Response to the ESMA Consultation Paper on MAR Review Report

Brussels, 29th November 2019

Introductory remarks

FESE welcomes the possibility to respond to the ESMA Consultation Paper on MAR review report. FESE members are committed to ensuring the highest possible level of investor confidence and market integrity. Exchanges have long assumed a central role in the oversight and supervision of markets, investing for decades in the systems, human resources and expertise required to detect and prevent market abuse of all kinds.

While we acknowledge the importance of MAR, we believe that some areas and issues should be reassessed and adjusted to ensure a proportionate and fair regime for all market participants. This could be done either via amendments to the Level 1 text or modifications at Level 2 and enhanced supervisory convergence. Among the various topics raised in the Consultation Paper, we would like to highlight certain key areas that would require further work or guidance from ESMA:

- Regarding the **scope**, even though there may be reasonable grounds for increasing monitoring of possible market abuse and misconduct in the **spot FX markets**, the global nature and characteristics of those markets make it inappropriate to include them in the MAR regime as it currently is. There is an excessive need for structural changes in relation to infrastructure, transparency and supervision of the involved entities, in order for a monitoring under the MAR regime to create value. The FX Global Code has developed as the appropriate industry standard for this market and this should be assessed further to determine if changes are required.

  Furthermore, we suggest removing **benchmarks** from the scope of MAR as have a separate manipulation regime in the EU Benchmarks Regulation. From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon.

- We believe that the definition of **inside information** is from an overall perspective adequate and sufficient for the purpose of preventing market abuse and should not be expanded. However, there are a number of aspects on which we would welcome clearer guidance as this would have the benefit of facilitating compliance for issuers, and also preventing fragmented interpretation both across Europe and within Member States.

- We agree with ESMA’s view that **insider lists** are useful, not only to NCAs but also to issuers’ own compliance function. We do not believe that amendments are required to the Level 1 text in this area; however, further clarity would be helpful, e.g. to specify that only persons who have had actual access to inside information should be included in the corresponding insider list. We believe it would be valuable to issuers if ESMA and NCAs clarified the purpose of insider lists and explained why the lists become less effective for NCAs if they contain individuals who are not in fact insiders.

- We believe that the **proposal to establish a regular reporting mechanism of order book data** needs to be considered very carefully, conducted in a harmonised fashion, and be accompanied by an impact assessment, as trading venues have already invested significant resources and costs into developing systems to comply with the current requirements. There is a risk that this proposal could result in increasing the burden on NCAs and venues, without achieving its objective on improving market surveillance. The underlying question is whether the potential advantages of cross-market order book surveillance justify the efforts and uncertainties (such as challenges related to the technical implementation or potential unintended consequences for trading venues and investment firms) that might result from requiring regular reporting of all this data.

In addition to the points raised by the Consultation Paper, we would like to raise specific concerns relevant to FESE members.

The impact of MAR on smaller markets

For smaller markets, the regulatory burden can be sometimes overwhelming. More precisely, the 'one-size-fits-all' model, mostly used in the context of EU level legislative frameworks, is less proportional for smaller markets and brings excessive and disproportionate requirements for services providers, thus making the overall market less competitive.

For instance, due to the application of the Market Abuse Regulation to MTFs, issuers on these specialised markets need to apply the same requirements as the main markets. While we acknowledge there are some alleviations for SME Growth Markets, many of the requirements apply equally to SMEs as to the Regulated Market. This discourages smaller companies who face rising compliance costs and hence prefer to de-list and to resort to private equity.

We would, therefore, like to encourage regulators to run a comprehensive assessment of the impact of the various legislative files which might differ based on the size and maturity of the markets.

SME Growth Market 'alleviations': Perceived to have minimum impact

Alleviations introduced for SME Growth Markets are expected to provide benefits and reduce cost and effort for SMEs listing on these markets. However, the market feedback we received shows a broad perception that the planned 'alleviations' are not sufficient. For instance, the requirement to provide insider lists 'upon request' does not address some critical concerns of SMEs:

- The amount of effort required to create an insider list would be excessively cumbersome for small companies with limited resources and no investor relations function.
- The terminology used by the Commission has caused confusion among both SMEs and regular issuers. The proposed further alleviations introduce an alternative type of insider lists for SME issuers, which would contain individuals with regular access to inside information, instead of being event-based, and require fewer details about each individual. This could be referred to as "regular insiders" or "frequent insiders". However, the Commission has in one of its FAQs referred to this group of individuals as "permanent insiders".[1] This has led to confusion as that term is already used in MAR and is applicable to all issuers as a supplement to an event-based list, so it is used in a different context. Therefore, this needs to be clarified.
- There is uncertainty regarding who should be included on the insider lists, specifically external individuals, including advisors, services suppliers and/or other stakeholders. The risk of unintentionally providing an incomplete list is perceived to be inhibitive.

[1] https://europa.eu/rapid/press-release_MEMO-18-3728_en.htm

Furthermore, the alleviations for SME Growth Markets do not address SMEs' concerns specifically related to market sounding. The market sounding requirements included in MAR add significant administrative costs for SMEs and create risk, in these companies' perception, that they might be required to disclose sensitive information to competitors.

MAR provisions should reflect the nature of the instrument

FESE members believe that more needs to be done to strengthen the attractiveness of EU markets for both the listing of equities and bonds.

Equities and bonds serve different corporate financing objectives and meet different investor needs regarding risk and reward. Bonds are less exposed to risks of market abuse or market manipulation due to the nature of the instrument. Simply due to the fundamental concepts of a debt instrument neither investors nor issuers have significant control over bond prices. By definition, the key variables that influence the price of a bond are (i) market risk, (i) liquidity risk and (iii) credit risk. Bondholders cannot influence any of these variables, and the only variable that can be influenced by an issuer is the likelihood of default. In addition, investing in a bond is generally a long-term investment where investors hold bonds to maturity. It is therefore highly unlikely that there could be sufficient liquidity in an individual bond to enable a small group of investors to significantly impact the bond price through manipulation. This is the case for bonds issued by SMEs but also for large corporates. It is the general liquidity problem in debt instruments (few transactions, sometimes erratic prices), which causes the higher price volatility, rather than effective market manipulation.

Furthermore, the scope of inside information that could significantly and materially impact the price of a bond is relatively small compared to equity. This is due to the basic principle that the price of a bond is related to the ability of the company to repay its debt. The price of equity is more related to the profitability of the issuer. The planned acquisition of a competitor or discovery of a new technology can significantly impact revenue and therefore the price of equity. But the same information would not significantly change the price of a bond relative to the change in equity value.

The price of equity is significantly more volatile than the price of a bond, making it more attractive to potential manipulation, compared with bonds which do not have the same characteristics.

Bond trading volumes are significantly smaller than equity trading volumes with much of the trading done over-the-counter (OTC) between two sophisticated counterparties. Most bonds and high yield bonds. in particular, are held to maturity with very limited trading. This significantly limits the potential for using bonds to benefit from market manipulation, simply because the market is not liquid enough to facilitate a material impact on bond prices. Investment grade bond turnover in 2015 was around 60%[2], compared to European equity turnover of 111%[3].

Insiders typically do not hold or trade debt in their own companies. In addition, while managers may be given stock options as a form of compensation, bonds are not usually used for this purpose. As a result, requiring a company to implement procedures to report insider transactions related to bonds should be re-considered. It is unlikely that bond transactions by insiders will occur, and if it does, it will have a minimal risk of market abuse for the reasons identified above.

[2] FCS Commercial Group http://www.fcscfg.com/index.php/terminology/bond-turnover.

[3] AFME Equity Primary Markets and Trading Report Q4 2015, available at https://www.afme.eu/en/reports/Statistics/equity-primary-markets-and-trading-report-q4-2015/, p. 5.

Based on these basic bond characteristics, the likelihood of manipulating the price of a single bond through insider dealing is residual. Therefore:

- The cost and effort required to ensure that bonds comply with MAR greatly exceed the risk, which MAR is expected to reduce for these instruments.
- MAR should address the relative risks of individual instruments and asset classes based on the instrument's specific characteristics.

As a concluding remark to this section, we would also want to highlight the fact that smaller issuers of debt instruments suffer more from the regulatory burdens deriving from MAR described above. However, the basis for such requirements is the nature of the instrument, not the venue where those instruments are traded. In this sense, a more proportionate regulatory requirements should be applied to regulated markets (and not only MTFs) as the debt instrument is the same.

The impact of MAR on debt issuers

Debt issuers are particularly impacted by MAR. More specifically, there are two key segments of debt issuers which tend to list primarily on multilateral trading facilities (MTFs) for which MAR poses significant challenges:

- Small and Midcap debt issuers domiciled **in** the EU
- Medium and Large debt issuers domiciled **outside** the EU

Market abuse rules have always been a requirement under the Market Abuse Directive for financial instruments traded on a regulated market. But while these components of market abuse rules are not new, it is the extension of these requirements to MTFs and other trading facilities that impacts these debt issuers and poses a challenge to the EU's ability to compete with other capital markets throughout the world.

Large debt issuers, regardless of their domicile, that have already listed their equity or other debt on an EU regulated market will already have the appropriate processes in place and therefore face little impact from the extension of MAR to MTFs. But for the two issuer segments identified above, the extension of MAR to MTF markets poses an administrative cost burden (cost of compliance) that did not exist before and which greatly exceeds the risk which MAR is expected to reduce. It also increases compliance risk for these issuers. Although the likelihood of being sanctioned may be low, the impact in case of a breach is high. As a result, these issuer segments are more likely to choose to avoid the administrative burden and compliance risk and simply not list in the EU or even delist from EU MTF markets and relist outside the EU.

The applicability of MAR on cross border entities and listings

We would welcome further clarification on the applicability of MAR when it comes to cross border listings. Currently, there is uncertainty on what it concerns:

- Issuers with subsidiaries in the EU and non-EU countries: What is the scope of MAR regarding activities of non-EU subsidiaries that could have an impact on listings of EU subsidiaries?
- European Issuers with listings in the EU and non-EU countries: What is the scope of MAR regarding information and activity that could impact the price of instruments listed in non-EU countries?

Need for alignment of MAR and MIFIR in terms of data reporting requirements

Finally, we would like to raise a last consideration regarding the need to align MiFIR and MAR in terms of data reporting requirements. Currently, both Article 4 of MAR and Article 27 of MiFIR require trading venues to report reference data related to financial instruments. However, the requirements currently differ in a number of important respects such as the starting point for reporting (application for trading in MAR vs. admittance to trading/actual trading in MiFIR), reporting frequency (end-of-day under MiFIR vs. application for trading and end of trading under MAR).

In order to ensure consistency in the reporting of reference data, both sets of requirements should be aligned. This point is in line with the German position paper recently published on the necessary amendments and revisions to secondary market provisions in MiFID II/R[4]. We believe that this concern would be properly addressed under the current consultation on MAR or/and under the upcoming MiFID II/R REFIT.

Questions

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

We do not consider it necessary to extend the scope of MAR to spot FX contracts as it reads now. We believe that careful consideration of the peculiarities of spot FX markets and an assessment of the potential impact should be carried out before proceeding with any specific EU legislation.

Even though there may be reasonable grounds for increasing monitoring of possible market abuse and misconduct in the spot FX markets, the global dimension and characteristics of those markets makes it inappropriate to include them in the current MAR regime. The main reason is, as outlined by ESMA, that there is an excessive need for structural changes in relation to infrastructure, transparency and supervision of the involved entities, in order for a monitoring under the MAR regime to create value. To some extent the political and monetary systems, including the special role played by central banks, makes it too complex simply to include spot FX contracts in the scope of MAR.

Given the global nature of the spot FX market, the FX Global Code has developed as the appropriate standard for participants to adhere to. We also suggest that the effects of the FX Global Code should be assessed, mainly in terms of efficiency and adequateness, should the principles be elevated into legislation. Any further proposals in this regard should only be made if there is clear evidence that the current arrangements are not sufficiently robust and effective.

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.

Please see response to Q1.

Even though there may be reasonable grounds for increasing monitoring of possible market abuse and misconduct in the spot FX markets, the global nature and characteristics of those markets makes it inappropriate to include them in the MAR regime as it currently is. There is an excessive need for structural changes in relation to infrastructure, transparency and

[4] See https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_VII/19_Legislaturperiode/Position-paper-MiFID-and-MiFIR.pdf

supervision of the involved entities, in order for a monitoring under the MAR regime to create value. To some extent the political and monetary systems, including the special role played by central banks, makes it too complex to simply include spot FX contracts in the scope of MAR.

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?

From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon. Furthermore, we believe that consistency should be provided in the EU regulatory framework on market abuse and the regulation of indices, and that policy makers should coordinate their activities in the ongoing review of MAR and the BMR. FESE agrees with ESMA's analysis on the differences in scope between the definition of a benchmark in MAR and BMR. ESMA is right to raise these differences as a potential risk. Therefore, we suggest removing benchmarks from the scope of MAR and have a separate regime in the BMR.

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

From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon, that we suggest to remove benchmarks from the scope of MAR and have a separate manipulation regime in the BMR.

Furthermore, the BMR already provides enough clarity on the sanctions envisaged in case of serious infringement in Articles 35 and 42, and therefore there is no need to have additional regulatory burdens.

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?

From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon, that we suggest to remove benchmarks from the scope of MAR and have a separate manipulation regime in the BMR

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?

From an overall point of view, the benchmark concept and mechanisms are very different from the market mechanisms that MAR is built upon, that we suggest to remove benchmarks from the scope of MAR and have a separate manipulation regime in the BMR.

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

We agree that there is a need to change the reporting mechanism under Article 5(3) of MAR.

It causes excessive burden on issuers to identify all relevant authorities and creates uncertainty in relation to how to ensure compliance with the rule. It is burdensome for the issuers to keep informed of where their shares are not only admitted to trading, but also where they are traded.

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.

We support Option 2 suggested by ESMA but would suggest that this option should be modified so that issuers should only be required to report to the NCA that is defined in Article 17 of MAR and the supplemental delegated regulation, which is the NCA the issuer must provide information to regarding delayed disclosure.

The rationale behind this is that that reporting obligation would match the extension of the disclosure obligation under Article 17 of MAR, meaning that issuers are well aware of the distinction in obligations in relation to trading venues where they have requested for admittance to trading and other trading venues where their instruments are traded (with or without their knowledge).

If the approach in Option 3 is taken regarding "the most relevant market in terms of liquidity" under Article 26(1) of MiFIR, that NCA could be different from the home state as defined under the Transparency Directive, the country of incorporation of the issuer (which affects Article 19 of MAR) and the relevant NCA under i.e. Article 17(3) of MAR. Additionally the NCA of the most relevant market in terms of liquidity can be a market place in where the issuer has not requested for admission to trading. Finally the "most relevant market in terms of liquidity" concept is less established among issuers than other ways to determine the competent authority and the possibility of it changing once a year makes it less predictable and less transparent.

Therefore, in our view a modified version of Option 2 that requires all relevant information to be reported to the one NCA already known to the issuer, who can then forward on to others, would be the preferable option in order to avoid the issues described above.

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.

Yes, we agree with regard to the removal of the requirement from Article 25 of MiFIR. If the competent authorities can access the same information, or at least the information necessary for them to conduct their supervision, we do not see any reason to report the same information twice.

We do, however, not see a requirement for the provision of information to the NCA under Article 26 of MiFIR if the same information has to be published at the same time

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

N/A

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

N/A

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

We believe that the disclosure of the aggregated data of BBP is sufficient.

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?

In our opinion the definition of inside information is from an overall perspective adequate and sufficient to identify inside information for the purpose of preventing market abuse. However, there are a number of aspects that are subject of discussions and uncertainty in connection with the definition of inside information. Issuers would therefore benefit from further clarification regarding the following points, whereby such clarification could rather take the form of a technical standard or ESMA recommendations than changes to MAR itself:

1. Guidance on the meaning of “significant effect” and the “reasonable investor” would be appreciated. The notion of significant effect indicates a higher level of impact than the reasonable investor test, but it remains unclear how much would constitute “significant”. For example, the German Federal Financial Supervisory Authority has stated that a certain profit, no matter how small, would suffice. Consequently, any movement of the share price would be relevant. But many issuers feel that the aspect of significance would not be adequately reflected in that case. The definition of "significant" is therefore difficult to interpret and may need further clarification, if not in the MAR itself then on the level of an ESMA statement.

2. It is challenging for issuers to make the assessment on how likely an event should be in order for the information to be of “precise nature”. More guidance on this notion would also be helpful in harmonising the view of when information becomes inside information across Member States.

3. Clarity would be appreciated on how the requirement that the information must be non-public to constitute inside information relates to information that has been made public by someone else than the issuer, e.g. an authority or another issuer. Does the issuer, under such circumstances, still have an obligation under Article 17 of MAR to disclose such information?

4. How does the definition of inside information being directly or *indirectly* related to an issuer, relate to the obligation under Article 17 of MAR to disclose inside information that *directly* concerns the issuer?

5. a) “Precise information” in connection with information regarding events that lie in the future and the relevance of intermediate steps is still a matter of debate, as well as the relationship between the probability of the final result and the probability of the intermediate step, especially the application of a probability-magnitude-test in this regard. It should be clarified that an intermediate step cannot be classified as inside information as long as the final result cannot be reasonably expected to occur. The only exception should be if the intermediate step represents an inside information in itself, fully satisfying all criteria for inside information as defined in Article 7 (1) of MAR.
b) Furthermore, the Lafonta decision (Case C-628/13) has induced questions on whether an information can be precise if the direction where the stock price will go cannot be anticipated. The Lafonta decision has created much uncertainty and it would be most helpful if the ESMA could comment on this subject.

c) Inside information in connection with financial (interim) reporting and outlooks. Preliminary figures from financial interim reporting can be inside information if they deviate significantly from either the published outlook, the market expectations or the previous year figures. Few issuers publish a guidance for the interim figures, and at the time reliable preliminary figures are available consensus estimates are often not available yet. In connection with a published growth strategy, the comparison with previous year figures does not lead to satisfying results since the deviation is what the market expects. Further clarification that the question whether the issuer maintains its full year guidance is, in such cases, the relevant test would be helpful.

6. Concerning debt markets, we would like to highlight that bond prices are significantly less volatile than equity, and many are illiquid by nature. It is difficult to determine if information will have 'significant effect on the price of the debt instruments if made public'. It is especially burdensome for SMEs and high yield bond issuers, who are less likely to have access to analysts and brokers or internal staff with financial experience required, to model possible price impacts. We suggest guidance is provided as to how this should be applied to issuers of debt securities or a more specific tailored regime should be considered.

7. In relation to derivatives trading, the definition of inside information expressly includes information relating to an issuer of financial instruments that would be likely to have a significant effect on the prices of related derivative financial instruments. Information on expected dividends is critical for the pricing of derivatives, and in our view the dividend policy of the issuer needs to be very clear and any changes should be communicated in a clear and timely way. This has already been acknowledged in the ESMA Q&A on MAD back in January 2012, however we believe this needs to be re-emphasised and directly linked to MAR.

8. We would also welcome if ESMA could consider providing guidance regarding the obligation to publish inside information on the website of the issuer. We note for instance from a BaFin FAQ (available here part IV, Q4, p. 13), that an issuer, that does not have a website, is not subject to that obligation.

9. Lastly, although this is only indirectly related to the definition of "inside information", it would be helpful if ESMA could clarify the definition of financial instrument with respect to paragraph 1(d) of Article 2 of MAR. According to this paragraph MAR applies to "financial instruments (…), the price or value of which depends on (…) a financial instrument referred to in the [previous] points (…)". This could mean that non-listed instruments whose price depends on financial instruments that fall into the remit of MAR would fall into the scope of application of MAR as well. Without any limitation to this rule, it gives rise to many questions, e.g. what kind of information needs to be published and how (given that these instruments are not listed) or whether the inside information relating to the non-listed instrument that is unrelated to the listed instrument should be disclosed.

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

We are of the view that the definition of inside information is in general sufficient for combatting market abuse, however as mentioned in Q13 it is a difficult assessment to make and therefore further guidance would be helpful. It should also be noted that the MAR definition of 'inside information' is not consistent with other non-EU jurisdictions. For foreign issuers, this requires additional efforts to meet different requirements and increases the risk of non-compliance due to the uncertainty on having fully complied with MAR requirements.

Given the difficulties to interpret the prerequisites in the definition of inside information (both at EU level and with regard to third countries), clearer guidance on the definition would have the benefit of facilitating compliance for issuers, and also preventing fragmented interpretation both across Europe and even within Member States.

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 do not believe the definition should be expanded but, as indicated in Q14, clearer guidance on the definition would have the benefit of facilitating compliance for issuers, and also preventing fragmented interpretation both across Europe and within Member States. Issuers often point to the fact that there are different interpretations as to what constitutes inside information according to different NCAs. For instance, the information about the change of the CEO in some countries automatically constitutes inside information, while in others the case-by-case assessment is more important.

Furthermore, we would welcome additional guidelines with respect to two conditions in the definition of inside information: the precise nature and the significant effect on the price. The uncertainty surrounding these conditions has led certain issuers to re-consider transactions (and ultimately not carry them out) as they were concerned that a premature disclosure of the information to the market would cause them losing their competitive advantage.

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?

We have not been made aware of any specific concerns with the current definition.

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?

There is an inherent challenge with including commodity derivatives under MAR, as commodities markets, and to some extent the commodity derivatives markets, have different characteristics, purposes and market participants.

The primary purpose of commodity derivatives markets is to offer hedging possibilities, between commercial participants or against financial players accepting to get the risk transferred: as far as commodity listed derivatives are concerned, the priority should remain to give comfort to commercial participants that they can perform their hedging interventions without being exposed to regulatory uncertainty via too wide a definition in a domain where disciplinary case-law is limited.

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.

N/A

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?

Please see the response to Q17.

In addition, we note that energy commodity derivatives in practice are the interface between MAR and REMIT. Given the fact that those two regulations have slightly different definitions of inside information (i.e. the anchoring of the "reasonable investor" test) it is very important that it is clear for market participants active in the energy commodity derivatives market which definition applies.

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

N/A

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

We believe it would be helpful to clarify situations where liquidity contracts are in place with the issuer of illiquid securities, and that in these circumstances where a liquidity provider is facilitating the retail flow by providing additional liquidity, this is not considered front-running. We understand there will have to be strict controls in place to ensure that this is not taken advantage of, but it would be helpful to have clarity on this situation.

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?

FESE welcomes ESMA's consultation on the review of definitions of insider dealing and market manipulation and agrees with ESMA's concern that market manipulative behaviour in markets impairs market integrity and destroys trust in markets, and should not be taken lightly. FESE is aligned with ESMA's view in terms of 'pre-hedging' causing risk of potential market abuse, competition distortion among brokers ("un-level playing field"), severe market distortion, information leakage, allowance for insider information and creation of slippage costs for investors.

We are outspoken proponents of agreed common definitions created together with market participants to support safety, integrity, efficiency, investor protection and resiliency towards the financial markets to reach a level playing field.

FESE concurs with ESMA`s view that behaviours of market participants in terms of undertaking transactions in anticipation of further matching events is important for regulatory purposes. An exact definition of what is considered to be permitted in relation to pre-hedging and what actions could be considered as 'front-running' would help market authorities to effectively monitor and identify instances of potential market abuse, according to our understanding, but also the market participants.

We believe that a clear differentiation between those two notions is necessary to avoid misinterpretation and to define the scope of acceptable behaviour. Consequently, potentially affected market participants would be enabled better to avoid unintended illegitimate behaviour.

In this regard, it may also be important to distinguish between the type of market. For example, with respect to the concerns of manipulative behaviour specifically in derivative markets, FESE can observe that market participants are at times trying to facilitate trading in markets where it is not always simple to readily see prices, for example in less liquid options markets, where investors need the support of brokers, and where liquidity providers/ market makers provide prices to what is demanded and could wrongly be understood as front-running. Forming an ecosystem where investors, brokers and liquidity providers interact in a triangle could result in beneficial outcomes as well should not be considered as 'front-running', but rather be delineated, as ESMA suggests.

To this backdrop, FESE would like to encourage ESMA to gather intelligence of such market practices that can help the market, especially in less liquid instruments, and its participants, and could potentially fall under an envisaged concise exception and get a deeper understanding of the exact nature, market constellation and chronological procedures of 'pre-hedging'.

In the Consultation Paper, ESMA review commented that NCAs have received number of suspicious transaction and order reports regarding pre-hedging behaviours. We think it needs to be examined which markets were involved and whether any of these transactions were in fact market abuse breaches or raised by the firms due to a lack of additional information to assess if these were MAR breaches. MAR does not provide a differentiation between insider dealing (Article 8 of MAR) / conflicts of interest (Article 12 of MAR) and pre-trading which seems to be a pre-condition for further examination of pre-trading.

Therefore, FESE would like to emphasise that possible conditional allowance for 'pre-hedging' can render beneficial outcomes for certain markets and would like to encourage ESMA to gather intelligence from the market as to how the delineation in definition or mitigating measures that support positive outcomes can be designed into a regulatory framework. For instance:

1. ESMA shall gather intelligence on the exact nature of 'pre-hedging' and how to delineate from front-running and negative consequences for the market (definition clarification). This could be achieved by understanding which market practices exist, how the interaction in the triangle for the parties involved (investor, broker, liquidity provider) looks like, according to the market they interact in;
2. An understanding of the chronological procedure in the specific 'pre-hedging' process under analysis, ESMA could identify potential types of drawbacks and benefits of 'pre-hedging' in the particular case or constellations;
3. Many of the market participants also have suggestions on how to mitigate potential drawbacks and propose measures that from a market operator point of view seem reasonable. Liquidity providers, for example, suggest two-sided request for quotes as a measure, in case of particular drawbacks in pre-hedging constellations. Investors might ask for more process transparency in bilateral transactions, brokers likewise seek measures that allow for certainty, which seem reasonable to us, for all stakeholders to achieve healthy, integer and thriving markets.

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

N/A

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

N/A

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.

From an overall point of view, FESE members, being trading venues, find the scheme well-functioning. However, feedback from our issuers indicates that it is a very difficult assessment to make and uncertainty arises particularly in connection with rumours without factual basis and behaviour with respect to rumours (of any kind) while in delay.

As mentioned before, we do not necessarily assess the MAR text as insufficient, but additional guidance on interpretation would lead to more legal certainty, which is fundamental for compliance

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.

Difficulties in assessing whether an issuer could still have legitimate interests to delay a disclosure even after the event is final, e.g. a contract being entered into and signed, or an interim financial report being adopted by the board of directors. In the latter case, it could be a legitimate interest to keep on delaying that information to the market with reference to a pre-published date (financial calendar) for the disclosure of the report.

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?

We do not believe an additional requirement specifically referencing systems and controls should be included in the legislation as our view is that it is already implied in the requirements. In order for issuers to comply with the obligations under MAR, such controls are necessary to have in place

We believe that, overall, existing rules should be applied before further rules are being introduced. Only if it turns out that existing rules are not effective further rules should be considered. We fear that, otherwise, the suggested obligation to establish and maintain effective arrangements, systems and procedures for the management of inside information will increase the administrative burden and costs which have already led to a considerable amount of delistings. Imposing another unclear obligation on the issuer community will cause the loss of another considerable number of listings. The implementation of a requirement as proposed by ESMA for all issuers would be logically accompanied by a standardisation and certification requirement for purposes of auditability. Such monitoring systems would, even on a small scale, require important investments by issuers that would render capital markets even less attractive.

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

In protracted processes in connection with M&A transactions it can be difficult to identify the right point in time in the process when an information becomes inside information. For example, when an issuer has been approached concerning a possible take-over offer but considers the information to be insecure, the indicative price may be unattractive or the terms of a due diligence unacceptable etc. In that situation the issuer does not necessarily know if and when the situation will evolve and then it is very difficult for an issuer to decide when, in that process, to categorise the information as inside information. More guidance on the relevant triggers, depending on the nature and specifics of the transaction, would be helpful.

Furthermore, preliminary figures from financial interim reporting can be inside information if they deviate significantly from either the published outlook, the market expectations or the previous year figures. Few issuers publish a guidance for the interim figures, and at the time reliable preliminary figures are available, consensus estimates are often not available yet. But in connection with a published growth strategy the comparison with previous year figures does not lead to satisfying results since the deviation is what the market expects. Further clarification that the question whether the issuer maintains its full year guidance is in such cases the relevant test, would be helpful.

Lastly, we note diverging approaches from NCAs regarding the qualification of financial information (which is not mandatorily published under another set of rules, such as the Transparency Directive) as inside information. It would be helpful to obtain clarification from ESMA under which circumstances financial information constitutes inside information.

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

We believe there is no need for notifying to NCAs information that has ceased to be inside information, nor to disclose it. This would otherwise create an additional burden on the NCA as well as issuers who are investigating new routes in terms of investments, research and/or development. Being obliged to report even projects that have been abandoned would discourage such issuers from innovating. Similarly, issuers could argue that disclosing plans that have been given up could create a competitive disadvantage.

The interest of the NCAs in this information should be restricted to the question whether the issuer complied with its obligations to take a decision on the delay at the right time and maintain an insider list etc.

Furthermore, the proposed obligation would create conflicting incentives for the issuer. On the one hand the issuer should assume the existence of an inside information rather early in the project and decide on a delay. On the other hand, it then would have to report to the NCA even if the project fails and exposes himself to scrutiny, thereby being disincentivized to assume an inside information early on.

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.

N/A

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.

N/A

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.

N/A

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

N/A

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?

N/A

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?

N/A

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?

N/A

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?

N/A

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 general, market soundings occur more frequently for debt than equity simply because debt is issued on a more frequent basis by individual issuers. For banks issuing debt for funding and liquidity management purposes, issuance could occur on a daily basis. Corporates may also issue debt several times per year for refinancing, liquidity and other short to medium term funding needs. Our members' feedback seems to indicate a trend for large and frequent issuers with established contact with their investors as they have changed their transaction process to announce transactions at an earlier stage to legally avoid the market soundings regime. However, the lack of EU equivalent requirements deters them to list in the EU.

Regardless of the country of domicile, market feedback indicates that smaller, less frequent issuers, including many high-yield bond issuers, will face significant administrative costs to comply with the market soundings regime.

In addition, there is a significant amount of uncertainty regarding the scope and definition of market sounding activities. Market participants have specifically identified that there is either limited guidance or no guidance regarding the terms 'transaction announcement', 'acting on the issuer's behalf' and 'gauging interest'. It should be considered whether the requirement to monitor also non-inside information is relevant.

Further clarification is clearly needed from regulators to reduce uncertainty and ensure compliance with market soundings requirements.

Although this is not directly linked to the market soundings topic, it would be important to receive further guidance regarding Article 10(1) of MAR and in particular what can be considered as being in the scope of the normal exercise of an employment, a profession or duties.

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

We agree with ESMA's view that insider lists are useful, not only to NCAs but also to issuers' own compliance function. From an issuer's perspective, insider lists are most helpful not only to manage the flow and confidentiality of inside information but also to increase the awareness of individuals as to the sensitivity of the information and the gravity of its misuse. The protection of market integrity is based on the responsible handling of inside information by all stakeholders.

Q4: Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

We do not believe that amendments are required to the Level 1 text in this area. Whether continuous or on request, insider list requirements are considered excessive by issuers as they must be complete, done in real time and must cover all possible events that could be investigated before an event occurs. The current uncertainty regarding which external parties must be included in the list creates a risk that the list will not be considered complete by regulators.

However, further clarity from ESMA in this area would be helpful. We agree with ESMA's position that only persons who have had actual access to inside information should be included in the corresponding insider list. We understand there may be a tendency for issuers to include more individuals than is accurate so as not to miss anyone.

We believe it would be valuable to issuers if ESMA and NCAs clarified the purpose of insider lists and explained why the lists become less effective for NCAs if they contain individuals who are not in fact insiders.

As pointed out by ESMA in section 170 of the Consultation Paper, issuers have an obligation to only permit access to inside information on a 'need-to-know' basis. This means that issuers need to be able to identify inside information when it arises, restrict access to it to those who need it (by not storing it in shared folders, using code names etc) and document when such access is granted to new individuals. This will ensure issuers maintain accurate insider lists.

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?

We do not believe that it is appropriate for NCAs to start requesting supporting evidence of the effective access to the inside information, as mentioned by ESMA in section 169 of the Consultation Paper. Inside information can very well be shared verbally and the recipient thereafter be properly entered into the insider list. There is nothing in MAR which requires the issuer to also keep a "paper trail" and such an approach would indeed increase the administrative burden on issuers.

We would argue that all issuers need to be clear on who is privy to inside information. This will vary depending on the different types of company, and there has to be a practical approach to this so there is some sort of limitation on who is involved (i.e. issuers shouldn't be including everyone just in case). Therefore, ESMA and NCAs should instead clarify and reinforce the obligations not to allow access to inside information for those who do not need it and not to include persons on insider lists unless they have actually been granted such access. Thereafter, the content of the insider lists should be trusted without requiring any further supporting evidence.

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 do not believe that issuers are or should be required to list everyone who might have access to inside information when those persons are outside of the issuer's control. It would be less unreasonable to require such persons (e.g. a law firm representing the issuer's counterparty) to keep their own internal list of individuals with access to the information. The risk of unlawful trading should be as high within the counterparty's advisory firm as within the firm representing the issuer. This would however be a substantial expansion of the scope of Article 18 of MAR which would affect everyone that interacts with issuers, both directly as a counterparty or indirectly as an advisor or sub-supplier to a counterparty. Such an expansion should not be taken lightly, and the increased administrative burden and transactional costs need to be carefully evaluated and measured against any expected improvement of market integrity.

We do not believe that such an expansion is required for the obligation to cover auditors and notaries, as they should be seen as "*acting on the issuer's behalf or on their account*" and be covered already by the existing wording. This is also the established market practice in several jurisdictions, that the big international auditing firms maintain insider lists not only for their tax advisors and consultancy divisions but also for their auditors.

Regarding service providers, issuers have the obligation to inform them about the nature of the information they are getting access to and about their duty to maintain an insider list by themselves. This ensures that they are aware of the requirement. If third parties without any relationship to the issuer would come in the situation, they would lack the necessary systems and procedures to deal with it.

In summary, we believe that ESMA should clarify that the current obligation covers auditors and notaries, rather than expand the obligation to include new persons who are more distanced from the issuer and who merely provide services to the issuer but that have no insider knowledge of it. Furthermore, clarifying the current coverage of the obligation would optimise the usefulness of the insider list and avoid further regulatory burdens.

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.

The permanent insider section makes sense as it currently is. It would create a needless burden to add in the permanent insider section which permanent insider has accessed information relating to the event-based lists. The permanent insiders are supposed to access all that information because they occupy key functions of the company. It would probably be more sensible to provide additional guidance on who is supposed to be registered in the permanent section rather than extending the content of the permanent section (as highlighted in Q40). However, we would caution against referencing specific functions as potentials for inclusion as it will very much depend on each individual company as to what individuals / specific roles may always be privy to inside information.

We understand that issues have been identified where issuers use the permanent section as a substitute rather than a supplement to the event-based sections and/or include far too many persons on it and therefore further guidance from ESMA is required.

The main point that needs to be highlighted is that the use of permanent insider lists does not mean issuers should not be creating event specific lists also. These are essential and should include any additional individuals for each specific event, who are not included on the permanent list. Issuers need to be made aware that for each insider event there needs to be a new event-based section in the insider list, even if only persons listed as permanent insiders have access to the information. Using the combined lists correctly avoids any duplication and therefore makes it easier and less onerous for issuers.

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

We agree with the remarks from the issuers' associations highlighted in paragraph 187 of the consultation paper and with ESMA's preliminary view. There should be one contact in the third-party entity that is included in the issuer insider list and then that person is responsible for maintaining its own insider list covering individuals in the third party entity.

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.

In our opinion, the administrative burden could be reduced by requiring less personal details to be included in an insider list.

In addition, issuers on some markets have made a stricter interpretation of Article 18(2) of MAR than other markets. They interpret the reference to "written confirmation" as a requirement to obtain a physically signed piece of paper from each insider. This of course has a massive impact on the administrative burden of maintaining insider lists and reduces their usefulness to NCAs as the electronic records will be scanned images of papers rather than searchable emails or system logs.

To these issuers, it would be very valuable if ESMA and the relevant NCAs could clarify that the requirement of receiving "written confirmation" can be met by having the insider confirm by email or by pressing a "Confirm-button" which generates a written system log that identifies the person and the time of the confirmation.

This would reduce the administrative burden for issuers, increase the quality of the documentation for NCAs and is in line with the generally accepted interpretation of what constitutes a "written record" in today's society.

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?

We believe that this threshold, currently setting a total amount of EUR 5,000 reached within a calendar year (Articles 19 (8) and (9) of MAR), should be raised at European level and not be left to Member States' discretion. We suggest it could be increased to EUR 10,000 across the EU.

Furthermore, the definition of a Person Discharging Material Responsibility (PDMR) is significantly broader than in other international jurisdictions, including 'closely associated persons' and the effort required to track and report 'manager transactions' under MAR is significantly greater than in other jurisdictions. For instance, MAR requires reporting of all PDMR transactions for equity and debt of the issuer, as well as derivatives and other linked financial instruments. This is a much wider scope than the US, which only requires reporting on equity transactions.

In addition, many market participants perceive 'closely associated persons' to be ambiguous and this creates a risk of non-compliance for foreign issuers unfamiliar with this definition. Guidance should be provided on how closely associated persons within the same family shall be notified of their obligations and how the proof of such notification should be constituted.

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).

We believe that this threshold, currently setting a total amount of EUR 5,000 reached within a calendar year (Articles 19 (8) and (9) of MAR), should be raised at European level and not be left to Member States' discretion. We suggest it could be increased to EUR 10,000 across the EU.

A more harmonised framework would be especially useful to facilitate more cross-border transactions in Europe. Market participants should face as few differences as possible as these function as barriers to cross-border financing activities.

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

N/A

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

N/A

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

N/A

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.

N/A

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?

N/A

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?

N/A

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

The chosen language is very complicated. What is meant is the disclosure of the report itself, unless the relevant information contained in the report is disclosed at an earlier point in the form of preliminary figures. The restriction to those reports that are compulsory to disclose is logically incomprehensible. Quarterly figures are important information in any case. The restriction from Article 19(11) of MAR is meant to prevent the misuse of such information. Therefore, PDMRs are prohibited from trading within the timeframe before they are disclosed. It is questionable, if there is actually any difference whether such disclosure is legally or contractually required.

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.

We note the same downsides as ESMA when it comes to extending the prohibition to issuers so would advise against it. Factually, issuers would need to inform a potentially large number of persons closely associated with PDMRs of the beginning of the closed period. This is an additional administrative burden. If the need-to-know principle is adequately implemented and communicated, persons closely related to PDMRs should not have access to inside information anyways.

Furthermore, the definition of a PDMR is significantly broader than in other international jurisdictions, including ‘closely associated persons’. The effort required to track and report ‘manager transactions’ under MAR is significantly greater than in other jurisdictions.

In addition, many market participants perceive ‘closely associated persons’ to be ambiguous that creates a risk of non-compliance for foreign issuers unfamiliar with this definition. In particular, guidance should be provided on how closely associated persons within the same family shall be notified of their obligations and how the proof of such notification should be constituted.

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.

Since these exemptions are made upon a case-by-case assessment under exceptional circumstances and insider trading is always forbidden, we see no reason as to why other instruments could not be included.

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.

N/A

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.

While the specific MAR regime clearly applies to CIUs admitted to trading or trading on a trading venue, we are of the view that the general objective of these requirements is relevant to all CIUs in terms of investor protection. Given the purpose of these requirements is to ensure transparency and market integrity to the benefit of the investor, we would be concerned if the requirements differed significantly or were deemed too onerous to the extent as to discourage CIUs from requesting admission to trading venues as that would not be a desirable outcome for the market as a whole.

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.

In the case of PDMR obligations applying to the management companies of CIUs, we agree with the principle of ESMA's approach but it needs to be clear which entities are within scope and which individuals it applies to given the different structures in place. i.e. where funds have no legal personality and have a Manager who undertakes the executive decisions, and funds which have their own legal personality and use an external management company (commonly known as a ManCo), to undertake certain regulatory responsibilities. It is important that a distinction is made between a Manager, in the case of an entity that does not have its own legal personality, and a Management Company in the case of other types of funds that have a legal entity and that the two terms are not used interchangeably as they do not have the same meaning in the industry generally.

In both scenarios, it is likely these individuals will be privy to inside information so those relevant provisions will apply, but in relation to PDMRs, it needs to be clear who is discharging the managerial responsibility - for funds with no legal personality, it would be standard practice for the PDMR requirements to be complied with by the principals of the manager. However, in some other cases where the fund has its own legal personality, it should be clear that the individuals in the management company within scope of the PDMR obligations are those responsible for the decision-making, and it may be that using the "relevant person" terminology may be too broad in certain circumstances.

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

N/A

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.

We believe further analysis should be undertaken on the implications of this as it may be considered that using the “relevant persons” definition could be too broad.

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 our view, we do not think other entities should be captured by the PDMR regime.

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

Yes, we agree that it would provide clarity to the market to specifically refer to units of CIUs as being within scope. We understand this is the general interpretation in the market in any case.

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

Yes, we agree that the management company should have the same legal responsibility as the issuer under Article 17 of MAR where the fund does not have its own legal personality.

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?

We agree that the requirements for insider lists should apply to CIUs. We support ESMA’s proposals to specify that the issuer should only be required to have one contact on its insider list for each external provider.

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.

FESE considers that the proposal to use XML templates in accordance with the ISO 20022 methodology, in order to harmonise the requirements under Article 25 of MiFIR for trading venues, is a reasonable approach. XML templates would allow more flexible amendment of information, easier validation from trading venues and easier processing for regulators. We however suggest a phased approach with enhancing of the content only in a second step.

In addition, we would highlight that this data cannot be delivered intraday and thus should only be required on a T+1 basis. These requirements cover a significant amount of data and this would give sufficient time for venues to submit it in the required format and with the required fields, including client code information. We believe this would meet the requirements for NCAs for the specific purpose of market surveillance.

Costs of this measure are difficult to estimate, at least until further clarity is provided on the specific changes that would be required. Providing XML to all regulators requires some development and testing and, the greater the changes, the higher the costs. Moreover, additional costs for regulators would finally be passed on market participants and be added to all costs already incurred by MiFID II. We would hence urge that a cost-benefit analysis is conducted before any measure is decided. Any further increase in costs would have to be proportionate and reasonable, and the benefits clearly demonstrated.

Based on our experience of RTS24 reporting, we think clear rules must be defined for the XML schema upgrades: we find the current big-bang approach used by most regulators for XML reporting hard to manage, and would strongly advise to make it mandatory for regulators to provide a transition phase when XML schema is updated.

In addition, the following points must also be considered:

- Changes to the templates shall not apply retrospectively because of the prohibitive costs incurred;
- Other execution venues, such as Systematic Internalisers should also be within scope of these requirements,
- A transition phase is essential to allow the market for developing and adapting the new requirements.

All regulators shall follow the same approach if it is concluded that this harmonised approach will achieve the objective of creating a cross-platform uniform market replay that regulators can use for cross-market order book surveillance.

Lastly, if further work is being contemplated by ESMA on this proposal, we would strongly suggest that a workshop is held. This would allow participants to engage on this from the very beginning, and would guarantee a satisfactory and efficient result for all parties – regulators, trading venues and investment firms.

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

FESE believes that ESMA's objective to enhance the ability of regulators to monitor markets for market abuse is positive and we support this aim, as market integrity is fundamental to the orderly functioning of our markets. That said, we believe this proposal needs to be considered very carefully, conducted in a harmonised fashion, and be accompanied by an impact assessment, as trading venues have already invested significant resources and costs into developing systems to comply with the current requirements. However, we fail to understand, from the Consultation Paper, a) the deficiencies identified by ESMA in the current ad-hoc system and b) the advantages of a regular reporting mechanism.

We strongly believe that any proposal to change the requirements for trading venues to provide order book data to regulators should also apply to investment firms in the same way, as this is essential in order to deliver the full view of order data for regulators to monitor activity for market abuse. It should also be noted that currently some NCA requests are different depending on the category of trading venue. It is crucial that the approach taken applies to all in the same way so that it can be ensured that there is a level playing field for all entities engaged in trading activity.

We would like to highlight the following points which should be considered further as part of this proposal:

- FESE members would like to understand for what purpose the establishment of a regular reporting mechanism should be used. Section 11.1.2 in the MAR Review Paper only describes the status quo and states that according to Article 38 of MAR, the European Commission is required "to assess the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for the framework" and that the Commission requests ESMA's input on this topic. It remains unclear whether the proposal of the establishment of an EU framework for cross-market order book surveillance is based on a needs' assessment and thus where exactly the added value might lie. Further, ESMA does not provide any evidence as regards potential shortcomings or deficiencies of the existing regime; as noted in para 296, the exchange of information between NCAs according to the rules and procedures of the existing regime actually facilitated the detection of market abuse in a cross-border context. Hence, the report falls short to argue in a sufficiently precise manner how this system could be improved by establishing cross-order book surveillance.

- In its consultation paper ESMA does not provide any information on why NCAs would require regular access to all data. While some NCAs require regular reporting already, for the majority this would require NCAs to heavily invest in IT infrastructure (servers, storage, lines, cloud, trainings etc.). Moreover, it would consume a lot of time and budget before any such data transfer could start. Unlike transfer and processing of smaller data subsets the transfer of entire data pools is complex and slow. Examining entire data pools instead of relevant data only for concrete case specific questions of potential market abuse may also lead to confusion and even wrong conclusions. If, however, regular reporting is required, we would emphasise that these data cannot be delivered intraday and thus should be required on a T+1 basis. These requirements cover a significant amount of data and this would give sufficient time for venues to submit it in the required format and with the required fields, including client code information. We believe this would meet the requirements for NCAs for the specific purposes of market surveillance.

- The question is, if the potential advantages of cross-market order book surveillance justify the efforts and uncertainties (such as challenges related to the technical implementation or potential unintended consequences for trading venues) that might result from it. Article 25 of MiFIR is intended to put financial authorities in a position to efficiently monitor financial markets. Therefore, in case of suspicion and on request, they are provided with information stored by investment firms and trading venues to detect and investigate potential cases of market abuse – thus, enabling financial authorities to analyse and evaluate suspicious behavior of market participants in a concrete case. A plus of the current system in place is that trading venues only need to provide a subset of data on request (and not all available data). Transfer and processing of smaller subsets of data is easier and faster than submitting the entire data pool. However, certain regulators have taken different approaches as some already require regular reporting and therefore, once ESMA has done further analysis and concludes on a way forward, the agreed new approach needs to be harmonised.

- Finally, according to ESMA's review report and as mentioned above, the cross-market order book would only cover trading venues (Article 25(2) of MiFIR) but not OTC and bilateral trading, such as Systematic Internalisers. The OTC space remains a black box, which seems contrary to the purpose of an EU cross-market order book surveillance as it would give an incomplete picture of all trading activities within the EU. This calls the usefulness of the order book data pool into question. The EU cross-market order book would add new (legal, administrative, organisational, financial) requirements on trading venues which is neither justified from a level playing field perspective nor from the point that trading venues have established systems and controls to detect and prevent market manipulation which certain market participants in the OTC space have not accomplished in an equivalent manner. Therefore, we believe further assessment is required with respect to this proposal and a harmonised approach needs to be ensured, especially across different type of venues.

To conclude, further analysis is required by ESMA, otherwise there is a risk that this proposal would result in a large burden for both NCAs and trading venues in terms of adapting their IT-infrastructures, with potentially little to no improvement on monitoring efforts. While we acknowledge that some trading venues need to comply with similar requirements in certain jurisdictions, we are concerned that broad and continuous data reports may not improve the monitoring efforts of the NCAs unless further valuation is done to demonstrate what is required. In any case, any further assessment will need to ensure a harmonised approach is taken.

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.

We believe that the proposal to establish a regular reporting mechanism of order book data needs to be considered very carefully, conducted in a harmonised fashion, and be accompanied by an impact assessment, as trading venues have already invested significant resources and costs into developing systems to comply with the current requirements. There is a risk that this proposal could result in increasing the burden on NCAs and venues, without achieving its objective on improving market surveillance. As previously high-lighted, the underlying question is if the potential advantages of cross-market order book surveillance justify the efforts and uncertainties (such as challenges related to the technical implementation or potential unintended consequences for trading venues and investment firms) that might result from requiring regular reporting of all this data.

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

N/A

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.

FESE supports ESMA's view that there is no need to modify MAR in this respect as the administrative sanctions for insider dealing and market manipulation are already addressed in the respective Member States' national law.

Furthermore, we wish to make a general comment as regards enforcement of MAR across Europe. As ESMA's report on MAR sanctions has shown, the situation looks very different. FESE would encourage any measures which would streamline enforcement and sanctioning, whether in the MAR framework itself or in practical efforts to achieve better convergence. The split picture contributes to maintaining barriers for cross-border financing opportunities for issuers, as investors hesitate on cross-border investments. Better convergence would support financing of companies, contributing to growth and job creation.

Also, the sanctions regime in MAR seems tailored to larger companies. The market capitalisation of a company listed on SME Growth Markets may be around only one million EUR, while MAR provides, for offences of insider dealing and market manipulation, a maximum fine of 5 million EUR for natural persons. Member States can also impose even higher maximum administrative fines. Such disproportionality could be reviewed bearing in mind that many listed companies are indeed SMEs.

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

N/A