



European Securities and
Markets Authority

Reply form for the Consultation Paper on MAR review report



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	European Federation of Energy Traders (EFET)
Activity	Non-financial counterparty
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>

The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent, sustainable and liquid wholesale markets, unhindered by national borders or other undue obstacles. We currently represent more than 100 energy trading companies, active in over 28 European countries.

<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>

No, in the view of EFET, the scope of the Market Abuse Regulation (MAR) should not be extended to spot FX contracts. FX spot contracts are not financial instruments pursuant to Article 10 of Commission Delegated Regulation (EU) 2017/565 and we see no need to include these contracts into the scope of MAR. In particular, EFET agrees with ESMA's arguments discouraging extending the scope of MAR to spot FX contracts (page 15-16).

In general, EFET does not support the inclusion of physical products, incl. physically settled gas/ power spot and forwards, into financial regulation, as the costs and burden of (duplicative) regulatory obligations under financial regulation would trigger numerous adverse consequences for commodity markets. Those include the exit of market participants, which would lead to a substantial drop in liquidity, resulting in less effective hedging for the real economy.

<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>

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>

In our opinion, the definition of what constitutes a commodity benchmark under MAR should be defined exclusively by the Benchmark Regulation (BMR) and, hence, the MAR definition of a benchmark should simply refer to the definition in BMR. BMR should be regarded as the leading regulation, as the protection of benchmarks under MAR should be limited to benchmarks in the sense of BMR. However, as BMR is under review, we agree with ESMA that any changes to MAR should be coordinated and coherent with the eventually amended BMR provisions.



<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>

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<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>

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<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>

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>

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>
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>
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<ESMA_QUESTION_CP_MAR_10>

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

<ESMA_QUESTION_CP_MAR_11>
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>
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<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>

As far as this question relates to the general definition of inside information under Article 7 (1) (a) MAR, we would like to highlight that the general definition is too wide and vague. Therefore, it would, if applied to commodity derivatives markets, impose significant uncertainties on market participants if and at which point of time information will constitute inside information in relation to commodity derivatives.

On the contrary, we believe that this general definition should be narrowed as it is open to an extremely wide interpretation and currently creates a high level of uncertainty for issuers of securities (corporates). As a consequence, issuers are not only under the constant risk of being forced to premature disclosures. The broad interpretation also blocks issuers' possibilities to raise capital, causes difficulties with employee participation schemes and generally increases compliances duties to inappropriate levels.

With regard to the special definition of inside information for commodity derivatives under Article 7 (1) (b) MAR, EFET is of the opinion that this definition is appropriate as it recognises the structural difference between information on an issuer of securities and on a

commodity derivative contract or on the underlying commodity markets to this contract. See also our answer under Q.16 and 17. In this context, it is important to note that commodity trading firms are not issuers of commodity derivatives traded on OTC markets and exchanges and, hence, are not under the disclosure obligation of Article 17 (1) MAR.

With regard to the special definition of inside information for emission allowances under Article 7 (1) (c) MAR, EFET would like to propose changes to address the following issues:

- It is still unclear for gas and power market participants under Article 2 (7) of REMIT (“wholesale energy market participant”) what constitutes ‘inside information’ in relation to emission allowances under the definition of Article 7 (1) (c) MAR, which is not already covered by the definition of inside information under Article 2 (1) REMIT. It is our experience that in practice all potential insider information concerning emission allowances markets and derivatives thereof, as well as concerning physical and derivative gas and power markets, is already sufficiently covered and published under REMIT.
- In the emission market, prices are mainly influenced by macro-economic information and EU Member States’ policy decisions (e.g. EU Emissions Trading System (ETS) revision, nuclear phase out, amount of certified emission reductions (CERs) that could be taken into account in the EU). Usually industrial emitters hold little or zero non-public information that would be relevant in relation to the price developments of emission allowances and their derivatives. Most, if not all, of the planned and unplanned shut-downs of production, storage, transmission and other facilities have no or do not have a significant effect on price formation in emission markets, as industrial installations are not large enough to impact the wider market. In any case, these outages are already covered by the REMIT definition of inside information and consequential disclosure obligations under REMIT. Hence, wholesale energy market participants under REMIT have difficulties in identifying further information held by them in respect of emission allowances and derivatives thereof.
- In any case, the publication of inside information under REMIT is also sufficient for the purpose of MAR disclosure of inside information, as Article 2 (2) of Implementing Regulation (EU) 2016/1055 recognises it also for the purpose of compliance with the disclosure obligation under Article 17 (2) MAR.
- Nevertheless, wholesale energy market participants (as defined in REMIT) have to comply with the MAR definition at the same time, although, in practice, it does not cover additional price relevant inside information. Therefore, we believe that the current MAR definition of ‘inside information’ in relation to emission allowances creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants without any obvious benefits.
- Therefore, we propose to introduce a reference to the definition of inside information of REMIT into the definition of Art. 7 (1) (c) MAR to avoid these adverse consequences

for wholesale energy market participants. This would mean that wholesale energy market participants would have to comply exclusively with the *lex specialis* REMIT definition of insider information with regard to emission allowances and derivatives thereof. This approach substantially reduces complexity for the real economy.

- Furthermore, in our opinion, this current complexity is exaggerated by the defined thresholds under Article 7 (4) and 17 (2) MAR, which determine which emission allowance market participants (EAMPs) are subject to the insider regime under MAR. The set thresholds for EAMPs, defined as per Art. 5 of Regulation (EU) No 2016/522, are set at a rather low level, both in respect of the emission threshold of 6 million tonnes a year and the rated thermal input threshold of 2'430 MW. Especially the rated thermal input is rather easy to exceed, even though a market participant may have only a mix of CCGTs that run rather clean, or as a result of an asset owner operating many small installations independently from one another but of which the combined MW capacity exceeds the threshold set at a group level. As such, while such asset owner/operator may exceed the MW threshold in total, and therefore be subject to the disclosure obligations, in practice the small size of some installations will likely mean that any information the firm holds about their capacity and utilisation may be so small as not to have a significant price effect upon the market for emissions allowances.
- Imposing additional disclosure requirements on EAMPs without relevance to investors' decisions seems unnecessary and, therefore, we are of the opinion that (a) the threshold for an exemption from such requirements should be increased and/or (b) the existing thresholds should be applied at single power plants /resp. facilities level instead of group level.

Please also see our response to questions 40, 42 and 44.

<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>

Yes, we believe that all current definitions of inside information under Article 7 (1) MAR are sufficient for combatting market abuse, in particular to prevent insider trading. However, as stated under Q13, EFET believes that the current general definition of Article 7 (1) (a) MAR is too wide and that insofar even a more restrictive definition would be sufficient.

<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, we have not identified such missing price relevant information under any of the definitions of inside information under Article 7 (1) MAR.

<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>

No, we have not identified price relevant information which is not covered by the current definition of inside information relating to commodity derivatives.

However, as mentioned above under Q13, it is our experience that in practice all relevant insider information concerning emission allowances markets and derivatives therefore, as well as concerning physical and derivative gas and power markets, is already sufficiently covered and published under REMIT.

Therefore, we believe that the current MAR definition of 'inside information' in relation to parts of the commodity markets, i.e. the emission allowances, as well as gas and power markets, creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants subject to REMIT without any obvious benefits. We emphasise the importance of the coherence of the definition of inside information in respect of commodity derivatives under both MAR and REMIT as wholesale energy market participants are active in both physical and financial markets, in particular to hedge their commercial physical positions. Hence, wholesale energy market participants should only implement one comprehensive market abuse framework covering both relevant physical and financial instruments which should be constructed on the basis of the same principles and policies. Information that is not (incl. own trading strategy and plans) inside information under REMIT, should not constitute inside information under MAR neither.

Therefore, we propose to introduce a reference to the definition of inside information of REMIT into the definition of Art. 7 (1) (b) MAR to avoid these adverse consequences for wholesale energy market participants. This would mean that wholesale energy market participants would have to comply exclusively with the *lex specialis* REMIT definition of inside information with regard to emission allowances and derivatives thereof, as well as with regard to physical and derivative power and gas markets. This approach substantially reduces complexity for the real economy.

<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>

EFET members consider that the 4th element of the definition of inside information in relation to commodity derivatives, namely that relevant information must be disclosable, should be retained. The definition of inside information in relation to commodity derivatives, and the additional criteria that it should relate to disclosable information to be made public, is important to allow commodity producers to reduce their commercial risks via commodity derivatives transactions.

The EU legislators have agreed for specific reasons to retain the additional condition already mentioned in the previous MAD, i.e., that the inside information has to be 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 (hereinafter “the disclosability criterion”). These specific reasons for this regulatory framework, which were mentioned by the EU Commission in its legislative MAR proposal and MAR impact assessment, are still valid.

The main reason is that there are differences between commodity derivatives and security markets that justify different approaches to the regulation of (mis)use of inside information. The main difference is that commodity market participants must be able to hedge their production needs and commodity price risks. It is therefore critical, that no general disclosure obligation (i.e., requiring the disclosure of all inside information relating to commodity markets irrespective of the disclosability criterion) be in place. In particular, the disclosability criterion prevents any general disclosure obligation that requires making public all inside information.

It is not conceivable that any such obligation could be imposed, given the variety of possible underlying commodities and the global nature of the markets. Commodities firms, including energy utilities, miners, oil and gas producers, growers, refiners, farmers, etc., are all engaged in commerce and trade, which essentially involves holding information which is relevant to existing or anticipated production, and to quality, storage and supply levels, and these parties will use that information in order to determine their trading and risk management needs and to fulfil their deliveries.

Otherwise, such a general disclosure obligation would dramatically restrict the ability of physical market participants to efficiently hedge at economic prices, other than from a distressed position as the market in terms of prices and liquidity can then move against them. This, in turn, would lead to increased overall costs of trading and production for those participants and therefore increased costs for consumers. Hedging by commodity producers and other market participants is a commercially prudent strategy that reduces risk in the real economy, and we believe that regulation should not disincentivise this risk management.

Similarly, to REMIT, MAR should recognise that in respect of commodity producers and their group companies, one's own trading plans and strategy do not constitute inside information (see also recital 12 of REMIT¹ and ACER REMIT Guidance² section 5.2.) In this respect, please note that industrial groups often have a company within their structure that acts as central access to the commodity markets for the entire industrial commodity group in order to externalise physical flows and related financial hedges. The overall trading plan and strategy of such an industrial group should be recognised as not constituting inside information subject to the condition that information barriers are in place within relevant group entities in compliance with REMIT obligations.

<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>

We are not aware of material hedging difficulties and from that perspective we do not see a need to change the current definition of Article 7(1)(b) of MAR.

Also in respect to wholesale energy market participants under REMIT, the current definition of inside information of commodity derivatives does allow them to effectively hedge their physical activities as (i) any information in respect of their installations is already subject to REMIT disclosure obligations and (ii) both REMIT and ACER have explicitly stipulated that one's own trading plans and strategies do not constitute insider information. This covers one's hedging strategy in respect to its physical assets.

¹ REMIT, recital 12: *The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. Information regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.*

² See: <https://documents.acer-remit.eu/wp-content/uploads/4th-Edition-ACER-Guidance-updated.pdf>



<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>

We do not agree that the general definition of inside information of Article 7(1)(a) of MAR should be used for commodity derivatives for the same reasons as explained in our responses to Q13 and 17.

<ESMA_QUESTION_CP_MAR_19>

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

<ESMA_QUESTION_CP_MAR_20>

We do not see any need to change the scope of the current framework.

<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>

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<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>

Hedging activities of commodity firms should not be considered as prohibited so-called “pre-hedging” under MAR (in case of the introduction of such a prohibition) as from a commodity market participant perspective, hedging anticipated commercial (commodity) risks is a normal market practice. This is a legitimate and necessary practice because commodity firms should be able to implement their own plans and strategies for trading, production

and hedging. Like under REMIT (see recital 12, sentence 3 of REMIT), information regarding the market participant's own plans and strategies for trading should not be considered as inside information. For example, energy utilities must be able to implement their own plans and strategies for their expected power production and for this purpose must be able to procure all necessary commodities and emission allowances at any point in time to run their power plants and to sell the power (to be) produced and this on any (spot and future) commodity markets. It allows commodity market participants for example to lock-in a price of anticipated physical oil, power or gas products transactions and to protect these anticipated physical flows from adverse price fluctuations. Consequently, such understanding of legitimate hedging activities is confirmed by the understanding of what constitutes hedging by non-financial firms under EMIR and MiFID, and MAR should follow the same approach.

<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>

See our response to Q22.

<ESMA_QUESTION_CP_MAR_23>

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

<ESMA_QUESTION_CP_MAR_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_24>

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>

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>

As stated in Q13, all relevant inside information concerning emission allowances markets and derivatives thereof, as well as concerning physical and derivative gas and power markets, is already sufficiently covered and published under REMIT. Therefore, we do not believe that there is any need to introduce any further systems and controls requirements into MAR (Article 16 or 17) for wholesale energy market participants under REMIT, incl. EAMPs. We believe that the systems and controls already established under Article 16 and 17 MAR are sufficient to detect and prevent insider dealing by these market participants, incl. EAMPs. In particular, the systems and controls referred to in Article 16 (2) of MAR to be adopted by persons professionally arranging and executing transactions are sufficient.

<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>

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>

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>

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<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>
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<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>
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<ESMA_QUESTION_CP_MAR_32>

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

<ESMA_QUESTION_CP_MAR_33>
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<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>
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<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>
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<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>
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<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>
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<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>
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<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>
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<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>

We believe that the insider list requirements for EAMPs should be reviewed as follows:

At first, we question whether the requirement to establish insider lists is meaningful and propose to abolish it for EAMPs. As explained under Q13, we believe that industrial EAMPs, including wholesale energy market participants, in general do not hold relevant inside information. From an EAMP perspective, it is also worth noting that non-public information is ranked lower in terms of importance than macroeconomic data concerning the price of emissions. Also, insider lists are primarily a useful tool for issuers of securities, but not for users and producers of an underlying commodity or emission allowances (derivatives). Finally, it is worth noting that – unlike for EAMPs – establishing an insider list in respect of commodity firms and their commodity business is rightly not required, as commodity firms are not issuers of commodity derivatives. The fact that EAMPs are not issuers

of emission allowances either, speaks in favour of abolishing this requirement for EAMPs as well.

Secondly, if that requirement is not abolished, and as stated in Q 13, we propose to reduce the scope of EAMPs under such an obligation by either (a) setting the threshold for qualifying as an EAMPs at a higher level, and/or (b) applying the existing thresholds at single power plants /resp. facilities level instead of group level.

Thirdly, if the requirement for EAMPs to establish insider lists were to be kept (even in a more limited scope), we propose the following changes:

- We propose to limit the scope of persons to be included in these insider list to the senior management of firms. The current insider list regime is operationally very demanding, not only to keep it up-to-date, but also in respect of privacy data management requirements under GDPR. For the current insider lists, firms should collect many personal details, such as national identification numbers, home address, mobile numbers and personal e-mail addresses. The inclusion of personal details in the insider list seems disproportionate and inadequate to the task of protecting the integrity of financial market, as this information could be made available rapidly upon request. Therefore, it should be limited to the senior management of a firm as the conduct of other employees of a firm is sufficiently controlled by the firms' compliance functions.
- Furthermore, we suggest that EAMPs should be allowed to maintain only one permanent insider list with all persons that might have access to inside information, without the need to keep detailed track of when these persons have access to inside information and when they cease to have such access, and with less personal details. The resulting inflation of the number of persons included in the permanent insider lists is linked to the highly administrative and time-consuming work to establish and keep up-to date ad-hoc/event-based insider lists. It is much more straightforward to identify a number of persons within an organisation that may have access to inside information and flag these, rather than to establish and manage both a permanent insider list and an event-based insider list separately. We, however, do not see much value added in keeping insider lists in the current format with much personal data, whereas this information could be easily provided to NCAs upon request and raises concern as to the proportionality principle in respect of data privacy rules under GDPR.

<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>

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>

As per our response to Q40, EFET is in favour of reducing the scope of insider lists to exclude EAMPs, considering the limited value added (EAMPs not holding price relevant information) of these lists compared to the disproportionately high administrative burden.

If that requirement is not abolished, and from an EAMP perspective, we are not in favour of extending the scope of the requirement for firms to establish insider lists beyond the group of persons currently covered by Article 18 MAR, i.e. even to persons who do not act on behalf or on the account of the EAMPs. ESMA mentioned as examples external notaries and auditors but this could easily be extended to other external service providers (such as lawyers) who would gain access to inside information in the normal course of their profession. Including this category of persons would only increase the administrative burden for firms in respect of drawing up, keeping up-to-date and managing the current insider lists with limited added value. These persons are already bound by their professional secrecy, subject to deontological and other regulatory prohibitions and upon NCAs' request, these external service providers can be easily identified.

As raised under nr. 177 of ESMA's consultation paper, ESMA could request these external service providers accessing inside information of their clients in the course of their normal professional activity to establish themselves and include in their insider lists the natural or legal persons accessing pieces of inside information whilst working for them. Such burden should not be placed on issuers or EAMPs.

<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 refer to our response to Q40 and 42.

<ESMA_QUESTION_CP_MAR_43>

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

<ESMA_QUESTION_CP_MAR_44>

In our opinion, currently the MAR EAMP thresholds defined as per Art. 17(2) para. 2 are set at a rather low level and the compliance burden of keeping an updated insider list for EAMPs is unduly high. Please also see our responses to questions Q13, 40 and 42.

<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>

We refer to our response to Q40 and 42.

<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>

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<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>

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<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>

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<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>



We refer to our responses to Q40.

<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>

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<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>

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<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>

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<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>

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<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>

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<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 persons closely associated with PDMRs, including any benefits and downsides.



<ESMA_QUESTION_CP_MAR_55>
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<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>
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<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>
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<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>
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<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>
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<ESMA_QUESTION_CP_MAR_59>

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

<ESMA_QUESTION_CP_MAR_60>
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<ESMA_QUESTION_CP_MAR_60>

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

<ESMA_QUESTION_CP_MAR_63>
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<ESMA_QUESTION_CP_MAR_63>

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

<ESMA_QUESTION_CP_MAR_64>
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<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>
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<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>

Whilst we have no comments on the establishment of a framework for cross-market order book surveillance, in our view, data harmonisation is of crucial importance for all market participants and will significantly reduce the cost of market abuse surveillance for firms.

Most commodity trading firms are active in more than one market and trade on more than one trading platform (Regulated Market, MTF or OTF). The data feeds provided by the different trading platforms differ significantly, because these platforms use their own, non-harmonised data feeds. Commodity trading firms face difficulties in receiving, transforming and harmonising the required data into their own data systems and standards. Market participants have to employ substantial and costly efforts to put the received data into a meaningful, single data format appropriate for their own controls and systems for market abuse surveillance. Therefore, we suggest introducing minimum harmonisation requirements for data necessary for market abuse surveillance tasks. We are ready to contribute to the development of such a unified data standard and consider that such a standard will reduce costs and increase efficiency for everyone in the market.

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

<ESMA_QUESTION_CP_MAR_69>
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<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>

We agree with the preliminary views of ESMA that there is no need to modify MAR in this respect at this stage.

However, we would like to point out that, at the moment, operators of a trading venue (exchanges) still have their own rules on market manipulation, to which market participants have to adhere when they onboard an exchange. Consequently, exchanges can impose fines on market participants when they are in breach of these rules. In some cases, this could result in both exchanges and financial regulators fining a market participant for the same behavior under exchange rules and under MAR. The reason is that exchanges have to send a suspicious orders and transactions report (STOR) to their financial regulators in case they spot potential market manipulation by market participants (see Article 16 (2) MAR). We appreciate that exchanges should have the ability to deal with market manipulation cases and should not be left to guess whether the regulator would step in. However, we believe that market participants should not be fined several times for the same behaviour. This 'lottery' of dual sanctions issued by exchanges and regulators is not fair for market participants, and exchanges and regulators should be prevented from imposing fines at the same time for the same behaviours. For example, 'unintended' and 'minor offences' could be left to the exchanges to fine. This would leave the more serious incidents to regulators to investigate and sanction and, at the same time, it would give market participants some clarity as to what they can expect with regard to sanctions.

<ESMA_QUESTION_CP_MAR_70>

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

<ESMA_QUESTION_CP_MAR_71>

We believe that the cross-border enforcement of sanctions can become a burden, especially in the case of cross-market manipulations. In such cases, several financial regulators may find sufficient evidence to investigate attempts, as well as successfully executed market manipulations. In power and gas markets, the additional involvement of ACER and the relevant energy regulators could be expected. In addition, for certain market manipulation behaviours the antitrust authorities are entitled to impose fines as well. Therefore, it is important to define clear rules and procedures, which establish one leading authority for each individual case. This would ensure that attempts, as well as successfully executed market manipulations, will be investigated and sanctioned only once.

<ESMA_QUESTION_CP_MAR_71>