follow-up of the requirements analysed in the previous sections, Article 5(1)(b) of MAR establishes the obligation of the issuer to disclose to the public the trades previously reported to the CAs.
74. Despite this element not being included in the Commission's mandate, in light of the experience gained since the entry into force of MAR, ESMA is of the view that it is questionable whether the publication of such data set in a disaggregated form is useful for market participants.
75. In that sense, ESMA's preliminary view is that market participants might find more useful data in an aggregated form, in particular the aggregated volume traded, and the weighted average price paid for the shares in each trading session.

**Q11: Do you agree with ESMA's preliminary view?**

**Q12: Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.**

## **5 Article 7 of MAR – Definition of “inside information”**

### **5.1 Effectiveness of the definition of “inside information” in preventing market abuse**

#### **Mandate from the Commission:**

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements:

[...]

(b) whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse.

### 5.1.1 Regulatory framework

76. Article 38 of MAR requires the Commission to assess whether the definition of inside information is sufficient to cover all information relevant for NCAs to effectively combat market abuse.
77. Such definition is contained in Article 7 of MAR, which distinguishes four distinct sub-sets of inside information: the first one (Article 7(1)(a) of MAR<sup>22</sup>) concerns financial instruments, the second one (Article 7(1)(b) of MAR<sup>23</sup>) commodity derivatives, and the third one (Article 7(1)(c) of MAR<sup>24</sup>) emission allowances or auctioned products based on them. In addition, Article 7(1)(d) of MAR<sup>25</sup> clarifies the scope of inside information for persons charged with the execution of orders concerning financial instruments.
78. In a nutshell, all inside information, irrespective of whether it concerns financial instruments, commodity derivatives, emission allowances or persons charged with the execution of orders has to be:
- of a precise nature; Article 7(2) clarifies that the information is of a precise nature if it *"indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances"*<sup>26</sup>.
  - not public, and
  - likely, if it were made public, to have a significant effect on the relevant prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances

<sup>22</sup> "Information of a precise nature, which has not been made public, 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 or on the price of related derivative financial instruments".

<sup>23</sup> "In relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets".

<sup>24</sup> "In relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments".

<sup>25</sup> "For persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's 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".

<sup>26</sup> The same paragraph also specifies that "in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information." In addition, Article 7(3) of MAR provides that an "intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article".

(as identified in Article 7(1) of MAR). As regards the likelihood to have a significant effect on the above prices, it concerns information a reasonable investor would be likely to use as part of the basis of his or her investment decisions<sup>27</sup>.

79. MAR extended the definition of inside information contained in MAD to include information concerning emission allowances and auctioned products based on them. In addition, it provided clarifications on points which have been dealt with by the jurisprudence of the European Court of Justice. For instance, MAR provided more details with reference to the precision of inside information<sup>28</sup>.
80. With reference to inside information concerning commodity derivatives, please see sub-section 5.1.2.1.

### **5.1.2 Definition of inside information and its effectiveness in preventing market abuse**

81. This section of the CP aims at gathering views from market participants on whether the definition of inside information is sufficient to cover all information relevant for NCAs to effectively combat market abuse.
82. As of the date of this CP, MAR has been applied for approximately three years. Such time-span by itself cannot be considered sufficient to establish an exhaustive track record of shortcomings or application problems linked to the definition of inside information. At the same time, the definition of inside information is largely built upon the MAD one, hence ESMA encourages market participants to provide their views on the effectiveness of the definition of inside information for the purposes of preventing market abuse.
83. In addition to seeking market participants' views on the definition of inside information – i.e. on any elements of the definitions contained in Article 7 of MAR –, ESMA has identified three more specific areas on which it intends to consult market participants, which are further described in the three sub-sections below: (i) inside information for commodity derivatives, (ii) inside information with respect to front-running conducts, and (iii) pre-hedging.

**Q13: Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?**

**Q14: Do market participants consider that the definition of inside information is sufficient for combatting market abuse?**

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<sup>27</sup> For emission allowances, the information is considered of inside nature only if the participant in the emission allowances market exceeds the thresholds identified by Article 17(2) of MAR and by Article 5 of the Commission Delegated Regulation (EU) 2016/522, of 6 million tonnes a year of carbon dioxide equivalent or, where they carry out combustion activities, 2430 MW of rated thermal input.

<sup>28</sup> Among others, the case Markus Geltl v Daimler, Case C/19/11.

**Q15: In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?**

#### **5.1.2.1 Inside information for commodity derivatives**

84. MAR included in the definition of inside information in relation to commodity derivatives also price sensitive information which is relevant to the related spot commodity contract as well as to the derivative itself, so that the final definition included in MAR refers to information concerning directly or indirectly one or more commodity derivatives or the related spot commodity contract.
85. In addition, consistently with the previous text existing under MAD<sup>29</sup>, MAR provides that the inside information has to be reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets<sup>30</sup>. In this respect, Recital (20) of MAR contains two examples of relevant legal provisions and market rules, contracts or customs: (i) REMIT, and (ii) the Joint Organisations Database Initiative database for oil.
86. For wholesale energy products, REMIT provides for a specific definition of inside information as "*information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products*". The definition lists also the relevant information for wholesale energy products<sup>31</sup>,

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<sup>29</sup> Article 1(1) of MAD provided: "In relation to derivatives on commodities, "inside information" shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets."

<sup>30</sup> The Commission noted, both in its legislative proposal concerning MAR and in the related impact assessment, that the – at the time – existing regulatory framework had not adequately dealt with transparency on commodities and related derivatives. The relevant available information, which was not regulated at European level, largely depended on the rules and practices concerning specific commodities and related markets. There was not, hence, a common understanding of the content of inside information of commodity derivatives, but such understanding was largely conditioned by legislation or – *inter alia* – practice and customs concerning each commodity. This was the reason for which, in order to identify the inside information on commodity derivatives, MAR refers to information which is reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets.

<sup>31</sup> Pursuant to Article 2(1) of Remit, "*'inside information' means information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products*.

*For the purposes of this definition, 'information' means:*

(a) *information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;*  
(b) *information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;*  
(c) *information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, in so far as this information is likely to have a significant effect on the prices of wholesale energy products; and*  
(d) *other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.*"

Information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to do so, and if it is specific

thereby providing the indication of what information should be considered for the purposes of Article 7(1)(b) of MAR. It includes, among other things, information required to be made public in accordance with some regulations and information concerning specific topics (e.g., the capacity and use of facilities for production of electricity).

87. Pursuant to Article 7(5) of MAR, ESMA has issued guidelines on the information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives<sup>32</sup>. In particular, the guidelines give indicative examples of information "*which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets*" as referred to in Article 7(1)(b) of MAR, which is one elements needed to meet the definition of inside information relating to commodity derivatives
88. The guidelines clarify that "*for information to be considered "reasonably expected to be disclosed", it should be (i) widely accessible in a non-discriminatory way after disclosure, (ii) contained in an official statement and not part of a private or personal opinion or analysis and (iii) not a rumour nor a speculative statement*". In light of the above, ESMA notes that the definition of inside information on commodity derivatives covers a subset of information if compared to the definition of inside information concerning financial instruments, since it requires, in addition to the precision, price sensitivity and non-publicity (features of the inside information concerning financial instruments), that the information is also expected or required to be disclosed.
89. ESMA is thereby consulting market participants to gather their views on (i) the effects of the difference between the definition of inside information for commodity derivatives and for financial instruments (as the first one covers only the information which is also required or expected to be published), and (ii) whether such difference is appropriate or necessary. Namely, ESMA is consulting market participants on whether and how the further requirement for the inside information on commodity derivatives to be expected or required to be published should be clarified.
90. ESMA understands that the intention of the additional criteria for the definition of inside information for commodity derivatives ("*information reasonably expected or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice, or custom, on the relevant commodity derivatives or spot market*") was to recognise that commodity producers may hold proprietary information relating to their commercial activity which would otherwise be viewed as inside information under the general definition on inside information for financial instruments. The additional criterion was intended to limit information which could be considered to be inside information, in order to facilitate commodity producers undertaking their commercial

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enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of wholesale energy products".

<sup>32</sup> [https://www.esma.europa.eu/sites/default/files/library/2016-1412\\_final\\_report\\_on\\_mar\\_guidelines\\_on\\_commodities.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1412_final_report_on_mar_guidelines_on_commodities.pdf).

activities by entering into commodity derivatives to hedge and therefore reduce the risk to their commercial activities.

91. The different bar set for the inside information concerning commodity derivatives and financial instruments may lead to the following: a non-listed commodity producer may be able to disclose to other parties information that, if the same firm was listed, would be treated as inside information. Those other parties receiving the information from the non-listed firm may be able to trade on that information, which would be considered as insider dealing if the same information was received from a listed firm. ESMA is consulting market participants on the extent to which this potential harm is appropriate vis-à-vis supporting commercial producers' activities.

**Q16: Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?**

**Q17: What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?**

**Q18: As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.**

**Q19: Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?**

#### **5.1.2.2 Definition of inside information with respect to “front running” conduct**

92. As indicated above, Article 7(1)(d) of MAR clarifies the scope of inside information for persons charged with the execution of orders concerning financial instruments, by providing that *“for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client’s 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.”*

93. The above description identifies the relevant meaning of financial information for the market abuse practice known as “front running”, consisting of one party, mainly a broker or a person charged of executing orders, that, being aware of a forthcoming order or transaction

on a financial instrument, uses such information by acquiring or disposing of relevant financial instruments ahead of the relevant order or transaction.

94. In this respect, ESMA notes that:

- Article 7(1)(a) does not explicitly include the orders in the general definition of inside information concerning financial instruments, and Article 7(1)(d) states that pending orders are relevant as inside information for persons charged with the execution of orders;
- Pursuant to Article 7(1)(d), the information, if made public, would be likely to have a significant effect on the prices of the financial instruments.

95. ESMA considers that some clarifications as regards the definition of inside information and front running behaviours could be needed.

96. Namely, Article 7(1)(d) applies to natural and legal persons (pursuant to Article 3(13) of MAR) charged with the execution of orders, and explicitly includes in the inside information the information on pending orders. However, Article 7(1)(d) does not apply to other categories of persons that may be aware of a future relevant order (e.g., directors of an issuer, the issuer itself, institutional investors, etc.).

97. ESMA considers that, notwithstanding the fact that Article 7(1)(a) does not explicitly refer to data on pending orders as relevant for the purposes of the inside information, it is indeed part of such category, where it is of a precise nature, has not been made public and can have a significant effect on the prices of the financial instruments or related derivatives. Therefore, in such cases, the application of Article 7(1)(a) of MAR implies that front-running behaviours will be relevant for the purpose of insider dealing even when carried out by persons beyond those charged with the execution of orders who had knowledge relating to an order.

98. In addition, ESMA notes that, the MiFID II/MiFIR investor protection rules (See Sections I – General Provisions, and II – Provisions to ensure investor protection - of Chapter II - Operating conditions for investment firms -, Articles 21 to 30 of MiFID II as well as Article 24 of MiFIR) also apply to front running behaviour. Such rules include the obligation for investment firms to act honestly, fairly and professionally and in a manner which promotes the integrity of the market (Article 24 of MiFIR), to act in accordance with the best interests of their clients (Article 24 of MiFID II), to execute orders on terms most favourable to the clients (Article 27 of MiFID II), the client order handling rules (Article 28 of MiFID II) and the obligation to identify and prevent or manage conflicts of interest (Article 23 of MiFID II). Depending on the specific circumstances of the case, such rules may be an additional or alternative (where the threshold of the inside information is not met, and therefore the market abuse framework is not applicable) ground to review and, if adequate, sanction front running behaviour. Provided that the assessment on the existence of inside information has to be performed on a case by case basis, ESMA notes that the provisions to ensure investor protection, set forth by MiFID II, may prove useful where MAR is not triggered.

**Q20: What changes could be made to include other cases of front running?**

**Q21: Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?**

#### **5.1.2.3 Pre-hedging**

99. Some NCAs have received STORs from market participants on behaviours relating to practices commonly referred to by some market participants as pre-hedging or anticipatory hedging. A number of the relevant STORs relate to conducts carried out in connection to requests for quotes.
100. ESMA understands that one justification for the pre-hedging provided by market participants is that it takes place when a broker acting as principal undertakes a transaction in anticipation of a client order in order to manage the risk associated with those client trades. Typically, the relevant broker, having received a request for quote from a client but not yet its firm order, hedges the position that it would have to take where it happened to win the request for quote (hence prior to the conclusion of the latter).
101. From a market abuse perspective, pre-hedging behaviours may create risks of potential insider dealing, if a broker were to use the information received from the client to trade on for its own account, including potentially trading against the client. In this respect, and provided that a case by case assessment is necessary, it is noted that the request for quotes often meets the definition of inside information.
102. Pre-hedging may present the risk of distorting competition and harming the client's interests where there is competition between brokers (competitive requests for quote). In such cases, pre-hedging may affect the market price of the relevant financial instrument and have consequences on the price that other competing firms show to the client before the conclusion of the request for quote. Such a situation is likely to impact negatively the client depending on various criteria, including if the pre-hedging has been carried out by firms other than the one that ultimately wins the request for quote.
103. From a conduct perspective, such behaviours may also create risks around managing conflicts of interest between the firm and their client, client order handling rules around fair execution of client orders, and best execution rules.
104. For example, a broker may receive a request for quote from a client, and pre-hedge that transaction. A broker who uses the information received in that request for quote for its own proprietary benefit, may not be acting in the interest of its client and, in addition, may be at risk of insider dealing. For instance, there may be conduct and market abuse risks where such a broker pre-hedges and then declines to provide a quote, or where such a broker could fill a client order from its existing inventory but trades aggressively in the market in a way that impacts on the price, or trades in a way which disadvantages another broker who executes the order for that client. The risk for the client would be even greater

where all the brokers involved in the request for quote pre-hedge, as the multiple price impacts would cumulate.

105. It would also be important from a conduct perspective for brokers to provide clients with sufficient transparency and disclosure about their use of pre-hedging arrangements, the application and functioning of those arrangements, and the potential impact and risk of pre-hedging arrangements on the execution of client orders. Such transparency and disclosure would be important for clients to understand how their orders will be executed and the impact on their orders.

106. ESMA also understands that the pre-hedging behaviours may be held out to benefit the client, by passing on the benefit of pre-hedging activities, to provide a better price to the client. Pre-hedging is also held out to reduce the impact and disruption of large orders on the market. However, there is a potential risk around the extent to which the pre-hedging behaviour benefits the broker compared to the client.

**Q22: What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?**

**Q23: What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?**

**Q24: What financial instruments are subject to pre-hedging behaviours and why?**

## **6 Article 17 MAR - Delayed disclosure of inside information**

### **6.1 Effectiveness of the mechanism to delay the disclosure of inside information**

#### **(c) Effectiveness of the mechanism to delay disclosure of inside information**

Currently the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One-way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4). Possibly reflecting a diverging approach to treatment of inside information across Member States, the Commission has received indications that relying on the mechanism of delaying disclosure of inside information is used to a varying extent across jurisdictions in the Union. It would appear that, while in some Member States issuers rely on this mechanism regularly, issuers of others use it on an exceptional basis. Therefore, for the Commission

to better understand whether this tool needs to be calibrated, ESMA should gather information on the usage of this mechanism across Member States and identify points of divergence in its application, if any. Furthermore, the Commission would like ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism. Finally, to gain a complete picture of the use of this mechanism, ESMA should provide information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, as provided in the third subparagraph of Article 17(4). In this latter case, the Commission would like to receive information on how many such requests have been submitted by those NCAs.

### 6.1.1 Relevant regulatory framework

107. Article 17(1) of MAR provides that an issuer<sup>33</sup> has to inform the public as soon as possible of inside information which directly concerns it. Such information has to be made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Article 17(2) of MAR sets forth the disclosure obligation for emission allowances market participants<sup>34</sup>.

108. The definition of inside information is contained in Article 7 of MAR (see above section 5 of the CP). On its basis, issuers in possession of an information of a precise nature, relating directly or indirectly to the issuer itself or to its financial instruments, which is not public and which, if made public, would be likely to have a significant effect on the prices of the financial instruments or derivative financial instruments, are obliged to disclose it “as soon as possible”.

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<sup>33</sup> Namely, “issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State”. In other words, issuers whose financial instruments are traded without their approval of the admission to trading or trading are not subject to the obligation of Article 17(1) of MAR.

<sup>34</sup> Article 17(2) provides that “An emission allowance market participant shall publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business, including aviation activities as specified in Annex I to Directive 2003/87/EC or installations within the meaning of Article 3(e) of that Directive which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part. With regard to installations, such disclosure shall include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations.

The first subparagraph shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent and, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold.

The Commission shall be empowered to adopt delegated acts in accordance with Article 35 establishing a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input for the purposes of the application of the exemption provided for in the second subparagraph of this paragraph”. The CP mainly focusses on the obligation to disclose inside information applicable to issuers, pursuant to Article 17(1) of MAR.

In this respect, see ESMA Questions and Answers on the Market Abuse Regulation, questions and answers Q.11.2 and Q.11.3, available at this link <https://www.esma.europa.eu/document/qa-market-abuse-regulation>.

109. Article 17(4) of MAR allows issuers and emission allowance market participants to delay on their own responsibility the disclosure of inside information provided that all the three conditions below are met:

- (a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- (b) delay of disclosure is not likely to mislead the public; and
- (c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information<sup>35</sup>.

110. In terms or procedure, Article 17(4) of MAR requires the issuer or emission allowance market participant to inform the relevant NCA that the disclosure was delayed immediately after such disclosure occurred.

111. The issuer / emission allowance market participant must also provide a written explanation of how the three conditions listed above were met, unless the relevant Member State opted to require that the record of the explanation can be provided only upon request of the competent NCA.

112. The provisions on disclosure of inside information and related delay require issuers and emission allowance market participants to perform an assessment – which can be of a complex nature – of where certain information they possess meets the requirement of inside information. A further assessment is required where the issuer or emission allowance market participant envisages to delay the disclosure<sup>36</sup> of such information, and Article 17(4) of MAR underlines that such “second” assessment is performed under the responsibility of the issuer or emission allowance market participant.

113. In this respect, Article 30(1) of MAR requires Member States to grant NCAs power to take appropriate administrative sanctions and measures in relation to – among others - the infringements of Article 17(1) and (4) of MAR.

114. The mandate from the Commission requested ESMA to perform an analysis on how the delay of inside information disclosure is applied. This request originates from indications received by the Commission that the delay of disclosure of inside information is used to a varying extent across jurisdictions in the Union. In particular, the Commission requested ESMA to (i) gather information on the usage of the delay mechanism designed by Article 17(4) of MAR across Member States and identify points of divergence in its application, if any; (ii) assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism, and (iii)

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<sup>35</sup> Article 17(4) provides that where the inside information arises in the framework of a protracted process occurring in stages, that is intended to result in a particular circumstance or event, the above conditions apply to delay the disclosure of inside information relating to such process.

<sup>36</sup> Article 17(1) and (2) provided for different timing for the publication of the inside information, respectively for issuers, that have to disclose it “as soon as possible” and for emission allowance market participants, that have to disclose it effectively and in a timely manner.

gather information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, together with the indication of how many requests have been submitted by the relevant NCAs.

115. ESMA is currently gathering information on the above points. The CP aims at requesting market participants' views on whether the conditions for the delay of disclosure are well framed and sufficiently clear for issuers to effectively rely on the mechanism of the delay of disclosure of inside information. In this respect, ESMA invites market participants to provide also relevant examples of difficulties encountered in the application of such mechanism.

**Q25: Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.**

**Q26: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.**

### **6.1.2 Assessment of whether the conditions for the delay of the disclosure of inside information are sufficiently clear for issuers**

#### **6.1.2.1 Relevance of the internal controls to identify and disclose inside information**

116. The mandate from the Commission requests ESMA to gather information on the usage of the mechanism of delay of disclosure of inside information across Member States, and to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism.

117. In this respect, the definition of inside information set forth by MAR is relevant both for the infringement of insider dealing (Article 8 of MAR) and for the disclosure obligation (Article 17 of MAR).

118. ESMA stresses the importance for issuers and emission allowance market participants to have in place systems and controls concerning the lifecycle of the information. Such controls should enable issuers and emission allowance market participants to identify inside information, protect it and establish whether to publish it as soon as possible or delay the disclosure pursuant to Article 17(4) or (5) of MAR.

119. Article 16 of MAR requires persons professionally arranging or executing transactions to establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. ESMA deems that the obligation to establish and maintain effective arrangements, systems and procedures could prove efficient also for the management of inside information. However, the current text of Article 17 of MAR does not set forth such obligation for issuers.

120. Inserting in Article 17 a requirement for issuers to have in place systems and controls for the management of inside information would also be consistent with similar requirements under Article 16 for market monitoring and surveillance arrangements.
121. ESMA deems that the establishment and maintenance of effective arrangements, systems, and procedures for the identification, handling, and disclosure of inside information appropriate to the scale, size, and nature of issuers' business activity is appropriate to ensure that issuers comply with their obligations under Article 17 to identify and disclose inside information, and to meet the relevant conditions for delaying the disclosure of inside information pursuant to Article 17(4) of MAR.
122. ESMA is therefore consulting market participants on the inclusion in MAR of a requirement for issuers to establish and maintain effective arrangements, systems and procedures for the identification, handling and disclosure of inside information. This would help to ensure that issuers are properly identifying information which requires disclosure and properly considering whether that information should be disclosed.
123. In order to ensure that the arrangements are adequate to the scale, size and nature of the business of the issuer, ESMA deems that MAR should provide for a high-level requirement, without describing the specific arrangements, systems or procedures to be established. In this way, issuers would be enabled to identify the set-up which is most suitable for them, avoiding the risk that specific regulatory prescriptions would be appropriate for some types of issuers but not adequate to other ones.

**Q27: Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?**

**Q28: Please provide examples of cases in which the identification of when an information became “inside information” was problematic.**

- 6.1.2.2 Notification to NCAs of the delay of disclosure of information which has lost its inside information nature
124. Article 17(4) of MAR states that an issuer may, on its own responsibility, delay disclosure of inside information to the public, provided that all of the conditions therein contained are met. Where an issuer has delayed the disclosure of inside information according to Article 17(4) of MAR, immediately after the information is disclosed to the public, the issuer needs to inform the NCA that disclosure of inside information was delayed and provide written explanation on how the conditions set out in Article 17(4) of MAR were met.

125. In its Questions and Answers on the Market Abuse Regulation (ESMA70-145-111)<sup>37</sup> and, in particular, Q5.2, of 29 September 2017, ESMA clarified that, where the issuer has delayed the disclosure of inside information in accordance with Article 17(4) of MAR, and the information has subsequently lost the element of price sensitivity, that information ceases to be inside information and thus is considered outside the scope of Article 17(1) of MAR. Therefore, the issuer is neither obliged to publicly disclose that information nor to inform the competent authority in accordance with the last paragraph of Article 17(4) of MAR that disclosure of such information was delayed<sup>38</sup>.

126. However, the notification of the delay of disclosure of inside information, where the relevant information loses its inside nature following the decision to delay the disclosure, would enable NCAs to better identify possible cases of insider dealing. Namely, such notification would allow NCAs to monitor any insider dealing or attempted insider dealing conduct occurred in the period in which the information was inside information.

**Q29: Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.**

## 6.2 Issues specifically related to credit institutions or financial institutions

### 6.2.1.1 Financial stability delay

127. The mandate from the Commission does not refer to any application issues for Article 17(5) of MAR. Nevertheless, ESMA intends to consult market participants on a possible clarification of Article 17(5) of MAR.

128. Namely, Article 17(5) of MAR provides for a further case in which disclosure of inside information can be delayed, which is limited to issuers that are credit institutions or financial institutions and aims at preserving the stability of the financial system. In particular, such issuers may, on their own responsibility, "*delay the public disclosure of inside information, including information which is related to a temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort*". In order to benefit from this further case of delayed disclosure, all the following conditions set forth in Article 17(5) of MAR have to be met:

- (a) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;

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<sup>37</sup> Available at this link [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

<sup>38</sup> A5.2 further explains that "However, given that the information had been inside information for a certain period of time, the issuer had to comply with all relevant obligations relating to the drawing up and updating of insider lists and the maintenance of the information relating to the delay of disclosure, stemming from MAR and its delegated and implementing Regulations".

- (b) it is in the public interest to delay the disclosure;
- (c) the confidentiality of that information can be ensured; and
- (d) the NCA has consented to the delay on the basis that the conditions in points (a), (b) and (c) are met.

129. Further provisions concerning the financial stability delay are contained in Article 17(6) of MAR. ESMA provided clarifications on certain aspects of Article 17(5) through the Q&As on MAR<sup>39</sup>, including on the assessment of the relevant conditions.

130. Article 17(5) is applicable where the issuer is a credit or financial institution, which means that the relevant entity has to meet two conditions: (i) issue or propose to issue financial instruments, and (ii) be a credit or financial institution.

131. ESMA is consulting market participants on whether the current wording of Article 17(5) should 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.

**Q30: Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.**

**Q31: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.**

#### 6.2.1.2 The obligation to disclose inside information under Article 17 MAR and its interaction with the regulatory framework regarding the prudential obligations of credit institutions and investment firms

132. As part of its ongoing work in ensuring supervisory convergence, ESMA is currently analysing, together with other European institutions, the interaction between the obligation to disclose inside information under MAR and other requirements set out in the regulatory framework for credit institutions and investment firms.

133. In that context, ESMA is analysing whether the MAR obligation to disclose inside information might generate interpretational issues with other obligations arising from Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms<sup>40</sup> (CRD), Regulation (EU) No

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<sup>39</sup> Questions and Answers on the Market Abuse Regulation (MAR), ESMA70-145-111, Version 14, Last updated on 29 March 2019, page 20, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

<sup>40</sup> OJ L 176, 27.6.2013, p. 338–436

575/2013 on prudential requirements for credit institutions and investment firms<sup>41</sup> (CRR), and Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms<sup>42</sup> (BRRD).

134. In particular, ESMA is currently addressing two main issues:

- a. ESMA has learnt that certain issuers might find problems in interpreting jointly Article 17 MAR, that imposes the obligation to disclose immediately inside information (unless the disclosures mentioned above apply), with Article 28(1) Commission Delegated Regulation (EU) No 241/2014 for Own Funds supplementing CRR. Article 28(1) of Commission Delegated Regulation (EU) 241/2014 establishes that '*Redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior approval of the competent authority*'.
- b. ESMA published on March 2018 a Q&A on the publication of inside information as regards the Pillar II assessment and/or any information received in relation to the Minimum Requirement for own funds and Eligible Liabilities (MREL) exercise<sup>43</sup>.

As a follow-up of that exercise, ESMA is engaging with other EU institutions to provide further clarity on the possible interactions between the obligation to disclose inside information and the regulatory framework for Pillar II guidance and Pillar II requirements.

Moreover, ESMA also considers appropriate engaging in such a dialogue to manage any interpretation issues that may arise in the future following the amendments of BRRD<sup>44</sup>, CRD (V)<sup>45</sup> and CRR (II)<sup>46</sup>.

135. Whereas there might not be a need for amending MAR in this respect, ESMA wishes to take the opportunity of this CP to gather information from market participants about the difficulties found when applying jointly these provisions.

**Q32: Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.**

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<sup>41</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 OJ L 176, 27.6.2013, p. 1–337

<sup>42</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council; OJ L 173, 12.6.2014, p. 190–348.

<sup>43</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf), see Q&A 5.1.

<sup>44</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L0879>.

<sup>45</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE\\_16\\_2019\\_REV\\_1](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE_16_2019_REV_1).

<sup>46</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE\\_15\\_2019\\_REV\\_1](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE_15_2019_REV_1).

## 7 Article 11 MAR - Market sounding

### 7.1 Enforceability of market soundings

136. As a general rule, unlawful disclosure of inside information arises “*where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties*” (Article 10(1) of MAR).
137. As explained in Recital (34) of MAR, “*conducting market soundings may require disclosure to potential investors of inside information*”.
138. When a Disclosing Market Participant (DMP) carries out a market sounding following the relevant requirements, it will be protected from the allegation of unlawful disclosure of inside information, without having to actively demonstrate that they have acted in the normal exercise of an employment, profession or duty.
139. More precisely, Article 11(4) of MAR stipulates that “*for the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person’s employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article*”.
140. Recital (32) of MAR highlights that “*the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse*”.
141. On the same line, Recital (35) of MAR clarifies that “*There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information, but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against the unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation [...]*”.
142. ESMA is of the view that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11 and when they do so, they can benefit from the described protection.
143. This would be in line with CDR 2016/960 (whereby a number of requirements are imposed on DMPs regardless of whether inside information is expected to be disclosed in the course of the sounding), but it is also coherent with one of the main goals that led to the introduction of the market sounding regime, i.e. ensuring the possibility for NCAs to obtain a full audit trail on a process which is by nature at risk of unlawful disclosure of inside information.

144. In addition, Article 30(1) of MAR stipulates, among other things, that "*Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements: [...]*" [emphasis added].

145. Through that provision, while the Co-Legislators intended to create a minimum level of harmonisation as regards administrative sanctions and other administrative measures to be provided by Members States with respect to the infringements of the Articles referred to in point (a) of Article 30 of MAR, it also gave Member States the opportunity to include additional administrative sanctions and administrative measures other than the ones that are required as a minimum.

146. Therefore, Member States can adopt, via national law, measures aimed at sanctioning the violation of the requirements laid down in Article 11 of MAR, without prejudice to any additional sanction where unlawful disclosure of inside information has been committed.

147. However, ESMA has been made aware of a different reading whereby the market sounding regime and the relevant requirements would be a mere option for DMPs to benefit from the protection from the allegation of unlawful disclosure of inside information.

148. For the above reasons, ESMA is of the view that any change in the formulation of current Article 11 of MAR may be done in order to:

- (a) clarify the obligatory nature of the requirements currently contained in Article 11 of MAR, i.e. whenever a behaviour meets the definition of market sounding the relevant obligations apply;
- (b) confirm the fact that DMPs carrying out market soundings in accordance with the relevant requirements should be granted full protection against the allegation of unlawfully disclosing of inside information;
- (c) to foster harmonisation and a level playing field across the EU, ensure that administrative sanctions for not complying with the market sounding regime are established by MAR, without prejudice to any further sanction whenever the conduct constitutes market abuse;

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

## **7.2 Definition of market sounding and difference with other forms of interactions with potential counterparties**

149. The definition of market sounding is contained in Article 11(1) of MAR, stipulating that a "*market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a*

*possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors".*

150. To be a market sounding such communication of information should be carried out by i) an issuer, ii) a secondary offeror of financial instruments (in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors), iii) an EAMP or iv) a third party acting on behalf or on account of the above persons.

151. Additionally, according to Article 11(2) of MAR, disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company should also constitute market sounding, provided that:

- (a) the information is necessary to enable the security holder to form an opinion on their willingness to offer the securities;
- (b) the willingness of the security holder is reasonably required for the decision to make the takeover bid or merger.

152. Recital (33) of MAR provides three examples of market sounding:

- a) a sell-side firm has been in discussions with an issuer on a potential transaction, and it has decided to gauge potential investor interest to determine the terms that will make up a transaction;
- b) where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; and
- c) where the sell-side firm is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors.

153. Current definition of market soundings is broad and seems to cover a wide range of interactions, e.g. it could also include the cases where the DMP has engaged in interactions aimed at directly offering a deal or a transaction to one or more potential contractual counterparties.

154. ESMA is assessing whether some limitation to the definition of market sounding should be introduced, e.g. excluding certain types of transactions, or whether additional clarification on the scope of the definition of market sounding should be provided<sup>47</sup>.

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<sup>47</sup> ESMA notes that the SME listing package that is currently in the process of being adopted, explicitly sets out that "*communication of information to those qualified investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of bonds by an issuer that has*

155. ESMA would also like to receive information from market participants describing the various stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transactions, and to which stages the market soundings regime should apply, depending on the extent of the risk of inside information being unlawfully disclosed.

156. In particular, current reference in the definition to "*prior to the announcement of a transaction*" relates to the public disclosure of the terms of the transaction that were previously subject to the sounding, excluding from that moment the application of the relevant regime. ESMA is assessing whether such reference in the definition is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement.

157. ESMA would like to remind readers that one of the purposes of the rules and procedure set out for carrying out a market sounding is to encourage such activity by offering DMPs a protection from the allegation of unlawful disclosure of inside information, without them having to actively demonstrate that they have acted in the normal exercise of an employment, a profession or duties. Therefore, one should bear in mind that any change in the definition of market sounding may have implications on the scope of the whole regime and in turn on the scope of the relevant protection.

**Q34: Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?**

**Q35: What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?**

**Q36: Do you think that the reference to "*prior to the announcement of a transaction*" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?**

### **7.3 Simplification of the market sounding procedures and requirements**

158. The current formulation of Article 11 of MAR, in conjunction with the provisions set out in CDR 2016/960, provide for a series of requirements and specific procedures to be followed by DMPs while carrying out a market sounding.

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*financial instruments admitted to trading on a trading venue, or by a third party acting on its behalf or account, shall not constitute a market sounding".*

159. ESMA is assessing if and how some of the above requirements and procedures may be simplified while ensuring an adequate level of audit trail for the NCAs to be able to effectively investigate any potential abuse.

160. For example, DMPs are currently under the obligation to use recorded telephone lines only where they have access to such lines and the persons receiving the market sounding have given their consent to the recording of the conversation. Where that is not the case, the alternative is a complex procedure for the DMP to draw up and the person receiving the sounding to agree or amend minutes of the exchange of information.

161. Given that recording facilities are of common use for commercial purposes and due to compliance with other legislative requirements, ESMA would like to gather the market participants' view on whether the use of recording facilities should be simply made compulsory for all soundings.

162. Another example could be the cleansing procedure, how that impacts the person receiving the market soundings and any potential ways to make it simpler, with particular reference to parked or failed transactions.

163. In that sense, an increased number of persons that expressed their wish not to receive the market soundings (included in the relevant list set out in Article 4(2) of CDR 2016/960) may be an indicator of an excessive burden of the regime for those persons receiving the market soundings.

**Q37: Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?**

**Q38: Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?**

## 8 Article 18 MAR - Insider list

### 8.1 Usefulness of insider lists

#### Mandate from the Commission:

Usefulness of insider lists drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse

In relation to the above point, the Commission would in particular like to know to what extent NCAs rely on insider lists within the meaning of Article 18 in investigating

instances of market abuse. To that end, the Commission would appreciate if ESMA, in providing its answer, gathers information on the following:

- number of requests to receive insider lists addressed by the NCAs to issuers
- whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so the breakdown of requests pertaining to one or the other
- how instrumental insider lists are in completing investigations initiated by NCAs.

164. Insider lists serve different purposes: they contribute to protect market integrity by allowing NCAs to identify who has access to inside information and by stating the specific date and time on which a piece of information became inside information and also the date and time when the relevant persons gained access<sup>48</sup> to it. Additionally, insider lists should be helpful for issuers to manage the flows and confidentiality of inside information<sup>49</sup>.

165. NCAs consider insider lists as critical in completing their investigations. Therefore, ESMA's preliminary view is that the insider list is a key tool for investigating possible market abuse infringements.

**Q39: Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.**

## 8.2 Content of the insider lists

166. Despite the following sections are not required in the Commission's mandate, ESMA is of the view that it can take advantage of the experience gained after the entry into application of MAR to clarify the scope of the obligation, improve the usefulness of insider lists and reduce, where possible, the burden for issuers. From that perspective, the following section will address the identification of the persons that should be included in the insider lists, the role of permanent insider lists and how MAR could be amended to facilitate discharging the obligation to maintain insider lists.

### 8.2.1 Actual access versus potential access to inside information

167. ESMA has detected that currently some issuers include in their insider lists persons who, due to the position within the issuer/external service provider or due to any other engagement with them, could have accessed that information even if they never did that in practice (for instance, some issuers include in the insider list all the staff working in the compliance department despite not all of them have accessed a piece of inside information).

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<sup>48</sup> Recital (56) and (57) of MAR

<sup>49</sup> Recital (57) of MAR

168. While ESMA recognises that the approach outlined above might facilitate the task of the issuer/service provider when drafting the insiders list and provides an immediate overview of all the potential suspects in an investigation, it may also lead to an 'inflation' in the number of persons included and it eventually might reduce the usefulness of the insider list. This may cause issuers to not have proper oversight of those who actually have accessed a piece of inside information and may reduce the effectiveness of the insider list to NCAs who conduct investigations.
169. Given that such approach may include several individuals who may not have accessed the relevant piece of inside information, NCAs can request, if necessary, supporting evidence of the effective access to the inside information by a subset of those individuals.
170. ESMA considers that insider lists should only include persons who effectively accessed a piece of inside information, and not those who could have done that. ESMA notes that recital (57) of MAR indicates that insider lists must contain persons who "gained access" to inside information, not those who might have done that because they had the technical capacity/access to do so. Similarly, Commission Implementing Regulation (EU) 2016/347 is clear when requires specifying the '*date and time at which a person obtained access to inside information*' and the same in case the person ceased to have access to inside information'. Such requirement is also consistent with the obligation to manage adequately inside information so as to permit access to it on a 'need-to-know' basis.
171. Whereas this approach would reduce significantly the number of 'false positives', the determination of which individuals did gain access to a piece of information might involve that issuers and firms have in place systems and controls for that purpose.
172. ESMA is aware of the proposed revision of the insider list regime for SMEs in the proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 (MAR) and (EU) 2017/1129 (Prospectus Regulation) as regards the promotion of the use of SME growth markets<sup>50</sup>. According to that proposal, issuers whose financial instruments are admitted to trading on an SME growth market should include in their insider lists only those persons who, due to the nature of their function or position within the issuer, have *regular* access to inside information. At the same time ESMA notes that such approach may not be adequate for other MAR issuers, due to the significant differences between SME issuers and the rest of MAR issuers. Additionally, ESMA wishes to highlight that the proposal foresees the capacity of Members States to apply the regular regime for insider lists to SME issuers.
173. Nonetheless, ESMA would like to understand what changes and systems and controls issuers would need to put in place to be able to provide, within a short timescale at the request of the NCA, an insider list identifying the persons who had actually accessed inside information.

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<sup>50</sup> European Parliament legislative resolution can be found here: [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0439\\_EN.html#title1](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0439_EN.html#title1)

**Q40: Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.**

**Q41: What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?**

### **8.2.2 Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists**

174. Despite the fact that this issue is not included in the Commission's mandate, ESMA has received questions from market participants regarding the subjects of the obligation to draw up and maintain insider lists.

175. The current text of Article 18(1) of MAR establishes that "*the issuer or any person acting on their behalf or on their account*" shall draw up and maintain an insider list. ESMA notes that the abovementioned proposal for a regulation amending MAR and the Prospectus Regulation as regards the promotion of the use of SME growth markets specifies that the obligation to keep their own insider list encompasses as well persons acting on behalf or on account of the issuer, in line with ESMA's prior Q&A<sup>51</sup>.

176. ESMA notes that Article 18(1)(a) of MAR defines the scope of the issuer's insider list more broadly, including also persons performing tasks through which they have access to inside information, without requiring having any other specific relationship with the issuer<sup>52</sup>. From that perspective, auditors or notaries should be included in the insider list of the issuer if they have had access to inside information.

177. In the context of the current CP, ESMA is considering whether the obligation to draw up and maintain insider lists should be explicitly expanded to other persons performing tasks through which they have access to inside information, even if they do not act on behalf or on the account of the issuer. The two examples identified by ESMA at this stage are auditors and notaries, but there might be other cases.

178. In the case of auditors, according to the International Auditing and Assurance Standards (IAAS) whose standards<sup>53</sup> are mentioned in both Directive 2006/43/EC (Article 26) and Regulation 537/2014 (Article 9)<sup>54</sup>, the auditor must be granted access<sup>55</sup> to

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<sup>52</sup> See Recital (57) of MAR.

<sup>53</sup> [https://www.ifac.org/system/files/publications/files/IAASB%20HANDBOOK\\_Vol%201\\_0.pdf](https://www.ifac.org/system/files/publications/files/IAASB%20HANDBOOK_Vol%201_0.pdf) pg 78-79.

<sup>54</sup> The introduction in EU regulation through delegated acts has not taken place yet. However, some Member States do include them in their own national regulations.

<sup>55</sup> In case such access is not provided, that information has to be included in the additional report to the audit committee. See Article 11 Regulation 537/2014. Lack of access may also lead to not being able to provide an audit opinion. See Article 28 of Directive 2006/43/EC.

information that may qualify as inside information<sup>56</sup>. It is noted as well that the final audit report (before publication) may also be considered as inside information<sup>57</sup>.

179. Similarly, notaries, as persons authorised to perform legal formalities might have access to inside information before it reaches public knowledge.

**Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.**

### 8.2.3 The role of the permanent insider section

180. Following questions from market participants and the supervisory experience gathered by CAs, ESMA wishes to expand the scope of its review to the role of the permanent insider section despite it was not included in the Commission's mandate.

181. Regarding the purpose and the content of the permanent insider section, ESMA wishes to remind market participants that Commission Implementing Regulation (EU) 2016/347 introduced the permanent insider section of the insider list as an option to avoid replicating the personal details of those permanent insiders in each event-based insider list<sup>58</sup>. The purpose of that section is described in recital (4) of Commission Implementing Regulation (EU) 2016/347: "*to avoid multiple entries in respect of the same individuals in different sections of the insider lists*", i.e. to avoid replicating the personal details in each event-based insider list.

182. In other words, the permanent insider section is supplemental to the event-based insider list. This is because the persons represented in the permanent insider section, in accordance with article 2(2) of Implementing Regulation 2016/347, "*have access at all times to all inside information*". As a consequence, the details of permanent insiders shall not be included in the other sections of the insider list.

183. In line with that, ESMA has detected several behaviours that do not fit within the obligations set out in MAR:

- (a) Using the permanent insider section as a substitute of the event-based insider lists.

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<sup>56</sup> Access to all information of which management and, where appropriate, those charged with governance are aware that is relevant to the preparation of the financial statements such as records, documentation and other matters; additional information that the auditor may request from management and, where appropriate, those charged with governance for the purpose of the audit; and unrestricted access to persons within the entity from whom the auditor determines it necessary to obtain audit evidence.

<sup>57</sup> <https://corpgov.law.harvard.edu/2018/11/15/audit-process-private-information-and-insider-trading/>

<sup>58</sup> Article 2(2) second paragraph of Commission Implementing Regulation (EU) 2016/347. This is also reflected in the [ESMA Final Report on draft technical standards on the Market Abuse Regulation](#) (section 8.3.4)

- (b) As a side-effect of considering the permanent insider section as substitute of event-based lists, ESMA has detected an ‘inflation’ in the persons included in those lists. From that angle, ESMA reiterates the clarification provided in recital (4) of Commission Implementing Regulation (EU) 2016/347, i.e. only “*persons who, due to the nature of their function or position, have access at all times to all inside information within the issuer, the emission allowance market participant, the auction platform, the auctioneer or the auction monitor*”. In ESMA’s view, only an extremely limited group of individuals should meet that definition, including the Chief Executive Officer, in certain specific cases, the Chief Finance Officer, Executive assistant, Chairman of the Board, Head of Legal Department/Compliance Officer and Chief Technical Officers.
184. Whereas the points mentioned above would not require an amendment of MAR *stricto sensu*, ESMA is considering whether the regulatory framework should be changed to provide greater clarity on the purpose and functioning of the insider list. This could include, for example, specifying that for each piece of inside information the corresponding insider list should include all the elements listed in Article 18(3) for each and every person having access to that piece of information (including those listed in the permanent insider section) and clarifying how the permanent insider list should be used in conjunction with the events based list.
185. ESMA notes that, as an alternative, Commission Implementing Regulation (EU) 2016/347 could be amended to add the relevant columns to the permanent insider section and permit using it as an event-based. ESMA will reflect on the feed-back from this consultation and after having checked if it is the Commission’s intention to amend MAR in this respect, would consider if proposing amended implementing technical standards.
186. Additionally, ESMA would like to get the views of market participants on the usefulness of the permanent insider section as such.

**Q43: Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.**

#### **8.2.4 Reduction of the administrative burden for issuers regarding insider lists**

187. Finally, some associations of issuers have approached ESMA highlighting the administrative burden that insider lists represent for their members. These associations have requested specifying that the issuer should not have to keep the entire list of natural persons having access to inside information, but just one contact person for each external service provider having access to inside information. Those external service providers should include in their own insider lists the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement.

188. ESMA understands that clarifying this point in Level 1 would also prevent problems for issuers related to the different supervisory practices related to the cross-border provision of services.

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

**Q44: Do you agree with ESMA's preliminary view?**

**Q45: Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.**

## **9 Article 19 MAR - Managers' transactions**

### **Mandate from the Commission**

[...]

(c) the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply;

[...] Furthermore, under the second subparagraph of Article 38 the Commission is required to submit, after consulting ESMA and by 3 July 2019, a report to the European Parliament and to the Council on the level of the thresholds set out in Article 19(1a)(a) and (b) 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, with a view to assessing whether that level is appropriate or should be adjusted. Pursuant to that second subparagraph, the Commission must consult ESMA prior to submitting its report. As such, the Commission seeks ESMA's contribution on this matter, so that it can proceed in preparing the report as required.

### **2. Advice on non-mandatory elements of the Report**

(f) appropriateness of certain aspects of the requirement to notify managers' transactions

Regarding the above point, the Commission seeks ESMA's input on the following two aspects of that requirement:

### i. level of thresholds

Currently the threshold that triggers the notification obligation is set to EUR 5000, with the possibility for NCAs to raise it to Euro 20 000. The Commission would welcome ESMA's analysis on whether these thresholds are appropriate to ensure a high level of market transparency and integrity without creating a disproportionate compliance burden for managers and issuers.

### ii. transactions to be notified once the threshold is reached

Under Article 19, after the relevant threshold has been reached, managers and issuers have to notify and disclose all subsequent transactions, regardless of the size of individual transactions. The Commission seeks ESMA's advice and assessment on whether this reporting methodology is most appropriate to capture relevant transaction data and whether it strikes the right balance between a high-level market transparency and a proportionate compliance burden.

## **9.1 Appropriateness of thresholds and transactions to be notified once the threshold is reached**

190. The Commission requested ESMA to: (i) assess if the current threshold for the notification obligation, of € 5,000, is adequate, or whether it creates a disproportionate burden for managers and issuers, and (ii) provide advice on whether the fact that, once the threshold is reached, each subsequent transaction has to be notified to the relevant NCA strikes the right balance between a high level market transparency and a proportionate compliance burden.

### **9.1.1 Initial threshold and notification of subsequent transactions**

191. Article 19(8) of MAR provides that PDMRs have to notify the issuer and the NCA when in a calendar year they reach the threshold of € 5,000, to be calculated by adding the value of the transactions conducted, without netting them. The notifications concern, as regards issuers, transactions conducted by PDMRs on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto, and, as regards EAMPs, transactions conducted by PDMRs on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto.

192. In addition to the € 5,000 threshold, Article 19(9) of MAR provides that NCAs may decide to increase the threshold to € 20,000. In such a case, the NCA has to inform ESMA of its decision and the related justification, with specific reference to market conditions to

adopt the higher threshold<sup>59</sup>. As of the date of this CP, four NCAs decided to avail themselves of the increased threshold, namely the Danish Finanstilsynet, the French Autorité des Marchés Financiers, the Italian Commissione Nazionale per le Società e la Borsa and the Spanish Comisión Nacional del Mercado de Valores. Those NCAs indicated that, on the basis of the relevant markets they supervise, increasing the threshold to € 20,000 Euro would strike the right balance between transparency and administrative burdens for PDMRs<sup>60</sup>. BaFin communicated to ESMA that it also plans to increase the threshold to € 20,000 by the beginning of 2020<sup>61</sup>.

193. As regards the value of the threshold, some market participants expressed the views that the current threshold should be significantly increased, in order to reduce the administrative burden and ease compliance for issuers and avoid disseminating information on PDMRs' transactions which, in light of the amount, would not anyway give meaningful signals to the market.

194. At the same time, several NCAs noted that, as of today, certain PDMRs notify any transaction carried out regardless of the € 5,000 threshold, in order not to monitor when the threshold is exceeded, thereby reducing the risk of a missed notification.

195. ESMA would also like to receive feedback on whether it is beneficial to maintain the option for NCAs, on the basis of their national market, to increase the minimum threshold to a higher amount (as is now under Article 19(9) of MAR) or whether there should be a single, potentially adjusted, threshold applicable in the Union.

196. With reference to the amount itself, ESMA acknowledges that few NCAs opted for the increased amount of € 20,000 Euro, which provides the indication that, for supervisory purposes, the current € 5,000 Euro has been considered as adequate by most of them.

197. As clarified in recital 58 of MAR, the notification of PDMR's transactions is a preventive measure against market abuse and provides also useful information to the issuers and to investors.

198. With reference to the subsequent notification of PDMRs' transactions, Article 19(8) of MAR provides that, when the amount of € 5,000 has been reached by the PDMR, any subsequent transaction has to be notified, regardless of its size. ESMA deems that the approach currently envisaged by MAR is quite simple, as it does not require PDMRs to put in place any further controls, for instance, on whether other thresholds are reached or not.

**Q46: Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the**

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<sup>59</sup> See the document List of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons, 13 February 2019, ESMA70-145-1020, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-145-1020\\_list\\_of\\_thresholds\\_increased\\_pursuant\\_to\\_mar\\_article\\_199.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-1020_list_of_thresholds_increased_pursuant_to_mar_article_199.pdf).

<sup>60</sup> The reasons provided by the NCAs are available in the document List of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons.

<sup>61</sup> See the relevant announcement, available at <https://www.bafin.de/dok/12779768>.

**market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?**

**Q47: Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).**

**Q48: Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.**

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

**Q50: Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.**

### **9.1.2 Level of the thresholds set out in Article 19(1a)(a) and (b) of MAR**

199. On the basis of Article 38 of MAR, the Commission requests ESMA to provide its advice on the level of the thresholds set out in Article 19(1a)(a) and (b) 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, with a view to assessing whether that level is appropriate or should be adjusted.

200. In particular, Article 19(1a)(a) provides that no notification obligation applies where the financial instrument concerned by the relevant transaction is a unit or share in a collective investment undertaking in which the exposure to the issuer's shares or debt instruments does not exceed 20% of the assets held by the collective investment undertaking.

201. Article 19(1a)(b) provides that the notification obligation does not apply to transactions concerning financial instruments which have exposure to a portfolio of assets in which the exposure to the issuer's shares or debt instruments does not exceed 20% of the portfolio's assets.

202. Such paragraph was inserted by Regulation (EU) 2016/1011<sup>62</sup> concerning benchmarks, which became applicable on 1 January 2018. Recital 72 of the same Regulation explains that there are a variety of financial instruments linked to shares and debt instruments of a given issuer (which are relevant for the purposes of the PDMRs' notifications). Such financial instruments include units in collective investment undertakings, structured products or financial instruments embedding a derivative that provides exposure to the performance of shares or debt instruments issued by an issuer. The identified "de minimis"

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<sup>62</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJ L 171, 29.6.2016, p. 1–65.

threshold allows to identify those transactions which, by providing an exposure of 20 % or less to the issuer's shares or debt instruments, are considered as not relevant.

203. NCAs consider that the 20% threshold is functioning well, and ESMA has not received any indications from market participants that it is not adequate. In addition, as regards Article 19(1a)(a), the 20% threshold is consistent with the general rules concerning diversification of investments applicable to UCITS (see Articles 52 to 56 of UCITSD<sup>63</sup>). At the same time, since the thresholds have been applied for less than 2 years (as they became applicable on 1 January 2018), ESMA considers that the experience is too short to reach a conclusion on whether the threshold is appropriate or not.
204. In light of this, ESMA solicits market participants' expression of views on the appropriateness of the 20% thresholds included in Article 19(1a)(a) and (b). Where such thresholds are deemed inadequate, ESMA requests market participants to explain the reason why and provide examples in which the 20% threshold is not effective.

**Q51: Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.**

**Q52: Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?**

## **9.2 Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11)**

205. The Commission's mandate, in line with Article 38 of MAR, requests ESMA to assess the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11), with a view to identifying whether there are any further circumstances under which the prohibition should apply.

206. Article 19(11) of MAR provides that a PDMR shall not conduct transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public according to: (a) the rules of the trading venue where the issuer's shares are admitted to trading; or (b) national law. Article 30(1) of MAR sets forth the requirement for Member States to impose administrative sanctions for violations of the obligation not to carry out transactions in the closed period.

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<sup>63</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast).

207. ESMA has identified certain elements of Article 19(11) on which it is requesting market participants' views. Further considerations which relate to the conditions for the application of the closed period are discussed in Section 9.3.2 of the CP.

**Q53: Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?**

### **9.2.1 Announcement of financial reports which the issuer is obliged to make public**

208. In its Q&As on MAR, ESMA provided clarifications on the meaning of «announcement» of the interim or year-end financial results, for which ESMA clarified that it is (i) the public statement whereby the issuer announces the information included in an interim or a year-end financial report that the issuer is obliged to make public, and (ii) for the year-end financial report, the public statement whereby the issuer announces, in advance to the publication of the final year-end report, the preliminary financial results agreed by the management body of the issuer and that will be included in that report. However, this applies only if *“the disclosed preliminary financial results contain all the key information relating to the financial figures expected to be included in the year-end report. In the event the information announced in such way changes after its publication, this will not trigger another closed period but should be addressed in accordance with Article 17 of MAR”*<sup>64</sup>.

209. In other words, if the preliminary year-end financial results do not contain all the key information relating to the financial figures expected to be included in the year-end report, the closed period would apply from the announcement of the latter. This is because the closed period applies only for financial results that the issuer is obliged to make public, according to the rules of the trading venue where the shares of the issuer are admitted to trading or to national law.

210. In light of the reference to national law and rules of trading venues, issuers are subject to different number of closed periods across the EU.

**Q54: Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.**

### **9.2.2 Persons required to comply with the closed period**

211. The requirement not to carry out transactions in the closed period applies only to PDMRs, that are also subject to administrative (and potentially to criminal) sanctions and measures for the breach of Article 19(11).

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<sup>64</sup> See Q7.2 and A7.2, in Questions and Answers on the Market Abuse Regulation (MAR), ESMA70-145-111, Version 14, Last updated on 29 March 2019, page 20, available at [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf).

212. Both the obligation and the sanction explicitly refer to PDMRs<sup>65</sup>. ESMA consults market participants on whether it is appropriate to explicitly extend the application of the closed period to issuers and to persons closely associated with the PDMRs. These two categories – and the same is valid for the PDMRs – remain subject at all times to Articles 14 and 15 of MAR prohibiting insider dealing and attempted insider dealing, unlawful disclosure of inside information, as well as market manipulation and attempted market manipulation.

213. In general terms, the prohibition to carry out transactions in the closed period is a preventative measure, which aims at limiting the violation of Articles 14 and 15 of MAR, addressed to persons that, by virtue of their functions, are likely to be in possession of inside information. Considering the rationale of the provision, ESMA seeks market participants' views on the explicit extension of the closed period obligations also to issuers and to the closely associated persons. Namely:

- The issuer has, by definition, proximity at all times with the inside information, and would therefore be in a position which, from a substantial standpoint, is at least equivalent to the PDMRs' one. In light of this, the extension of the closed period to issuers is considered beneficial by some market participants.

The extension of the closed period to issuers presents however a number of downsides.

Among other things, trading prohibitions for issuers could imply possible limitations of the on-going refinancing (for instance, through MTN programmes) for issues in several sectors (among others, credit institutions), or limit the possibility to buy and use the shares to pay for an investment or acquisition of a business.

Possible side effects of the extension of the closed period to issuers also need to be taken into account. For instance, Article 4 of the Commission Delegated Regulation No 2016/1052 provides that the exemptions of Article 5 of MAR do not apply if issuers trade on own shares during a closed period, with some exceptions, among which are the following cases: (i) the trading decisions concerning the timing of the purchases of the issuer's shares are independently taken by an investment firm or credit institution, and (ii) the issuer is an investment firm or credit institution and has "Chinese walls" in place. The effects of an extension of the closed period to issuers in analogous cases should be carefully considered.

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<sup>65</sup> Defined by Article 3(1)(26) of MAR as: (a) a spouse, or a partner considered to be equivalent to a spouse in accordance with national law; (b) a dependent child, in accordance with national law; (c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or (d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c), or which is directly or indirectly controlled by such a person, or which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.

- As indicated above, Article 19(11) of MAR applies to transactions conducted by PDMRs on their own account or for the account of a third party, directly or indirectly.

The prohibition covers, among others, transactions carried out by legal entities of which the PDMR is the only ultimate beneficial owner, in cases where the investment decision was of the PDMR or in cases where the PDMR participated on the investment decision process.

The reference to “indirect” transactions includes those on own account conducted indirectly and those conducted for the account of a third party<sup>66</sup>. Depending on the facts of a specific case, this could also include those transactions conducted through or for a closely associated person, as in the case, for instance, of an agreement between a PDMR and a closely associated person who carries out the transaction.

Nevertheless, Article 19(11) does not cover transactions carried out by the closely associated person, taking advantage of inside information gathered from the PDMR (i.e. those cases in which the PDMR is not conducting the transactions indirectly through a closely associated person).

The extension of the closed period to closely associated persons would place burdens on the PDMRs, to make sure that they correctly identify the closely associated persons at all times, and on the issuers, that would have to provide communications on the closed period start and end dates to them. In addition, the risk of closely associated persons committing market abuse is smaller than that concerning PDMRs. In light of the above, ESMA consults market participants on whether the extension of the closed periods to closely associated persons would be considered as proportionate.

**Q55: Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.**

### **9.3 Exemptions to the application of the closed period requirement**

214. Article 19(12) of MAR provides that an issuer may allow a PDMR to trade on its own account or for the account of a third party during a closed period either: (a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or (b) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

215. The mandate by the Commission does not raise specific questions on the exemptions to the application of the closed period requirement. However, ESMA deems that such

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<sup>66</sup> For instance, see the Q&As on Article 19 of MAR published by BaFin.

provision has a direct impact on the assessment of the appropriateness of the conditions of the closed period and on whether there are further circumstances under which the prohibitions should apply.

216. In general terms, ESMA notes that there is a limited set of circumstances in which transactions may be carried out in the closed period, which mainly depend on “external” factors such as the presence of exceptional circumstances or the characteristics of the transactions. ESMA intends therefore to gather market participants’ views on whether further criteria to apply exemptions from the closed period requirements need to be considered:

- a) Article 19(12)(a) allows the issuer to exempt the PDMR only as regards “*the immediate sale of shares*”. Sale of other financial instruments cannot therefore be exempted by the issuer. Nevertheless, the sale of other financial instruments (for instance, listed bonds) could, depending on the specific circumstances of the case, be functional to the solution of the same severe financial difficulties conditions which are considered by Article 19(12)(a) of MAR.
- b) There is merit in exploring whether market participants consider that there are cases, currently not explicitly covered by the criteria under Article 19(12)(b), which should be added to the exemptions.

Reference is made to cases in which, at the time in which a contract was entered into, it was not possible to foresee that such contract would require the acquisition or the subscription of financial instruments (the “transaction” pursuant to Article 19) within a closed period. In this respect, it is relevant to point out that exemptions to the closed period are not appropriate where the PDMR would be able to make an investment decision in such time-span.

**Q56: Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.**

**Q57: Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.**

## 10 MAR and collective investment undertakings (CIUs).

### 10.1 Introduction

217. As financial instruments according to MiFID II (Section C of Annex I), CIUs are within the scope of MAR in accordance with Article 2 of MAR<sup>67</sup>.

218. The notion of CIUs covers a wide range of entities. From an EU perspective, all CIUs are either Collective Investment Undertakings in Transferable Securities (UCITS) or Alternative Investment Funds (AIFs). UCITS and some AIFs (European Social Entrepreneurship Funds (EuSEFs), European Venture Capital Fund (EuVECAs) and European Long-Term Investment Funds (ELTIFs)) are regulated at EU level<sup>68</sup>. Other AIFs are subject to national law as far as their authorisation, ongoing operation and transparency is concerned.

219. ESMA has recently published a Q&A<sup>69</sup> clarifying that a CIU, even without legal personality, can be considered as a MAR 'issuer'<sup>70</sup> under the current legislative framework. However, that analysis raised the issue that some of the MAR obligations for issuers might not have been intended to cover CIUs.

220. At the same time, ESMA also acknowledges that there might be elements making the application of MAR to CIUs vis-à-vis other issuers more difficult: the fact that a significant number of CIUs do not have legal personality, and the role played in CIUs by external companies (e.g. management companies, asset managers, depositaries), the specificities of CIUs in terms of investment strategies and the determination of net asset value (both for CIUs with and without personality), makes it advisable to analyse whether it is necessary to apply the MAR provisions for issuers to them.

221. Therefore, ESMA makes use of this consultation to analyse whether there is genuine need for MAR to be amended to explicitly include or exclude these entities, not only with respect to PDMR obligations, as requested in the Commission's mandate, but also addressing other interlinkages between CIUs (and their management companies<sup>71</sup>) and

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<sup>67</sup> Article 2 MAR: This Regulation applies to the following:

(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;  
(b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;  
(c) financial instruments traded on an OTF;  
(d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

<sup>68</sup> Directive 2014/91/EU and Directive 2011/61/EU and Regulation (EU) 2017/1991 amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds.

<sup>69</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf), Q&A5.6

<sup>70</sup> Article 3(1)(21) of MAR.

<sup>71</sup> Noting that in some cases CIUS will not have external management companies but will be internally managed.

MAR that have been subject to ESMA Q&As in the past or that, otherwise, might not be clear for market participants:

- Disclosure of inside information in Article 17 of MAR; and
- Insider lists in Article 18 of MAR.

222. As a general point in this section, ESMA considers that any amendment of MAR should aim at ensuring a level playing field between the different types of CIUs, regardless the type of CIUs concerned and whether it has legal personality or not.

223. Finally, whereas the Commission's mandate refers in general to CIUs and their external management companies, ESMA considers it important to clarify that the references to CIUs in this section only address the case of CIUs that have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, CIUs that have (directly or through their management company) approved trading of their financial instruments on an MTF or an OTF or have (directly or through their management company) requested admission to trading of their financial instruments on an MTF in a Member State.

**Q58: Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.**

## 10.2 Application of the PDMR obligations to CIUs

### **Mandate from the Commission:**

The definition of PDMR might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds without a legal personality. The same logic applies to investment funds with a legal personality managed externally. In light of these considerations, the Commission would like ESMA to assess whether there is a need for the managers of management companies to be covered by the requirement to disclose their transactions and how to best adapt the scope of that requirement to ensure a level regulatory playing field between different management structures of investment firms (external vs internal management) while preserving the effective attainment of the policy objective pursued by Article 19.

224. Article 19 of MAR introduces a set of requirements with respect to PDMRs and closely associated persons, the most important<sup>72</sup> being:

- (a) Obligation of PDMRs and closely associated persons to notify all personal transactions related to shares or debt instruments of the issuer above certain thresholds<sup>73</sup> to the issuer and the CA;
- (b) Obligation of the issuer to ensure that the notifications of transactions are made public promptly;
- (c) Ban of personal transactions related to shares or debt instruments of the issuer 30 days before the announcement of an interim financial report or a year-end report that the issuer has to make public; and
- (d) Capacity of the issuer to waive the prohibition of personal transactions in pre-determined cases.

225. From that perspective, ESMA considers that the fulfilment of the mandate received from the EC encompasses three legs:

- (a) The need to cover explicitly PDMR obligations to management companies of CIUs;
- (b) The identification of the individuals who should be captured by PDMR obligations; and
- (c) The revision of the financial instruments that determine the scope of PDMR obligations.

#### **10.2.1 On the need to cover explicitly PDMR obligations to management companies**

226. There are different forms of CIUs. Some of them, such as UCITS, and some AIFs, are regulated at European level while others are subject to national laws. 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.

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<sup>72</sup> The other obligations under Article 19 are:

- a. Obligation of the issuer to notify PDMRs about their obligations under Article 19 of MAR;
- b. Obligation of PDMRs to notify their closely associated persons about their obligations under Article 19 of MAR;
- c. Obligation of issuers to elaborate a list of PDMRs and closely associated persons;

<sup>73</sup> 5,000 euros. In France, Denmark and Italy the threshold is 20,000 euros.

227. In discharging those responsibilities, the employees of the management company (or the staff of other companies on which the management company has totally or partially outsourced its functions) have regular access to inside information relating to the CIU and the capacity to take managerial decisions affecting the future developments and business prospects of the CIU, i.e. would meet the definition of a 'senior executive' PDMR in Article 3(1)(25) of MAR.

228. Additionally, the purposes of PDMR obligations are different from those of other obligations arising from MAR<sup>74</sup>, UCITSD<sup>75</sup> or AIFMD<sup>76</sup> which are designed to prevent the existence of unmanaged conflicts of interest or dealing with inside information. Instead, the rationale for PDMR obligations are<sup>77</sup>:

- a) Transparency towards investors;
- b) Preventive measures against market abuse, particularly insider dealing;
- c) Facilitating CA's supervision.

229. Such transparency towards the market might be particularly useful where the CIU's portfolio is based on non-liquid assets.

230. As a counter-argument, it has to be taken into consideration that the secondary market price of the CIU's units or shares is closely tied to its Net Asset Value. This seems particularly clear for UCITS ETF<sup>78</sup>. Therefore, one could argue that managerial decisions in relation to the CIU have less significant impact on the share price/unit price than in non-CIU companies as the value of each single asset is not influenced by the CIU or its management company.

231. ESMA also notes that, despite partial overlaps between the obligations set out in UCITSD/AIFMD and MAR, significant gaps remain vis-à-vis MAR obligations: the ban of personal transactions prior to the announcement of half-year or year-end reports, the transparency of personal transactions towards investors and the extension of the obligations to closely associated persons are not covered by EU fund regulation. See the table below.

<sup>74</sup> See Article 18 and recital (57) of MAR.

<sup>75</sup> See in particular, recital (13) of Commission Directive 2010/43/EU as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company: "Directive 2009/65/EC obliges management companies to put rules in place on personal transactions. In accordance with Directive 2006/73/EC, *management companies should prevent their employees who are subject to conflicts of interest or in possession of insider information, within the meaning of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)* [\(EU\)](#), *from entering into personal transactions that are the consequence of a misuse of information they have acquired through their professional activity*. See also Article 13 to 16 of Commission Directive 2010/43/EU.

<sup>76</sup> See Articles 63 to 66 of Commission Delegated Regulation (EU) 231/2013/EU.

<sup>77</sup> See recitals (58) and (59) of MAR

<sup>78</sup> ESMA defines „UCITS ETF“ as follows: „A UCITS ETF is a UCITS at least one unit or share class of which is traded throughout the day on at least one regulated market or Multilateral Trading Facility with at least one market maker which takes action to ensure that the stock exchange value of its units or shares does not significantly vary from its net asset value and where applicable its Indicative Net Asset Value, see Guidelines for competent authorities and UCITS management companies, 01/08/2014 | ESMA/2014/937, page 3.

<i>Article 19 MAR-PDMR obligations</i>	<i>UCITSD personal transactions</i>	<i>AIFMD personal transactions</i>	<i>Conclusions</i>
Obligation of PDMRs and closely associated persons to notify all personal transactions related to shares or debt instruments of the issuer above certain thresholds to the issuer and the NCA.	The management company has to be informed of any personal transaction entered into by a relevant person (Article 13(2)(b) and (c) of Commission Directive 2010/43/EU).	The management company has to be informed of any personal transaction entered into by a relevant person (Article 63(1) Commission Delegated Regulation (EU) 231/2013).	Addressed except: No reference to reporting these transactions to NCAs. Closely associated persons are not covered.
Obligation of the issuer to ensure that the notification of transactions are made public promptly.	Article 20(3) Commission Directive 2010/43/EU: management company has to report to investors the decisions to solve conflicts of interest but not transactions.	Article 36 Commission Delegated Regulation 231/2013 only refers to the disclosure of conflicts of interest but not transactions.	Not addressed.
Ban of personal transactions related to shares or debt instruments of the issuer 30 days before the announcement of an interim financial report or a year-end report that the issuer has to make public.	Generic obligation to have arrangements to prohibit persons who are involved in activities that may give rise to a conflict of interest from entering into personal transactions, where the transaction is based on inside information (Article 13(a)(i) Commission	Generic obligation to have arrangements to prohibit persons who are involved in activities that may give rise to a conflict of interest from entering into personal transactions, where the transaction is based on inside information; Article 63(1)(a)(i) Commission	Not addressed.  Whereas Transparency Directive (TD) only applies to CIUs of closed-end type (Article 1(2) of TD), Article 68 of UCITSD prescribes the publication of annual and half-yearly reports. AIFMDs also have transparency

	Directive 2010/43/EU)].	Delegated Regulation 231/2013)].	requirements to investors (Articles 22 and 23 AIFMD). However, it can be argued that the importance of these provisions is relative in the case of UCITS and AIFs, since there is ongoing disclosure of the net asset value, increased in the case of CIUs traded on a trading venue.
Capacity of the issuer to waive the prohibition of personal transactions in exceptional circumstances.	Management companies maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors. (Article 18 to 20 Commission Directive 2010/43/EU).	Management companies maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors (Article 14 AIFMD).	Addressed.

232. Based on the analysis above, ESMA's preliminary view is that there are grounds to consider that MAR should explicitly cover PDMR obligations to CIUs and their management companies.

**Q59: Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs**

**10.2.2 Identification of the individuals who should be captured by PDMR obligations in the case of CIUs admitted to trading or traded on a trading venue**

233. According to Article 3(1)(25) of MAR, a PDMR means a person *within an issuer*, an emission allowance market participant or another entity referred to in Article 19(10) who is:

- (a) A member of the administrative, management or supervisory body of that entity; or
- (b) A senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly and power to take managerial decisions affecting the future developments and business prospects of that entity.

234. ESMA agrees with the Commission that, notwithstanding that MAR does not contain any explicit 'carve out' for management companies of CIUs regarding PDMR obligations<sup>79</sup>, the explicit wording of Article 3(1)(25) seems to address other types of issuers and therefore might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds.

235. ESMA also considers that, in case PDMR obligations were explicitly extended to CIUs, it would be necessary to determine:

- a. Who should be the persons captured by the PDMR definition in the case of CIUs; and
- b. Whether persons not having a contract of employment with the management company should be captured by the PDMR definition.

236. ESMA notes that the current PDMR regime might not be fit for the purpose of Article 19: as an example, personal transactions of portfolio managers may be particularly relevant for funds but that they might not be captured under the current MAR PDMR definition.

237. As a consequence, if it were considered necessary, ESMA's preliminary view is that a possible solution for defining the PDMRs of CIUs admitted to trading or traded on a trading venue could mirror the definition of 'relevant persons' in Article 3(3) of Commission Directive 2010/43/EU, containing the list of 'relevant' persons who are subject to a special

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<sup>79</sup> For instance, see MiFID II Article 2(1)(i) that exempts from the obligation to register as an investment firm to CIUs and pension funds and the depositaries and managers of such undertakings.

regime for personal transactions<sup>80</sup>, the conflict of interest policy<sup>81</sup> and the rules of conduct for management companies<sup>82</sup>.

238. In the comparison of ‘relevant persons’ with the definition of PDMR included in the table below, it becomes evident that not all the individuals that could be relevant for PDMR obligations in the context of CIUs would meet the current definition of Article 3(1)(25) of MAR.

<p>Article 3(1)(25) of MAR considers as a PDMR a person within an issuer, an emission allowance market participant or another entity referred to in Article 19(10), who is:</p> <ul style="list-style-type: none"> <li>a) a member of the administrative, management or supervisory body of that entity; or</li> <li>b) a senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity.</li> </ul>	<p>The definition of ‘relevant person’ in Article 3(3) of Commission Directive 2010/43/EU includes:</p> <ul style="list-style-type: none"> <li>a. a director, partner or equivalent, or manager of the management company;</li> <li>b. an employee of the management company, as well as any other natural person whose services are placed at the disposal and under the control of the management company and who is involved in the provision by the management company of collective portfolio management;</li> <li>c. a natural person who is directly involved in the provision of services to the management company under a delegation arrangement to third parties for the purpose of the provision by the management company of collective portfolio management</li> </ul>
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239. Under this proposal, ESMA’s preliminary view is that at least two cases could be identified:

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<sup>80</sup> See Article 13 of Commission Directive 2010/43/EU.

<sup>81</sup> See Chapter III of Commission Directive 2010/43/EU. See as well Articles 30 to 37 of Commission Delegated Regulation (EU) 231/2013 on exemptions, general operating conditions, depositaries, leverage, transparency and supervision of AIFs.

<sup>82</sup> See Chapter IV of Commission Directive 2010/43/EU.

- (a) in the case of CIUs without legal personality, the 'relevant persons' from the management company (or from external service providers acting for the CIU in question) should be considered as PDMRs;
- (b) in the case of CIUs with legal personality managed by an external management company, there would be two types of PDMRs:
  - the individuals that currently meet the definition of PDMR as they are genuinely 'within the issuer', e.g. as members of the administrative body of an investment company; and
  - the 'relevant persons' from the management company (or from external service providers acting for the CIU in question) should be considered as PDMRs.

240. Were PDMR obligations explicitly extended to CIUs admitted to trading or traded on a trading venue, ESMA has not find at this stage any reason to exclude 'closely associated persons' from the scope of PDMR obligations in the case of CIUs admitted to trading or traded on a trading venue.

241. Finally, ESMA would like to gather the views of market participants on who should be the person in charge of waiving the prohibition of personal transactions in exceptional circumstances (i.e. should it be the issuer or the management company? Who within the management company should authorise these transactions?) in case PDMR obligations would be extended to CIUs.

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

**Q61: What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.**

**Q62: ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.**

### **10.2.3 Revision of the financial instruments that determine the scope of PDMR obligations**

242. With respect to the applicability of Article 19 of MAR to management companies, ESMA agrees with the analysis made by the Commission that a strict reading of Article 19(1)(a) leads to the conclusion that it does not apply to CIUs issuing units, because this Article only refers explicitly to shares and debt instruments.

243. However, in a significant number of cases, CIUs issuing units do not have legal personality, leaving those CIUs out of the scope of this provision. Therefore, such

interpretation would create an unlevel-playing field between CIUs issuing shares and CIUs issuing units, exempting the latter from the managers' transactions requirements. Moreover, the terms "share" and "units" are used interchangeably in the asset management sector.

244. From a policy perspective, and in line with the Commission's mandate, ESMA considers that MAR should not create an unlevel playing field between the different types of CIUs, favouring those without legal personality vis-à-vis those with legal personality.

245. Without prejudice to the outcome of the prior analysis on the need to explicitly extend PDMR obligations to CIUs, ESMA's preliminary view is that, if it were considered necessary extending PDMR obligations to CIUs, Article 19(1)(a) of MAR should expressly refer to 'units' of CIUs.

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

### **10.3 Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

246. Article 17 of MAR provides that issuers who have requested or approved admission to trading of their financial instruments on a trading venue shall make public inside information. The issuer may only delay such disclosure where the conditions set out in Articles 17(4) or (5) of MAR are met.

247. According to Article 3(1) (21) of MAR, an issuer means a legal entity governed by private or public law, which issues or proposes to issue financial instruments, the issuer being, in the case of depository receipts representing financial instruments, the issuer of the financial instruments represented.

248. ESMA understands that the disclosure obligations laid down in Article 17 of MAR apply to all types of issuers as defined under Article 3(21) of MAR for which they, or a person acting on their behalf, have requested admission to trading or approved trading of their financial instruments on a regulated market, an MTF or an OTF.

249. In that context, ESMA has recently clarified in a Q&A that under the current legislative framework, the disclosure obligation of Article 17 of MAR also applies to financial instruments admitted to trading or traded on a trading venue issued by a CIUs without legal personality<sup>83</sup>, which is considered for these purposes as the 'issuer'. ESMA also clarified that the management company managing the CIU could be held responsible for a potential infringement of the CIU's obligation to disclose inside information under Article 17 of MAR. Such clarification does not seem necessary with respect to CIUs with legal personality

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<sup>83</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf) see Q&As 5(6)

admitted to trading or traded on a trading venue, which are equally within the scope of MAR and subject to the disclosure obligations of Article 17.

250. ESMA also specified the cases where inside information may arise for CIUs admitted to trading or traded on a trading venue<sup>84</sup>.

251. However, the preparatory analysis carried out by ESMA for the Q&A made clear that in some Member States it might be difficult to enforce these obligations due to the lack of legal personality of the issuer.

252. Consequently, ESMA wants to get stakeholders' views on the need for amending Article 17 of MAR to ensure the disclosure of inside information by CIUs without legal personality along the following lines:

- Specifying that the obligations set out with respect to issuers also apply to CIUs without legal personality *for which a management company acting on their behalf* has requested or approved admission to trading of their financial instrument in a regulated market or an MTF in a Member State or, in the case of an instrument only traded on an MTF has approved trading of their financial instruments on an MTF; and
- Specifying that the management company of the CIU is responsible for ensuring compliance with Article 17 of MAR even when the management company has delegated the execution of certain functions to third party entities such asset managers.

253. ESMA's preliminary view is that the management company should be responsible for the publication of inside information, with the other entities involved responsible for reporting to it any information that might be of relevance immediately. However, ESMA is also keen to know the views of market participants about the need to consider differently CIUs in this respect and if necessary, who should be responsible for discharging the obligation to disclose information given that it is possible that not in all cases management companies receive all inside information.

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

#### **10.4 Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved**

254. Article 18 of MAR establishes an obligation on the issuer or any person acting on its behalf or on their account to draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise

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<sup>84</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf) see Q&A 5(7)

performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies.

255. Insider lists contribute to protect market integrity by allowing national competent authorities to identify who has access in the first place and the specific date on which those persons gained access to inside information<sup>85</sup>. The lists also help issuers to manage confidentiality issues<sup>86</sup>.

256. Whilst ESMA acknowledges the existence of a set of obligations under EU legislations that could partially address similar requirements to those in Article 18 of MAR<sup>87</sup> the specific obligations of Article 18 of MAR are not replicated in any other EU legislations applicable to CIUs admitted to trading or traded on a trading venue.

257. ESMA's preliminary view is that currently MAR provisions on insider lists equally apply to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved.

258. Moreover, ESMA's reiterates that is considering an amendment of Article 18 of MAR to specify that the issuer should only include one contact natural person for each external service provider having access to inside information and each external service provider having access to inside information should include in their own insiders list the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. one contact person per external provider).

259. Along these lines, ESMA's preliminary view is that there is no need to further amend Article 18 of MAR in this respect.

260. ESMA however would first like to get the views of market participants on the need to apply specifically the obligation to elaborate insider lists to CIUs admitted to traded or traded on a trading venue.

**Q65: Do you agree with ESMA's preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?**

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<sup>85</sup> Recital (56) and (57) of MAR.

<sup>86</sup> Recital (57) of MAR.

<sup>87</sup> As an example:

- In the case of UCITs and AIFMs, EU legislation imposes on management companies the obligation to "establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question".
- Along the same line, for UCITs and AIFs, the organisational requirements set out in EU legislation ensure that the relevant persons "are aware of the procedures which must be followed for the proper discharge of their responsibilities".

## 11 Competent Authorities, market surveillance and cooperation

### 11.1 Establishment of an EU framework for cross-market order book surveillance

#### Mandate from the Commission:

1. Advice on the mandatory elements of the report

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements:

(d) possibility of establishing a Union Framework for cross-market order book surveillance in relation to market abuse, including recommendations for such a framework.

With respect to this point, the Commission would like ESMA to formulate its recommendations having particular regard to the transaction reporting obligation under Article 26 of Regulation (EU) No 600/2014 and how data reported to national competent authorities pursuant to that obligation can help in designing such a framework.

#### 11.1.1 Background

##### 11.1.1.1 Order-book data gathering for market surveillance purposes

261. Article 38 of MAR requires the Commission to assess the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for the framework. As per the above box, the Commission's mandate requests ESMA to formulate a recommendation on this point, considering, in particular, the transaction reporting mechanism in order to design the framework.

262. As of today, NCAs monitor order book data to detect and investigate potential cases of market abuse, including when the suspicious trading activity has taken place in another EU jurisdiction, within the regulatory framework set out in Articles 25 of MiFIR (establishing the record-keeping obligations of order book data for trading venues) and 25 of MAR (for the cooperation and exchange of data between NCAs).

263. Namely, as regards orders, Article 25(2) of MiFIR and the Commission Delegated Regulation (EU) 2017/580<sup>88</sup> (RTS 24) provide for an obligation to maintain records of any

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<sup>88</sup> Commission Delegated Regulation (EU) 2017/580<sup>88</sup> of 24 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the maintenance of relevant data relating to orders in financial instruments.

order received by trading venues, for a period of at least five years. The records have to be maintained by each relevant trading venue and are at the disposal of the NCAs. The content of the records to be maintained by each trading venue is harmonised, in accordance with RTS 24<sup>89</sup>. Although the regulation prescribes standards and formats of the individual order details to be used when providing the relevant order data to the competent authority, it does not require the trading venues to comply with a common technical template or message when they send data to NCAs (as does Article 26(9)(a) of MiFIR with reference to transaction data).

264. NCAs may as a matter of fact opt for: (i) *ad hoc* requests to trading venues, where they need to get data on specific cases, or (ii) on the basis of the powers granted to NCAs under Article 23 of MAR or of Article 25(2) of MiFIR, request each supervised trading venue to submit their records on orders with a periodicity set by the NCA. *Ad hoc* requests may also be addressed to trading venues subject to the supervision of other NCAs, where the orders concern, *inter alia*, financial instruments admitted to trading on a regulated market, or for which a request for admission to trading on such market has been made, or which are traded on an MTF or an OTF or for which a request for admission to trading has been made on an MTF operating within the NCA's jurisdiction (on the basis of Article 22 of MAR, which identifies the competent authorities for market abuse cases).

265. As mentioned above, order data gathered by trading venues has to be provided in a consistent format, which includes identification codes of the members or participants that transmitted the orders, of the order itself, the date and time the order was transmitted, the characteristics of the order, including the type of order, the limit price if applicable, the validity period, any specific order instructions, details of any modification, cancellation, partial or full execution of the order and the agency or principal capacity. RTS 24 provides further details on the applicable data provision standards and formats.

266. ESMA clarified that, for orders that trading venues have to keep at the disposal of the NCA pursuant to Article 25(2) of MiFIR, the reference to "orders" includes those that are active, inactive, suspended, implicit and rerouted as well as order modifications, cancellations and rejections, firm and indicative quotes<sup>90</sup>.

267. In summary:

- a) order data maintained by different trading venues is maintained in a decentralised manner by each trading venue respectively;
- b) the content of the order details maintained by each trading venue is harmonised under a defined set of data fields but there is no common technical template/message for data provision; and

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<sup>89</sup> Commission Delegated Regulation (EU) 2017/580

<sup>90</sup> See ESMA Guidelines Transaction reporting, order record keeping and clock synchronisation under MiFID II of 10 October 2016 (ESMA/2016/1452), page 222, available at [https://www.esma.europa.eu/sites/default/files/library/2016-1452\\_guidelines\\_mifid\\_ii\\_transaction\\_reporting.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf).

- c) NCAs can access such data upon request addressed to the relevant trading venue. The order book data is collected by means of these requests, which may concern the order book data relevant for a specific case or broader requests on the order book data of a trading venue, for periods established by the relevant NCA.

268. Order book data is exchanged, where appropriate, between NCAs on the basis of Article 25 of MAR where such exchange is necessary to get a full view of the order book in relation to the trading activity in one or several financial instruments.

269. Given the different degrees of liquidity and fragmentation of trading across Member States, the framework designed by Articles 25 of MiFIR and 25 of MAR is diversely used by NCAs. Some NCAs undertake ongoing requests for order book data for the sake of detecting potential cases of market abuse and exchange regularly that data with other concerned NCAs. Other NCAs – especially where the financial instruments they supervise are mostly traded in domestic markets - request order book data from the trading venues they supervise and from other NCAs in the framework of the investigation of specific market abuse cases. Finally, it should also be noted that a further channel that NCAs have to uncover potential new cases is the suspicious transactions and orders reporting provided by Article 16 of MAR.

270. For the purposes of this CP, considering that Article 38 of MAR refers to a cross-market order book for market surveillance, reference is made to the obligation to maintain records applicable to trading venues only, and not to investment firms. With reference to the latter, Article 25(1) of MiFIR and the Commission Delegated Regulation (EU) 2017/565<sup>91</sup> set forth the relevant obligations, which are overall consistent with those concerning trading venues.

#### 11.1.1.2 Transaction reporting

271. Differently from the abovementioned framework concerning order data, as regards transactions, Article 26 of MiFIR and the Commission Delegated Regulation (EU) 2017/590<sup>92</sup> mandates the reporting of the data to NCAs. In particular:

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<sup>91</sup> See Article 74 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

<sup>92</sup> Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities.

272. Investment firms executing transactions in financial instruments<sup>93</sup> are obliged to report complete and accurate details of such transactions to NCAs no later than the close of the following working day<sup>94</sup>.
273. The NCAs have arrangements in place to ensure that the information is received by the NCA of the most relevant market in terms of liquidity for the relevant financial instruments. Transactions falling within the scope of the second sub-paragraph of Article 26(1) of MiFIR are exchanged between NCAs through the Transaction Reporting Exchange Mechanism (TREM)<sup>95</sup>.
274. The reporting obligation concerns both transactions carried out on trading venues and over the counter, and investment firms are responsible for the completeness, accuracy and timeliness of submission to the NCAs<sup>96</sup>.
275. The data reported to NCAs include details of the names and numbers of the financial instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, data to identify the clients as well as the investment firm and persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction. The Commission Delegated Regulation 2017/590 specifies the above elements and provides the details to be reported in transaction reports.
276. The analysis of transaction data is performed by the relevant NCAs, for the purposes of MiFIR (see Article 24 of MiFIR) and also for market abuse purposes.
277. It is noted that Article 52 of MiFIR provides that, in the MiFIR review report which the Commission will have to submit to the European Parliament and to the Council on the functioning of Article 26, it may make "*any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article for the purposes of this Regulation and of Directive 2014/65/EU and the detection of insider dealing and market abuse in accordance with Regulation (EU) No 596/2014*".

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<sup>93</sup> Reference is made to (c) financial instruments that are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made; (b) financial instruments where the underlying is a financial instrument traded on a trading venue, and (c) financial instrument where the underlying is an index or a basket composed of financial instruments traded on a trading venue (Art. 26 (2), letters (a) to (c), of MiFIR).

<sup>94</sup> For firms that are not subject to MiFID II/MiFIR provisions, executing transactions on EU trading venues, the latter are in charge of the reporting obligations.

<sup>95</sup> See Technical Reporting Instructions, MiFIR Transaction Reporting of 17 July 2017 (ESMA/2016/1521), available at this link [https://www.esma.europa.eu/sites/default/files/library/2016-1521\\_mifir\\_transaction\\_reporting\\_technical\\_reporting\\_instructions.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1521_mifir_transaction_reporting_technical_reporting_instructions.pdf).

<sup>96</sup> See also Article 26(7) of MiFIR.

## **11.1.2 ESMA's initial considerations as regards the cross-market order book surveillance framework**

### **11.1.2.1 General considerations regarding an enhanced cross-market order book surveillance framework**

278. As indicated above, ESMA will have to assess the possibility of establishing a framework for the cross-market order book surveillance concerning market abuse cases including recommendations to the Commission for such a framework.

279. As a matter of fact, there is a wide range of possibilities regarding how the technical arrangements for an enhanced European framework for monitoring order book data may look like. On one hand cross-market order book surveillance could remain based on the existing framework of requests from NCAs to supervised trading venues and the subsequent cooperation and exchange of data with other relevant NCAs. On the other hand, other possibilities, for instance, establishing reporting obligations on order book data, could also be considered.

280. In this respect, ESMA wishes to highlight that its final advice might be impacted by different regulatory and structural developments, including any developments linked to the United Kingdom withdrawal from the European Union.

281. In that regard, ESMA is keen to gather the views of market participants on the possibilities that they could envisage for European cross-market order book surveillance and the pros and cons of those approaches.

282. Regardless of the model finally chosen, ESMA has identified as a pre-requisite for any cross-market order book surveillance framework within the EU the need to harmonise the format in which trading venues transmit their order book data to NCAs. A second element on which ESMA wishes to consult the market is the mandatory reporting of order book data as a possible means to enhancing the EU surveillance framework of cross-market order book.

283. It is noted that the references in this CP to order book data are intended to address 'end of day' data only, and not 'real time' data, since 'end of day' data allows NCAs to efficiently carry out market surveillance activities.

- a) Harmonised format for providing order book data to NCAs

284. The experience gained since the application of MiFIR has demonstrated that RTS 24 does not – due to the limited mandate set out in Article 25(3) of MiFIR - prescribe a common technical format or message for data provision by trading venues, forcing NCAs to 'convert' the reports provided by trading venues in different formats into one format to consolidate the data and be able to investigate it.

285. In light of this, ESMA deems that the first step towards the surveillance of cross-market order data is to revise the current regulatory framework designed by Article 25(2) of MiFIR to ensure that trading venues record and report order book data in an electronic and machine-readable format and using a common template.
286. ESMA considers that the ISO 20022 would be the appropriate methodology, and that XML templates should be used. ISO 20022 is the ISO-approved standardisation methodology for financial messages and data sets, and it is already used for transaction data. It is syntax-independent but includes a set of XML design rules to convert the message model into XML schemas, whenever the use of the ISO 20022 XML-based syntax is preferred.
287. The use of XML templates in accordance with ISO 20022 methodology would provide a significantly higher degree of data standardisation in comparison to the current situation, under which each trading venue retains – and provides to NCAs - order book data on the basis of individual standards and without common templates.
288. On the basis of the foregoing, ESMA deems that a set of common XML templates in accordance with the ISO 20022 methodology would have to be developed and mandated for the use by each and any trading venues based in the EU when providing the relevant order data to NCAs.
289. ESMA is already considering the harmonisation of the reporting formats on the basis of ISO 20022 for the exchange of order data between NCAs.
290. Nevertheless, an amendment of the current framework set forth in Article 25(2) of MiFIR would be needed to ensure the use of uniform standards and templates by trading venues, with a possible mandate to ESMA to develop such uniform standards and templates.
291. ESMA also considers that, in addition to standards and templates harmonisation, the order book data quality should be ensured. In this respect, appropriate validation systems should be designed to ensure that the data recorded by trading venues is of the appropriate quality.
292. In ESMA's view, the abovementioned harmonisation of standards and templates, and the assurance of the appropriate data quality would in any case enhance the quality and efficiency of order book data monitoring regardless of the system used to carry out, by facilitating the comparison of order book data across trading venues.
293. In this respect, ESMA intends to gather information on the impact and costs that trading venues would incur to implement new common standards to order book data transmit such data to NCAs upon request (by using the ISO 20022 methodology).
- b) Market participants' views on possible compulsory reporting of order book data to NCAs

294. The abovementioned harmonisation of the format in which order book data is shared would constitute a first prerequisite for a more comprehensive cross market order book surveillance framework.
295. ESMA notes that there are elements suggesting that the current system, based on 'ad hoc' requests could be improved by including mechanisms for compulsory ongoing reporting of order book data from trading venues to NCAs: in particular, ESMA notes that several NCAs supervising fragmented markets have indicated that order book data received from other NCAs helped detecting potential market abuse behaviours that would have not been noticed from the analysis of the data requested from the domestic trading venues only.
296. At the same time, ESMA acknowledges that any type of systematic order book monitoring might entail significant costs both for trading venues and NCAs.
297. From that perspective, ESMA would like to consult trading venues on whether: a) daily reporting of order book data in a standardised format would entail a significantly higher cost than maintaining and transmitting ad-hoc such a standardised information to its NCA upon request; b) limiting the daily reporting of order book data to a subset of financial instruments could guarantee the right balance between ensuring that NCAs receive relevant data for their supervisory activities and the reporting impact for trading venues. For instance, ESMA is keen to know whether the costs and impact for trading venues would vary if the compulsory reporting would concern all financial instruments traded in a trading venue, or if it is limited to specific types of financial instruments, or to financial instruments admitted to trading or traded on several trading venues, or to financial instruments that have certain characteristics in terms of liquidity (e.g. shares where there is a liquid market based on FIRDS), or that are components of identified benchmarks.
298. In this respect, ESMA requests trading venues to elaborate on the impact and cost that a compulsory reporting mechanism would have in comparison with a record keeping and ad-hoc transmission of records to NCAs, assuming that both would be subject to the same degree of standardisation. Please differentiate between the consequences of a full-scale reporting (i.e. concerning all traded financial instruments) and of a targeted reporting. With reference to the latter, ESMA requests trading venues and other market participants to elaborate on any suggested criteria to limit the scope of the compulsory reporting.

**Q66: Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.**

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

**Q68: In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.**

## **11.2 Cum/ex and multiple withholding tax reclaim schemes**

### **11.2.1 Dividend arbitrage and multiple WHT reclaim schemes**

299. Dividend arbitrage strategies have existed for many years in EU financial markets and can involve the placement of shares in alternative tax jurisdictions around dividend dates, with the aim of minimising the relevant tax on dividends.

300. Dividend arbitrage strategies therefore often require the establishment of an equity position cum-dividend in a tax-favourable jurisdiction. That equity position needs to be later ‘unwound’, i.e. returned to their original less favourable jurisdiction.

301. Those strategies are often structured in a way that an investor lends or sells its shares to a borrower/buyer domiciled in a country that has a lower dividend tax rate, so as to minimise the taxes paid on such dividend. The borrower/buyer receives the dividend paid out by the issuer of the share and then returns it to the lender/seller, minus the dividend tax and a percentage – or “cut” – negotiated between the two counterparties.

302. However, achieving a dividend arbitrage is not the main objective of some schemes.

303. When issuers distribute dividends, the tax law of some Member States provides for a withholding tax (WHT) on the dividends distributed to be withheld by the issuer. In some jurisdictions the tax law provides for a tax certificate to be issued (often by the shareholder's custodian bank) and, in cases where the shareholder is not a tax subject in the State of distribution of the dividend, it can be later claimed back in the form of a reimbursement from the tax authorities.

304. In some schemes, the real intention is indeed not to pursue a basic form of dividend arbitrage, but rather to obtain multiple refunds of taxes to multiple persons, with only one (or none) of them having actually received the dividend distributed and paid the relevant WHT<sup>97</sup>.

305. Typologies vary and may involve various forms of so-called Cum/Ex or Cum/Cum trading. It should be noted that, in the absence of a unique definition, semantically Cum/Cum and Cum/Ex merely refer to the dates of the trade which establishes a position

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<sup>97</sup> In some cases, potentially no persons have actually received any dividend, and both the trading and WHT claims are wholly based on fictitious shares.

(always cum-dividend) and the dates of eventual delivery, settlement, unwind or financing of that trade (either cum-dividend or ex-dividend). All the other elements of the scheme, including the instrument used (shares, stock loans, options/ forwards/ futures, ETFs, ADRs, etc.), the number of participants, the existence of shares, the jurisdiction of participants, and the legitimacy of requests to tax refunds may vary in each case.

306. Further to some of such schemes being exposed by a journalistic investigation reported by the media in October 2018, the European Parliament adopted the Resolution 2018/2900 (RSP) of 29 November 2018, requesting ESMA to conduct an inquiry into those schemes.

307. ESMA has responded to the EP resolution with a Report on preliminary findings on multiple WHT reclaim schemes<sup>98</sup> (hereinafter “the ESMA’s report”), while ESMA’s inquiry is still in progress.

### **11.2.2 Current legislative framework and potential amendment to MAR**

308. Dividend arbitrage, in its most basic form, i.e. trading actual shares in such a way as to place these shares in a favourable tax jurisdiction (whether on a Cum/Ex or Cum/Cum basis), to then obtain a tax refund on tax which was actually paid, is not necessarily a fraud. The wider and different discussion as to whether it is tax evasion or tax avoidance and whether this is an illegal practice under the tax law of each Member State is not for ESMA to assess.

309. Differently, the ESMA’s report focused on any scheme which involves transactions<sup>99</sup> aimed at creating the paperwork (incl. tax certificates) which allows persons to obtain tax refunds on dividend tax which was not paid, and which may represent a fraud under national legislation.

310. ESMA’s report has shown that multiple WHT reclaim schemes do not typically involve violations of MAR and therefore they are not straightforwardly detected by traditional monitoring systems that NCAs have conceived and calibrated to that specific purpose.

311. Even where detected, the NCAs will not have a EU legal basis to resort to any of the MAR investigative powers to continue investigating the schemes further than in relation to any potential violation of MAR. ESMA’s report has highlighted that those NCAs that currently investigate multiple WHT reclaim schemes can do so as they have been granted an extended remit in that sense under their national legislation.

312. Although those schemes have no direct connections with market abuse, ESMA considers that such schemes may have negative impacts on the integrity of the financial markets. Market integrity may be seen as not limited to the prevention of market abuse, but rather encompassing the fair and safe operation of markets, the trust and confidence

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<sup>98</sup> ESMA’s report on preliminary findings on multiple WHT reclaim schemes can be found [here](#).

<sup>99</sup> According to ESMA’s report typologies vary and may and some schemes may combine a mixture of Cum/Cum and Cum/Ex trading and may even involve Ex/Ex financing.

in the market and its reputation, so that investors and market participants can have confidence and be sufficiently protected.

313. Any practice exclusively aimed at obtaining a financial gain connected to a multiple WHT reclaim may be seen as incompatible with market integrity in a wider sense.

314. The ESMA's report highlighted that NCAs are not currently allowed under MAR, MiFID II and MiFIR regimes to transmit to tax Authorities information regarding STORs received from other NCAs and TREM data.

315. Although ESMA's report has highlighted that closer cooperation with tax authorities seems appropriate in order to better supervise financial markets in respect of the schemes described above, ESMA notes that any exchange of information with tax authorities has to bear in mind the internationally accepted standards in the field of cooperation and information exchange amongst competent authorities.

316. In order to mitigate that concern and not to impair the cooperation with third countries' competent authorities, the proposal included in this CP would only concern the possibility to cooperate and exchange of information across the EU.

317. In light of the above, ESMA is considering whether MAR should be amended to:

- a) overcome the identified EU regulatory gap and give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation.

Therefore, whenever an NCA suspects that a regulated entity's unfair behaviour may represent a threat to the integrity of the financial markets (e.g. in the case of multiple WHT reclaim scheme), it would be able to further and closer examine it using the traditional market surveillance tools, the transaction reporting data under the MiFID II regime<sup>100</sup> and the other appropriate investigative tools under MAR. Where an NCA concludes that those unfair behaviours represent a threat to the integrity of the financial markets, it would be given the power to request the regulated entity to cease such an activity and issue adequate sanctions;

- b) grant the NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU.

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

## 12 Sanction and measure

### 12.1 Appropriateness of introducing common rules on the need for all MSs to provide administrative sanctions for insider dealing and market manipulation

#### Mandate from the Commission:

Appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation

In relation to the above point and pursuant to the second paragraph of Article 38, the Commission notes that ESMA is required to undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of MAR, of the application of such criminal sanctions within Member States. Any data made available under Article 33(1) and (2) are also to be included in that exercise. Following the mandate in Article 38(1)(a) of MAR, the Commission has requested ESMA's views on the "appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation".

318. As indicated in ESMA's first Annual report on administrative and criminal sanctions and other administrative measures under MAR<sup>101</sup>, Article 30(1), second subparagraph, of MAR provides that Member States could decide not to lay down rules for administrative sanctions where the infringements referred to in the same provision were already subject to criminal sanctions in their national law by 3 July 2016.

319. In this respect, such option was exercised by Denmark, Finland, Germany, Ireland and Poland as follows: (i) in Denmark there are criminal sanctions for the infringements of Articles 14, 15, 16(1) and (2), 17(1), (2) to (5), (7), (8), 18(1) to (6), 19(1) and (2), (5), (7), 19(11) and Article 20(1) of MAR; (ii) in Finland there are criminal offences for infringements of Article 14, 15 and 17 of MAR; (iii) in Germany there are criminal offences for infringements of Article 14 and 15 of MAR – where committed intentionally and, for Article 15, if the infringement leads to an influence on the market price of the respective financial instrument -; (iv) in Ireland there is a criminal offence for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR, and (v) in Poland there are criminal offences for infringements of Article 14, 15, and for the infringement set forth in Article 30(1), first subparagraph, letter (b) of MAR.

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<sup>101</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-1081\\_mar\\_article\\_33\\_report\\_sanctions.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-1081_mar_article_33_report_sanctions.pdf)

320. ESMA carried out a preliminary fact-finding regarding the practical experience gathered by the NCAs of the jurisdictions that decided to exercise that discretion. The results do not suggest an urgent need for amending MAR in this respect:

- a) Firstly, none of those authorities report major problems when implementing criminal instead of administrative sanctions other than longer delays in the effective enforcement derived from the need to engage with external public bodies (police, public prosecutor...).
- b) There is no unanimity either between those authorities on whether they consider necessary amending Article 30(1) second paragraph of MAR: two authorities were clearly in favour of maintaining the status quo (one authority considers that having only criminal sanctions is positive for certain types of market abuse, and other authority reports that moving to a system where administrative sanctions were available in all cases would infringe their Constitutional law and their system of separation of powers) whereas two other authorities are inclined to move into a system where administrative sanctions are available to all NCAs.
- c) Similarly, there is no unanimity between the other NCAs having the whole range of administrative sanctions available: two authorities consider necessary further harmonisation in this respect, whilst one authority considers this an internal matter that does not require further harmonisation.

321. In the absence of more compelling evidence, ESMA's preliminary view is that there is no need to modify MAR in this respect at this stage.

**Q70: Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.**

## 12.2 Cross border enforcement of sanctions

### Mandate from the Commission:

- (g) Cross-border enforcement of sanctions

The Commission would like ESMA to gather information on whether NCAs encounter difficulties in the recognition and enforcement of financial penalties imposed under MAR in cases with a cross-border element. Examples of such cases could include situations where the sanctioned person is a resident or has its registered seat in another Member State or when that person leaves the Member State of the sanctioning NCA without paying the fine. To better understand and assess the nature and the breadth of the problems NCAs may face, as well as potential ways of addressing them, the Commission would like ESMA to conduct an analysis of legal obstacles to the

recognition and enforcement of financial penalties, if any. In doing so, it is encouraged to take into account in particular the following:

- i. number of financial penalties imposed by NCAs vis-à-vis non-residents and how successful the NCAs were in enforcing them;
- ii. whether the interpretation given to the Council Framework Decision 2005/214/JHA in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties;
- iii. whether under the current legislative framework there are tools that might be used to facilitate the cooperation between NCAs in order to address the issue and what role ESMA could play in this process

322. The Commission requested ESMA to gather information on the cross-border enforcement of financial penalties. In particular, the mandate requests ESMA to assess the nature and breadth of problems that NCAs can face when enforcing penalties which have a cross-border element, as in the case where the person against whom a financial penalty has been imposed is residing or has its registered seat in another EU Member State, or when a person fails to pay the fine and then leaves the territory of the sanctioning NCA.

323. The supranational dimension of financial markets and the possibility to trade on any market in Europe through standard and widely used platforms highly increases the possibility of market abuse cases with cross-border dimensions. The need to apply for complex judicial recognition proceedings could therefore constitute a risk for the effectiveness of NCAs' work. Unless a mechanism allowing the systematic mutual recognition and enforcement of MAR sanctions can be used, NCAs would have to engage in long processes before the Courts of another Member State to have their decision recognised and enforced.

324. In this respect, the EC specifically asked ESMA whether the interpretation given to the Council Framework Decision 2005/214/JHA<sup>102</sup> ('the Framework Decision') in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties.

325. Below please find a concise summary of the Framework Decision and of the Baláž case judgment, which does not intend to be exhaustive. The Framework Decision deals with the principle of mutual recognition regarding judicial cooperation in both civil and criminal matters within the EU, and aims at facilitating that financial penalties imposed by judicial or administrative authorities in a Member State can be recovered in another Member State

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<sup>102</sup> Council Framework Decision 2005/214 of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

where the natural or legal person against whom a decision has been passed has property or income, is normally resident or, in the case of legal persons, has its registered seat.

326. In principle, under the Framework Decision, where the final decision imposing a financial penalty is transmitted to the relevant competent authority of the Member State, the relevant competent authorities of the receiving Member State should take all necessary measures for its execution, unless the grounds for non-recognition or non-execution<sup>103</sup> apply.

327. In order to do this, the Framework Decision provides the pre-requisite of having the opportunity to have the case tried by a court; that there has to be a final decision requiring a financial penalty to be paid by a natural or legal person; the formalities for such cooperation; and determines to which Member State should accrue the resources obtained from the execution, subject to further agreement between Member States.

328. The Framework Decision was interpreted by the European Court of Justice in the judgement on the Baláž case (C-60/12), addressing its key terms: '*court having jurisdiction in particular in criminal matters*' and the necessary '*opportunity to have a case tried before a court having jurisdiction in particular in criminal matters*'.

329. In doing that, the European Court of Justice specified that the term cannot be interpreted on the basis of national laws but needs a uniform reading (and consequent application) at EU level, taking into account a number of factors established in settled case-law to consider a body as a 'court' (such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*<sup>104</sup>, whether it applies rules of law and whether it is independent). The European Court of Justice also raised the different interpretation across Member States of the term '*jurisdiction in criminal matters*'.

330. Finally, on the necessary '*opportunity to have a case tried before a court having jurisdiction in particular in criminal matters*', the European Court of Justice considered that a prior administrative phase may be required, depending on the specific features of the judicial systems of the Member States. However, the European Court of Justice further considered that access to a court having jurisdiction in criminal matters, within the meaning of the Framework Decision, must not be made subject to conditions which make such access impossible or excessively difficult<sup>105</sup>.

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<sup>103</sup> Article 6 and 7 of the Framework Decision.

<sup>104</sup> *Inter partes* proceedings are lawsuits in which all interested parties have been served with adequate notices and are given a reasonable opportunity to attend and to be heard. When the judgment is given, all the parties are bound by the result.

<sup>105</sup> Specifically on the question on the interpretation of Article 1(a)(iii) "*a court having jurisdiction in particular in criminal matters*", the ECJ ruled that the court having jurisdiction within the meaning of the article in question must apply a procedure which satisfies the essential characteristics of criminal procedure without, however, it being necessary for that court to have jurisdiction in criminal matters alone.

331. Regarding the MAR provisions, ESMA notes that cross-border enforcement of sanctions is addressed in Article 25(5) MAR, where, in the context of the NCAs' obligation to cooperate, foresees that "*competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions*".

332. This provision is further developed by Article 9 of Commission Implementing Regulation (EU) 2018/292<sup>106</sup> establishing the procedures for assistance in recovery of pecuniary sanctions.

333. ESMA considers that ensuring cross-border enforcement of the MAR sanctions is extremely relevant for NCAs' capacity to exercise equal, strong and deterrent sanctioning regimes against financial misconduct. In line with that ESMA is considering whether it is necessary to amend EU law to ensure that cross-border enforcement of sanctions is carried out smoothly.

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

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<sup>106</sup> Commission Implementing Regulation (EU) 2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse, C/2018/1063, OJ L 55, 27.2.2018, p. 34–49

## 13 Annexes

### 13.1 Annex 1- Summary of questions

**Q1:** Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

**Q2:** Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

**Q3:** Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

**Q4:** Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?

**Q5:** Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

**Q6:** Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

**Q7:** Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

**Q8:** If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

**Q9:** Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

**Q10:** Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

**Q11:** Do you agree with ESMA's preliminary view?

**Q12: Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.**

**Q13: Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?**

**Q14: Do market participants consider that the definition of inside information is sufficient for combatting market abuse?**

**Q15: In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?**

**Q16: Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?**

**Q17: What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?**

**Q18: As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.**

**Q19: Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?**

**Q20: What changes could be made to include other cases of front running?**

**Q21: Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?**

**Q22: What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?**

**Q23: What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?**

**Q24: What financial instruments are subject to pre-hedging behaviours and why?**

**Q25: Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.**

**Q26: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.**

**Q27: Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?**

**Q28: Please provide examples of cases in which the identification of when an information became “inside information” was problematic.**

**Q29: Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.**

**Q30: Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.**

**Q31: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.**

**Q32: Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.**

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

**Q34: Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?**

**Q35: What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?**

**Q36: Do you think that the reference to “*prior to the announcement of a transaction*” in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?**

**Q37:** Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

**Q38:** Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

**Q39:** Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

**Q40:** Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

**Q41:** What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

**Q42:** What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

**Q43:** Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

**Q44:** Do you agree with ESMA's preliminary view?

**Q45:** Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

**Q46:** Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

**Q47:** Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

**Q48:** Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

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

**Q50: Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.**

**Q51: Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.**

**Q52: Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?**

**Q53: Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?**

**Q54: Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.**

**Q55: Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.**

**Q56: Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.**

**Q57: Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.**

**Q58: Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.**

**Q59: Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs**

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

**Q61:** What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of “relevant persons” would be adequate for CIUs other than UCITs and AIFs.

**Q62:** ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.

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

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

**Q65:** Do you agree with ESMA’s preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?

**Q66:** Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

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

**Q68:** In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

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

**Q70:** Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.

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

## 13.2 Annex 2- European Commission's mandate on the MAR Review

Under Article 38 of Regulation (EU) No 596/2014 on market abuse ('MAR') the Commission is required to submit, by 3 July 2019, a report to the European Parliament and to the Council on, firstly, the application of MAR and, secondly, the level of thresholds set out in its Article 19(1a)(a) and (b) in relation to managers' transactions in certain specific circumstances. The Commission will rely on this report as a basis for any legislative action it may deem appropriate. In light of the Commission's obligation under Article 38, I wish to seek ESMA to provide the Commission with advice on the elements set out in the first section below.

Under Article 38, the Commission may also consider other elements of the MAR framework it deems necessary in order to put forward purposeful legislative amendments. It is with this in mind that the Commission seeks ESMA to consider in its technical advice not only the mandatory elements indicated in the first section, but also to provide its input on the considerations specified in the second section.

### 1. Advice on the mandatory elements of the report

The first paragraph of Article 38 calls on the Commission to submit a report on the application of MAR assessing at least the following elements:

- (a) appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for **insider dealing and market manipulation**

In relation to the above point and pursuant to the second paragraph of Article 38, the Commission notes that ESMA is required to undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of MAR, of the application of such criminal sanctions within Member States. Any data made available under Article 33(1) and (2) are also to be included in that exercise.

- (b) whether the definition of **inside information** is sufficient to cover all information relevant for competent authorities to effectively combat market abuse
- (c) appropriateness of the conditions under which the **prohibition on trading** is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply
- (d) possibility of establishing a Union framework for **cross-market order book surveillance** in relation to market abuse, including recommendations for such a framework

With respect to this point, the Commission would like ESMA to formulate its recommendations having particular regard to the transaction reporting obligation under Article 26 of Regulation (EU) No 600/2014 and how data reported to national competent authorities pursuant to that obligation can help in designing such a framework.

#### (e) scope of application of the **benchmark provisions**

Furthermore, under the second subparagraph of Article 38 the Commission is required to submit, after consulting ESMA and by 3 July 2019, a report to the European Parliament and to the Council on the level of the thresholds set out in Article 19(1a)(a) and (b) 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, with a view to assessing whether that level is appropriate or should be adjusted. Pursuant to that second subparagraph, the Commission must consult ESMA prior to submitting its report. As such, the Commission seeks ESMA's contribution on this matter, so that it can proceed in preparing the report as required.

### 2. Advice on non-mandatory elements of the report

#### (a) whether **spot FX contracts** should be covered by MAR

The scope of application of MAR as defined by its Article 2 does not include foreign exchange spot transactions. Given the size of the spot FX market, the Commission would appreciate ESMA's input on whether there is a need for that market to be covered by the market abuse regime. In its assessment, ESMA should give due regard to whether national competent authorities ('NCAs') have the necessary regulatory tools to effectively and efficiently supervise and sanction market abuse on spot FX markets and whether extending the scope of MAR to these markets would prove to be the most appropriate way of remedying supervisory gaps, if any exist. To that effect ESMA is encouraged to analyse and take into account the particularities of the spot FX market and how well these would mesh with the MAR framework.

#### (b) scope of reporting obligations under the exemption for **buyback programmes**

Under Article 5(3), in order for its buyback programme to benefit from the exemption from application of certain provisions of MAR, the issuer must report each transaction relating to the buy-back programme not only to the NCAs of the trading venues on which the shares are admitted to trading but also to those of each trading venue where they are traded. This reporting obligation is reiterated in the Commission Delegated Regulation (EU) 2016/1052<sup>107</sup>, which lays down technical standards for the conditions applicable to buy-back programmes. Since issuers are not necessarily aware of their shares being traded on a certain venue, full compliance with the reporting requirements might prove to be challenging for the issuers. In light of that consideration, the Commission would like ESMA to assess whether, and if so in what way, the scope of the reporting obligations under Article 5(3) and the related delegated regulation should be fine-tuned to avoid putting excessive compliance burdens on the issuers without unduly undermining market transparency and interests of investors.

#### (c) effectiveness of the mechanism to **delay disclosure of inside information**

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<sup>107</sup> Article 2(2) provides that 'the issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are traded'

Currently the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4). Possibly reflecting a diverging approach to treatment of inside information across Member States, the Commission has received indications that relying on the mechanism of delaying disclosure of inside information is used to a varying extent across jurisdictions in the Union. It would appear that, while in some Member States issuers rely on this mechanism regularly, issuers of others use it on an exceptional basis. Therefore, for the Commission to better understand whether this tool needs to be calibrated, ESMA should gather information on the usage of this mechanism across Member States and identify points of divergence in its application, if any. Furthermore, the Commission would like ESMA to assess whether the conditions for the delay of disclosure are well framed and sufficiently clear for the issuers to effectively rely on that mechanism. Finally, to gain a complete picture of the use of this mechanism, ESMA should provide information on which Member States have made use of the option to require issuers to provide a record of a written explanation of the decision to delay only upon the request of the NCA, as provided in the third subparagraph of Article 17(4). In this latter case, the Commission would like to receive information on how many such requests have been submitted by those NCAs.

- (d) usefulness of **insider lists** drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse

In relation to the above point, the Commission would in particular like to know to what extent NCAs rely on insider lists within the meaning of Article 18 in investigating instances of market abuse. To that end, the Commission would appreciate if ESMA, in providing its answer, gathers information on the following:

- number of requests to receive insider lists addressed by the NCAs to issuers
- whether NCAs' requests to receive insider lists distinguish between permanent insider lists and event-based insider lists and if so the breakdown of requests pertaining to one or the other
- how instrumental insider lists are in completing investigations initiated by NCAs.

- (e) adequacy of the requirement to notify **managers' transactions** as applied to collective investment undertakings

In relation to this point, the Commission would like ESMA to assess and provide feedback on whether legislative amendments are needed regarding the following issues in particular:

- i. personal scope of Article 19(1) in conjunction with Article 3(1)(25)

Article 3(1)(25) defines a person discharging managerial responsibilities ('PDMR') as a person 'within an issuer' satisfying certain conditions. That definition as such might raise some doubts as to whether it is capable of covering managers in external management companies managing investment funds without a legal personality. The same logic applies to investment funds with a legal personality managed externally. In light of these considerations, the Commission would like ESMA to assess whether there is a need for the managers of management companies to be covered by the requirement to disclose their transactions and how to best adapt the scope of that requirement to ensure a level regulatory playing field between different management structures of investment firms (external vs internal management) while preserving the effective attainment of the policy objective pursued by Article 19.

ii. material scope of Article 19(1)(a)

The above-mentioned provision requires PDMRs to notify transactions conducted on their own account relating to shares or debt instruments of the issuer within which they are discharging managerial responsibilities. The PDMR obligations also apply to managers of collective investment undertakings ('CIUs'). However, the current drafting of the provision does not explicitly mention units in collective investment undertakings, which are, alongside shares, a type of ownership interest in a CIU. Therefore, it could be argued that on a strict reading of Article 19(1)(a) units in CIUs are outside of the scope of that provision, which may result in an unlevel regulatory playing field between CIUs issuing shares and those issuing units. The Commission would consequently like ESMA to assess whether this presents a regulatory loophole that should be addressed.

(f) appropriateness of certain aspects of the requirement to notify **managers' transactions**

Regarding the above point, the Commission seeks ESMA's input on the following two aspects of that requirement:

i. level of thresholds

Currently the threshold that triggers the notification obligation is set to EUR 5 000, with the possibility for NCAs to raise it to EUR 20 000. The Commission would welcome ESMA's analysis on whether these thresholds are appropriate to ensure a high level of market transparency and integrity without creating a disproportionate compliance burden for managers and issuers.

ii. transactions to be notified once the threshold is reached

Under Article 19, after the relevant threshold has been reached, managers and issuers have to notify and disclose all subsequent transactions, regardless of the size of the individual transactions. The Commission seeks ESMA's advice and assessment on whether this reporting methodology is most appropriate to capture relevant transaction data and whether it

strikes the right balance between a high level market transparency and a proportionate compliance burden.

(g) **cross-border enforcement** of sanctions

The Commission would like ESMA to gather information on whether NCAs encounter difficulties in the recognition and enforcement of financial penalties imposed under MAR in cases with a cross-border element. Examples of such cases could include situations where the sanctioned person is a resident or has its registered seat in another Member State or when that person leaves the Member State of the sanctioning NCA without paying the fine. To better understand and assess the nature and the breadth of the problems NCAs may face, as well as potential ways of addressing them, the Commission would like ESMA to conduct an analysis of legal obstacles to the recognition and enforcement of financial penalties, if any. In doing so, it is encouraged to take into account in particular the following:

- i. number of financial penalties imposed by NCAs vis-à-vis non-residents and how successful the NCAs were in enforcing them;
- ii. whether the interpretation given to the Council Framework Decision 2005/214/JHA<sup>108</sup> in the judgement of the Court of justice of the European Union rendered in the Baláž case (C-60/12) has proved to help in the recognition and enforcement of financial penalties;
- iii. whether under the current legislative framework there are tools that might be used to facilitate the cooperation between NCAs in order to address the issue and what role ESMA could play in this process.

### 3. Guiding principles

In carrying out its analysis of the elements covered by the mandate and set out in sections 1 and 2, ESMA is invited to take into account the following principles:

- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by the mandate;
- while preparing its advice, ESMA should seek coherence within the regulatory framework of the Union;
- ESMA is encouraged to widely consult market participants and stakeholders in an open and transparent manner. In doing so, ESMA's advice should take account of different opinions expressed by the market participants and stakeholders during their consultation;

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<sup>108</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, p. 16)

- ESMA is invited to provide sufficient empirical evidence and factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered.

#### **4. Final remarks**

Given that the procedures which need to be followed for the adoption of the report to the European Parliament and the Council are potentially lengthy, I would kindly ask ESMA to provide its contribution by no later than **31 December 2019**. I look forward to receiving ESMA's input and remain at your disposal for any questions.