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Dear Sir or Madam

RE: CONSULTATION PAPER- MAR REVIEW REPORT

The Investment Association welcomes the opportunity to respond to ESMA's consultation paper.

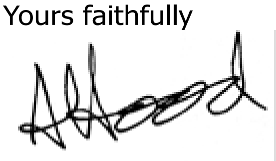
The Investment Association represents the UK asset management industry. Our members manage over £7.7 trillion in the UK of assets on behalf of UK, European and international clients, both retail and institutional. Collectively, our members make up the second-largest asset management industry in the world.

We note the areas of most significance to our members:

- The proposed extension of scope to include spot FX contracts – we suggest that this not go, but that the FX Global Code of Conduct is resolving most of the identified issues in this area.
- The definition of inside information needs to be made more clear
- Market soundings regime needs some improvement, particularly around communications which do not result in a market announcement, and cleansings
- And the application of MAR to listed CIUs should be amended, and the identified issues dealt with through the more targeting regimes under the UCITS Directive and AIFMD.

Below, we have provided our responses to the questions raised in your paper.

Yours faithfully



Adrian Hood

Regulatory and Financial Crime Expert

SECTION 3: SCOPE OF MAR

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

No, we see no overriding need to extend the scope of MAR to include spot FX contracts: spot FX is so liquid that there is limited scope for inside information; and its global nature would mean that the imposition of EU rules may be ineffective, or detrimental. The wide-spread adoption of the FX Global Code of Conduct would render any such extension, to a large extent, redundant.

The nature of the issuer in this context is problematic. If you think of the issuers of currencies as governments, then the likelihood of companies having inside information is small. Changes to MAR would not capture the misuse of inside information by governments.

We suggest that the Code, as an appropriately targeted regime, achieves the desired ends, without incurring the difficulties and expenses identified. As the Code is currently under review, and will be finalised in 2020, any changes that are deemed necessary would better be implemented through this means.

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.

We note, and agree with, the difficulties identified by ESMA should the scope of MAR be extended. As spot FX is not a MiFID financial instrument many systems and considerable infrastructure is not in place. The spot FX market is mostly

OTC with price determination driven by bilateral interaction rather than supply and demand on lit venues, the market does not lend itself to being scoped into the MAR regime.

It would also be necessary to provide a tailored definition of inside information for spot FX contracts. There should also be greater clarity on which currencies would be in scope: should scope be limited to products traded on EU venues – if not, if could catch any spot FX traded anywhere in the world.

We would not support the wholesale application of MiFID requirements to the spot FX market. If MAR is to be applied to the spot FX market then it would be better to apply it in a similar way as is done for spot commodity contracts.

We note that the UK FEMR had recommended applying some of the key features of the current MAR-MiFID II scheme to the spot FX market (particularly sanctions for abusive behaviour, record-keeping obligations for firms, the obligation to report suspicious transactions and orders). There should be no need to apply the MiFID II trade and transaction reporting regimes to the spot FX market.

These would be disruptive to the market and expensive to impose. This would be a huge operational task for currently regulated firms, but an even greater one for unregulated market participants and it is unlikely that all non-regulated entities would be capable of investing in the relevant operational requirements/ systems. Many unregulated entities trade spot FX but nothing else.

Firms could also find it difficult to identify those contracts that impact on financial market transactions, and may change their behaviours, in a non-ideal way, as a result.

Even if features of the current MAR-MiFID II scheme were to be applied to the spot FX market, many of them would need to be carefully tailored to the market, adopting and adapting as necessary. A small scale trial, initially, in a deep and liquid section of the market might be a practical first step, to ensure that any proposed changes are effective, and not counter-productive.

Also, given the size and speed of the FX market, extending MAR in this way would impose considerable burden on the NCAs, who would responsible for monitoring it effectively.

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?

The analysis appears sounds and thorough. It makes sense that benchmarks are regulated, but other aspects of market abuse regulations are less relevant.

We note that the scopes of the two regulations are very nearly contiguous, there are minor non-overlapping elements. While it would, in an ideal world, be resolved by bringing the definitions into line, this would be difficult in practice.

There will, in practice, be few, in any, benchmarks which are used in a way which will be caught in the scope of BMR, but not in that of MAR (we are not aware of any). We would be greatly surprised if leaving the definitions out of line had any real world practical consequence. It would seem most unlikely that any actual or attempted market abuse were tailored so precisely as to fit through one of these theoretical loopholes.

Definition of 'benchmark'

While it is notable that the two different definitions are carefully tailored for the purposes of their Regulation, and we consider that it would be difficult to amend them to bring them into line, without adversely affecting one, or both, Regulations, the discrepancy between the definitions of a benchmark in the two pieces of regulation risks creating a gap.

As mentioned in the ESMA consultation paper, the current definition of a 'benchmark' in MAR excludes "an index that is used to measure the performance of an investment fund", which is included in the definition of the same term per the BMR. As we agree on the merits of including benchmark administrators and benchmark contributors within the scope of the MAR (insofar as not already in scope), we wish to prevent a situation whereby a benchmark administrator or contributor remains out of scope of the MAR if they only produce benchmarks which are used to measure the performance of investment funds. While, in practice, this may capture a small sub-group of the total number of benchmark administrators and/or contributors, this is a definitional gap worth addressing, by including 'indices used to measure the performance of investment funds' into the MAR definition of benchmark.

'Manipulation of benchmarks'

There is no good reason to limit 'manipulation of benchmarks' under MAR solely to "behaviour which manipulates the *calculation* of a benchmark" [emphasis added].

Given that BMR wording aimed at addressing manipulation of benchmarks makes reference to MAR (including "any conduct… that may involve manipulation or attempted manipulation of the benchmark under MAR"), it would make sense to retain a consistent scope for this term across both regulations.

We suggest that the wording relating to 'manipulation of benchmarks' under MAR is phrased in the same way as under BMR by referring to "behavior which involves manipulation of a benchmark".

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?

Yes. The scope should be amended to include benchmark administrators and supervised contributors.

The wording should be aligned with the regulatory framework developed in the BMR.

Further consideration should be put into determining whether it would be practical for the sanctions regime to apply to recognised third country administrators and endorsing entities for third country administrators.

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?

Yes. This power should be extended so that it covers benchmark administrators that are not regulated firms.

Further consideration should be put into determining whether these powers should apply to recognised third country administrators and endorsing entities for third country administrators.

We would also propose that NCAs should have powers to suspend or require the recalculation of benchmarks, although this may be more appropriately incorporated into the Benchmark Regulation.

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?

We consider that the scope of administrative sanctions and measures should explicitly include submitters and assessors, as well as those discharging managerial responsibilities for them, if different.

SECTION 4: ARTICLE 5 MAR- BUY-BACK PROGRAMMES (BBPS)

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

Yes – we see considerable value for issuers in reforming the reporting mechanism.

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.

No comment.

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.

No comment.

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

No comment.

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

No comment.

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

No comment.

SECTION 5: ARTICLE 7 OF MAR – DEFINITION OF "INSIDE INFORMATION"

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?

Many firms have noted that there is definitely a lack of clarity. It can be difficult in many cases to establish whether or not something is inside information. Most Investment Management firms will take a cautious approach. This has led to a marked increase in the need for external advice from lawyers and brokers

The main areas are pinpointing when something is *precise* (e.g. internal or external investigations, board changes, disputes regarding key contracts, declining financial performance not within the sphere of insolvency, transactions such as M&A or joint ventures) and when something is *likely to have a significant effect on price* (financial results in line with market expectation, non-financial developments such as ESG/corporate governance failings).

Another area where more clarity from ESMA would be helpful relates the phrase "*reasonably expected to come into existence*". For example a communication, deemed by the issuer to not include inside information, may disclose intentions on the size and pricing for a potential capital raise but make no mention of the timing when a capital raise might occur. In such a scenario there should be an explicit obligation on the issuer to assess when this intermediate step towards a capital raise is precise enough to be deemed as inside information and to communicate the conclusion of that assessment to the receiving party.

While it is important that the regulations do apply high level rules, so that they can be interpreted appropriately in different market sectors, inconsistency in approach by different market participants on similar fact patterns (with some being more cautious than others) can lead to an un-level playing field in the markets in question.

An example of this would be when establishing whether loan documents, such as facility agreements and term sheets posted to the public side of loan data sites, are considered material non-public information (MNPI) in respect of issuers with financial instruments admitted to trading.

Further clarity is required around 'cleansing' of inside information (i.e. the point when information ceases to be inside information). Specifically, on 'cool off periods' and their application: confirmation that a firm would not be construed to be trading on the basis of insider information if it trades immediately after the public release of the cleansing statement where the broader market may not have had sufficient time to digest that information would be helpful.

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

Generally yes, the current definition is sufficient, as long as it is interpreted pragmatically, predictably and in accordance with the intentions of the Regulation.

However, the lack of certainty over what types of information would be inside information and at what point they become so, has created difficulties for legitimate transactions, as market participants are concerned that they might be insider dealing.

The absence of a concept of 'legitimate activity' in Article 9 in circumstances where the only inside information one has is knowledge of the fact of a counterparty's intentions is also problematic. For example if it is inside information that a shareholder is selling down their stake and they agree a bilateral transaction following a market sounding, the purchaser has inside information about the seller's intentions and has no legitimate behaviour to rely upon (whereas the seller could rely on the fact that they are carrying out their own intention to deal (Article 9(5))).

We would strongly object to any suggestion that there should be different definitions for inside information in different circumstances, or for different purposes, such as, for instance, for market abuse and disclosure requirements. This could only lead to confusion and chaos.

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?

We are not aware of any.

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?

No comment.

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?

The current balance between disclosure by commodity producers, and their ability to act commercially seems reasonable.

Our members have reported that they see little benefit in this practice for investors in this market.

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

No comment.

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?

Article 7(1)(a) references inside information being information which has not been made public. The requirement for information to be disclosable in the market is an important one in MAR, as without it there is a risk that market participants become unable to trade where they have information, but with limited prospect of being cleansed by an announcement. However, information in the commodity derivative market is unlikely to be made public'.

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

While front running can be an abuse of inside information, it is more likely to be a failure to meet obligations towards a client and is better dealt with in that context.

Our members consider that there are no clear signs of market being abused, so no need for change. The problems identified are adequately covered already both by MAR and conduct obligations under Article 24 of MiFID.

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

No.

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?

Using RFQs bilaterally or through electronic platforms is a common way our members seek to deal in fixed income products. Market participants' handling of this information is, therefore, of crucial importance and a pre-requisite to avoid front running or market abuse, and to protect the integrity of the financial market and to enhance investor confidence. We therefore welcome ESMA's discussion on the subject of pre-hedging and encourage ESMA to publish clear guidance on the matter.

RFQs can meet the definition of inside information, particularly where the size and direction of the trade are disclosed, which would normally be the case. Such information could not be "public", so it should not be used, by the broker, to trade.

The justification that such pre-hedging is for risk management purposes is strange. Not only would the broker not have taken on any risk at the time that it does this, but this would not, in any way, prevent the behaviour from constituting market abuse or front running. There is no 'risk management' exemption in MAR, and nor should there be.

One of the arguments for keeping the practice is that there are 'benefits to investors' as prices can be improved where risk is hedged. Our members are not aware of any evidence for this in practice, and many consider that it is actively detrimental. Both the information leakage, and the cumulating multiple price impacts of all RFQ'd brokers pre-hedging are all disadvantageous to the investor's interest.

We would encourage the Commission to make amendments to MAR, or ESMA to publish guidance, to make clear that this practice is prohibited. We would also support the production of guidance from ESMA as to what behaviours are acceptable for broker in receipt of RFQ information, so that they may carry on with their legitimate price quoting function.

If such pre-hedging is to be allowed to continue, it is important that an appropriate assessment if conducted to determine whether this 'benefit' is real.

Clear additional guidance from ESMA would be necessary, setting out how and when brokers can differentiate between pre-hedging and potential front running, or even mere inadvertent price movement.

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

Our members are not aware of any evidence for this in practice, and many consider that it is actively detrimental. Both the information leakage, and the cumulating multiple price impacts of all RFQ'd brokers pre-hedging are all disadvantageous to the investor's interest.

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

Pre hedging is not instrument specific and covers all financial instruments and markets.

SECTION 6: ARTICLE 17 MAR- DELAYED DISCLOSURE OF INSIDE INFORMATION

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.

The conditions seem appropriate. If applied appropriately they are suitably onerous, and issuers should only rarely be able to fully justify any delay in disclosing inside information.

The default position should remain that issuers disclose any inside information as soon as possible. Delays should be the exception, and only permitted were all the conditions set out in Article 17(4) are met.

We are concerned over the interpretation of Article 17(4)(b): that delay of disclosure must not be likely to mislead the public. This requirement is particularly onerous, as part of the definition of inside information is that it is information that a reasonable investor would be likely to use as part of the basis of their investment decision. However, the ESMA Guidance (ESMA/2016/1478) states that delayed disclosure of inside information is likely to mislead the public if the information is materially different from a previous public announcement of the issuer on the matter to which the inside information refers. This would not include situations were market expectations will not be met, but that the expectations were not based on signals from the issuer.

We consider that if the issuer has inside information that contrasts with such market expectations, then delays in disclosure are likely to mislead the public, and so should be disclosed. Such misleading, albeit by omission, should not be allowed. No delay in disclosure in such circumstances should be permitted.

If this grey area is not closed down, it risks fostering divergent approaches between issuers, with some discouraged from making use of this practice at all, while others are likely to engage much more widely in it. If the purpose of MAR, and of this MAR review, is to create, and enhance the functioning of, a level market abuse framework across Member States, then this provision needs to be clarified in a way that provides practical guidance to issuers wishing to make use of Art 17.

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.

We would be very interested in the outcome of the ESMA analysis mentioned in paragraphs 114-115, and whether issuers are fully appreciating the need to meet all three of the conditions when deciding to delay disclosure.

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?

The proposal seems eminently sensible. It is important that any such systems and controls are proportionate, but adequate for the purpose. This should be aligned with the FCA's Listing Principle 1 and Guidance in LR 7.2.3 G.

It is unclear how this provision should apply to issuers technically within MAR scope (with regard to the prohibitions) but which has not consented to, and/or is not aware of, the trading of their instruments on an EEA trading venue and therefore not subject to the disclosure requirements.

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

No comment.

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.

We consider that this interpretation of the Regulation has constituted a significant breach in its ability to fully achieve its aims.

Any issuer which has decided to delay the disclosure of inside information, should be required to notify its NCA of this fact once the information is no longer inside information, whether this is due to its disclosure, its having lost its price sensitivity, or for any other reason.

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.

No comment.

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.

No comment.

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.

No comment.

However, we would be concerned if firms were experiencing the problems identified in paragraph 134(a) without paying appropriate regard to the requirement that delays in the disclosure of inside information do not mislead the market.

SECTION 7: ARTICLE 11 MAR- MARKET SOUNDING

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

While we have, in the past, interpreted Article 11 as an optional safe harbour, rather than as an obligation, we would support any action which increases the onus on DMPs to comply with the standards set out under Article 11, including the related level two regulations. Consistency and clarity is highly desirable in this, as in many other, areas.

However, we are concerned that, if Article 11 is made compulsory, there may be implications for MSRs should a DMP breach their obligations. Would, for example the MSR be expected, or required, to submit a STOR?

It is notable that Recital 35 of MAR states that there should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information. As such, we would suggest that the mere fact that the DMP fails to comply with their obligations under Article 11 should not impose any reporting obligation on the MSR.

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?

No comment.

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?

We understand that it is not unusual for brokers to approach Investment Management firms in order to discuss ideas and potential opportunities where they have received no mandate from an issuer. These brokers do not approach under MAR market sounding guidelines and may confirm that they do not believe that there are any concerns regarding inside information as they are not working on behalf of an issuer. Investment Management firms receiving such approaches are likely to treat such approaches with caution and try to determine the broker is actively pitching or in discussion with the issuer. Unless these are specifically ideas that the broker has come up with independently, it can be difficult for the Investment Management firm to assess whether or not there is an MNPI concern.

We are aware that brokers may approach investment management firms at an early stage in what might lead to an issuance of debt. They consider that there is insufficient certainty regarding any eventual deal, so do not treat such conversations as market soundings. Should such fixed income 'early look' communications be in scope of the market sounding regime? DMPs do not currently consider them to be so.

Brokers' market sounding cleansing statements may be selectively disseminated via Bloomberg to the MSRs contacted, or via offering memorandums disclosed to MSRs only via NetRoadshow. The brokers and the market are treating such disclosures as a form of public announcement. Any selective dissemination causes difficulties for the buy-side in determining whether or not they are fully cleansed.

We consider that it should be clear that all the stages are subject to the market sounding regime.

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?

We consider that it is extremely important that the market sounding regime covers all communications that are intended to result in a transaction which would require a market announcement. The cancellation of the intended transaction, following the market sounding, should not, retrospectively, remove the protective effect of, or the requirements for, the market sounding regime. However, there should be a real, initial, intention for the communications to result in a transaction. Firms should not be able to use a 'phantom' transaction as a fig leaf to exempt them from their obligations when communicating with buy-side firms.

The definition in Article 11(1) should be amended so that it starts as follows:

> "A market sounding comprises the communication of information, as part of a process which, if concluded, would require an announcement prior to the announcement of a transaction…"

If the proposal to extend the market sounding regime was extended to also cover communications never intended to be followed by an announcement, the regulations should clarify the obligations of the DMP to ensure that the DMP should:

- confirm to the MSR whether the communication amounts to market sounding before any information is disseminated. Absence of explicit DMP confirmation could lead to confusion on assessing whether the DMP is acting under a mandate from the Issuer and whether there is any inside information.
- be required to maintain records of information disseminated and the materiality assessment of the inside nature of the information.
- retain the responsibility for cleansing strategy for communications including where the communications results in no transactions irrespective of whether or not a transaction was contemplated at the onset.

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?

The application of the market sounding regime can be particularly tricky in the fixed income space, where there seems to be more varied interpretation applied by DMPs as to when a sounding is taking place (i.e. not considered there to be inside information, and therefore no sounding, until quite late in the process, and sometimes not at all). This relates to the 'early look' concept as mentioned in Q 35.

MSRs are happy to get the DMP standard set of information (as set out in Article 3 of Commission Delegated Regulation (EU) 2016/960) in an accompanying email – it is not necessary to run through all the detail in the phone call.

It would be helpful if DMPs provide the MSR with an exhaustive written list of the documents and the type of information they plan to share and make reference to this in the cleansing statement to explain why the information is no longer material.

Cleansing seems to be fairly frequently forgotten, or it may be ambiguous where the raise has failed, as MSRs may only receive a private cleanse (i.e. e-mail to the MSR, but nothing to the market). It would help Investment Management firms if there was a more explicit requirement to notify cleansing publicly, even if the DMP no longer intends to go ahead with the transaction.

MSRs should be able to rely on a cleansing notice from the DMP unless there are any reasons not to: it should be framed as a rebuttable presumption.

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)?

In instances where DMPs consider the sounding includes inside information, is there a need for recipients to independently assess and log a separate assessment? MSRs should be able to rely on this positive assessment, if they confirm that they agree to treat the information as inside information.

SECTION 8: ARTICLE 18 MAR- INSIDER LIST

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

Yes, we consider the maintenance of insider lists by issuers and those acting on their behalf as DMPs to be vital to enable regulators to track who know what when.

Given the sensitivity of inside information it is of the utmost importance that firms in possession of it are able to keep track of it, and of any individual who has knowledge of it.

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

Yes. Only those individuals who actually are aware of the inside information should be included on the insider list. While it may be simpler for a firm to merely include everyone on the list, this would prove useless for the NCA, or as a control for the firm, in practice.

We would object strongly to any proposals to water down such controls. Any reversion to previous standards would be an unjustifiable backward step.

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?

The maintenance of events-based insider lists (as opposed to permanent insider lists) would go a long way towards meeting such a request, provided they are subject to robust governance by the first and second lines of defence, are readily accessible and archived.

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.

We would not object to the scope of the requirement extending to those performing tasks which may lead their coming across inside information, such as auditors and notaries.

It should be noted that MSRs are not acting on behalf of or on the account of issuers. As such, the requirement to maintain insider lists should not be extended to them. However, it is noted that DMPs must record in their list the details of persons who they market sound, and (under the ESMA MAR Guidelines: Persons receiving market soundings) MSRs must keep records of the persons working for them performing tasks through which they have access to the information communicated in the course of the market soundings, listed in a chronological order for each market sounding.

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.

If the permanent insider list is to be maintained, then it is important that it is used appropriately. As ESMA states, it should only include those individuals who actually have, as a matter of fact, access at *all times* to *all inside information*.

It should not be used as a convenient blanket to cover all those who may, from time to time be aware of the inside information held by the firm, or those who have access to the information, but may never make use of that access.

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

While this does not seem unreasonable, if the proposed approach is to be taken, then it should be made clear that:

- This is an option that the issuer can take if it chooses, but that it could continue, as presently required, to include all individuals at firms acting on its behalf, on its insider list;
- That the issuer should have access, at all times, to the insider lists maintained by those acting for it, and should provide such access to its NCA;
- That the responsibility for the accuracy of the insider lists maintained by those acting on behalf of the issuer, remains with the issuer.

We would be concerned if this proposal were to undermine the principle of the insider lists including all of those persons who have access to inside information. In light of the responsibility for the accuracy of such insider lists remaining with the issuer, it is difficult to see how, in such circumstances, it can be maintained and monitored effectively.

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.

No comments.

SECTION 9: ARTICLE 19 MAR- MANAGERS' TRANSACTIONS

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?

No, this threshold should not be increased. This is an important market transparency and governance control. The market, and investors in an issuer (those who own the issuer), should be informed of any transactions by the PDMRs of those issuers.

This disclosure is a key control over conflicts of interest and the governance of issuers, which should not be watered down for the administrative convenience of those to whom the issuer's owners have entrusted their management.

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).

No. We would oppose any increase in the threshold.

Those to whom the management of issuers has been entrusted should be entirely clear and transparent in their dealing in the shares, and other financial instruments, of those firms.

We consider the option for Member States to increase the threshold to €20,000 to be unnecessary, and if it is to be used, there should be more stringent justification than is indicated to be the case by paragraph 192 of the ESMA consultation.

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

As we would oppose any increase or relaxation of the reporting threshold we would not welcome alternative criteria.

We understand that alternative criteria may be suggested, and that it may be suggested that certain types of transactions (passive transactions, gifts, inheritances etc.) should be exempted, but we consider that it is important that the system be kept as simple as possible, and that these transactions would, regardless, provide the market with valuable information about the holdings in the issuer of the PDMR.

Any proposal that, once PDMRs have passed the initial €5000 threshold, that they should also be able to not report small transactions would be objected to.

Firstly, on the grounds that this would add complexity to the system, secondly, as the owners of issuers should be aware that PDMRs are engaging in numerous minor transactions, and thirdly, as it may provide an unwelcome loophole for PDMRs to continually trade in amounts just below the de minimis threshold.

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

No comment.

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

No.

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.

Yes. We strongly support the maintenance of these threshold. It avoids the possibility of numerous unintended consequences which would otherwise be possible, and we agree with ESMA that the threshold is functioning well, with no issues having been raised with regard to it.

This amendment to MAR was added to avoid the unintended consequence of preventing PDMRs from investing in Collective Investment Schemes ("CIS") for fear that they may inadvertently incur an obligation to report, when they are not aware that the CIS holds a small proportion of relevant financial instruments. The introduction of a 20% *de minimis* provision in the level one text avoids this being likely to happen.

The introduction of a *de minimis* holding level of 20% for CIS is an objective compromise and reflects the requirements placed on UCITS pertaining to investment concentration in Article 52 of Directive 2009/65/EC as amended by Directive 2014/91/EU.

If every unit in a UCITS that invests in the equity or debt of an issuer is said to be related to the share or debt, then it must discourage any PDMR from investing in UCITS. The PDMR will have a direct economic exposure to the UCITS and will of course know its name. But the PDMR cannot ask before purchase whether the UCITS has any holding in the issuer. The PDMR will not be given non-public information, so the PDMR may see the issuer is not in the top 10 holdings, or in the last statutory report – which will no longer be current – and unless the UCITS holds a disclosable amount of equity in the issuer (under the Transparency Directive), it is unlikely that the PDMR can tell whether the UCITS has a holding in their issuer at that time.

Accordingly, there needs to be a reasonability test. Specifically, PDMRs should only have to report their holdings in relevant CIS where it is reasonable (or possible) for the PDMR to be aware of this.

We are also concerned about the implications of Article 10(2)(n) of the Commission Delegated Regulation (EU) 2016/522. This requires PDMRs to notify the issuer of any transaction executed by the manager of an AIF in which the PDMR has invested.

The PDMR is not going to be aware of any such internal transaction by the AIFM. We note above that any collusion by the PDMR and CIS manager should still be subject to prosecution for market abuse. This provision is unworkable unless enhanced with a knowledge provision. It also does not seem to be limited to situations where the manager of the AIF execute transactions in the financial instruments issued by the firm for which the PDMR is a manager.

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?

No. We are not aware of any such alternative system.

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?

No comment.

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

No comment.

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.

No comment.

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.

Such an extension to any type of financial instrument would seem reasonable. This should include units in collective investment undertakings which may have exposure to the instruments of the issuer.

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.

It should be made clear that the PDMR is not restricted from buying or selling units or shares in CIU, as defined in Article 19(1a).

The application of the Article 19(12) to employee share schemes (e.g. Share Incentive Plans and Save As You Earn plans) is unclear and could be clarified.

SECTION 10: MAR AND COLLECTIVE INVESTMENT UNDERTAKINGS (CIUs).

We consider the inclusion of listed open-ended Collective Investment Undertakings (CIUs), such as UCITS, in the scope of MAR to impose overly onerous provisions on such CIUs, without there being any demonstrable need for their inclusion, from a market abuse standpoint.

It should be made clearer that all of the proposals set out in Section 10 would only apply to listed CIUs.

We have seen no evidence of market abuse being committed in relation to listed open-ended CIUs. Given the diversified nature of open-ended funds, we would consider the incidence of inside information in the context of such funds to be rare, and the proposed issuer provisions, therefore, to be too onerous.

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.

Yes, listed CIUs should be differentiated from other issuers in terms of their being subject to PDMR obligations, disclosure of inside information and insider lists. Application of these provisions to listed CIUs is disproportionate relative to both the size of the market that is thus inadvertently captured and the degree of market abuse risk to which listed CIUs are vulnerable: it should therefore be avoided.

Appropriate controls can be put in place via the UCITS Directive or AIFMD.

Inadvertent consequences

The current interpretation of the scope of MAR results in it applying not only to all EU-domiciled listed CIUs, but also to all offshore-domiciled CIUs that have been listed on EU MTFs or OTFs. Such a listing may have happened without the intention, consent or knowledge of the issuer of such CIUs, and it is not controllable or preventable by those issuers.

There are close to 7,000 exchange-traded funds (ETFs) issued globally. Most of these CIUs will be domiciled outside the EU. These proposals therefore risk having unintended consequences for a much larger universe of offshore-domiciled funds and issuers, than the number of issuers intended to be captured by the MAR.

Such unintended consequences have never been the purpose of the Regulation, which should remain proportionate to the functioning of the EU market.

Degree of market abuse risk

The degree of market abuse risk in the listed open-ended fund space is extremely small, due to both the diversified nature of open-ended funds, and the controls that the fund and management company boards of listed CIUs are subject to by their listing venues and their local regulators.

The open-ended nature of such funds, coupled with most of these vehicles being passively managed, makes the incidence of inside information extremely rare, which, in turn, vastly reduces the risk of market abuse, as there is little to no inside information to act on.

Any residual market abuse risk is being addressed and minimised through the controls which fund and management company boards are subject to at a corporate level, and/or through their listing venues and local legislation. These provisions address personal account dealing, transparency of disclosure, and conflicts of interest in general, and in practical terms address most of the concerns identified in the ESMA consultation paper.

For example, under the Irish market abuse law, Irish fund boards are required to maintain, where necessary, deal specific or project insider lists. In addition, the funds require their Directors to notify the funds of all transactions carried out on a discretionary basis, either directly or indirectly for the benefit of a Person Discharging Managerial Responsibilities ("PDMR") (i.e. Board members) or a personal close associate of a PDMR (i.e. spouse or dependent), in relation to shares issued by the funds. Such notification shall be required to be made to the company within 24 hours of the transaction being executed and, as required by the regulations, such transactions will be made public via RNS within 3 days of such transaction.

As a reflection of the comprehensive nature of these local provisions, some fund boards have voluntarily resolved not to trade in the shares of the funds whose boards they sit on.

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.

While we note that ESMA's preliminary view is that there are grounds to consider that MAR should explicitly apply PDMR obligations to CIUs and their management companies we would reject some of the conclusions reached by ESMA.

Management companies are separate legal entities to funds and should be viewed akin to third-party providers. Funds appoint management companies to oversee the day-to-day running of the funds. Management companies are accountable to the Boards of the funds which appointed them.

Most (if not all management companies) are regulated in their home jurisdiction and as such are, on an ongoing basis, subject to increased scrutiny from their local competent authorities: in particular around 'conflicts of interest', 'outsourcing', 'related parties' and transactions being at 'arms-length'. Therefore, an additional layer of provisions would not be helpful or provide added value in terms of reduced market abuse risks. Rather, given its current scope, the proposals would serve to capture far more issuers than its originally intended scope.

The PDMR obligations would increase the burden on NCAs for little benefit and also could mislead the public if they are directly following transactions without adequate information as to the PDMR's rationale for dealing.

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

We are concerned with some of the difficulties inherent in the proposals for applying the regime set out in Article 19 of MAR to CIUs. Nor are we clear as to the existence of any actual need for the disclosure regime to be applied in such a way. There is a risk that an onerous and ill-adapted application of disclosure rules designed for listed companies will impose considerable unnecessary bureaucratic burden and expense on CIUs, to no real benefit.

Before any such application is taken forward there should be a proper review of whether there is, in fact, any mischief which needs fixing, within listed CIUs. If any such is identified, then a properly calibrated disclosure regime should be designed following discussion with CIUs, fund management companies and depositaries.

ESMA should also consider, as part of this analysis, whether their proposals are already captured through either the local regulatory or exchange listing provisions that listed CIUs are subject to.

If no mischief is identified, then the status quo should be maintained, with the controls already existing within the UCITS Directive and Commission Directive 2010/43/EU being maintained and suitably enforced.

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.

Following my answer to Q60 - which recommends that the need for any such obligation be properly reviewed, before, if (and only if) necessary, applying a properly tailored regime – I would note that, in line with the table on page 70 of the ESMA Consultation, the 'relevant persons' should only capture those who have 'regular access to inside information relating directly or indirectly to the CIU'.

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.

In line with our other responses, any such proposal would risk being disproportionately onerous.

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

Yes. Bearing in mind our responses to previous questions in this section, there is no reason to differentiate the scope of application between CIUs which do or do not have legal personality.

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

If, notwithstanding our earlier expressed objection to the application of this regime to listed CIUs, these obligations are to be applied, then we are inclined to agree with ESMA's preliminary analysis.

Fund management companies in the UK have adopted the view that the Article 17 obligations apply to listed CIUs, and to the fund management companies themselves, where the CIU is not a legal entity, since ESMA published its answers to Q5.6 and Q5.7 in March 2019.

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?

If, notwithstanding our earlier expressed objection to the application of this regime to listed CIUs, these obligations are to be applied, then it is hard to see why the Article 18 obligations would not apply to listed CIUs, in the same way that they would apply to any other issuer.

SECTION 11: COMPETENT AUTHORITIES, MARKET SURVEILLANCE AND COOPERATION

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.

We agree with ESMA that that ISO 20022 would be the appropriate methodology, and that XML templates should be used for trading venues to transmit order book data to NCAs.

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

No comment.

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.

No comment.

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

The proposals seem reasonable.

SECTION 12: SANCTION AND MEASURE

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.

Given the evidence identified by ESMA in their preliminary fact finding exercise, this does not seem to be necessary at this time.

It seems strange that market sounding is not within the scope of sanctionable events under MAR. While we note that member states may, if they choose to, include it within their national sanctioning powers, we consider that, in the interest of market cleanliness and harmonisation across member states, that this be required of NCAs.

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

No comment.