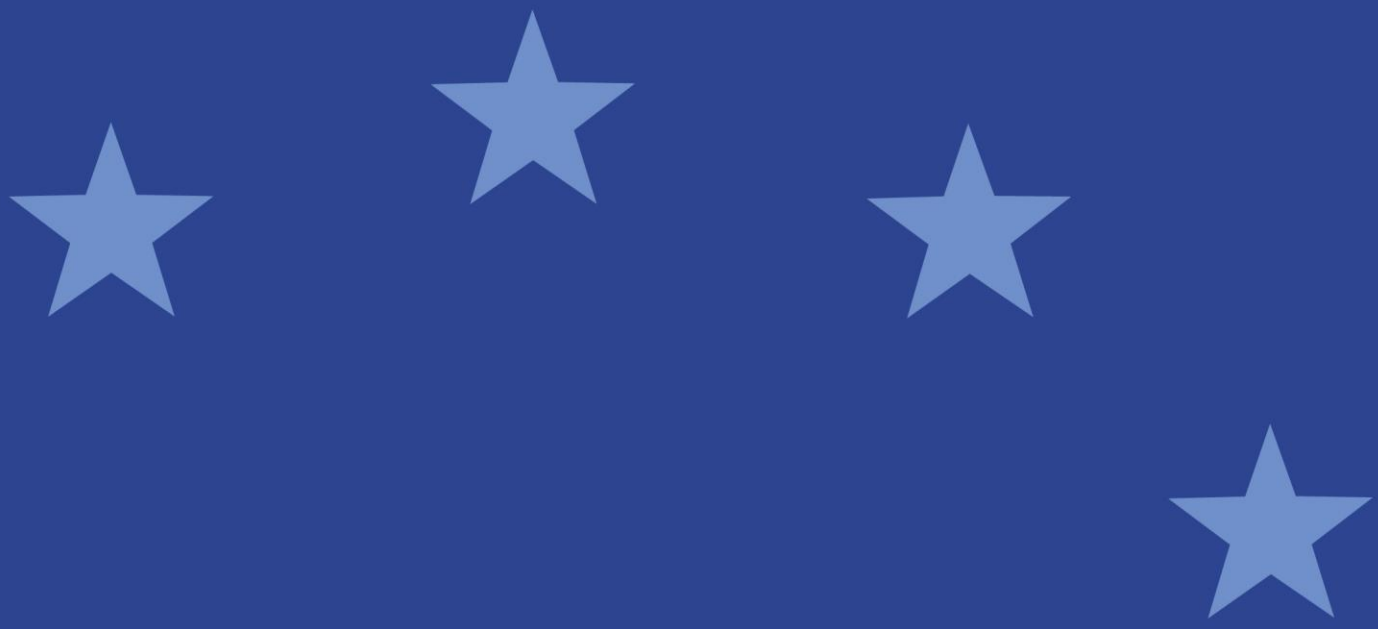
esma European Securities and Markets Authority

Reply form for the Consultation Paper on MAR review report



3 October 2019

European Securities and Markets Authority

Date: 3 October 2019

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MAR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

In order to facilitate the handling of stakeholders' responses please save your document using the following format:

ESMA_CP_MAR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_CP_MAR_ESMA_REPLYFORM or

ESMA_CP_MAR_ANNEX1

Deadline

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	Swedish Securities Dealers Association, Swedish Banker's Association
Activity	Banking and Investment Services
Are you representing an association?	☒
Country/Region	Sweden

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
Introduction

This is a joint response one from Swedish Securities Dealers Association and Swedish Bankers' Association.

Swedish Securities Dealers Association (register id 7777147632-40) represents the common interest of banks and investment firms active on the Swedish securities market. Swedish Securities Dealers Association (SSDA) promotes members' views regarding regulatory, market and infrastructure related issues.

Swedish Bankers' Association (register id 53517281038-30) represents banks and financial institutions established in Sweden. The aim of Swedish Bankers' Association (SBA) is to contribute to a sound and efficient regulatory framework that facilitates for banks to help create economic wealth for customers and society.

SSDA and SBA welcome the extensive and in-depth consultation paper from ESMA. Besides the issues that are included in the consultation paper from ESMA, we have a few additional issues that we would like to address to ESMA´s attention. These are described below.

Clarification of financial instruments in scope of Article 19

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

In Germany, the competent authority has clarified that the notification requirement under Article 19 of MAR applies to transactions (i) in shares or debt instruments of the issuer that are traded on a regulated market or on an MTF/OTF at the request or with the approval of

the issuer (with reference to Article 2(1)(a) to (c) and Article 19(4)); or in derivatives or other financial instruments relating thereto (with reference to Article 2(1)(d)).[1]

In the UK, the competent authority has clarified that the notification requirement under Article 19 of MAR only applies to transactions in financial instruments of the issuer which are either (i) subject to a request for or approval of admission to trading on an EU trading venue, or (ii) linked to financial instruments which are themselves subject to a request for or approval of admission to trading on an EU trading venue. Dealing in instruments that do not fall into either of these categories is not subject to Article 19.[2]

Unlike the competent authorities in Germany and the UK, the Swedish competent authority and Swedish Administrative Courts have held that Article 19 applies to transactions in all financial instruments issued by an issuer, where the issuer has requested or approved admission of any of its financial instruments to trading on a regulated market or an MTF/OTF.[3]

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

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

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

Investment recommendations

[1] https://www.bafin.de/SharedDocs/Downloads/EN/FAQ/dl_faq_mar_art_19_DD_en.html;jsessionid=4DA3A17A2595E72CC657740BF4F79FF5.1_cid372?nn=7856822
[2] https://www.fca.org.uk/markets/market-abuse/regulation
[3] See a judgment from the Stockholm Administrative Court of Appeal, 7 March 2019 (only available in Swedish): https://www.fi.se/contentassets/f9e62a11e369456580d030b30b7deeb1/abjornsson-frontoffice-kr-17-9099.pdf

In our opinion there is not sufficient alignment between the rules on investment recommendations under MAR on one hand, and the rules on investment research and marketing communications and research unbundling under the MiFID II regime. We find that there is an inherent conflict between the obligations under MAR to provide the recommendations free of charge under some circumstances, and the requirements under MiFID II to ensure that research are subject to a separate identifiable payment. Furthermore, we find that the obligations under Article 4 of Commission Delegated Regulation (EU) 2016/958 are not well-suited for the presentation of investment strategies.

A request for admission to trading on a regulated market

The main scope of MAR and MAD is financial instruments admitted to trading on a regulated market or traded on an MTF or for which a request for admission to trading on a regulated market has been made.

For the purposes of transparency, operators of a regulated market, an MTF or an OTF should notify, without delay, their competent authority of details of the financial instruments which they have admitted to trading, for which there has been a request for admission to trading or that have been traded on their trading venue. A second notification should be made when the instrument ceases to be admitted to trading.

An obligation should in our opinion be introduced also to publish the information that there has been a request for admission to trading on their trading venue as MAR is applicable already when a request for admission is made. For example, the rules regarding insider trading, market manipulation and managers transactions. There should of course be requirement to publish the fact that those instruments are now in the scope of MAR. In our opinion it should be a requirement to disclose the fact a request for admission to trading has been made. It could be an obligation for the marketplace or for the NCAs but there should be a publication before MAR is applicable for those instruments.

TYPE YOUR TEXT HERE
<ESMA_COMMENT_CP_MAR_1>

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

<ESMA_QUESTION_CP_MAR_1>
We believe that the scope of MAR should not be extended to cover spot FX contracts at present. The market for spot FX-contracts is global market and we support the implementation of the FX Global Code of Conduct, which is a worldwide global Code. The market participants should have sufficient time to adopt to the FX Global Code of Conduct.

Furthermore, there are fundamental differences between the scope of MAR and characteristics of the market for FX-spot. The scope of MAR is financial instruments admitted to trading on a regulated market (or traded on an MTF or an OTF) which is different compared with the OTC market for FX spots. Furthermore, there are no issuers on the market for FX spots and the markets for FX spots function quite different compared with the market in today's scope of MAR.

It is important to note that the market is truly global any legislation or rulebook must in our view cover the whole market not only EU-participants. A regulation on EU level could risk moving the spot FX flow outside the EU.

Having said that, arrangements, systems and procedures used according to MAR to prevent insider trading and market manipulation can be used and is also used in one form or another by the market actors on the FX spot market to check and control the market and the conduct of actors and traders.

In our opinion, there is not enough evidence in favour of a legislation of spot FX market. Furthermore, if a legislation is considered such legislation should be outside MAR. It would be very difficult to include the market for FX-spot in the scope of MAR or MiFID.

Instead, we recommend that the progress of the FX Global Code of Conduct should be closely monitored and analysed.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_1>

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

<ESMA_QUESTION_CP_MAR_2>
Yes, we agree. In our answer to question 1 we have stated that we, at least for the moment, cannot see enough reasons to regulate the FX spot market. If legislation should be discussed there must be a comprehensive investigation of the spot FX markets and an analysis of the consequences of such a regulation. We have doubts that MAR or MiFID is the right place for a future regulation of FX spot.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_2>

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

<ESMA_QUESTION_CP_MAR_3>

We partly agree with ESMA's analysis. We believe that the purpose of preventing manipulation of benchmarks can be fulfilled by only extending the scope of MAR to the persons/activities covered by the BMR, and that the definition of benchmark should in that case be aligned, e.g. as incorporation by reference to the BMR.

MAR and the EU Directive 2014/57/EU ("**MAD**") together impose not only administrative sanctions but also criminal sanctions, and MAD requires that member states implement criminal sanctions for market abuse. Any potential conflicts with local law implementing MAD should be analysed before the prohibitions and definitions in MAR are amended, as it might also trigger a need for amending MAD. Any amendments should be subject to careful consideration of principles of criminal law and proceedings of justice.

Prohibition of (attempted) manipulation of benchmarks

The market abuse rules in MAR applies to a broad range of securities related activities on the financial markets. MAR applies to market operators, fund managers, investment firms, as well as any other market participant – reaching as far as to individual investors both natural and legal persons. The generally broad scope of MAR is appropriate because the financial markets are accessible to anyone and market manipulation can be conducted by investors at any level.

In relation to manipulation of benchmarks, the current prohibition in MAR is limited to values that by reference to it determine the amount payable under, or the value of, a financial instrument. The scope of the BMR is, as ESMA concludes, wider and is not tied to only financial instruments. We believe it may be impractical to apply the same broad scope-approach to manipulation of benchmarks and question the potential benefits.

The BMR will soon be in full force and will cover most market participants in relation to benchmark related issues, and we believe that the room for any person not subject to those rules to manipulate a benchmark will be limited. In addition, certain markets and reference assets included in a benchmark are inaccessible for individual investors and manipulation would require a certain market position and size. Reference values that are benchmarks under the BMR but not linked to financial instruments will likely be difficult to manipulate unless you are a person in a role covered by the BMR.

With reservation for our opinion on the definition of benchmark as described below, we believe that Article 2(c) and Article 12(1)(d) in MAR should be clarified, especially in

regard to "any other behaviour" in relation to manipulation of the calculation of a benchmark. This can be achieved by referring to the specific provisions in the BMR.

Definition of benchmark in MAR

We agree with ESMA's analysis that it may be beneficial to await the outcome of the BMR revision before revising the benchmark definition in MAR. However, we are of the opinion that the definition of benchmark in MAR should not solely be a reference to the definition of a benchmark in the BMR, since the latter is too extensive and unprecise considering the broad scope of MAR. We would welcome clarification of the current definition of benchmark in MAR.

The definition of benchmark in the BMR is designed as a two-step process where the relevant reference value shall be individually assessed based on certain criteria. Assessing whether a reference value constitutes a benchmark requires specific knowledge, and it can be argued whether an average investor is even able to comprehend the concrete concept of a benchmark as defined in the BMR. The administratively sanctioned general prohibition against market manipulation does not require intent, subsequently the situation where a person has no knowledge that a reference value is being manipulated, or that it even exists, must be addressed. A reference value can constitute a benchmark regardless of e.g. registration, and there is no easily recognisable trigger for when a reference value shall be considered a benchmark – contrary to MAR which is linked to the MiFID definition of financial instruments and to admission to trading, which are concepts that are known to most investors.

Criminal law, and regulation of criminal characteristics such as MAR, should require a certain level of predictability. It is not desirable to have an unclear definition of what constitutes a benchmark and subsequently what may be illegal. If the scope of the prohibition of manipulation of benchmarks is fully aligned and limited to the roles and activities covered by the BMR, a reference to the definition in the BMR may however be most appropriate.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_3>

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

<ESMA_QUESTION_CP_MAR_4>
No, we believe that e.g. suspension of authorisations given under the BMR would preferably be governed by the BMR to avoid the risk of conflicts of authority and application. The NCA which is to apply MAR might not be the same NCA that the administrator or supervised contributor is under supervision by under the BMR. We also believe that such rules might be difficult to apply in practice in respect of persons located in third countries.

If an administrator of a benchmark or a supervised contributor is found to manipulate a benchmark, that would likely mean it is non-compliant with the BMR which may be reason for suspension of authorisation under the BMR.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_4>

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

<ESMA_QUESTION_CP_MAR_5>
No, we believe that NCAs already has far-reaching authority to request necessary documentation in order to investigate market abuse, as well as request documentation from persons already subject to the BMR.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_5>

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

<ESMA_QUESTION_CP_MAR_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_6>

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

<ESMA_QUESTION_CP_MAR_7>
We welcome a simplification of the reporting mechanism under Article 5(3). The obligation to report to the NCA of each trading venue has been burdensome and problematic. Our experience is that the treatment of this reporting obligation differs in the EU and the NCAs do not have the same procedures and the same interpretation of MAR. Furthermore, is has shown to be challenging to comply with the regulation, since it can be difficult to identify all the trading venues where the issuers shares are being traded.

We are of the opinion that there also is a need to maintain alignment between the buy-back and stabilization exemptions and therefore the reporting mechanism under Article 5(4) of MAR should be modified as well as the reporting mechanism in 5 (3).

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_7>

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

<ESMA_QUESTION_CP_MAR_8>
No, we prefer Option 2, reporting to the NCA of the jurisdiction where the issuer requested admission to trading or, where relevant, approved trading with the same additional requirement as in option 3.That means that the NCA of the jurisdictions where the issuer requested admission to trading or, where relevant, approved trading should, upon request, forward the information to the NCAs of the trading venues where the shares are traded.

This approach should also be taken in relation to 5 (4).
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_8>

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

<ESMA_QUESTION_CP_MAR_9>
Yes, we support the proposal and agrees with ESMA that there is no need to require issuers to report to NCAs the information under MiFIR Article 25(1) and 25(2) related to buy-back programs since the NCAs already have access to the information under MiFIR.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_9>

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

<ESMA_QUESTION_CP_MAR_10>
In general, we support the idea of reducing the number of reporting fields to the NCAs in relation to buy-back programs. That said, the institutions have today a set-up for the TRS reporting, and they have implemented systems and programs that can support the reporting to the NCAs in relation to buy-back programs. If there will be changes to this reporting it will require development of new reporting systems and programs in the institutions which will have a cost. Furthermore, if any changes are made firms should be given sufficient implementation time.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_10>

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

<ESMA_QUESTION_CP_MAR_11>
Yes, the SSDA agrees with ESMA's preliminary view that market participants might find more useful data in an aggregated form, the aggregated volume traded, and the weighted average price paid for the shares in each trading session

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_11>

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

<ESMA_QUESTION_CP_MAR_12>
We have no additional suggestion.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_12>

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

<ESMA_QUESTION_CP_MAR_13>
Yes, some of our members have experienced difficulties in the interpretation of the definition of inside information.

The legal assessment of at what moment the information shall be deemed to be of a "precise nature" according to article 7 MAR can be problematic, especially in cases where the relevant circumstance or event is part of a protracted process which may result in a particular future event but which is not within the control of the issuer (e.g., investigations or re-views by public authorities). TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_13>

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

<ESMA_QUESTION_CP_MAR_14>
There is no need to expand the definition.

Issuers and market participants have become familiar with and established robust procedures for handling and disclosing inside information. Hence, the definition of inside information could be narrowed and made more stringent without losing efficiency.

Narrowing down and/or clarifying the definition could prove more effective in combatting market abuse. This is especially true in relation to Articles 7(2) to 7(4) which should be either clarified (by revising the text itself or by additional ESMA guidance or completely removed. In relation to Article 7(2), the second part thereof (see quotation below) has proven particularly difficult to interpret and apply.

"In this respect 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."

With respect to Article 7(3), if information of a part of a process constitutes inside information, we believe it is already captured by Article 7(1) and we question the need for this article and propose that it is removed.

Article 7(4) is a hypothetical test of what information a "reasonable investor" might use as a basis for his or her investment decision. Just as the concept of "bonus pater familias" in tort law (which has been heavily criticised in legal doctrine), it creates difficulties in practice since it requires a comparison between the reality and a fictional normative figure.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_14>

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

<ESMA_QUESTION_CP_MAR_15>
No. TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_15>

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

<ESMA_QUESTION_CP_MAR_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_16>

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

<ESMA_QUESTION_CP_MAR_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_17>

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

<ESMA_QUESTION_CP_MAR_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_18>

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

<ESMA_QUESTION_CP_MAR_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_19>

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

<ESMA_QUESTION_CP_MAR_20>
There is no need to expand the definition of inside information to include other cases of front runing. To the contrary, narrowing and/or clarification of the definition could prove more effective in combatting market abuse. This could be achieved by either clarifying or completely removing the second part of Article 7(2), which can be difficult to interpret and apply.

"In this respect 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 inter-mediate 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."

Articles 7(3) can be removed along with Article 7(2). Furthermore, we believe that if information about a part of a process amounts to inside information, it should be captured by Article 7(1) independently.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_20>

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

<ESMA_QUESTION_CP_MAR_21>
No, there is no need to implement specific conditions in MAR regarding front running. However, guidance in certain areas would be welcomed in the form of Q&A.

In the assessment of whether certain information constitutes inside information, the likelihood of a significant effect on the price of a financial instrument shall be assessed. For the purpose of assessing potential price movements, the liquidity of a financial instrument or market is one of the determining factors and subsequently it should already under current regulation be part of the assessment.

Additional guidance in the form of examples of specific situations relating to financial instruments with low liquidity and illiquid markets may serve a purpose for some market participants and issuers. However, we strongly believe that any potential regulation or guidance in this area should be of safe harbour character since the circumstances in each case might vary greatly between different markets and types of financial instruments and transactions. It is important that any regulation or guidance does not disrupt liquidity or prevent the possibility of conducting transactions or making markets.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_21>

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

<ESMA_QUESTION_CP_MAR_22>
It is our opinion there is no need for legislation. Pre-hedging is a vital element in order to ensure liquidity in the financial markets, as well as an important tool for a bank or investment firm to effectively manage its risk. Pre-hedging is to the benefit of customers by enabling investment service providers to offer competitive pricing and may in certain cases be necessary for certain transactions to even be possible to execute. Pre-hedging should not be deemed as misuse of client information, provided that the pre-hedging is performed in pursuit of the legitimate activities in the provision of investment services or as market maker or liquidity provider. We would like to emphasize that if pre-hedging of orders and transactions be further limited, there is an apparent risk that the market for certain financial instruments will disappear to the detriment of the investors and the market.

It could also be questionable whether it's appropriate to conduct a transaction without pre-hedging, since the bank or investment firm might not be able to offset the risk exposure entailed, for example bond issuances and M&A transactions. If a bank would assume risk in a customer transaction that it will not be able to hedge, it would increase risks in the trading book and increase cost of funds. This may discourage banks or investment firms from conducting transactions thus impacting the liquidity and the risks in the whole financial system.

MiFID II/MiFIR conduct rules include the obligation for investment firms to act honestly, fairly and professionally in a manner which promotes the integrity of the market (Article 24 of MiFIR) and to act in accordance with the best interest of clients. (Article 24 of MiFID II). This address the risk of inappropriate behaviour in the interdealer market and in customer facing activities. Trading venues also conduct monitoring to detect any inappropriate behaviour that may jeopardize the fair and efficient operation of the market. Investment firms is also required to include pre-hedging activities in its own monitoring and surveillance according to Article 16 of MAR.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_22>

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

<ESMA_QUESTION_CP_MAR_23>
We believe that pre-hedging is conducted in the interest of and for the benefit of the customer to enable the investment firm to be able to provide a price or quote and ensure successful execution and completion of a transaction. In some cases, pre-hedging is necessary in order to ensure that a transaction is possible to execute, for example if there is low liquidity in a market or relevant financial instrument (for example illiquid currencies, rates or financial instruments). Pre-hedging is not conducted for the benefit of the investment firm or bank or for it to make a profit. If prehedging is performed other than for the benefit of the customer, it might be considered misuse of client in-formation, or it might constitute proprietary trading which is already subject to regulation.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_23>

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

<ESMA_QUESTION_CP_MAR_24>
Financial instruments trading in OTC markets where investment firms trade in principal capacity.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_24>

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

<ESMA_QUESTION_CP_MAR_25>
In our opinion the conditions to delay disclosure of inside information are relevant and should enable issuers to delay disclosure of inside information when necessary. The interpretation of those rules should be the same in all member states of the Union.

A general remark is that the ESMA MAR Guidelines regarding delayed disclosure of inside information (the "**Delay Guidelines**") generally encompasses situations related to M&A activities or financial difficulties when providing examples of situations in which it could be in the legitimate interest of the issuer to delay the disclosure.

It would be beneficial if the Delay Guidelines could be further developed to also include different types of issuers, as well as examples of other situations in which inside information may arise and there may be a legitimate reason for the issuer to delay the disclosure. Such situations could for example include ongoing, protracted, inspections or reviews by public authorities in which the outcome of such investigation or review would likely be jeopardised by immediate public disclosure. It could also be a situation where an issuer is listed on multiple venues in different time zones and where delayed disclosure would be beneficial to protect the integrity of the financial markets.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_25>

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

<ESMA_QUESTION_CP_MAR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_26>

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

<ESMA_QUESTION_CP_MAR_27>
We are of the opinion that it is not necessary to include a specific requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information as an issuer already today must, in practice, have such systems and controls in place to comply with their obligations under article 17 MAR. Contrary to the situation under article 16 MAR, article 17 MAR is applicable to a large group of issuers varying in scale, size, and nature of business which. In our opinion, it would have to render any requirement in MAR and supporting guidelines to be of such high-level and generic nature that it would only create unnecessary complexity and uncertainties for the issuers without any corresponding gain in the efficiency of their controls and systems compared to the current situation.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_27>

Q28. Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

<ESMA_QUESTION_CP_MAR_28>
The legal assessment of when the information at hand shall be deemed to be of a "precise nature" according to article 7 MAR may in some cases be problematic if the circumstances or event is part of a protracted process that may result in a particular future event, but which is not within the issuer's control.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_28>

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

<ESMA_QUESTION_CP_MAR_29>
There is no need for any notification, but the issuers should be able to produce the reasons if it is required by the NCA.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_29>

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

<ESMA_QUESTION_CP_MAR_30>
We support an amendment of Article 17(5) MAR in order to clarify that in case a listed issuer which is not a credit or financial institution, but which is directly or indirectly controlling a listed or non-listed credit or financial institution, receives information regarding financial difficulties in a credit or financial institution, it should be able to delay the disclosure of such information on the same basis as the credit or financial institution under Article 17(5). This would be in line with the goal to achieve the overarching principle of said Article; i.e., to safeguard the financial stability of the Institution and of the financial system.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_30>

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

<ESMA_QUESTION_CP_MAR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_31>

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

<ESMA_QUESTION_CP_MAR_32>
No further examples. However, there have been situations in which supervisory authorities have implied that they expect an issuer to abstain from the disclosure of certain information received by it from such authorities (e.g., as part of an ongoing inspections), which results in a difficult position for the issuer (especially when such authority is also the competent authority under MAR).

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_32>

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

<ESMA_QUESTION_CP_MAR_33>
No, in our view, MAR read in conjunction with Recital 35 supports no other interpretation than the one which, understandably, is widespread across the EU, i.e. that Article 11 of MAR is a safe harbour from Article 10 of MAR, not a stand-alone obligation. See, for example, Market Abuse Regulation (EU MAR) Q&A (Updated 22 May 2018), Prepared by the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code, Part B Question 5, Ventoruzzo & Mock (eds.), Market Abuse Regulation — Commentary and Annotated Guide, 2017, p. 306, and Klöhn, Marktmissbrauchsverordnung, 2018, pp. 367, 392, 395 and 398.

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

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

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

Therefore, our view is that no "clarifications" along the lines of what ESMA suggests should be made. First, they are not clarifications and, secondly, compelling reasons speak in favour of not amending MAR is these regards. Consequently, no new sanctions should be introduced either.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_33>

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

<ESMA_QUESTION_CP_MAR_34>
As stated in question 33 we strongly oppose to amending MAR to make Article 11 a stand-alone obligation rather than a safe harbour. However, of course, if Article 11 were to be turned into a stand-alone obligation, the scope would have to be significantly narrowed in order not to render certain legitimate sounding measures in practice illegal. One way of achieving this could be to exclude, altogether, soundings carried out by the issuer or potential takeover bidder itself as opposed to soundings carried out by its professional advisers.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_34>

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

<ESMA_QUESTION_CP_MAR_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_35>

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

<ESMA_QUESTION_CP_MAR_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_36>

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

<ESMA_QUESTION_CP_MAR_37>
Because Article 11 of MAR is a safe harbour, not a stand-alone obligation (see question 33), the highly formalised procedures prescribed in Article 11 are not necessarily problematic. However, understandably, some financial advisers frequently conducting market soundings on behalf of clients may wish to adopt a policy to the effect that Article 11 should always be strictly complied with so that the adviser always stays in the safe harbour. This causes an inflexible practice where the focus is on satisfying detailed formal requirements rather than applying sound judgement and due care. We believe MAR, one way or another, would benefit from the inclusion of a clarification to the effect that market soundings carried out wholly or partly outside Article 11 are entirely permissible, but that a cautious and careful approach should of course always be taken when disclosing inside information so that the action taken does not amount to a breach of Article 10.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_37>

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

<ESMA_QUESTION_CP_MAR_38>
See our answer of question 37.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_38>

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

<ESMA_QUESTION_CP_MAR_39>
We agree with ESMA's preliminary view regarding the usefulness of an insider list allowing NCAs to identify who has access to inside information and the relevant timeline. The insider list is also helpful for issuers and others to manage the flows and confidentiality of inside information.

However, too much information is included in the insider list which have resulted in heavy administrative burdens and costs for issuers and others. In our opinion only adequate, relevant data should be included, and information should not be excessive in relations to the purpose of the Insider list.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_39>

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

<ESMA_QUESTION_CP_MAR_40>
As stated above we are of the opinion that the list could be simplified, see question 45.

Furthermore, we recognize the difference between actual access and potential access to inside information and welcome the possibility to exclude persons from insider lists where possible. To be clear, however, we do not believe that having individuals listed as insiders due to potential access in any way reduces the usefulness of the insider list, as long as the reason for each individual to be listed as an insider is correctly detailed in the "Function and reason for being insider" field in the insider list.

We believe that ESMA should allow issuers to include or exclude individuals with potential access to inside information as they please, as the administrative burden to check which individuals with potential access actually have "gained access" may be heavy for some issuers where technological or administrative means are lacking, but very light for other issuers with

effective measures of access logging and reporting already in place. Issuers should therefore be free to decide for themselves which solution would be most beneficial for them.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_40>

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

<ESMA_QUESTION_CP_MAR_41>
Issuers would need systems that not only log access to databases and servers but also send alerts to the function responsible for insider list management within the issuer. Only with such an alert system could always the issuer properly maintain an up-to-date insider list and be able to promptly provide the NCA with the list upon request. Searching through records of access logs after such a request has been received would constitute a massive administrative burden and would require issuers to be granted extensions on the deadline of the request.

There are huge differences in the resources of issuers, in particular issuers on smaller market and SME Growth Market. For that reasons such systems should not be a requirement, but issuers should nevertheless be encouraged to implement them.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_41>

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

<ESMA_QUESTION_CP_MAR_42>
We see ESMA's request to widen the scope from two angles: 1) independent third parties 2) persons that hold inside information but are not the Issuers or any person acting on their behalf or on their account:

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

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

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

In a worst-case scenario, we see a risk of local authorities interpreting this very broadly. This would potentially require us to place staff working in market functions on insider lists, if they handle e.g. orders from clients of a certain size or block trades that would be inside information. To handle such insider lists (based on our activities), we would either need to invest heavily in systems to be able to handle the dynamics of the restriction activities or have a fulltime restriction for every Sales and Dealer in Equities/FI&C. It would increase costs in an environment, where the model is already significantly under pressure. On top of this, we would be concerned about any spill over effects towards the clients. This would also place a very heavy administrative burden on the companies required to maintain insider lists, without it adding any value when it comes to e.g. monitoring and trade surveillance.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_42>

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

<ESMA_QUESTION_CP_MAR_43>
We support keeping the permanent insider lists. It supports efficient information flows with senior management when discussing insider matters thus enabling effective decision-making. By not having a permanent insider list or making the interpretation too narrow this can increase the operational risk associated with this process (i.e. increase risk that all individuals are not being added on the relevant event-based insider lists). It may also hinder effective and timely senior management communication or decision-making as individuals will be unsure of who can be included in conversations and whether they can/have been wall crossed.

However, the permanent insider list should never substitute the ad hoc lists as inside information only exists on a case/event basis, where each case/event relates to a specific set of circumstances that have occurred or will reasonably be expected to occur.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_43>

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

<ESMA_QUESTION_CP_MAR_44>

We agree with ESMA's preliminary view. Article 18 of MAR should be revised to specify that the issuer should only include one contact natural person for each legal person acting on behalf or for the account of the issuer having access to inside information and each one of those legal persons should include in their own insiders list the natural or legal persons accessing that piece of inside information working for them under a contract of employment or under any other type of arrangement in the same terms (i.e. one contact person per external provider).
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_44>

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

<ESMA_QUESTION_CP_MAR_45>
In our opinion there is an urgent need to reduce the administrative burden for issuers regarding insider lists. One step to reduce the burden should be as mentioned in previous question 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).

If legal persons acting on behalf or on the account of the issuer are explicitly required through Article 18 to keep their own insider list, then there should also be included a responsibility for issuers to notify such legal persons acting on their behalf or their account whenever they have shared information that the issuer classifies as inside information with them. Such a notification could be very simple but to the point and should be in writing

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

The information in the insider has increased administrative burdens and related costs for business. For that reasons information to be included should be carefully scrutinized to avoid disproportionate administrative burdens and related cost. Only adequate, relevant data should be included, and information should not be excessive in relations to the purpose of the Insider list.

The requirements to include date of birth, personal address and birth surname are excessive and without reasons. Therefore, they should be deleted. It is enough to have the following fields, name, national ID, work phone, work e-mail, reason for becoming insider and time of becoming insider.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_45>

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

<ESMA_QUESTION_CP_MAR_46>
The reporting threshold should be increased to at least Euro 20,000 and this threshold should be made mandatory with no possibility for member states to opt for a lower threshold. The current threshold of Euro 5,000 has done nothing but increase disclosure of insignificant transactions that do not give any meaningful signals to the market. Because of the insignificant Euro 5,000 threshold, it has become the practice of managers to report all their transactions regardless of the threshold so as to avoid or reduce the risk of failure to report notifiable transactions. The current threshold is clearly disproportionate and has done little or nothing to alleviate the administrative burden on managers.

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

As a general remark relating Article 19(3), it is our view is that the second and third paragraph needs to be amended to include a strict requirement for NCA:s to make information regarding PDMR transactions public. Currently the NCA approach to Article 19(3) is varying between the member states. We can see that a few NCA:s, including the Swedish NCA, provide a service through which PDMR:s can upload transaction reports to be displayed in a public register (in the Swedish example, the NCA provides an application on their website named "Insynsregistret"). We believe that having such a register available where all transactions of all PDMR:s of all issuers under the same NCA supervision creates great and favourable transparency in the market for investors and other market participants alike. While this is beneficial for market stability, the NCA providing such a tool would also greatly ease the administrative burden for both issuers and the PDMR:s themselves and harmonize the process for transaction reporting across the NCA:s supervisory field. Unfortunately, however, we have detected a negative trend where NCA:s who previously provided such a register now have de-commissioned this service (for example – the Danish NCA), and other NCA:s dismisses the request from market participants to introduce such a system.

We therefore recommend that ESMA should ensure that other NCA:s follow the example of the Swedish NCA and implement similar systems and registers by introducing a requirement in Article 19(3) for NCA:s to provide this service to the market participants they supervise.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_46>

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

<ESMA_QUESTION_CP_MAR_47>
The reporting threshold should be increased to at least Euro 20,000 and this threshold should be made mandatory with no possibility for member states to opt for a lower threshold.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_47>

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

<ESMA_QUESTION_CP_MAR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_48>

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

<ESMA_QUESTION_CP_MAR_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_49>

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

<ESMA_QUESTION_CP_MAR_50>
Having only one threshold is appropriate. Simple to understand and easy to implement.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_50>

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

<ESMA_QUESTION_CP_MAR_51>
Yes, but it is unhelpful and confusing that no similar threshold has been introduced in respect of Article 19(11). We assume that this is just a mistake. If the 20% threshold is not breached, an investment in a CIU will be excluded from the notification obligation in Article 19(1), and clearly it must be intended that such investment would not be subject to the prohibition under Article 19(11).
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_51>

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

<ESMA_QUESTION_CP_MAR_52>
No. TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_52>

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

<ESMA_QUESTION_CP_MAR_53>
Article 19(11) should be amended so as to enable persons discharging managerial responsibilities (**PDMRs**) to undertake certain dealings without having to rely on the issuer permitting such dealings (assuming that the issuer in each case is entitled to permit the dealings under Article 19(12)) where a rights issue or public takeover offer is made during a closed period to all shareholders. Such dealings include:

1. undertaking to subscribe, or subscribing, for their pro rata share of the rights issue; and
2. undertaking to accept, or accepting, a public takeover offer.

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

Furthermore, it should be clarified that transactions executed under a discretionary asset management mandate are excluded from the prohibition. The purpose of the prohibition in Article 19(11) is to prevent insider dealing by PDMRs. Since, the PDMR has no possibility to influence the asset manager and to make any investment decision, there cannot be any reason why such transaction would be captured by Article 19(11).
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_53>

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

<ESMA_QUESTION_CP_MAR_54>
The closed period applies 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.

In certain member states neither national law nor the rules of the relevant trading venue require the announcement of an interim financial report during the first six-month period of any financial year or during the second six-month period. However, rules of the relevant trading venue may require the announcement of an interim management statement (as opposed to an interim financial report) during such periods.

Issuers that are required by the rules of their trading venue to issue interim management statements, need to know whether a MAR closed period is determined by reference to the publication of those management statements. We submit that this is not the case. Interim management statements are clearly distinguished from and treated as something other than quarterly financial reports under the EU Directives 2013/50 and 2004/109.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_54>

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

<ESMA_QUESTION_CP_MAR_55>
Article 19(11) as currently drafted already goes a long way to prevent insider dealing, as it captures not only transactions conducted by PDMRs on their own account, but also transactions conducted for the account of a third party, directly or indirectly. ESMA's concern that it does not capture cases where a closely associated person trades based on inside information provided by the PDMR and where a PDMR in possession of inside information recommends a closely associated person to trade is fully addressed by Article 8 that prohibits such trading. An extension of the closed period to closely associated persons would place additional burdens on both PDMRs, closely associated person and issuers and create new obligations for individuals which they can be personally liable for breaching, where there is no harm to market integrity. Against this backdrop, Article 19(11) as currently drafted strikes an appropriate balance between fulfilling the purpose of the prohibition in Article 19(11) (which is to is to prevent insider dealing by PDMRs) on the one hand, and not unnecessarily placing burdens on PDMRs, their closely associated persons and issuers (and subjecting them to hefty fines in circumstances where it would be unreasonable to do so) on the other.

We agree with the downsides identified by ESMA of extending the closed period to issuers. Furthermore, these downsides would materially harm market efficiency by preventing debt and equity offerings as well as investments and acquisitions by issuers.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_55>

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

<ESMA_QUESTION_CP_MAR_56>
Article 19(12)(a) should be amended to enable the issuer to permit a PDMR, on a case-by-case basis, to sell also other financial instruments than shares, where there are exceptional circumstances which require the immediate sale. As ESMA has pointed out, the sale of financial instruments other than shares may also be functional to the solution of the same severe financial difficulties conditions which are considered by Article 19(12)(a) of MAR. There is no reason whatsoever to differentiate between shares and other financial instruments in this context.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_56>

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

<ESMA_QUESTION_CP_MAR_57>
ESMA believes that there is merit in exploring whether market participants consider that there are cases, currently not explicitly covered by the criteria under Article 19(12)(b), which should be added to the exemptions. We note that ESMA in this context makes reference to cases in which, at the time in which a contract was entered into, it was not possible to foresee that such contract would require the acquisition or the subscription of financial instruments (the "transaction" pursuant to Article 19) within a closed period. ESMA goes on to state that in this respect, it is relevant to point out that exemptions to the closed period are not appropriate where the PDMR would be able to make an investment decision in such timespan.

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

which obviously cannot be the case. Reference is also made to Article 9(3) which makes it clear that performing a contractual obligation entered into prior to possessing inside information is not insider dealing.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_57>

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

<ESMA_QUESTION_CP_MAR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_58>

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.

<ESMA_QUESTION_CP_MAR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_59>

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

<ESMA_QUESTION_CP_MAR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_60>

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

<ESMA_QUESTION_CP_MAR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_61>

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.

<ESMA_QUESTION_CP_MAR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_62>

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

<ESMA_QUESTION_CP_MAR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_63>

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

<ESMA_QUESTION_CP_MAR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_64>

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

<ESMA_QUESTION_CP_MAR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_65>

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

<ESMA_QUESTION_CP_MAR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_66>

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

<ESMA_QUESTION_CP_MAR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_67>

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.

<ESMA_QUESTION_CP_MAR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_68>

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

<ESMA_QUESTION_CP_MAR_69>
Whilst we strongly support the policy intent behind the proposed amendments, our view is that these should be addressed in separate legislation as they fall outside the parameters of MAR. MAR specifically relates to unlawful behaviour in the financial markets, which is defined as consisting of insider dealing, unlawful disclosure of inside information and market manipulation. The concept of 'unfair behaviour' does not meet this definition and we therefore consider that it would be inappropriate to build concepts relating to unfair behaviour into MAR which is explicitly intended to address unlawful market abuse. Our view is that these proposed amendments should be addressed separately, rather than extending MAR to cover behaviour which it was not intended or designed to address.

The NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU, require a very careful analyse and must be guarded with specific requirements.
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_69>

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

<ESMA_QUESTION_CP_MAR_70>
No. TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_70>

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

<ESMA_QUESTION_CP_MAR_71>
ESMA mentions that the NCAs consider it an issue if a person fails to pay a fine and leaves the territory of the competent NCA. There are established frameworks for cooperation in relation to enforceability of claims and exequaturs, as well as international treaties. We see a potential conflict in relation to rules relating to e.g. bankruptcy proceedings and claims in general. It is our opinion that a fine should be treated as any other claim and be enforceable subject to established frameworks.

An NCA may have investigatory powers after a person has left the territory and can in some cases proceed with its investigation regardless. If that NCA were able to claim fines through another NCA, it must be considered whether it would be an unfair advantage in relation to

other creditors or investors, to not affect the willingness to lend to or invest in a company. The criminal character of MAR also calls for careful con-sideration of principles of justice and the reach of a competent authority.

As a general remark relating to sanctions and measure, we would like to raise that in respect of market manipulation, insider trading and manipulation of benchmarks, there are conflicting views between member states due to the possibility to opt out from implementing certain prohibitions of MAR if there is local criminal law that capture certain behaviour. We believe that it is necessary to address this issue and the fact that there may be conflicts depending on local implementation of MAR and criminal laws of respective member states. A conflict in this respect entails that investment firms in some jurisdictions are forced to take precautions by implementing more stringent procedures based on the fear that its employees can be prosecuted for aiding and abetting market abuse from the mere execution of client orders. The same situation could arise when employees perform their duties on behalf of an entity in the course of its activities under the BMR. These issues should be carefully considered.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_71>