EuropeanIssuers

aisbl - ivzw
Rue Belliard 4-6
B-1040 BRUSSELS

Tel : +32 (0)2 289 25 70
Fax : +32 (0)2 502 15 60

info@europeanissuers.eu
www.europeanissuers.eu

EUROPEANISSUERS RESPONSE TO THE ESMA CONSULTATION ON THE REVIEW OF THE MARKET ABUSE REGULATION

General information about respondent

Name of the company / organisation	EuropeanIssuers
Activity	Non-financial counterparty
Are you representing an association?	☒
Country/Region	Belgium

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
European Issuers appreciates the opportunity to respond to ESMA' consultation paper on the MAR review.
Though ESMA raises a number of important issues we generally believe that the MAR review needs a broader approach that better balances the interests of issuers in protecting their business and the interest of investors in the full and immediate transparency.
Against this background we took the freedom to include in our response a number of issues that needs to be addressed from our perspective to improve the attractiveness of European capital markets as means of finance for listed companies. Among the issues we raise are:

- The legislator should rethink the extension of the scope of MAR to other markets then Regulated markets in order to allow junior markets to be established in environment of low touch regulation. Though most welcomed by EuropeanIssuers the SME listing package is an incomplete substitute for the junior markets that had been established before 2014.
- The legislator should seek ways to clarify (and narrow) the definition of inside information to make compliance more affordable for issuers and to better protect the possibility of delaying disclosure of issuers against abusive market practices. All the associations of EuropeanIssuers realized that the broad definition of inside information raised many problems for i) the identification of when the information becomes an "inside information" and ii) the risk to publish information not enough mature, therefore, companies must rely on the possibility to delay which is the natural counterweight of that broad definition. EuropeanIssuers has the intention to work further on the definition to be able to propose concrete solutions for better calibrating the definition of inside information. We will keep ESMA and the European Commission informed of the outcome of these internal discussions.
- The legislator should review the regime of insider lists in order to avoid overly burdensome compliance procedures and in order to grant issuers more flexibility in practice.
- The legislator should review the regime of Managers' Transactions in order to reduce bureaucracy and in order to protect the signalling value of notifications.

Unfortunately, the ESMA consultation paper offers little relaxation regarding the compliance duties of listed companies but rather tends to increase compliance problems even further in proposing additional compliance and documentation procedures with regard to the delay of the publication of disclosure and with regard to Managers' Transactions.
Even though we know that ESMA acts under a mandate of the EU Commission in that review we thus would like to encourage ESMA to support our additional points for the sake of capital market development in the EU.

Scope of application

Before answering to the questionnaire of the present Consultation Paper we would like to underline that the Consultation Paper missed an important opportunity to tackle one of the major issues of MAR regarding the scope of application which has been extended to trading platforms (MTFs) beyond regulated markets. This extension has substantially increased the level of regulation for smaller companies listed on these MTFs, as these companies now must compile insider lists, notify managers' transactions and comply with the duty to publish inside information.[1]

Many smaller companies entered those junior markets because they considered themselves not ready to cope with a more stringent regulatory environment yet and wanted to benefit from lighter and more proportionate rules. Extension of MAR to MTFs endangers the business model of some of these markets developed to attract small growing companies to capital markets.

Some simplifications have been proposed in the context of the SME Listing Package but available only for SMEs on SME Growth Markets. Though this is helpful, the key issue of the extended scope remains. We therefore advocate for excluding non-regulated markets from the scope of certain MAR provisions (especially on disclosure and insider lists).

Moreover, it would be useful to verify which kind of activity of enforcement has been put in place on MTFs by the Competent Authorities, further to the extension of the rules to MTFs. Therefore, we would suggest ESMA conducting a survey among Member States in this regard.

[1] Although many MTFs before MAR had already in place some rules on disclosure of price sensitive information. See Veil and C. Di Noia, SME Growth Markets, D. Busch a G. Ferrarini, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, p. 354 e ss

<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, we don't think there is a need for the spot FX wholesale market to be covered by the market abuse regime.

The spot FX market is mainly an OTC market where the price is not necessarily determined by the interaction of demand and supply in a trading venue. Furthermore, as already recognised by ESMA, (i) the spot FX market wouldn't fit within the MAR's framework and (ii) many of the most important market participants have adhered to the FX Global Code.

<ESMA_QUESTION_CP_MAR_1>

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

<ESMA_QUESTION_CP_MAR_2>
Yes, we agree that structural changes would be necessary. This is an additional argument not to include FX spot markets in the scope of MAR.
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_3>

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

<ESMA_QUESTION_CP_MAR_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_4>

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

<ESMA_QUESTION_CP_MAR_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_5>

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

<ESMA_QUESTION_CP_MAR_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_6>

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

<ESMA_QUESTION_CP_MAR_7>
In general, we welcome initiatives aimed at streamlining the obligations related to buy back programmes. We deem appropriate to simplify the reporting mechanism by notifying buy-back programmes only to one National Competent Authority ("NCA"). We would prefer option 2, i.e. reporting to the NCA where the issuer have requested admission to trading, because this is the only option where the issuer has full knowledge and therefore full control. Though option 3 also would reduce the number of NCAs reported to, the issuer would still have to monitor constantly what the most liquid market is. Furthermore, the NCA to report might change over time depending on whether there are changes in liquidity pools.

<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>
We also welcome a harmonization of the set of information to be provided to the NCA, as suggested by ESMA. We only ask to check if, according to ESMA proposal, there is no overlap between field 3 (i.e., trading venue transaction identification code) and field 36 (i.e., venue MIC code) and to better specify the difference between field 7 (i.e., buyer identification code) and field 12 (i.e., buyer decision maker code LEI).

<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>
We agree with ESMA's view that is much more useful for the market participants to have buy-back transactions data only in aggregate form. In particular (i) aggregate volume traded, (ii) weighted average price per share and (iii) total consideration on a daily basis best suit to satisfy the need to know of market participants.

<ESMA_QUESTION_CP_MAR_12>

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

<ESMA_QUESTION_CP_MAR_13>
Yes, issuers have identified a number of difficulties with the identification of inside information, especially due to the fact that the definition includes a number of legal terms that need to be interpreted. The experiences, however, show that the definition is too open for too broad interpretations and this causes at least two problems to issuers: 1) they face the problem that too much information may be assumed to be published too early and at incomplete stages (which is aggravated by the fact that the option to delay is far from being a safe counterweight, see Q 25). 2) Even if issuers would be able to cope with the risk of premature disclosures, assuming inside information too early will result in blocking transactions (e.g. capital increases, bond issuances), causes difficulties in the execution of employee participation schemes and in general lead to burdensome compliance efforts that are not justified in early stages of processes.

Market participants, furthermore, experienced difficulties in the coordination between the **Transparency Directive**, which objective is to inform investors at predictable time, and MAR, which objective is to disclose the inside information as soon as possible. The question is especially relevant about periodic financial information (annual and half-yearly financial statements) for which the problem arises of identifying the moment, in the protracted process, in which the information becomes "inside" and then shall be disclosed. Apart from the cases of profit warnings, for which an immediate disclosure obligation is justified and necessary to inform investors, the **MAR should not interfere with the normal process of financial disclosure and pushes into the direction of a premature disclosure** close to the regular publication date.

- Concerning emission allowances, some of our members reported that they have never experienced a single case of inside information concerning emission allowances since the first application of MAR, also because the price significance of information related to emission allowance never materially occurs, given the peculiarities of this market. Even in the remote case of significance, outages are already covered by definition of inside information and consequential disclosure obligations provided by EU Regulation No. 1227/2011 on wholesale energy market integrity and transparency ("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. Therefore, we propose to introduce an incorporation by reference to the definition of inside information provided by REMIT into the definition of inside information provided by Article 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."

We would like to underline one more issue that should be tackled under the MAR Review which concerns the information flows within the same group; according to recital 19, MAR "is not intended to prohibit discussions of a general nature regarding the business and market developments between shareholders and management concerning an issuer. Such relationships are essential for the efficient function of markets and should not be prohibited by this Regulation". Upon certain conditions - it is possible to share inside information with third parties on a selective basis (e.g. major shareholders for a capital increase). For example – under an obligation of confidentiality and organizational measures suitable to segregate inside information - if necessary for the purposes of a company decision, the directors could encourage a moment of dialogue with the main shareholders, ensuring, in any case, that the confidentiality of the information is not jeopardised and considering the need to involve the major shareholders for the decision. This is a typical example, in our view, of the "duties" that should legitimate a selective disclosure according to art. 17.8 MAR; MAR Review should therefore include a specific safe harbour for intragroup circulation of information.

<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.

Instead of seeking to extent the scope of inside information, the MAR review should concentrate on narrowing the definition to a level that can be dealt with in practice. As mentioned in Q 13, the definition of inside information is **extremely broad and comprehensive.** Difficulties raise, a. o, in relation to the **disclosure obligations,** as the "inside information" shall be published as soon as possible; however, sometimes, this information is not enough "mature" (or is "too sensitive") to be immediately disclosed to the public. A **premature disclosure** is not in the interest of the issuers (as it could harm their ability to conduct business and protect sensitive information) nor of the investors (as torrents of unreliable information could be disclosed). Furthermore, it has to be noted that the broad definition may block the issuers' ability to raise capital or to execute employee participation schemes.

The current definition of inside information is largely built upon the MAD's definition; however, the move from a "directive" to a "regulation" did not allow **certain practices which were in place at national level to solve the problem of the premature disclosure**[2], leaving issuers in a difficult situation.

Issuers may still (as under MAD) **delay the publication** of inside information according to article 17; however, as we explain in Q.25 below, certain difficulties arise.

[2] J. Lau Hansen, Say when: when must an issuer disclose inside information? "Nordic & European Company Law", n. 16-03, June 2016; p.7

<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.
<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.
<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>
The regulations are extremely binding, but the current balance does not put at risk companies in undertaking hedging transactions.
<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>
No difficulties have been encountered.
<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>
Article 7(1) (b) of MAR must be kept separate from the definition set forth in Article 7(1) (a).
<ESMA_QUESTION_CP_MAR_19>

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

<ESMA_QUESTION_CP_MAR_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_20>

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

<ESMA_QUESTION_CP_MAR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_21>

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

<ESMA_QUESTION_CP_MAR_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_22>

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

<ESMA_QUESTION_CP_MAR_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_23>

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

<ESMA_QUESTION_CP_MAR_24>
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>
The delay of disclosure, which should be the solution not to prematurely publish inside information, creates certain problems in practice:

i) the first one is linked to the "**function" of the delay in the MAR**. Already the MAD has created a legal setting where the possibility of delaying the publication of inside information must be regarded as the natural counterweight to a rather broad definition of inside information (which is the same both for the market abuse prohibitions and for the duty of disclosure). We believe that **it should be clarified at European level that the activation of the delay mechanism should be considered as a logical counterweight of the current definition of inside information**.

ii)

This has not changed with the MAR, but what has changed is that **ESMA consider the delay as exceptional[3].** However, this is neither clear from the level 1 text nor it is reasonable from a broader perspective. As the legislator in the MAR, like in the MAD, has opted for a **rather broad definition of inside information** (covering both the market abuse prohibitions and the duty of disclosure), **the delay should be regarded as the natural counterweight to protect the legitimate interests of the issuer**. **This should be clarified in level 1.** M&A transactions may serve as a perfect example: they cannot take place without the option of delaying the disclosure of inside information; and this is, by the way, also in the interest of investors;

iii) the second problem is linked to the fact that **issuers must react to rumours**. ESMA's interpretation of this provision is that the leak of the rumour has not to come from the sphere of the issuer in order to trigger the duty to disclose the inside information[4]. This wide interpretation creates a massive problem for issuers. They always face the risk that a legitimately delayed information must be disclosed prematurely because of abusive rumour spreading. The review could address this problem by **clarifying that the leak must stem from sphere of the issuer** and, **if it does not, a no comment policy** will still be possible; **alternatively or additionally** the level 1 text should be amended in order to clarify what

constitutes a rumour that is **"precise enough**" to lead to immediate disclosure. This should be the case when it contains the most significant details of the delayed inside information and – in at the same time – does not contain wrong or misleading information.

iv) the third problem is related to the **condition stating that the delay should not be "likely to mislead the public"**. As stressed in the ESME Report[5] and by other authors[6], this condition - taken literally - it is almost impossible to comply with, because "the definition of "inside information" per se implies that a reasonable investor would use it as a basis for her decisions: thus, any delay in the dissemination is almost by definition misleading and it is very difficult to think of a circumstance in which delay would be permissible under this test". This condition, therefore, **should be deleted or "modified** in order to allow companies to trust on a **safer legal basis** when they decide to disclose negotiations when they can be confident, with a sufficient degree of certainty, that a positive outcome is reached"[7].

v) finally, concerning the condition of the "prejudice of a legitimate interest of the issuers" ESMA's guidelines remain overly restrictive. The **removal by ESMA of "impending developments that could be jeopardized by premature disclosure" from the list of illustrative examples** is unhelpful to issuers. As a result, issuers may assume that impending developments are incapable of constituting a legitimate interest justifying delayed disclosure. Therefore, we think that the case of "impending development should be re-inserted.

[3] ESMA Final Report /2015/1455, § 172. However, the Italian competent authority (CONSOB) in its guidelines tends to consider the delay as "physiological". In Italy, in 2018, there were 362 delays (versus 3-4 before the introduction of MAR) many of those delays are linked to extraordinary operations or periodical financial information.
[4] ESMA Final Report /2015/1455, § 243.
[5] See Esme Report, Market Abuse EU legal framework and its implementation by Member States: a first evaluation.
[6] The Law of Capital Markets in the EU, Sergakis, 2018, p. 109
[7] See C. Di Noia and M. Gargantini, Issuers at midstream: disclosure of multistage in the current and in the proposed EU Market Abuse Regime," European Company and Financial Review", p. 520, see fn. 2.

<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>
As already illustrated in answer to Q13 the most relevant problem is linked to the difficult assessment of the condition of not misleading the public and of a legitimate interest of the issuer. Furthermore, issuers face the constant risk to be forced to premature disclosures by abusive rumour spreading.

<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>
MAR has already resulted in a **complex regulation with heavy bureaucratic and burdensome** procedures. Introducing a system and controls requirement for identifying, handling and disclosing inside information would only **create additional burdens on issuers**, without solving any of the

problems the issuers raised in several occasions and restated in answer to Q.25 above. Moreover, ESMA fails to explain which problems the introduction of these news requirements intends to solve.

In our view, it should remain up to the **issuers to decide how to organise themselves to be compliant with the legislation** to find solutions adapted to the scale, size and nature of their business.

Finally, we also find **misleading the reference to article 16 MAR** which was set up for a different purpose i.e. detecting and reporting suspicious transactions, through "professional" people in the framework of their "professional activity".

Article 17, on the contrary, is about publishing inside information.

We take the opportunity to raise **another issue related to the scope of application of art. 16 MAR**. Due to a broad interpretation in a Q&A of ESMA (Q6.1) and differently from the previous regime, the abovementioned rules are applicable also to non-financial counterparties (NFC) professionally arranging or executing transactions in financial instruments. The ESMA Q&A brings into scope non-financial firms whose main activities however do not consist in arranging or executing financial transactions on a professional basis. NFC's engage in financial transactions on an ancillary basis only, with the main objective to hedge risks resulting directly related to their commercial or treasury financing activities (mainly with derivatives on exchange rate or taxes). Hence, decisions to use financial instruments are taken based on operative requirements, within the framework of internal guidelines, and not with the aim to chase opportunities in financial markets. Moreover, NFC's mostly act as clients of the financial sector in the respective transactions, not as providers or market makers. Therefore, **NFCs should not have to comply with the obligation of Art. 16 MAR.** From our perspective the review of the MAR should clarify the scope of Art. 16 MAR by excluding non-financial firms. It has never been the political intention to bring the "real economy" into the scope of that regime. Rather, it appears to be a mixture of an ambiguous wording (such as the reference to a trading desk for which there is no definition) and a far-reaching interpretation of ESMA that resulted in the current situation.

<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>
See Q 13. Issuers have identified a number of difficulties with the identification of inside information. That is due to the fact that the definition includes a number of legal terms that need to be interpreted. The experiences, however, show that the definition is too open for too broad interpretations.

Difficulties, e.g., arise with reference to the identification of **the moment in time in which a set of circumstances may reasonably be expected to come into existence** (this is the case, for example, of a negotiation or a participation to a procedure for the award of public work contracts; being multi-stage events in a protracted process it is not easy for the issuer to identify the moment in which the information becomes inside. Hence, there is always the risk to be forced to communicate information which are not mature enough from market perspective but may be regarded as inside information in a broad interpretation of the legal terms.)

<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>
ESMA, in a Q&A dated September 2017, clarified that when the issuer has delayed the disclosure of an inside information and this information has subsequently lost the element of price sensitivity, that information ceases to be inside information and thus is considered out of scope of art. 17.1 MAR.

Therefore, the issuer is neither obliged to publicly disclose the information, nor to inform the NCA, in accordance with art. 17.5, that the disclosure of such information was delayed.

In the present Consultation Paper ESMA proposes that the issuer should notify the NCA of the delay of disclosure of inside information even if that information has lost its inside nature; the purpose is to enable the NCA to better identify possible cases of insider dealing.

We do not agree on this proposal as it would pose problems of confidentiality and it would create more confusion on the notion of inside information. Moreover, it would add further administrative burdens on issuers while the NCAs have already at their disposal many other tools to detect abusive behaviours (the communications of suspicious transactions by intermediaries, the communications of managers' transactions under art. 19 MAR, the insider lists).

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_30>

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

<ESMA_QUESTION_CP_MAR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_31>

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

<ESMA_QUESTION_CP_MAR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_32>

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

<ESMA_QUESTION_CP_MAR_33>
It should be clarified that Art. 11 is a real safe harbour, meaning, that the persons who sound the market in a way described in Art. 11 do not violate the provisions of Art. 7. However, they should still be allowed to undertake market soundings in any other way provided that they comply with MAR duties.

Furthermore, the documentation duties are too extensive and should be simplified: this is why to our knowledge market participants currently do not want to be sounded.

Notwithstanding the point above while we support the SMEs' Listing Package exemption to all issuers seeking a private placement of bonds when these issuers already have financial instruments admitted

to trading on a trading venue, we would like to extend this exemption also to private placements of shares.

<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>
It could be useful to clarify that market soundings always refer to a "transaction" involving **financial instruments** so that the provisions on market soundings are not applicable in cases where the transaction involves only tangible assets (to make an example the transaction of a gas company for the sale of one of its refineries should not be subject to the market sounding provisions as it does not involve any financial instruments).

We agree that it may be difficult in practice to distinguish between a mere negotiation and market sounding process. It should be clarified that negotiation between parties does not fall into market sounding definition.

More specifically,

- a list of cases/categories of transaction in which market sounding rules are out of scope ("illustrative list" as main reference for the operability including the following cases: one-to-one negotiations, transactions concern tangible assets, participation in a competition for the acquisition of a non-listed company, opportunity of joint acquisition of a non-listed company, meeting with banks or advisor aimed at discussing possible future investments) should be provided.
- a list of phases of the transaction in which market sounding rules could not be applied, as per example interactions with the potential counterparty for scouting or negotiations purposes, should be provided.

As far as the scope of the definition of market sounding is concerned, we believe that the scope is clear: to assess the interest of potential investors in a potential transaction. Notwithstanding the above, the definition of market sounding should be integrated also by clarifying that if the transaction to be developed outside the European market involves a Europe-based company as "issuer", market sounding rules could be applied in any case ensuring a safe harbour.

We think that either an amendment to the Level I Regulation or ESMA's guidelines could help in clarifying the circumstances above mentioned.

<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>
According to the current status of the laws in force and the ESMA, guidelines and cases published until now, in our view the applicability of the market Soundings regulations on acquisition/disposal transactions is limited to the initial step of each transaction, during the phase of identification of opportunities for potential acquisition/disposal transactions, prior to preparing the preliminary investigation/pre-trial work and before due diligence activities.

<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>
The definition of market sounding should be amended to confirm that market sounding rules could be applied also in case of communications of information related to the potential transaction not followed by any specific announcement. A detailed definition of "announcement of an operation", with an illustrative list of main cases, could be better clarify applicability of market soundings rules.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_37>

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

<ESMA_QUESTION_CP_MAR_38>
We do not agree on making the use of recording facilities compulsory for all soundings. More flexibility should be allowed to listed issuer which, differently from intermediaries, do not use mandatory recorded telephones lines.

<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>
The management of the insider list is very burdensome also due to all the information that must be gathered by the issuer and inserted in the list. We question if the legislator reached the best balance between the supposed usefulness of these lists and the huge administrative burdens on companies. Therefore, we suggest some simplifications along the lines provided in answer to Q 44.

<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 agree with ESMA's view on the need to insert in the register only who effective had access to the specific inside information.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_42>

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

<ESMA_QUESTION_CP_MAR_43>
We think that permanent section of the insider list should be maintained; the problem of inflation of people in the permanent insider list is a matter of supervision as within the current concept of project related insider lists a narrow definition makes sense.

We, however, also have welcomed SMEs Listing Package final agreement to set forth an obligation for SMEs on SMEs Growth Markets to keep only insider lists of those persons "who, due to the nature of their function or position within the issuer, have regular access to inside information". Thus, it could be a way forward to grant issuers more flexibility how to ensure that the people that de facto have access to inside information appear on either a project related list or on a broader list in the sense of the SME package. However, in the latter case it has to be ensured that being on the list does not create a prejudice for a particular piece of inside information and people on that list are not entirely blocked for transactions.

In addition to the structural issues there are some more problems affecting the regime of insider lists: Issuers must publish inside information as soon as possible, according to article 17.1 and therefore the insider list should be opened only in case of delay. However, in some Member States the competent authorities take a different approach and ask for the insider list to be opened before, in the space of time necessary for the issuer to public the price sensitive information. It should be very helpful that the final sentence of Article 2, paragraph 1 of Commission Implementing Regulation (EU) 2016/347 is redrafted as follows: "… New sections shall be added to the insiders' list upon the identification of new inside information, as defined in Article 7 of Regulation (EU) No 596/2014, **provided that the disclosure of the inside information has been delayed according to article 17, paragraphs 4 or 5, of Regulation (EU) no. 596/2014."**

On the other side due to the fact that also intermediate steps in a protracted process may constitute inside information it seems that issuer should keep the insider list at the level of each piece of inside information rather than that of each transaction: **the major difference with the previous regime lies with the requirement to provide more granular information (at the level of each inside information rather than that of each transaction).** Under MAR implementing regulation 2016/347 insider lists are divided into separate sections, **each of which relating to different inside information.**

<ESMA_QUESTION_CP_MAR_43>

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

<ESMA_QUESTION_CP_MAR_44>
ESMA would like to clarify in Level 1 that the issuer should not have to keep the entire list of natural persons having access to inside information but just one contact person for each external provider having access to inside information; those external service providers should include in their own insider lists the natural or legal persons accessing the piece of inside information working for them under a contract of employment or under any other type of arrangement. This is already a common practice in some member States.

We fully support ESMA. Clarifications in Level 1 avoid diverging interpretations and prevent problems for issuers related to the different supervisory practices related to cross-border provisions of services.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_45>

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

<ESMA_QUESTION_CP_MAR_46>
The types and the number of transactions to be notified have been increased according to MAR and compared to the previous regime (let's think, for example, to gifts, inheritances and donations that were not included among the transactions to be notified under MAD and are completely passive from the PDMR's point of view). It would be therefore interesting to gather data from the NCAs about the number of transactions notified under MAR in comparison with the ones notified under the previous regime in order to ascertain if the market has been overflood with communications of marginal value as we suppose.

In order to avoid an overflood of useless information we propose to raise the threshold.

This is not the only problem affecting manager transactions, as issuers need also **clearer guidance on which kind of PDMR transactions need or do not need to be disclosed, taking into account** the scope of the relevant provisions in the context of different types of transaction. Regarding the guidance on the transaction to be disclosed, it should be clarified that **no notification duty is required for shares granted for free**; the moment in which shares are granted for free to PDMRs (meaning the moment in which shares are credited in the account of the PDMR) should not be notified (there is no discretion by

the PDMR and there is no signalling value for the market) while **when the shares are sold there should be a notification**. A different interpretation would imply a duplication of notifications, more work to be done by the issuer's staff and the increase of indirect costs. For **phantom stock**, the notification duty should be excluded as the PDMR has only the right to receive cash.[8]

We support the aggregation of transactions as a means of making the disclosure exercise as simple as possible. This should be continued and be on a same day basis with no netting, with only the highest and lowest prices (not the weighted average) disclosed.

In any case we suggest simplifying the system of notification making **the Competent Authorities responsible for disclosing managers' transactions to the public** (this is already an option left to Member States which has been exercised in the Netherlands).

On the **timing for the notifications, we welcome the modification recently adopted in the SME listing package and extended to all issuers.**

[8] See also European Issuers, *Response EC Consultation SME Listing*, 26 February 2018, p. 22.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_47>

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

<ESMA_QUESTION_CP_MAR_48>
We suggest a **modification on how to calculate the threshold**. In order to avoid the notification of irrelevant amount and reduce administrative burdens, we suggest that the notification should be done for tranches of threshold. In practice, once the threshold has been reached, the calculation of the threshold should restart from zero until a new threshold has been reached again (meaning that all the following amounts must be summed up until they reach again the threshold) [9].

[9] See EI' RESPONSE TO THE REVISION OF THE MARKET ABUSE DIRECTIVE (MAD) DATED 25 JUNE 2010 27 July 2010.

<ESMA_QUESTION_CP_MAR_48>

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

<ESMA_QUESTION_CP_MAR_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_49>

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

<ESMA_QUESTION_CP_MAR_50>
See answer to Q.48
<ESMA_QUESTION_CP_MAR_50>

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

<ESMA_QUESTION_CP_MAR_51>
Yes we consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate.

<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_52>

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

<ESMA_QUESTION_CP_MAR_53>
No.
<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>
We think that all the clarifications provided in the ESMA's Q&A are sufficient.

<ESMA_QUESTION_CP_MAR_54>

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

<ESMA_QUESTION_CP_MAR_55>
As already well explained in the CP the possible extension of closed periods to issuers would have several downsides considering also that issuers would be always subject to sanctions in case of infringements of art. 14 and 15 of MAR. For the above-mentioned reasons we would not extend closed periods to issuers. In addition, we highlight that the extension of closed periods to 30 days to corporate

issuers can create significant market stress and negative impacts on the management of the financial needs of the issuers, limiting the capital funding process and increasing financial risks. Specifically: (i) the concentration of all issuers in a narrow market time frame (this can have a negative impact on the issuances and on the capacity to ensure the financing needs, in particular for the corporates with low credit ratings) as well as a risk of potential impact on the share price and (ii) the increase in the execution risk of the corporate issuances due to the higher market volatility and the shorter possible market windows.

As far the possible extension to closely associated persons we agree with ESMA stating that indirect transactions conducted through or for a closely associated person are already subject to provisions of closed period and that this extension would place burdens on PDMRs to make sure that they correctly identify the closely associated persons and on issuers that would have to provide communications on the closed period start and end dates to them. All these burdens would be disproportionate.

Moreover, an explicit extension of the closed period obligations should not affect the exemption ensured to buy-back programme managed, independently, by an investment firm should according to art. 4, par. 2, let. b) of the EU Delegated Regulation 2016/1052.

Another important problem related to MAR art. 19 is the requirement for issuers to keep updated lists of persons closely associated (PCAs) to PDMRs. Having in mind, that MAR defines 4 kinds of business relations and 3 kinds of personal relations as well as 4 kinds of business relations of persons bound by personal relations, the number of people kept on these lists in enormous. Our conservative estimate is as many as 0,5 million people all over EU: 7743 listed companies (excluding London Stock Exchange), 10 PDMRs per company, 6 PCAs per PDMR (including businesses associated with PDMRs and PCAs). Since the earlier proposal of MAR amendment modifies this regulation to give to issuers 2 extra days for examination of notification of transactions by PCAs to the market, the need to keep the lists of PCAs is no longer justified. Hence, we propose deletion on requirement to keep these lists laid down in MAR 19(5).

<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>
We support ESMA's proposal to extend the provision of art. 19.12 a) to financial instruments other than shares (such as listed bonds) because they could be functional to face the financial difficulties by the PDMR.

<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>
One more issue that should be tackled regards the derogations to the application of closed periods to the manager transactions under art. 19.12; the problem arises in the context of employee share or saving schemes as article 19.12 states that: "Without prejudice to Articles 14 and 15, an issuer may allow a person discharging managerial responsibilities within it to trade on its own account or for the account of a third party during a closed period as referred to in paragraph 11 either: (a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or (b) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not

change". Article 9 of the delegated regulation 2016/522 mentions the transactions which can be authorised by the issuer during closed periods. However, this article lacks clarity and issuers question if the transactions such as a subscription to a capital increase reserved for employees or the allocation of the participation and / or the incentive to employee savings plans are included in the scope of Article 9 of the Delegated Regulation. In our view, even if they hold inside information, employees should nevertheless be able to subscribe since: - the operation is collective and open, under the labour law rules, to all employees of the group; - the operations are planned well in advance and the employee has no control over the choice of the subscription period; - the shares subscribed are blocked for several years (generally 5 years except in the event of release), which neutralises the effects of the holding of privileged information; - in certain cases, the shares may be released by regular payments or regular deductions from wages, which precludes their sale during this period; - there is a gap between when the shares are subscribed and when they are allocated in the saving plan, so that their allocation may occur at a time when the information has been made public. We think that this could be clarified by ESMA.

<ESMA_QUESTION_CP_MAR_57>

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

<ESMA_QUESTION_CP_MAR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_58>

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

<ESMA_QUESTION_CP_MAR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_59>

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

<ESMA_QUESTION_CP_MAR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_60>

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

<ESMA_QUESTION_CP_MAR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_61>

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

<ESMA_QUESTION_CP_MAR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_62>

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

<ESMA_QUESTION_CP_MAR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_63>

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

<ESMA_QUESTION_CP_MAR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_64>

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

<ESMA_QUESTION_CP_MAR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_65>

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

<ESMA_QUESTION_CP_MAR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_66>

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

<ESMA_QUESTION_CP_MAR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_67>

Q68. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope

of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

<ESMA_QUESTION_CP_MAR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_68>

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

<ESMA_QUESTION_CP_MAR_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_69>

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

<ESMA_QUESTION_CP_MAR_70>
It is important to note, that the maximum administrative sanctions should be related to the size of companies (in case of legal persons) and to the level of managers' compensation (in case of natural persons). The current wording of sanctions provisions under MAR art. 30 stipulate, that smaller companies could be subject to relatively higher sanctions than bigger companies. Moreover, there are hundreds of companies listed, where their capitalisation is smaller, than the amount of possible sanction.

<ESMA_QUESTION_CP_MAR_70>

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

<ESMA_QUESTION_CP_MAR_71>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_71>

***

EuropeanIssuers *is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. Our members include both national associations and companies from all sectors in 15 European countries, covering markets worth € 7.6 trillion market capitalisation with approximately 8000 companies.*

We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer-term. We seek capital markets that serve the interests of their end users, including issuers.

For more information, please visit www.europeanissuers.eu