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Finance for Europe

AFME response to ESMA MAR Review Consultation Paper

29 November 2019

1. The Association for Financial Markets in Europe (AFME)[1] welcomes the opportunity to respond to the ESMA Consultation Paper.

2. EXECUTIVE SUMMARY

We recognise that the proposals in this review are intended to streamline the efficiency of the MAR regime, which we believe is consistent with the wider objectives of the Capital Markets Union.

We note that, as of the date of the ESMA Consultation Paper, MAR has been in force for an insufficient amount of time to establish an exhaustive track record of shortcomings and application issues. Our answers to the consultation questions therefore reflect the current market position, however there may be further challenges which arise after a greater passage of time and/or in different market scenarios/conditions.

Our key points include:

- Buy back programmes and stabilisation - we agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR, however, our members also experience the same issues under Article 5(5) of MAR in relation to the reporting mechanism for the stabilisation exemption. In light of this, and the need to maintain alignment between the buy-back and stabilisation exemptions, we are of the view that the reporting mechanism under Article 5(5) of MAR should be modified, as well as the reporting mechanism under Article 5(3).

- Inside information - we consider that Article 7 of MAR is generally drafted in a sufficiently broad manner to ensure that the definition of inside information is wide enough, as well as flexible enough, to capture the information which (a) should be disclosed by issuers (subject to the ability to delay such disclosure); and/or (b) the misuse or inappropriate disclosure of which would amount to market abuse. Our members consider that, if the definition of inside information is reassessed, the focus should be on the extent to which existing national legislation, rules and guidance are consistent with the intended Level 1 definition and therefore whether Level 3 guidance should be provided to ensure pan-European consistency in the interpretation and application of the definition.

- Pre-hedging – we believe pre-hedging is an essential activity, which provides significant benefits to clients and the financial markets. In line with Principle 11 of the FX Global Code, pre-hedging must only be undertaken fairly and with adequate

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[1] AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76. Information about AFME and its activities is available on the Association's website: www.afme.eu.

disclosure, and conducted in accordance with MAR and MiFID. We do not believe that a prescriptive framework is required relating specifically to pre-hedging, as the existing regulatory framework adequately addresses the potential risks posed by pre-hedging activity.

- Market soundings - we do not agree with the proposed amendments to Article 11 of MAR. In our view, both the correct technical, and best practical, reading of Article 11 is that it provides protection against the allegation of unlawfully disclosing inside information. Market participants appreciate the advantages of adopting Article 11 processes where a transaction is in scope of Article 11 and involves the disclosure of inside information, as they will wish in these circumstances to benefit from the protection afforded by Article 11(4). In our view, it is clear that:
  - Articles 11(3), 11(6) and 11(8) MAR are mandatory; but
  - Article 11(4) MAR is not mandatory, and instead provides a "safe harbour" – namely that a disclosure of inside information made in accordance with Article 11(3), 11(5) and the associated Delegated Regulations will be deemed to comply with Article 10.
  - This understanding is consistent with ESMA's answer to Q9.1 in its MAR Q&A, which refers to a disclosing market participant applying Article 11 MAR where it wishes to "receive the protection under Article 11" – such language would not have been useful if the Article 11 requirements were mandatory in any event.
- Non-independent investment recommendations - we consider that the existing investment recommendation disclosure requirement in relation to sales and trading recommendations is inefficient, disproportionately burdensome and not welcomed by the buy-side. We would recommend a Level 1 carve-out for sales and trading ideas for wholesale clients.

Our detailed response to the consultation is set out below. We would be pleased to engage further with ESMA on any of the points made in our response.

3. SCOPE OF MAR

3.1 Spot FX contracts

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.

AFME members support the submission made by the Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA).

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.

AFME members support the submission made by the Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA).

We are not responding to Q3-5.

We note that the Commodities Working Group of the Global Financial Markets Association (GFMA) is responding to Q6.

4. ARTICLE 5 MAR – BUY-BACK PROGRAMMES (BBPS)

4.1 Reporting obligations of BBPs

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

We agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR owing to the disproportionate compliance burden on issuers having to report to trading venues where they did not request admission to trading. In particular the current reporting mechanism increases the time and expense for issuers as they have to identify all involuntary listings and then report to the NCAs of each such venue even though they did not request their shares to be traded on them. Our members also experience the same issues under Article 5(5) of MAR in relation to the reporting mechanism for the stabilisation exemption. In light of this, and the need to maintain alignment between the buy-back and stabilisation exemptions, we are of the view that the reporting mechanism under Article 5(5) of MAR should be modified, as well as the reporting mechanism under Article 5(3).

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.

In order to minimise the disproportionate compliance burden discussed in our response to Q7, reporting should be required to one NCA only. This could be achieved by requiring reports to the NCA of the EU jurisdiction where the security was first listed or the jurisdiction of the venue where it was first admitted to trading or, alternatively, issuers could report to the NCA of the most relevant market in terms of liquidity (provided that it is clearly and objectively identifiable which NCA this is (this could be achieved by disclosure on the ESMA website)). However, in order to ensure that the current disproportionate compliance burden is fully

addressed, this approach would need to be taken in relation to Article 5(5) as well as Article 5(3) of MAR. Our members therefore consider that the key to addressing the issues identified is to ensure that reporting is limited to one NCA and that this is applied to stabilisations as well as buy-backs.

4.2 Simplification of the reports for BBPs

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.

Our members have no objection to removing the obligation.

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

Our members have no objection to the proposed list of fields as long as this only requires minimal technology changes. However, we note that the Level 1 legislation at Article 5(3) refers to "the information specified in Article 25(1) and (2) and **Article 26(1), (2) and (3) of Regulation (EU) No 600/2014**" (bold emphasis added), but that some of the information listed in the Article 26 provisions is not reflected in the proposed fields listed in paragraph 71 of the Consultation Paper. If no change is proposed to the Level 1 legislation, then it would be beneficial to include language in any Level 2 regulation or updated ESMA Q&A to clarify that the information contained in the fields listed in paragraph 71 is sufficient to satisfy the obligations specified through the reference to "Article 26(1), (2) and (3)" in the Level 1.

4.3 Transparency of transactions related to a BBP

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

We have no objection to ESMA's preliminary view.

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

We have no additional suggestions for such aggregated data.

5. ARTICLE 7 OF MAR - DEFINITION OF INSIDE INFORMATION

5.1.2 Definition of inside information and its effectiveness in preventing market abuse

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?

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

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 consider that Article 7 of MAR is generally drafted in a sufficiently broad manner to ensure that the definition of inside information is wide enough, as well as flexible enough, to capture the information which (a) should be disclosed by issuers (subject to the ability to delay such disclosure); and/or (b) the misuse or inappropriate disclosure of which would amount to market abuse. Members do sometimes experience difficulties with identifying what information is inside information, but this is due to the inherently fact sensitive nature of the assessment that is required and the need to exercise professional judgment – we do not consider that

amendments to Level 1 or Level 2 legislation would assist in making this task easier. Our members consider that, if the definition of inside information is reassessed, the focus should be on the extent to which existing national legislation, rules and guidance are consistent with the intended Level 1 definition and therefore whether Level 3 guidance should be provided to ensure pan-European consistency in the interpretation and application of the definition.

We note that the Commodities Working Group of the Global Financial Markets Association (GFMA) is responding to Q16-19

Inside information for commodity derivatives

5.1.2.2 Definition of inside information with respect to "front running" conduct Q20/21

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

We do not believe that any changes are necessary. Article 7(1)(a) of MAR already captures the use of information relating to pending client orders and otherwise meets the definition of inside information. We do not consider amendments are required to Article 7(1)(a) or Article 7(1)(d) to clarify this.

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

No, we do not believe that any specific conditions are required, as the existing provisions are sufficiently broad to cover abusive behaviour in relation to all instrument types. We do not think that a distinction exists between liquid and illiquid instruments in this regard. We think that if ESMA intends to alter the existing approach by adopting specific conditions, it should consult formally and separately before doing so.

5.1.2.3 Pre-hedging

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?

Pre-hedging is an important function for the smooth operation of financial markets, benefitting clients generally by allowing brokers to provide increased liquidity to their clients and provide the quality of execution expected by clients (including, but not limited to, price). Whilst there could be a risk of disadvantage for the client as a consequence of pre-hedging, this generally arises through market movements rather than inappropriate conduct, and the risk is disclosed to and accepted by clients.

To ensure that these risks are properly managed, firms must ensure that appropriate systems and controls are put in place for pre-hedging activities to ensure that the pre-hedging activity is contained within parameters acting in the best interests of clients. Our members believe that, in line with Principle 11 of the FX Global Code, pre-hedging must only be undertaken fairly and with adequate disclosure, and conducted in accordance with MAR and MiFID.

As these requirements are already established in MAR and MiFID, we do not believe that a prescriptive framework is required relating specifically to pre-hedging. The existing regulatory framework under MAR and MiFID adequately addresses the potential risks posed by pre-hedging activity.

We also note that, based on the experience of our members, it is not the case that a request for quote often meets the definition of inside information, rather this is something that always needs to be considered on the facts and cannot be assumed on a general basis.

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

Pre-hedging is an essential activity, which provides significant benefits to clients and the financial markets. Pre-hedging allows the client to execute their orders where they may not otherwise be provided with a price or liquidity. Pre-hedging additionally allows for a firm to provide a price to a client which should be better, from a market risk point of view, than the price that the client might otherwise obtain for executing the relevant transaction because the fulfilment of the client's order in its totality at the point of execution might impact the price to the client's detriment (for example, executing the whole order at once might move the price against the client). For the market, such activity is beneficial because it mitigates the potentially disruptive activity that could result from being limited to trading the whole risk at a single point of execution.

Financial institutions stand ready to provide liquidity and risk-manage transactions for their clients. In several cases, those transactions can be significant in size and/or complexity, thereby warranting delicate handling to ensure orderly execution and delivery of best results to clients.

For example, if a client requests to execute a transaction with the firm in an equity derivative, the firm will have to determine its willingness to execute, and its pricing, based on its ability to hedge the position. For the firm to take on the position, it may be important that it is able to source some liquidity in the underlying ahead of the conclusion of the transaction, without alerting the market to the total interest of the client. This should deliver for the client significant advantages, both in terms of their ability to execute and the quality of execution, as the hedging activity can be conducted in a way that reduces market impact. Without the ability to pre-hedge a portion of the request, the potential market impact of hedging the request at the point of execution will be included in the calculation of the risk price advanced to clients. It would be extremely challenging for institutions to manage such executions and/or price favourably without the ability to conduct pre-hedging activities in appropriate circumstances.

Similarly, the continuous sourcing of liquidity in pre-hedging situations is beneficial to the financial markets at large. Markets are less impacted by potential volatility spikes triggered by significant transactions being brought to the market.

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

Pre-hedging is relevant for all asset classes, including both liquid and illiquid instruments. In addition, in pre-hedging a client transaction, any number of instruments may be utilised which are not necessarily the same instruments as the client-side transaction.

6. ARTICLE 17 MAR – DELAYED DISCLOSURE OF INSIDE INFORMATION

6.1.1 Relevant regulatory framework

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.

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.

The issues experienced by our members in this area generally relate to divergences in approach to the delayed disclosure requirements across Member States. For example, there are differing approaches to when, if at all, it is possible to delay disclosure of worsening financial conditions. Further Level 3 guidance would therefore be beneficial to ensure a harmonised approach in this area, and consistency for market participants.

6.1.2 Assessment of whether the conditions for the delay of the disclosure of inside information are sufficiently clear for issuers

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?

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

We do not support the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling and disclosing inside information as there are already frameworks in place across Member States (for example the Listing Rules in the UK) that address the expectations and requirements on issuers in relation to the identification, handling and disclosure of inside information.

See also our response to Q13-Q15 above.

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 do not support this proposal as we consider that it would create a disproportionate compliance burden for limited benefits. In particular, we consider that due to the fact that many transactions do not proceed, this would lead to a significantly increased burden on issuers to file delayed disclosure notifications.

We are not responding to Q30-32.

7. ARTICLE 11 MAR – MARKETING SOUNDINGS

7.1 Enforceability of market soundings

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

We do not agree with the proposed amendments. In our view, both the correct technical, and best practical, reading of Article 11 is that it provides protection against the allegation of unlawfully disclosing inside information. Market participants appreciate the advantages of adopting Article 11 processes where a transaction is in scope of Article 11 and involves the disclosure of inside information, as they will wish in these circumstances to benefit from the protection afforded by Article 11(4). In our view, it is clear that:

- Articles 11(3), 11(6) and 11(8) MAR are mandatory; but
- Article 11(4) MAR is not mandatory, and instead provides a "safe harbour" – namely that a disclosure of inside information made in accordance with Article 11(3), 11(5) and the associated Delegated Regulations will be deemed to comply with Article 10.

This understanding is consistent with ESMA's answer to Q9.1 in its MAR Q&A, which refers to a disclosing market participant applying Article 11 MAR where it wishes to "receive the protection under Article 11" – such language would not have been useful if the Article 11 requirements were mandatory in any event.

More generally:

- There may be transactions to which MAR technically applies but where there is little European nexus where market participants prefer to act in accordance with the

principles set out in Article 10 and comply with local laws and practices in the jurisdiction with the closest nexus to the transaction.

- Additionally there may be transactions to which MAR technically applies but where absolutely no inside information whatsoever will be disclosed and therefore, DMPs may reasonably take a view that no protections are required to obtain comfort as to compliance with Article 10. Mandatory compliance with Article 11 and Delegated Regulation processes would be wholly disproportionate and could inhibit legitimate and valuable investor interaction further.

As noted above, ESMA should take comfort from the fact that market participants are likely to use Article 11 whenever inside information is being disclosed in the course of conducting a market sounding under Article 11(1), and are likely to be complying with similarly sophisticated anti-market abuse regimes with alternative robust systems and controls in place without formally falling within Article 11 where they choose not to apply the Article 11 safe harbour for good reason (e.g. compliance with local requirements in the jurisdiction where the transaction technically in scope of MAR is taking place).

To the extent that the Article 11 requirements were made mandatory whenever a behaviour met the definition of a market sounding under Article 11 MAR, this would raise a number of significant issues in practice which would need to be clarified in order to ensure there is no detrimental impact on the functioning of the market. By way of example, ESMA would need to make clear how firms should deal with a conflict of laws scenario where there is a non-European element to a transaction (as described above) where the relevant local law requirement conflicts with the Article 11 requirements. In addition, consistency of scope of the market soundings regime would need to be ensured between all Member States to avoid creating an impediment to cross-border transactions.

7.2 Definition of market sounding and difference with other forms of interactions with potential counterparties

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

We believe the market has a good understanding of the requirements set out in Article 11(1)-(2) (as already clarified in existing ESMA Q&A), and do not consider that modifications or clarifications are required in relation to the scope of Article 11(1). The judgment as to whether an investor interaction will amount to a market sounding is fact-specific, but members believe that the industry has a good understanding of the factors relevant to this determination.

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

We believe that the market has a good understanding of the stages of interaction which fall within the definition of a market sounding. We do not think that further clarity in this regard is required. For instance, we think market participants understand the point at which they are seeking to gauge interest about the size and pricing of a potential transaction, the point at which a transaction is being negotiated/executed, and the point at which a transaction is announced. We consider that market participants understand that unprompted feedback from investors to a DMP, where no information is being provided by the DMP to the investor, is not part of a market sounding.

We are not responding to Q36.

7.3 Simplification of the market sounding procedures and requirements

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?

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 the both the DMPs and the persons receiving the market soundings)?

Our members are not supportive of the proposal that the use of recording facilities should be made compulsory for all soundings. Providing that it is clear that the market soundings regime remains a means of achieving protection against allegations of unlawfully disclosing inside information, but is not made mandatory, we do not have additional examples of situations where the application would prove difficult.

In our view, the regime could be simplified and improved if the audit trail requirements were made more straightforward. At the moment, they do not work well in a number of situations where we believe that a broader and more general obligation to keep proper records generally would suffice. For instance, site visits may be undertaken as part of a market sounding, and it is not realistic to expect them to be recorded or minuted in the way that might occur in other situations (e.g. an investor feedback call). Further, in our view, the obligation to exchange and sign written minutes of market sounding meetings is unnecessarily burdensome. The relevant NCA will be able to access evidence of the content of the meetings without this additional procedural burden if sensible records are kept in accordance with a more general requirement. Further, there are likely to be situations where it would be better for meetings to proceed where there is an IT failure that prevents a meeting from being recorded, as may have been intended when the meeting was arranged. In such circumstances the requirement for a market sounding recipient to sign the written minutes within five working days is also unduly burdensome. One possible alternative simplification would be to remove the requirement for written minutes to be agreed in accordance with Article 6 of Delegated Regulation 2016/960, and instead simply to require the minutes to be shared by the disclosing market participant to the market sounding recipient, or keep them available for disclosure to the relevant NCA on request.

We also note the following:

- Once a wall-crossing has been undertaken, or an initial MAR sounding script used with an investor when no actual wall-crossing is required, we consider it to be unnecessary and unduly burdensome to require all follow up conversations (for example, a call back from an investor after an initial MAR sounding script has been undertaken), to require a further full sounding reminder to take place, or a further check that an investor is authorised to continue the sounding, consenting still to be electronically recorded and understanding of the legal and regulatory implications. This is because it is evident from the context that the dialogue is a continuation of the original sounding, meaning that following all of the Article 11(5) and Delegated Regulation Article 3 requirements a second (or further) time is unnecessary.

- We question the continued necessity of applying the market soundings regime to instruments with no formal listing in the EU, but which are (often without the knowledge or authority of the overseas issuer) nonetheless capable of being traded on a European Union market. We understand the policy intention behind applying other aspects of MAR to such involuntary listings, but, as with the considerations applicable to share buybacks and stabilisation, consider that the market soundings regime should not apply where the European Union nexus is so limited that, for instance, it is merely

because an instrument has been quoted on a venue that the market soundings regime might be thought to apply.

8. ARTICLE 18 MAR – INSIDER LISTS

8.1 Usefulness of insider lists

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

Yes, on the basis that the information contained in insider lists may assist NCAs investigating market abuse.

8.2.1 Actual access versus potential access to inside information

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

We do not consider that modification to the formal insider list requirements should be made. Member firms have invested significant technological and human resource in understanding and applying the current requirements, and changes to the requirements at this stage would be disruptive and costly. However our members consider that it would be beneficial to ensure consistency in the application of these requirements amongst national regulators to develop a consensus approach to common issues in this area (for example, whether someone who accidently receives inside information should be included on the insider list and whether individuals should be included on both the deal specific and the permanent insider list where relevant).

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 would actually access the inside information within a short time period?

ESMA should not underestimate the potential systems and controls issues that could arise in distinguishing between persons who effectively accessed a piece of information, and those who could have done so but did not. ESMA should note that a proposed shift to require the provision of insider lists of individuals who accessed the information will depend on existing systems and controls and therefore the ability to do so will be bespoke to individual firms and may require significant investment. Firms do not always have systems to identify, from those that accessed a system, the information that they specifically reviewed, and in some cases can only obtain such information for some but not all systems, or only after conducting significant forensic investigative activity.

In addition, not all sharing of inside information takes place through systems, and other factors such as co-location and team structure should also be taken into consideration. One example of this relates to employees located in the Control Room within compliance who work closely together on processes such as conflicts clearance and the maintenance of the firm's watch list. In such a scenario it is not always possible to draw a distinct line between actual and potential access. While audit trails in compliance systems may be able to identify employees, who have directly accessed inside information, it is possible that all members of the Control Room may be aware of live transactions under review. In addition, compliance Control Room teams outside the EU region could have access to EU information to provide round the clock coverage for conflicts management and inside information watch system administration. Therefore, it would not be appropriate to exclude certain members of the group from an insider list on the basis that there is no record of direct systems access.

It may be more cost effective for NCAs to identify, at the appropriate investigation stage, whether they want to understand whether a given individual with potential access actually accessed such information when undertaking their role, or not.

8.2.2 Further clarification of which persons should be subject to the obligation to draw up and maintain insider lists

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 you consider appropriate.

It is not considered that amendments to MAR are necessary to include auditors, notaries or other similar parties on insider lists. Current market practice is that third party entities, such as auditors, accountants and notaries, and who act on behalf of firms and who are exposed to inside information should be included on the relevant insider list. We strongly encourage ESMA not to otherwise attempt to expand the obligation to maintain insider lists in the way contemplated. MAR has extra-territorial effect outside the EU. Parties who, perhaps accidentally, receive inside information should not be expected to understand the obligation to keep a list which is equivalent to an insider list. They are, of course, bound by the obligation not to trade on, not to encourage others to trade on, and not to pass on that information. That should be sufficient to ensure that MAR has the correct effect, without erecting procedural obligations on unregulated and unlisted parties that are unlikely to be able to be complied with. We consider it an essential element of the workings of MAR that the obligation to keep an insider list rests originally with the EU-listed entity, and that it makes sense for parties acting on their behalf also to be required to keep an insider list, but not others. We do not consider that it is appropriate to extend the obligation to any other cases.

In addition, our members are of the view that it is already clear that where a party has information relating to an issuer, but is not acting for the issuer (for example in relation to a M&A transaction), that party is required to keep an insider list.

8.2.3 The role of the permanent insider section

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.

Yes, we consider the permanent insider section to be a useful aspect of an insider list. However, we do not consider it helpful to provide a short example list of the roles of individuals who would meet the definition in Article 2(2) of Implementing Regulation 2016/347. Different firms will have different organisational structures, and that might alter which individuals were appropriate to be placed on the permanent insider list.

For example, at one firm it could be that the Head of Legal, or the Head of Compliance, did not have access at all times to all inside information on all transactions that were being undertaken. Matters could be escalated to them, but the day-to-day knowledge and involvement could rest with a number of senior Legal or Compliance colleagues who worked with the relevant business lines and reported to the Head of Legal or Head of Compliance. In those circumstances, it could be that a number of personnel within the Legal and Compliance departments would be represented as permanent insiders.

To take another example, it could be that a particular Compliance Officer works on all deals in a particular sector, or within a particular geography (e.g. by country). Such a person would be a permanent insider in respect of all such deals. Similarly, a Compliance Officer and a lawyer

who sit on a new product due diligence Committee would be permanent insiders for all deals in that area.

We think a similar approach could be taken to other roles and, as a consequence, would encourage ESMA not to give a short example list. Firms need to comply with the existing MAR requirements, and NCAs already have the ability to supervise compliance with those obligations.

8.2.4 Reduction of the administrative burden for issuers regarding insider lists

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

We agree with ESMA's preliminary view that corporate contact details for just one contact person for each external service provider having access to inside information on a transaction would be sufficient. This would also reduce the GDPR risks that may arise on a transaction where an entire list of natural persons having access to inside information is required on a transaction, as it is not always possible to obtain this information. In order to eliminate GDPR risks entirely, ESMA should make clear that the individual representative's contact details should only include their corporate contact details (i.e. name, firm, office phone number) and not personal data. This is on the basis that the third-party firm/entity will be able to provide that information to the NCA on request.

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.

We do not have additional suggestions.

We are not responding to Q46-54.

9. ARTICLE 19 MAR – MANAGERS' TRANSACTIONS

9.2.2 Persons required to comply with the closed period

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 do not consider that the Article 19(11) requirement should be extended to issuers or persons closely associated with PDMRs. As noted by ESMA, these two groups are subject at all times to Articles 14 and 15 of MAR and we are not aware of any evidence to suggest that these requirements are not functioning appropriately to prevent violations in this area. Accordingly, we are of the view that extending the Article 19(11) requirement in this way would not address any gap or risk in the current regime and would therefore impose unnecessary restrictions, in particular on issuers. Of particular concern are the trading limitations that this would place on issuers, and the impact that this would have on their continued access to finance or ability to raise finance by selling shares or other investments. For example, extending Article 19(11) will restrict the ability of issuers to continuously offer medium-term notes, therefore restricting their MTN programmes and therefore their access to investors. In addition, this will also negatively impact investors by cutting off, or limiting, access to these programmes. We are therefore of the view that any potential benefit of this proposal would be strongly outweighed by the downsides that it would entail.

We are not responding to Q56-57.

10. MAR AND COLLECTIVE INVESTMENT UNDERTAKINGS

We are not responding to Q58-65.

11. COMPETENT AUTHORITIES, MARKET SURVEILLANCE AND COOPERATION

11.1.2 ESMA's initial considerations as regards the cross-market order book surveillance framework

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.

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

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.

Harmonising the reporting formats for order book data would represent a significant one-off cost for firms that operate trading venues in order to make the systems and IT changes necessary to facilitate compliance. We do not consider that such a significant project was envisaged as part of the MAR Review and therefore we would request that this is treated as a separate consultation by ESMA which is subject to a cost benefit analysis. Consideration should also be given to ensuring that these proposals are, if implemented, effected in a way that is proportionate to the benefits that they are seeking to achieve. We would also suggest that financial instruments which have their primary listing outside the EEA should be excluded from the scope of these requirements as venues outside the EEA will not provide order book data to NCAs as a matter of course.

In addition to the cost implications we would also like to highlight the following comments in relation to the proposals that have been made:

(a) Currently at least one NCA already requires trading venues to provide a daily file of all orders and trades to them in a different format and content to the requirements set out in RTS 24. The operational burden would be significantly reduced if one format and content structure were to be maintained in accordance with the existing RTS 24 requirements.

(b) Some information required by trading venues under RTS 24 can only be obtained by the venue through its participants, including the client identification code. Investment firms are currently required to provide the long code to venues on a T+1 basis which would be incompatible with a requirement on the venue to report this information daily to the relevant NCA.

(c) Our members would be grateful for clarification in relation to the encryption requirements that would apply to a daily reporting system as this will have both cost and systems implications.

11.2.2 Current legislative framework and potential amendment to MAR

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

Our view in relation to the proposed amendments in paragraph 317(a), is that these should be addressed in separate legislation as they fall outside the parameters of MAR. In particular, MAR specifically relates to unlawful behaviour in the financial markets, which is defined as consisting of insider dealing, unlawful disclosure of inside information and market manipulation, which have a clear threshold and burden of proof. The concept of 'unfair behaviour' does not meet this definition and has an unclear threshold, and we therefore consider that it would be inappropriate to build concepts relating to unfair behaviour into MAR which is explicitly intended to address unlawful market abuse carrying criminal and/or quasi criminal sanctions. Accordingly, our view is that these proposed amendments should be addressed separately, rather than extending MAR to cover behaviour which it was not intended or designed to address.

AFME members understand and would not object to NCAs having the ability to cooperate and share information with EU tax authorities on request, including exchange of information between different EU Member States, as described in paragraph 317(b). Our members consider that taxpayers should be informed that such information has been requested and should also be provided with copies of the information provided so that they can correct any misunderstandings. It should be noted that EU based taxpayers already have to provide information on dividend arbitrage schemes to their local tax authorities in a prescribed format (under DAC 6) which is then shared with other taxpayers.

We also note that some NCAs may not be best placed or resourced to manage any such investigations.

12. SANCTIONS AND MEASURES

We are not responding to Q70-71.

OTHER POINTS

Non-Independent Investment Recommendations

AFME members consider that the existing investment recommendation disclosure requirement in relation to sales and trading recommendations is inefficient, disproportionately burdensome and not welcomed by the buy-side. We would recommend a Level 1 carve-out for sales and trading ideas for wholesale clients.

Typical investment recommendations include brief sales and trading commentary, usually one to two sentences, as part of a general flow of information between firms and their clients on a daily basis. They are usually short term in nature and are generally responsive to market moves or requests. However, despite the brevity of the sales and trading commentary, each idea requires several pages of disclosures. This requires significant ongoing resources and has a daily operational impact, as firms need to produce and disseminate disclosures which, in the main, are then sent to a designated inbox, which, investment management clients say, are unmonitored. This represents an on-going cost to producers which outweighs any perceived benefit. We do not consider that the investment recommendations regime was developed with sales and trading commentary in mind, and our members do not consider that its application in this context functions appropriately.

There are many reasons why an investment may be a long term buy from the point of view of a research analyst and yet for it to be appropriate for a sales person at a particular time to recommend that it be sold, without that amounting to a contradiction of the fundamental long term buy recommendation. We believe that any conflicts of interest considerations are already appropriately addressed by MiFID II, and that buy-side clients are well aware of these arrangements. In particular, clients recognise that sales and trading commentary provides an important, immediate response to emerging issues, and would not consider it to be in their interest for quick reaction responses to be delayed by the application of a research process, as this would result in the information becoming stale.

In our members' view, the distinction between retail and wholesale professional/institutional clients is an important one. Our members support the need to manage conflicts of interest but believe the disclosures would be more suited to investors that are receiving advice.

AFME members believe that this is an area of MAR that would benefit from a review focused on the costs and benefits of the regime, taking into account that the current regime was designed in relation to equity research disclosures rather than sales and trading commentary. We also believe that such a review would need to take into account that systems and procedures are already in place in order to avoid unintended consequences or additional systems builds from well-intentioned but misdirected attempts at reform. Given the broad extra-territorial application of the investment recommendations disclosure regime, the application of the rules should also take account of the existing regimes across the globe, and the complications that arise both for producers and receivers of investment recommendations of overlapping regimes.

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