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| 3 October 2019 |

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| Reply form for the Consultation Paper on MAR review report |
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| Date: 3 October 2019 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_CP\_MAR\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

**Naming protocol**

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA\_CP\_MAR\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_CP\_MAR\_ESMA\_REPLYFORM or

ESMA\_CP\_MAR\_ANNEX1

***Deadline***

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings ‘Legal notice’ and ‘Data protection’.

# General information about respondent

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| --- | --- |
| Name of the company / organisation | Stowarzyszenie Emitentów Giełdowych (Polish Association of Listed Companies) |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | Poland |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_CP\_MAR\_1>

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

<ESMA\_QUESTION\_CP\_MAR\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_1>

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

<ESMA\_QUESTION\_CP\_MAR\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_2>

1. Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

<ESMA\_QUESTION\_CP\_MAR\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_3>

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

<ESMA\_QUESTION\_CP\_MAR\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_4>

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

<ESMA\_QUESTION\_CP\_MAR\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_5>

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

<ESMA\_QUESTION\_CP\_MAR\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_6>

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

<ESMA\_QUESTION\_CP\_MAR\_7>

We consider the current reporting mechanism indicated in Article 5(3) of MAR requires to be modified. This mechanism is actually formalised, complicated and in our opinion impractical. The NCAs have the possibility to obtain such information directly from the investment firms. We think that such double reporting is too burdensome for the issuers and disproportionate in view of the nature.

Moreover, in our opinion, the issuers should not be obliged to provide the NCAs as well as the market information within the scope determined in point 71 of ESMA’s CP.

Despite of such modification, we would like to mention about our proposal concerning in general buy-back programs. According to current Article 5(2) of MAR, in order to benefit from the exemption provided for in paragraph 1, a buy-back programme shall have as its sole purpose:

1. to reduce the capital of an issuer;
2. to meet obligations arising from debt financial instruments that are exchangeable into equity instruments; or
3. to meet obligations arising from share option programmes, or other allocations of shares, to employees or to members of the administrative, management or supervisory bodies of the issuer or of an associate company.

We would like to propose the extension of above-mentioned exemptions and to add two, new conditions:

1. purchasing of own shares by the issuer only as an investment (including the further resale by the issuer of own shares in the future) or
2. in order to payment through the transfer of the ownership of such own shares by the issuer as a part of future transaction of purchasing by the issuer the assets or shares / units in other entities (in exchange for payment by the issuer to the sellers the total or part of the selling price through the transfer the ownership of own shares held by the issuers to these sellers).

In our opinion, such modification will extend the application of buy-back programmes determined in MAR. We do not see any arguments for exclusion above-mentioned exemption from MAR. In practice such modifications would contribute to realisation of business strategy by the issuers and to the development of theirs business.

<ESMA\_QUESTION\_CP\_MAR\_7>

1. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA\_QUESTION\_CP\_MAR\_8>

After analysing of three options given by ESMA in CP, in our opinion Option 2 is the best way to modify the current reporting. Option 1, due to the arguments presented in Q7, should not be accepted.

Option 3 requires from the issuer more activity. It is not possible to report just to one, prior known NCAs, as in Option 2. In the Option 3, before reporting, the issuer would be obliged to verify which market is relevant in term of liquidity according to Article 26(1) of MiFIR. After such analysis, the issuer would report the competent NCAs. In our opinion, such solution is not the best way to modify the reporting mechanism.

Option 2, as above-mentioned, is recommended way to modify current mechanism. The rule of determination the relevant NCAs is obvious for all market participants. What is more important, such Option 2 requires less activities from the issuers and is easier in application by the issuers.

<ESMA\_QUESTION\_CP\_MAR\_8>

1. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA\_QUESTION\_CP\_MAR\_9>

Yes. From our point of view, the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR should be removed. It is connected with the double reporting which we mentioned above. We do not see any sense to provide NCAs the information which NCAs are able to obtain directly from the investment firms. We regard it as unnecessary due to above-mentioned double reporting.

<ESMA\_QUESTION\_CP\_MAR\_9>

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

<ESMA\_QUESTION\_CP\_MAR\_10>

We consider that the list of fields to be reported by the issuers to the NCA is too broad. Such answer is connected also with the answers given in Q11 and Q12. Due to the fact that investment firms are obliged to keep a record for five years information determined in Article 25(1) and (2) of MiFIR, in our opinion the NCA should not receive so much information. There exist some mechanisms in legal system which allow NCAs to obtain such fully detailed information. As a consequence, the report to the NCAs should include only the most significant information, such as buyer’s general data, information concerning the investment firm participating in such transaction, quantity and price (and price currency). The list of fields should be limited.

<ESMA\_QUESTION\_CP\_MAR\_10>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_11>

We agree with ESMA’s preliminary view concerning the publication of aggregated data.

<ESMA\_QUESTION\_CP\_MAR\_11>

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

<ESMA\_QUESTION\_CP\_MAR\_12>

In our opinion, the aggregated volume traded and the weighted average price paid for the shares in each trading session should be sufficient for the market participants. We do not see more data which should be published by the issuers. Such information should be sufficient to the market to analyse the execution of buy-back programme.

<ESMA\_QUESTION\_CP\_MAR\_12>

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

<ESMA\_QUESTION\_CP\_MAR\_13>

In fact in almost every case issuers have problems with identification if a given information is inside information and of the moment in which information becomes inside information. The data gathered by the Polish NCA for the first year of MAR operation indicate, that the definition of inside information is very imprecise – particular issuers published over this period a very wide range of inside information reports: between 0 and 179! (see: *Annex 1, Chart 1*). The most important problems relating to identification of the moment in which information becomes inside information focus in two areas: financial inside information and negotiations (see respectively: *Annex 2 and Annex 3*)

Following the research undertaken by SEG, there are 4 possible solutions to the above

problem.

**Option 1: Dual definition of inside information**

The concept of dual definition provides for maintaining current regime of protecting inside information, while enhancing the regime for publication of inside information. The key principles are:

1. The definition of inside information remains unchanged
2. The provisions for protecting of inside information (insiders’ lists and ban on trading) remain unchanged
3. The requirement to publish inside information immediately is amended – the issuer would be obliged to publish inside information only once it becomes price-sensitive information
4. The definition of price-sensitive information could be as follows (it is based on current definition of inside information in MAR art. 7.2):

Information shall be deemed to be price-sensitive if it indicates a set of circumstances which exists, or an event which has occurred, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances.

1. Although the definition of price-sensitive information would be narrower than the definition of inside information, no harm for the market would appear, since the provisions on identification and protecting inside information would remain unchanged. On the other hand, only important information would be published, which would be beneficial both for investors, and for issuers.
2. Implementation of this option would solve majority (if not all) of the problems related to delay in publication of inside information – delay would simply not be necessary (see also answer to **Q25**).
3. Implementation of this option would bring the regulations more in line with the current market practice – e.g. vast majority of issuers do not publish immediately financial data to be included in annual reports, although they are definitely covered by current, extremely spacious definition of inside information, neither they formally delay the publication of such information (see also answer to **Q28**).

**Option 2: More precise definition of inside information**

This approach would require to precise such notions as: “reasonably be expected to come into existence” (MAR art. 7.2), “reasonable investor” (MAR art. 7.4), “part of the basis of […] investment decisions” (MAR art. 7.4). However, having in mind, that “clarification” in MAR art. 7.2 and 7.4 created even more ambiguity than original definition under MAR art. 7.1, it seems impossible to make appropriate clarifications of MAR art. 7.2. and 7.4.

SEG is not in position to provide draft amendments of MAR in this respect. Some solution, however, is presented under option 4 below.

**Option 3: Simplified definition of inside information**

Having in mind, that “clarification” in MAR art. 7.2 and 7.4 created even more ambiguity than original definition under MAR art. 7.1, it seems appropriate to delete MAR art. 7.2 and 7.4. Definitely wording in MAR art. 7.1 (“information of a precise nature” or “would be likely to have a significant effect on the prices”) is more previse than “clarifications” in MAR art. 7.2 and 7.4 (“reasonably be expected to come into existence”, “reasonable investor”, “part of the basis of […] investment decisions”).

Such an approach would partially solve the problem of definition of inside information, although would not solve the problem of delay in publication of inside information, in particular in relation to financial inside information.

**Option 4: Catalogue definition of inside information**

Since the attempts to make the definition of inside information precise enough have not been successful yet, a solution could be creation (as level 2 measure) an open-end catalogue of most frequently published kinds of inside information. Examples of such catalogues in relation to financial inside information and to “normal” inside information are presented in enclosures *GRS-1* and *GRS-2* respectively.

Preferences of Polish issuers related to the particular options are presented in enclosed graph (to be prepared after 21.11)

<ESMA\_QUESTION\_CP\_MAR\_13>

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

<ESMA\_QUESTION\_CP\_MAR\_14>

In relation to inside information concerning listed companies the definition is spacious enough or even too spacious (see answer to **Q15**). However, we have don’t have enough expertise to answer this question in relation to commodity markets.

<ESMA\_QUESTION\_CP\_MAR\_14>

1. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA\_QUESTION\_CP\_MAR\_15>

Quite the contrary – issuers identified a lot of cases covered by the definition, where the information is not price-sensitive, has no value for the market participants, but theoretically “reasonable investor would be likely to use [it] as a part of the basis of his or her investment decisions” and theoretically “it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments”. For this reason, the market is experiencing inflation of inside information reports and investors have problems with appropriate analyses of them. According to data gathered by the Polish NCA (see: *Annex 1, Chart 1*), during the first year of MAR operation, the number of inside information identified by issuers listed on the Warsaw Stock Exchange was very high with median value at 14 and maximum value at 179 (i.e. publishing inside information almost every trading day).

<ESMA\_QUESTION\_CP\_MAR\_15>

1. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA\_QUESTION\_CP\_MAR\_16>

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<ESMA\_QUESTION\_CP\_MAR\_16>

1. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA\_QUESTION\_CP\_MAR\_17>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_17>

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

<ESMA\_QUESTION\_CP\_MAR\_18>

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<ESMA\_QUESTION\_CP\_MAR\_18>

1. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

<ESMA\_QUESTION\_CP\_MAR\_19>

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<ESMA\_QUESTION\_CP\_MAR\_19>

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

<ESMA\_QUESTION\_CP\_MAR\_20>

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<ESMA\_QUESTION\_CP\_MAR\_20>

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

<ESMA\_QUESTION\_CP\_MAR\_21>

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<ESMA\_QUESTION\_CP\_MAR\_21>

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

<ESMA\_QUESTION\_CP\_MAR\_22>

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<ESMA\_QUESTION\_CP\_MAR\_22>

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

<ESMA\_QUESTION\_CP\_MAR\_23>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_23>

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

<ESMA\_QUESTION\_CP\_MAR\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_24>

1. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

<ESMA\_QUESTION\_CP\_MAR\_25>

The general perception of the regime of delay is contrary to MAR provisions as many issuers tend to delay publication of “almost inside information”, i.e. information, which is not precise and sure enough to consider it inside information, but may turn into inside information in the future. Even in the EC mandate for advice, the wording seems to imply existence of “almost inside information”, namely: “Inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public. One-way issuers can deal with this reality is through the mechanism of delaying disclosure of inside information as established in Article 17(4).”

Both the EC mandate and ESMA Q&A 5.2 indicate, that there is a need to differentiate between information, which “is mature enough to trigger a prohibition of market abuse” and information, which is “insufficiently mature to be disclosed to the public”. However, MAR does not allow for such interpretation – according to MAR art. 17.4 the delay is possible only in relation to inside information. So currently MAR does not recognize the „level of maturity”. The concept of dual definition of inside information presented in answer to **Q13 (option 1)** would be a solution to this problem.

In case the above solution is not implemented, the regime of delay of publication of inside information should be considerably amended (see answers to questions: **Q26, Q28, Q29 and Q30 below**).

<ESMA\_QUESTION\_CP\_MAR\_25>

1. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

<ESMA\_QUESTION\_CP\_MAR\_26>

The most important problem in assessment of conditions for the delay is the requirement, that   
“delay of disclosure is not likely to mislead the public” (MAR, art. 17.4 (b)). Logically, lack of publication of important information (and only important information could be inside information, so the delay regime refers only to important information) in every case is likely to mislead the public. Such wording of regulation puts issuers delaying publication of inside information at great risk, since sooner or later a “reasonable investor” would argue, that delayed information would have been used “as part of the basis of his or her investment decisions” (MAR art. 7.4) and a court (not specialized in capital market problems) would agree with that.

A solution could be creating of a catalogue of situations in which delay of publication does not mislead the public, as desired by Polish issuers (see: Annex 4, charts 6 and 7). Alternative solution would be introduction of dual definition of inside information – see answer to **Q13 (option** **1)**.

Another important problem is the condition of “legitimate interests of issuer”, in particular it does not allow for delay of publication of initial financial data gathered e.g. for creating annual report.

A solution could be extending the catalogue of “legitimate interests of issuer” by the case of preparing financial reports by issuer or introduction of dual definition of inside information – see answer to **Q13 (option 1)**.

Last but not least, meeting the confidentiality criterion (“the issuer or emission allowance market participant is able to ensure the confidentiality of that information”) is also problematic. Having in mind, that delay in publication often relates to negotiations, where many people on both sides of transaction are involved, declaring ex ante, that issuer “is able to ensure the confidentiality” is very brave, but verification if it was true is possible only ex post. Much better wording, reflecting market practice, would be e.g “the issuer or emission allowance market participant undertakes all the measures to ensure the confidentiality of that information”.

<ESMA\_QUESTION\_CP\_MAR\_26>

1. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

<ESMA\_QUESTION\_CP\_MAR\_27>

Mandatory systems and controls for identifying, handling, and disclosing inside information could be introduced basing on proportionality principle. It should be noted, that MAR refers also to alternative markets, in Polish case dominated by start-ups and micro caps. There are as many as 144 issuers with the capitalization below EUR 1 million listed on NewConnect market. In their case introduction of further requirements would mean that the company earnings would be consumed for compliance rather than payed to investors.

<ESMA\_QUESTION\_CP\_MAR\_27>

1. Please provide examples of cases in which the identification of when an information became “inside information” was problematic.

<ESMA\_QUESTION\_CP\_MAR\_28>

Since the definition of inside information is very vague, it is very difficult to identify moment of emergence of inside information almost in any case. However, the most typical are negotiations and financial inside information.

In case of negotiations there are many stages, at which information could be ex post considered inside information, but ex ante it isn’t, since the decisions have not been made yet, the documents have not been signed yet etc. Following the research undertaken by SEG (analyses of 14 stages of typical negotiations) you may find, that even the best experts on the Polish market have very different views on the moment, when negotiations become inside information (see: *Annex 3*).

Similarly in case of preparing annual report. Usually all the data are available to the company much earlier than the report is published and the more complicated procedures of auditors will be, the longer will be this period. Again the experts differ a lot in relation to the moment of identification of inside information there, but they agree, that it takes place well in advance of report publication (see: *Annex 2*). Moreover, according to latest research undertaken by SEG and PRK Doradztwo Giełdowe Sp. z o.o., the market reaction proves, that annual reports impact the market (which means, that they embraced inside information).

Introduction of dual definition of inside information could serve as a solution to this problem – see answer to **Q13 (option 1).**

<ESMA\_QUESTION\_CP\_MAR\_28>

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

<ESMA\_QUESTION\_CP\_MAR\_29>

If the information “lost its inside nature” it means, that (in vast majority of cases) it has never had any “inside nature”, that such information never was inside information, but rather “almost inside information” delayed just in case, to avoid potential responsibility of the issuer. If it “lost its inside nature” it means it was not sure enough to make any investment decision based on it. So it should never be recognized as inside information. Such problems are created by too spacious definition of inside information.

Introduction of dual definition of inside information could serve as a solution to this problem – see answer to **Q13 (option 1)**.

<ESMA\_QUESTION\_CP\_MAR\_29>

1. Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

<ESMA\_QUESTION\_CP\_MAR\_30>

Disclosure requirements of listed companies lead to extreme complications in case of financial problems of all issuers, not only financial institutions. If a listed company is obliged to disclose its difficult financial standing to the public, is hit simultaneously by banks (cutting financing), suppliers (requiring prepayments), clients (shift to other producers), competing companies (taking over suppliers, clients and staff) as well as by employees (most often transfer to closest business rival). Such a situation leads to losses of investors and to unlevel playing field vs. non-listed companies.

Hence, it should be considered, if the delay referred to in MAR art. 17.5 should be extended to all issuers. See also answer to **Q31**.

<ESMA\_QUESTION\_CP\_MAR\_30>

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

<ESMA\_QUESTION\_CP\_MAR\_31>

The issue which should be addressed is the problem of waiting for the consent of the competent authority, while there is a requirement to publish information for investors under “normal” disclosure requirements. Such a situation could emerge e.g. when time for publication of financial report expires and the data published in this report would disclose “temporary liquidity problem”.

Furthermore, quite often “temporary liquidity problem” would be something, that “reasonable investor would take into account in part while making investment decision”, so it is important not only for stability of financial system, but also for investors. Hence, request to delay under MAR 17(5) should be preceded by the decision of issuer to delay publication of information under MAR 17(4). However “temporary liquidity problem” is not necessarily “likely to prejudice the legitimate interest of the issuer” as further defined in ESMA guidelines 2016-1478, which means, that in practice issuer could not be allowed for delay of publication under MAR 17(4), so the information should be disclosed immediately. So in such cases to allow for delay under MAR 17(5) either competent authority should act faster than immediately, to allow for delay before publication requirement is met, or “temporary liquidity problem” should be clearly considered as one of examples when “immediate disclosure is likely to prejudice the legitimate interests of the issuer”. See also answer to **Q30**.

<ESMA\_QUESTION\_CP\_MAR\_31>

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

<ESMA\_QUESTION\_CP\_MAR\_32>

Financial institutions are subject to multiple requirements imposed by multiple regulations and multiple supervisory bodies. Many of such regulations or supervisory decisions clearly have impact on investors, but financial institutions have problems with indicating whether, when and to what extend they should provide reports to the market. The examples could be:

1. Imposing new regulation, which is publicly known (eg. MREL) – whether, when, and how detailed information for investors should be prepared?
2. Change in contribution do banking compensation scheme
3. Impact of supervisory requirements on dividend policy.

<ESMA\_QUESTION\_CP\_MAR\_32>

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

<ESMA\_QUESTION\_CP\_MAR\_33>

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<ESMA\_QUESTION\_CP\_MAR\_33>

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

<ESMA\_QUESTION\_CP\_MAR\_34>

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<ESMA\_QUESTION\_CP\_MAR\_34>

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

<ESMA\_QUESTION\_CP\_MAR\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_35>

1. Do you think that the reference to “prior to the announcement of a transaction” in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?

<ESMA\_QUESTION\_CP\_MAR\_36>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_36>

1. Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

<ESMA\_QUESTION\_CP\_MAR\_37>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_37>

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

<ESMA\_QUESTION\_CP\_MAR\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_38>

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

<ESMA\_QUESTION\_CP\_MAR\_39>

We consider that the insider list is useful to NCAs. Such list allows NCAs to identify, who has access to inside information and what is more important – when some person gain the access to such information. It is very useful from the NCA point of view and may remove all doubts arising out during the investigation.

However, we would like to underline that we consider the list of persons closely associated with the person discharging managerial responsibilities (MAR art. 19.5) not necessary, while very difficult to keep updated by issuers, since it requires managing quite intimate personal data. Broad discussion of the issue of list of persons closely associated with the person discharging managerial responsibilities is referred to in the answer to **Q50**.

<ESMA\_QUESTION\_CP\_MAR\_39>

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

<ESMA\_QUESTION\_CP\_MAR\_40>

In our opinion the insider list regime should not be amended. The current definition of this obligation is clear and does not require any modification. We agree that issuers, from their safety purposes, prefer including more persons in the insider list. As a consequence, such lists consist of persons having access to the inside information as well as of persons having the possibility to have such access. Such activity causes that the lists consist of persons who do not have actually access to the inside information.

Despite above, our view is to remain the insider list regime unchanged. However, some recommendations or guidelines should be presented by ESMA or each NCA to explain issuers meaning and purpose of such regulation. In particular, it should be clear, that issuers are not required to keep lists of natural persons employed by other legal persons – see the answer to **Q44**.

<ESMA\_QUESTION\_CP\_MAR\_40>

1. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA\_QUESTION\_CP\_MAR\_41>

The choice of systems and controls should be left to issuers, provided that these systems and controls meet the requirements of the purpose of regulation. Namely there should be a possibility to verify who actually worked on documents connected with the inside information and who actually gained the access to inside information as well as a possibility to generate such list of persons who had the access to the inside information on the request of NCAs with the correct and reliable information within a short time period.

<ESMA\_QUESTION\_CP\_MAR\_41>

1. What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

<ESMA\_QUESTION\_CP\_MAR\_42>

In our opinion, MAR should clearly indicate, whether the following persons should be included in lists of persons having access to inside information: interim court supervisor, notary, creditor committee, bailiff, court expert and any others persons, bodies and authorities regulated in the bankruptcy law and the restructuring law, as well as connected with the court proceedings.

Moreover, it should be clear if issuers are obliged to include in their lists persons, who do not act on behalf or on account of the issuer, but – to the knowledge of the issuer – are in a possession of inside information.

<ESMA\_QUESTION\_CP\_MAR\_42>

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

<ESMA\_QUESTION\_CP\_MAR\_43>

From our point of view, the permanent insider section in some instances could be misleading to the NCAs as often, the issuers’ lists include all members of the management board as well as all top managers of the company. In practice, not all of them has the permanent access to inside information. The consideration of the issuers is that it is better to contain more persons in such list because some of them may gain such access. However, no regulatory change in this respect seems necessary.

<ESMA\_QUESTION\_CP\_MAR\_43>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_44>

We agree with the ESMA’s preliminary view concerning the revision of Article 18 of MAR. In our opinion, the lists having access to inside information should include only the natural persons and – in the case of legal entities – only the name and data of such legal entity, without specification the details of persons acting within the scope of such legal entity. Such legal entity should be obliged and responsible for informing the issuer about the persons acting on the account of issuer within the scope of such legal entity. Hence, the issuers should prepare the lists acting on the basis of documents prepares by each legal entity.

<ESMA\_QUESTION\_CP\_MAR\_44>

1. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA\_QUESTION\_CP\_MAR\_45>

We do not see any other suggestion concerning the insider lists.

<ESMA\_QUESTION\_CP\_MAR\_45>

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

<ESMA\_QUESTION\_CP\_MAR\_46>

The increase of the minimum reporting threshold to EUR 20.000 might be considered, as the current EUR 5.000 threshold is easily achievable. This may lead to inflation of the information requirement and undermine the achievement of the set targets.

According to the SEG/FSR survey (see: Annex 4, charts 13 and 14) ca. 42,4% of the respondents support the idea to raise the threshold. Most of the respondents indicated the threshold of EUR 20.000 (41,5%) as the appropriate basic and the second highest number of respondents indicated the threshold of EUR 10.000 (15,1%). At the same time ca. 11,3% of the respondents answered there should be no threshold at all and all the transactions of PDMRs and PCAs should be reported. The same number of respondents see the current threshold as satisfying.

<ESMA\_QUESTION\_CP\_MAR\_46>

1. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA\_QUESTION\_CP\_MAR\_47>

There should be an option for NCAs to raise the basic threshold for reporting PDMRs and PCAs transactions, however according to the answer to Q46 (recommendation to increase the threshold from EUR 5.000 to EUR 20.000) consequently the optional threshold for NCAs should be higher than the current EUR 20.000 threshold.

<ESMA\_QUESTION\_CP\_MAR\_47>

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

<ESMA\_QUESTION\_CP\_MAR\_48>

A possible alternative solution could be to set the threshold depending on the market capitalisation of the company. This would be a proportional option, balancing the burden of reporting the transactions (adjusted to company size) and at the same time not lowering the transparency on the market in this respect.

<ESMA\_QUESTION\_CP\_MAR\_48>

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

<ESMA\_QUESTION\_CP\_MAR\_49>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_49>

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

<ESMA\_QUESTION\_CP\_MAR\_50>

It was identified by the market, that not every transaction beyond the set threshold should be subject to reporting, as this constitutes an unnecessary burden on PDMRs, PCAs and issuers and at the same time does not serve the purpose of market transparency. On the contrary, it could be misleading to the market.

An alternative could be a mechanism based on ‘resetting the counter’ each time the threshold has been exceeded (i.e. after each actually disclosed transaction), in contrast to ‘resetting the counter’ only once a year. In consequence, instead of notifying several minor transactions the market would be informed about ‘packages’ of transactions.

The same idea stands behind the current mechanism of reporting – it must be noted that currently only the last transaction of the first package of transactions totalling up to EUR 5.000 is being reported.

By introducing the option to ‘reset the counter’ there should be no requirement to report minor transactions until they sum up to the threshold again. In result, the market would be informed about every EUR 5.000 in transactions.

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An independent problem associated with this question and constituting a disproportionate burden is Article 19(5) of MAR. The provision provides an obligation for issuers and EAMPs to draw up a list of all PCAs. This responsibility frequently leads to the necessity to ask the managers for intimate information about their relatives and personal lives. As far as keeping the lists of PDMRs is obvious and well-founded, keeping the lists of PCAs appears highly burdensome.

It must be noted that MAR provides for 3 kinds of personal relations with PDMRs, 4 kinds of economic relations with PDMRs and another 4 kinds of economic relations with persons tided by personal relations with PDMRs. This equals to the number of ca. 25.200 PCAs in Poland and approximately over 500.000 in all EU. And yet the issuers and EMAPs have to prove due diligence in verifying every notification from PCAs.

Instead, a reasonable solution that would preserve the level of transparency could be to either abolish the lists of PCAs and introduce a mechanism of notifying the issuers and EAMPs indirectly via PDMRs or to furnish the issuers or EMAPs with an independent accurate timespan to verify and report the transaction (e.g. 2-3 business days after receiving a notification from an eligible person, not after the transaction).

According to the SEG/FSR survey (see: Annex 4, chart 16) ca. 81,2% of the respondents support the idea to waive the obligation to keep PCAs lists. 58,4% of the respondents support the idea of forwarding notifications via PDMRs and 22,8% are willing to accept an additional timespan to verify the PCAs identity.

<ESMA\_QUESTION\_CP\_MAR\_50>

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

<ESMA\_QUESTION\_CP\_MAR\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_51>

1. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

<ESMA\_QUESTION\_CP\_MAR\_52>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_52>

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

<ESMA\_QUESTION\_CP\_MAR\_53>

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<ESMA\_QUESTION\_CP\_MAR\_53>

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

<ESMA\_QUESTION\_CP\_MAR\_54>

Clarifications on identifying the closed period are desired, as it is frequent that some companies publish estimates on financial performance (preliminary financial results), before the actual final results. In this light it is not clear from the wording of the provisions whether final performance or estimates should be taken into account. This may cause difficulties, as the final performance is usually published only within another month after the estimates.

Although ESMA provided the market with some explanations, the literal wording of Article 19(11) of MAR refers only to the announcement of an interim financial report or a year-end report and not the preliminary estimates. Therefore, it should be considered to introduce the ESMA clarification together with the conditions to be fulfilled directly into the MAR provision.

<ESMA\_QUESTION\_CP\_MAR\_54>

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

<ESMA\_QUESTION\_CP\_MAR\_55>

There is no need to extend the requirement of Article 19(11) to PCAs. As PDMRs have an obligation not to disclose inside information the risk to prejudice transparency through carrying out transactions in the closed period is marginal. It must be additionally noted that an interim financial report or a year-end report is indisputably an inside information. The exposure is therefore appropriately mitigated and safeguarded.

<ESMA\_QUESTION\_CP\_MAR\_55>

1. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA\_QUESTION\_CP\_MAR\_56>

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<ESMA\_QUESTION\_CP\_MAR\_56>

1. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

<ESMA\_QUESTION\_CP\_MAR\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_57>

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

<ESMA\_QUESTION\_CP\_MAR\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_58>

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

<ESMA\_QUESTION\_CP\_MAR\_59>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_59>

1. Do you agree with ESMA’s preliminary view? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_60>

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<ESMA\_QUESTION\_CP\_MAR\_60>

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

<ESMA\_QUESTION\_CP\_MAR\_61>

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<ESMA\_QUESTION\_CP\_MAR\_61>

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

<ESMA\_QUESTION\_CP\_MAR\_62>

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<ESMA\_QUESTION\_CP\_MAR\_62>

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

<ESMA\_QUESTION\_CP\_MAR\_63>

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<ESMA\_QUESTION\_CP\_MAR\_63>

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

<ESMA\_QUESTION\_CP\_MAR\_64>

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<ESMA\_QUESTION\_CP\_MAR\_64>

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

<ESMA\_QUESTION\_CP\_MAR\_65>

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<ESMA\_QUESTION\_CP\_MAR\_65>

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

<ESMA\_QUESTION\_CP\_MAR\_66>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_66>

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

<ESMA\_QUESTION\_CP\_MAR\_67>

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<ESMA\_QUESTION\_CP\_MAR\_67>

1. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

<ESMA\_QUESTION\_CP\_MAR\_68>

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<ESMA\_QUESTION\_CP\_MAR\_68>

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

<ESMA\_QUESTION\_CP\_MAR\_69>

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<ESMA\_QUESTION\_CP\_MAR\_69>

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

<ESMA\_QUESTION\_CP\_MAR\_70>

Administrative sanctions seem much more efficient than penal ones, in particular in relation to insider trading, where proving misconduct beyond any reasonable doubt is often not possible. Although administrative sanctions seem “lighter” than penal ones, they are more preventive, since they are much easier to enforce.

However, Article 30(1) second paragraph of MAR is not the only place, where regulations on sanctions require amendment. A very important problem is that the same maximum sanction is allocated to extremely different “weight” of potential misconduct. E.g. there is the same maximum sanction for breach of MAR art. 18, 19 and 20 (over 5 pages of different requirements). Hence, the maximum sanctions should be more specifically allocated to given kinds of potential misconduct (56,9% of respondents) and/or there should be elaborated possible detailed algorithm for sanction calculation (73,8% of respondents) – see: *Annex 4, charts 17 and 18*.

Moreover, it is important to note, that issuers and their managers are currently subject to very high potential sanctions not for misconduct, but for misinterpretation of vague and spacious definition of inside information or for formal mistakes in maintaining list of insiders, of PDMRs or persons closely associated. Furthermore, this sanctions are disproportionate in relation to the size of the market or of given company and compensation of their managers.

In particular, construction of sanction implies, that SMEs are treated much worse, than bigger companies. Sanction e.g. for improper identification or publication of inside information is EUR 2,5 million or 2% of total turnover. So for big companies the maximum sanction is 2% of annual turnover, while in case of small company it could be EUR 2,5 million, which is not only higher than 2% of annual turnover, but in many cases is higher than its market value. There are as many as 284 companies listed in Poland (51 on regulated market and 233 on alternative NewConnect market – data as of the end of June 2019) with capitalization below EUR 2,5 million. Hence, to avoid discrimination of SMEs the maximum sanctions should be expressed in the same way as for big companies – in relation to annual income (45,6% of respondents) or market capitalization (13,6% of respondents) – see: *Annex 4, chart 19*.

The size of companies implies also the amount of managers’ compensation. The maximum sanctions amounting to EUR millions are higher than managers of SMEs could earn over their lifetime. The best solution would be limiting the value of maximum sanction to the average 6 months compensation of a given manager in the given capital group over last 3 years (see: *Annex 4, charts 20, 21 and 22*).

<ESMA\_QUESTION\_CP\_MAR\_70>

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

<ESMA\_QUESTION\_CP\_MAR\_71>

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<ESMA\_QUESTION\_CP\_MAR\_71>