



European Securities and  
Markets Authority

# Questions and Answers

On the Market Abuse Regulation (MAR)



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## 1. Purpose and status

1. The purpose of this document is to promote common, uniform and consistent supervisory approaches and practices in the day-to-day application of Market Abuse Regulation (No 596/2014, “MAR”). It does this by providing responses to questions asked by the public, financial market participants, competent authorities and other stakeholders. The question and answer (Q&A) tool is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Further information on ESMA’s Q&A process is available on our website.
2. ESMA intends to update this document on a regular basis and, for ease of reference, ESMA provides the date each question was first published as well as the date/s of amendment beside each question. A table of all questions in this document and dates is provided in Section I.
3. Additional questions on MAR may be submitted to ESMA through the Q&A tool on our website ([here](#)). Please see the guidance available on our website before submitting your question.

## 2. Legislative references and abbreviations

### Legislative references

<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>1</sup>
<i>MAR</i>	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Text with EEA relevance) <sup>2</sup>
<i>Implementing directive on reporting to competent authorities of actual or potential infringements</i>	Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation <sup>3</sup>

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<sup>1</sup> OJ L 331, 15.12.2010, p. 84

<sup>2</sup> OJ L 173, 12.6.2014, p. 1–61

<sup>3</sup> OJ L 332, 18.12.2015, p. 126–132

*Delegated regulation on an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions*

Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions (Text with EEA relevance)<sup>4</sup>

*RTS on financial instrument reference data under Article 4 of MAR*

Commission Delegated Regulation (EU) 2016/909 of 1 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications (Text with EEA relevance)<sup>5</sup>

*ITS on financial instrument reference data under Article 4 of MAR*

Commission Implementing Regulation (EU) 2016/378 of 11 March 2016 laying down implementing technical standards with regard to the timing, format and template of the submission of notifications to competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council (Text with EEA relevance)<sup>6</sup>

*RTS on disclosing market participants conducting market soundings*

Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings (Text with EEA relevance)<sup>7</sup>

*ITS on disclosing market participants conducting market soundings*

Commission Implementing Regulation (EU) 2016/959 of 17 May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and

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<sup>4</sup> OJ L 88, 5.4.2016, p. 1–18

<sup>5</sup> OJ L 153, 10.6.2016, p. 13–22

<sup>6</sup> OJ L 72, 17.3.2016, p. 1–12

<sup>7</sup> OJ L 160, 17.6.2016, p. 29–33

<i>(systems, templates and records)</i>	the format of the records in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council (Text with EEA relevance) <sup>8</sup>
<i>RTS on accepted market practices</i>	Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance (Text with EEA relevance) <sup>9</sup>
<i>RTS on the prevention, detection and reporting of abusive practices or suspicious orders or transactions</i>	Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions (Text with EEA relevance) <sup>10</sup>
<i>ITS on insider lists format</i>	Commission Implementing Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council (Text with EEA relevance) <sup>11</sup>
<i>ITS on the notification and disclosure of managers' transactions</i>	Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council (Text with EEA relevance) <sup>12</sup> ;
<i>RTS on investment recommendations or other information recommending or</i>	Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment

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<sup>8</sup> OJ L 160, 17.6.2016, p. 23–28

<sup>9</sup> OJ L 153, 10.6.2016, p. 3–12

<sup>10</sup> OJ L 160, 17.6.2016, p. 1–14

<sup>11</sup> OJ L 65, 11.3.2016, p. 49–55

<sup>12</sup> OJ L 88, 5.4.2016, p. 19–22

*suggesting an investment strategy*

recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest (Text with EEA relevance)<sup>13</sup>

*RTS on buy-back programmes and stabilisation measures*

Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council for the conditions applicable to buy-back programmes and stabilisation measures (Text with EEA relevance)<sup>14</sup>

*ITS on the technical means for public disclosure of inside information and for delaying the public disclosure of inside information*

Commission Implementing Regulation (EU) 2016/1055 of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council (Text with EEA relevance)<sup>15</sup>

## Abbreviations

<i>CIU</i>	Collective investment undertaking
<i>EC</i>	European Commission
<i>DMP</i>	Disclosing Market Participant
<i>EAMP</i>	Emission Allowances Market Participants
<i>EEA</i>	European Economic Area
<i>ETF</i>	Exchange-traded funds
<i>EU</i>	European Union
<i>ESMA</i>	European Securities and Markets Authority
<i>ITS</i>	Implementing technical standards
<i>MTF</i>	Multilateral trading facility
<i>OTF</i>	Organised trading facility

<sup>13</sup> OJ L 160, 17.6.2016, p. 15–22

<sup>14</sup> OJ L 173, 30.6.2016, p. 34–41

<sup>15</sup> OJ L 173, 30.06.2016, p. 47–51



*PDMR*

Person discharging managerial responsibilities

*RTS*

Regulatory technical standards

### 3. Summary table

Subject	Q	Topic of the Question	Level 1 / Level 2 provision	Last updated
General	4.1	Blanket cancellation of orders policy	Article 8 of MAR	30/05/2017
Disclosure of Inside information	5.1	Disclosure of inside information related to Pillar II requirements	Article 17 of MAR	23/03/2018
Disclosure of inside information	5.2	Delayed inside information that lost the feature of price sensitivity	Article 17(4) of MAR	29/09/2017
Disclosure of inside information	5.3	Delayed disclosure of inside information under Art. 17(5): assessment of the relevant conditions	Article 17(5) of MAR	01/10/2018
Disclosure of inside information	5.4	Delayed disclosure of inside information under Art. 17(5): notification of the expected duration	Article 17(5) of MAR	01/10/2018
Disclosure of inside information	5.5	Delayed disclosure of inside information under Art. 17(5): NCA's denial of consent	Article 17(5) of MAR	01/10/2018
Disclosure of inside information	5.6	Disclosure of inside information by collective investment undertakings without legal personality voluntarily admitted to trading or traded on a trading venue		29/03/2019
Disclosure of inside information	5.7	Potential cases of inside information in relation to collective investment undertakings voluntarily admitted to trading or traded on a trading venue		29/03/2019
Disclosure of inside information	5.8	Interaction between MAR and CRAR: Article 7 MAR and Article 10(2a) CRAR		06/08/2021 (new)
Disclosure of inside information	5.9	Disclosure to the public of credit ratings and inside information Article 7 MAR and Article 10(2a) CRAR		06/08/2021 (new)
Disclosure of inside information	5.10	Distribution of subscription ratings and disclosure of inside information Article 7 MAR and Article 10(2a) CRAR		06/08/2021 (new)



Prevention and detection of market abuse	6.1	Persons professionally arranging or executing transactions	Article 16(2) of MAR	1/09/2017
Managers' transactions	7.1	Exchange rate	Article 19 of MAR	26/10/2016
Managers' Transactions	7.2	Timing of the closed period	Article 19(11) of MAR	13/07/2016
Managers' transactions	7.3	Threshold calculation	Article 19(1) and(8) of MAR	20/12/2016
Managers' transactions	7.4	Price of gifts, donation and inheritance	Article 10(2)(k) of Regulation 2016/522	20/12/2016
Managers' Transactions	7.5	Notification of shares received as part of remuneration package	Article 19(1) of MAR Article 10(2)(i) of Regulation 2016/522	20/12/2016
Managers' transactions	7.6	Price of options granted for free	Article 10(2)(k) of	20/01/2017
Managers' Transactions	7.7	Person closely associated to a PDMR	Article 3(1)(26)(d) of MAR	06/07/2017
Managers' transactions	7.8	Trading during closed periods and prohibition of insider dealing	Article 19(12) of MAR	21/11/2017
Managers' Transactions	7.9	Types of transactions by PDMRs prohibited during closed periods	Article 19(11) of MAR	21/11/2017
Managers' Transactions	7.10	Non-applicability of the ban to transactions of the issuer on its own financial instruments	Article 19(11) of MAR	12/11/2018
Investment recommendation	8.1	Communications made orally or via electronic means	Article 3(1)(34) and 35 of MAR	26/10/2016
Investment Recommendation	8.2	Communications not referring to one or several issuers	Article 3(1)(34) and 35 of MAR	26/10/2016
Investment recommendation	8.3	Main business is not to produce investment recommendations	Article 3(1)(34) and 35 of MAR	26/10/2016
Investment Recommendation	8.4	Information implicitly recommending or suggesting an investment strategy	Article 3(1)(34) and 35 of MAR	26/10/2016
Investment	8.5	Communications containing	Article 3(1)(34) and 35	20/12/2016

recommendation		purely factual information	of MAR	
Investment Recommendation	8.6	Communications on previously disseminated investment recommendations	Article 3(1)(34) and 35 of MAR	20/12/2016
Investment recommendation	8.7	Recommendation on derivatives traded solely outside a trading venue	Article 3(1)(34) and 35 of MAR	20/12/2016
Investment Recommendation	8.8	Identification of derivatives in investment recommendations	Article 3(1)(34) and 35 of MAR	20/12/2016
Investment recommendation	8.9	Recommendations on multiple issuers	Article 20 of MAR	27/01/2017
Investment Recommendation	8.10	Recommendations relating to several financial instruments independently	Article 20 of MAR	27/01/2017
Investment recommendation	8.11	Recommendations on derivatives referencing an index	Article 20 of MAR	27/01/2017
Market soundings	9.1	Financial instruments in scope	Article 11(1) of MAR	1/09/2017
Insider lists	10.1	Subject of the insider list requirements	Article 18(1) of MAR	1/09/2017
Insider lists	10.2	Issuer's responsibility In case of delegation	Article 18(2) of MAR	1/09/2017
Emission Allowances and EAMPs	11.1	Time span for the calculation of the CO2 equivalent emissions and rated thermal input	Article 17(2) of MAR	14/12/2017
Emission Allowances and EAMPs	11.2	Meaning of parent and related undertaking in Article 17(2) of MAR		29/03/2019
Emission Allowances and EAMPs/ Disclosure Of inside information	11.3	Disclosure of inside information concerning emission allowances, referring to installations of other undertakings of the group of the EAMP		29/03/2019

## 4. General Questions and Answers

### Blanket cancellation of orders policy

Updated: 30 May 2017

**Q4.1** Is a policy pursuant to which, after becoming in possession of inside information, the person should immediately and without the exercise of discretion cancel all orders relating to that information (“blanket order cancellation policy”) compliant with the insider dealing prohibition under MAR?

**A4.1** Article 8(1) of MAR states that “*the use of inside information by cancelling or amending an order placed before the person concerned possessed inside information*” constitutes insider dealing. This presumption is rebuttable under Recital 25 of MAR if the person establishes that they “*did not use the inside information when carrying out the transaction*”.

For those reasons, it cannot be concluded that a blanket order cancellation policy per se constitutes insider dealing.

It follows that where a firm decides to adopt a blanket cancellation policy for its proprietary trading, the fact that the cancellation may or may not constitute insider dealing will have to be assessed on case-by-case basis, by determining whether or not the cancellation was indeed performed without using the inside information.

## 5. Questions and Answers on the disclosure of inside information

### Disclosure of inside information related to Pillar II requirements

Updated: 23 March 2018

**Q5.1** Are credit institutions required under MAR to publish systematically the results of the Pillar II assessment and/or any information received in relation to the Minimum Requirement for own funds and Eligible Liabilities (MREL) exercise?

**A5.1** A main objective of the Market Abuse Regulation (MAR) is to enhance market integrity. This is notably achieved through a prompt and fair disclosure of information to the public.

For issuers of financial instruments, this objective has been translated into the requirement under Article 17 of MAR. Issuers who have requested or approved admission of their financial instruments to trading on a Regulated Market, or in the case of instruments only traded on an MTF or on an OTF issuers who have approved

trading of their financial instruments on an MTF or an OTF or have requested their admission to trading on an MTF, must inform the public as soon as possible of any inside information relating directly to them. According to Article 7 of MAR, inside information is such information that is:

- non-public,
- precise, and
- if it were made public would be likely to have a significant effect on the price of the issuer's financial instrument or related financial instruments.

MAR offers, by way of exception to the immediate disclosure of inside information, the possibility on a case-by-case basis to delay such disclosure under certain conditions. In accordance with Article 17(4) of MAR, any issuer may thus delay, under its own responsibility, the public disclosure of inside information such as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public<sup>16</sup> and the issuer is able to ensure the confidentiality of the information. Where the issuer is also a credit or financial institution, Article 17(5) of MAR allows for another possibility to delay in exceptional circumstances, the public disclosure of inside information, under the issuer's responsibility, in order to preserve the stability of the financial system. Where such an issuer intends to delay under Article 17(5) of MAR, it needs the prior consent of the competent authority on the basis that the following conditions are fulfilled: i) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system, ii) it is in the public interest to delay disclosure and iii) the confidentiality of the information can be ensured.

However it is not feasible to define ex-ante, in a general manner, how the relevant conditions should be met and therefore the concerned issuer needs to assess, on a case-by-case basis, the particular circumstances before deciding to delay the disclosure of inside information under Article 17(4) of MAR or notifying to the competent authority its intention to delay under Article 17(5) of MAR.

Under MAR, an issuer can also be liable for market manipulation in case of dissemination of false and misleading information, including failure to properly disclose inside information to the public.

Many credit institutions across the European Union are issuers of financial instruments and thus subject to the regime established under MAR, when at the same time they are also subject to the prudential supervision of the banking regulators.

Consequently, in the context of the Supervisory Review and Evaluation Process (SREP) to be conducted in accordance with Article 97 of Directive 2013/36/EU (CRD IV), whenever a credit institution subject to the market abuse regime is made aware

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<sup>16</sup> ESMA issued MAR Guidelines on delay in the disclosure of inside information ( ESMA/2016/1478; 20 October 2016).

of information, notably the results of the exercise, it is expected to evaluate whether that information meets the criteria of inside information.

Along the same line, in the context of the MREL exercise to be conducted by the Single Resolution Board in accordance with the Bank Recovery and Resolution Directive, whenever a credit institution subject to the market abuse regime is made aware of information, it is expected to evaluate whether that information meets the criteria of inside information.

If these criteria are met, the MAR provisions apply with respect to the relevant disclosure requirements. Such a credit institution would have then to publicly disclose the inside information as soon as possible unless it has delayed such a disclosure after having assessed that all the conditions for delaying apply.

ESMA recalls that, if and when a publication (e.g. an article published in the press or internet postings) which is not resulting from the issuer's initiative in relation to its disclosure obligations or a rumour in the market relates explicitly to (a piece of) information that is inside information within the issuer, according to Article 17(7) of MAR that issuer is expected to react and respond to the relevant publication or rumour if that (piece of) information is sufficiently accurate to indicate that the confidentiality of this inside information is no longer ensured. In such circumstances, which should be the exception rather than the rule and should be examined by the issuer on a case-by-case basis, a policy of staying silent or of "no comment" by the issuer would not be acceptable. The issuer's reaction or response should be made publicly available in the same conditions and using the same mechanisms as those used for the communication of inside information, so that an ad hoc announcement has to be published without undue delay.

Finally, it is noted that the disclosure of inside information is a matter of national supervision and enforcement of MAR, solely under the competence of the national competent authorities designated to that effect in accordance with Article 22 of MAR and whose heads are members of the Board of Supervisors of ESMA.

### **Delayed inside information that lost the feature of the price sensitivity**

Updated: 29 September 2017

**Q5.2** How should an issuer deal with a situation where it has delayed a disclosure of inside information in accordance with Article 17(4) of MAR and, due to subsequent circumstances, that information loses the element of price sensitivity and therefore its inside nature?

**A5.2** According to Article 17(1) of MAR, an issuer has to inform the public as soon as possible of inside information that directly concerns that issuer. Article 17(4) of MAR states that an issuer may, on its own responsibility, delay disclosure of inside

information to the public, provided that all of the conditions therein contained are met. Where an issuer has delayed the disclosure of inside information according to Article 17(4) of MAR, immediately after the information is disclosed to the public the issuer needs to inform the competent authority that disclosure of inside information was delayed, and provide written explanation on how the conditions set out in Article 17(4) of MAR were met.

Where the issuer has delayed the disclosure of inside information in accordance with Article 17(4) of MAR and the information subsequently loses the element of price sensitivity, that information ceases to be inside information and thus is considered outside the scope of Article 17(1) of MAR. Therefore, the issuer is neither obliged to publicly disclose that information nor to inform the competent authority in accordance with the last paragraph of Article 17(4) that disclosure of such information was delayed.

However, given that the information had been inside information for a certain period of time, the issuer had to comply with all relevant obligations relating to the drawing up and updating of insider lists and the maintenance of the information relating to the delay of disclosure, stemming from MAR and its delegated and implementing Regulations.

### **Delayed disclosure of inside information under Article 17(5) of MAR: assessment of the relevant conditions**

Updated: 1 October 2018

**Q5.3** When issuers that are credit/financial institutions intend to delay disclosure of inside information under Article 17(5) of MAR, what are the elements they should consider in their assessment of the conditions therein contained?

**A5.3** When a credit/financial institution intends to resort to the financial stability delay under Article 17(5) of MAR, it should provide evidence to the NCA that the conditions laid down in points a), b) and c) of the same article are met.

The assessment of those conditions should be as complete as possible to the best of the credit/financial institution's knowledge.

If the NCA gives its consent to the delay further to its own assessment of the relevant conditions, the credit/financial institution is expected to share with the NCA any subsequent additional information relating to the conditions for the delay.

#### **Point a) of Article 17(5) of MAR: disclosure of inside information entails a risk of undermining the financial stability of the issuer and the financial system**

It should be noted that to resort to the delay under Article 17(5) of MAR, disclosure of inside information has to entail a risk of undermining the financial stability of both the issuer and the financial system.

For the disclosure of inside information to entail a risk of undermining the stability of the financial system, it is likely for it to pertain and be performed by an institution of relevance, e.g. in terms of impact and interconnection.

In this context, credit/financial institutions should not simply rely on *ex ante* categorisations but rather look at the specific circumstances.

#### **Point b) of Article 17(5) of MAR: the public interest to delay the disclosure**

In the absence of any definition of “*public interest*”, Recital 52 of MAR provides guidance stipulating that “*the wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information which is subject to delay*”.

When assessing the public interest, the credit/financial institution should attempt to identify different entities or groups who could be directly or indirectly affected by the decision to delay the disclosure of the inside information and whose interests may be understood as a public interest.

During the assessment of the public interest, it is important to consider interests beyond the direct economic impacts and other non-financial interests of the public. All of these interests would need to be considered, and none of them should be considered in isolation.

If there are divergent interests of the public, the credit/financial institution should assess on a case-by-case basis if the prevailing public interest(s) is to delay the disclosure of inside information. For example, a potential loss to investors who have made or may make an investment decision should be weighed against the adverse effect of public disclosure on other groups, such as depositors and consumers.

#### **Point c) of Article 17(5) of MAR: the confidentiality of the information**

Credit/financial institutions should provide the NCA with information on how the confidentiality of the inside information can be ensured.

Credit/financial institutions are expected to assess the confidentiality of the information at the time of the notification to the NCA, but also how the confidentiality can be ensured during the period in which the information might be delayed.

To that purpose, credit/financial institutions should consider their procedures and measures put in place to ensure the confidentiality and draw up their insider list given that, pending the NCA’s decision to consent to the delay, the disclosure of the inside information is *de facto* already delayed.

**Delayed disclosure of inside information under Article 17(5) of MAR: notification of the expected duration**

Updated: 1 October 2018

**Q5.4 Are credit/financial institutions required to notify the NCA of the expected duration of the delay under Article 17(5) of MAR?**

**A5.4** Yes. The credit/financial institutions notifying the NCA of their intention to resort to the financial stability delay are expected to provide their assessment on the expected length of the delay and the details of expected trigger events.

If the NCA gives its consent to the delay further to its own assessment of the relevant conditions, credit/financial institutions should inform the NCA whenever they become aware of a new element or event that may affect the duration of the delay under Article 17(5) of MAR.

**Delayed disclosure of inside information under Article 17(5) of MAR: NCA's denial of consent**

Updated: 1 October 2018

**Q5.5 Where the NCA does not consent to the delay of disclosure under Article 17(5) of MAR, can a credit/financial institution resort to Article 17(4) of MAR?**

**A5.5** No. Where the relevant conditions are not met, the NCA cannot consent to the delay under Article 17(5) of MAR and, according to Article 17(6) of MAR, the credit/financial institution will have to disclose the inside information immediately.

In that case, credit/financial institutions will not be able to resort to the delay of disclosure under Article 17(4) of MAR.

**Disclosure of inside information by collective investment undertakings without legal personality voluntarily admitted to trading or traded on a trading venue**

Updated: 29 March 2019

**Q5.6 Is a collective investment undertaking (CIU) without legal personality subject to the obligation to disclose inside information under Article 17 of MAR?**

**A5.6** Yes. Article 17(1) of MAR establishes the obligation of the issuer to inform the public as soon as possible of inside information which directly concerns that issuer, without exempting any sort of issuers.

For the purposes of Article 17 of MAR, a CIU without legal personality meets the definition of 'issuer' contained in Article 3(1)(21) of MAR regardless of the fact that the effective issuance/redemption of the shares/units of the CIU, and any obligations



arising from MAR (or from any other piece of legislation) are discharged by the relevant asset manager.

In that context, the asset manager could be held responsible for a potential infringement of the CIU's obligation to disclose inside information under MAR.

However, ESMA recalls that the obligation to publish inside information under Article 17(1) of MAR only covers issuers that have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State.

ESMA would like to highlight that, like any other issuer, a CIU without legal personality (and therefore, its management company on its behalf) may, on its own responsibility, delay the disclosure of inside information, provided that the relevant requirements set out in Article 17 of MAR are met.

Finally, ESMA recalls that the obligation to publicly disclose inside information under Article 17 of MAR is different from any other disclosure obligations arising from the UCITS Directive and AIFM Directive, as it strictly refers to cases involving 'inside information' (as defined in Article 7 of MAR) that directly concerns the issuer.

## Potential cases of inside information in relation to collective investment undertakings voluntarily admitted to trading or traded on a trading venue

Updated: 29 March 2019

### **Q5.7 Are there any specific cases of inside information that may arise with respect to CIUs admitted to trading or traded on a trading venue under Article 17 of MAR?**

**A5.7** According to Article 7 of MAR, inside information is such information that is non-public, precise, directly or indirectly related to one or more financial instruments or issuer, and if it were made public would be likely to have a significant effect on the price of the issuer's financial instrument or related financial instruments.

The examples provided below are a non-exhaustive list of cases where inside information may arise. They do not aim at covering all the possible instances of inside information. Ultimately, the final assessment has to be made on a case-by-case basis. Some of the situations listed below may not constitute inside information in all cases.

For CIUs *admitted to trading/traded on a trading venue in general (including ETFs)* the following situations can be envisaged as potential cases of inside information:

- a. any situation with significant impact (appreciation or depreciation) on the valuation of the CIU assets and, as a result, on the value of the CIU's units;

- b. cases where the CIU has been affected by fraud, theft or an adverse tax ruling;
- c. unexpected circumstances in the creation/redemption of units of a CIU, including:
  - o any situation under which the CIU cannot issue/redeem its units;
  - o creation of excessive or insufficient units due to a material mistake.
- d. events that will directly affect the liquidity of the market in units of an ETF arising from events impacting the entities acting as counterparties in the secondary market: bankruptcy of the official liquidity provider/s, absence of authorised participants, decision to change the segment on which the CIUs are traded, etc.;
- e. failure or delay of a counterparty to an OTC derivative impacting the return or the risk of the CIU;
- f. failure or delay of a counterparty in a securities lending transaction;
- g. issues related to the total or partial liquidation of the CIU's assets, such as:
  - o imminent insolvency or termination of the CIU, or a sub-fund where the CIU is an umbrella fund;
  - o partial liquidation of the CIU's units; or
  - o modalities and payment terms preceding the liquidation or delisting of the CIU.

In particular, for *real estate CIUs admitted to trading/traded on a trading venue*, inside information according to Article 7 of MAR may also arise in the context of significant events related to the acquisition, sale or management of the CIU's real estate assets, including rents renegotiation or possible relevant losses derived from legal disputes.

### Credit ratings, rating outlooks and information relating thereto, pursuant to article 10(2a) of Regulation No 1060/2009

Updated: 6 August 2021 (new)

**Q5.8 Are credit ratings, rating outlooks and information relating thereto, pursuant to article 10(2a) of Regulation No 1060/2009, presumed to be inside information until disclosure to the public, or should a case-by-case assessment of the conditions in Article 7 of Regulation (EU) No 596/2014 be anyhow carried out?**

**A5.8** Credit ratings, rating outlooks and information relating thereto are presumed to be inside information until disclosure to the public.

Article 10(2a) of Regulation No 1060/2009 (Credit Rating Agencies Regulation or “CRAR”) provides that “Until disclosure to the public of credit ratings, rating outlooks and information relating thereto, they shall be deemed to be inside information, as defined in and in accordance with Directive 2003/6/EC”<sup>17</sup>. As a consequence of the presumption set out in article 10(2a) of CRAR, for “credit ratings, rating outlooks and information relating thereto”, the assessment of the conditions laid down in Article 7(1)(a) of MAR is not required and those ratings should always be treated as inside information.

## Disclosure to the public of credit ratings and inside information

Updated: 6 August 2021 (new)

**Q5.9** Where a credit rating agency discloses credit ratings, rating outlooks and information relating thereto on its public website, does such disclosure suffice to consider them no longer inside information under Regulation (EU) No 596/2014?

**A5.9** Yes.

Further to their disclosure on the public website of the credit rating agency, credit ratings, rating outlooks and information relating thereto are no longer to be considered inside information.

Article 10(2a) of Regulation No 1060/2009 (Credit Rating Agencies Regulation or “CRAR”) provides a presumption that credit ratings and rating outlooks are to be deemed inside information until their “*disclosure to the public*” without further specifying the formalities of such public disclosure<sup>18</sup>.

Article 7(1)(a) of MAR defines inside information as an information “*that has not been made public*” regardless of whom has published the information or by which means.

## Distribution of subscription ratings and disclosure of inside information

Updated: 6 August 2021 (new)

**Q5.10** Where a CRA distributes its credit ratings by subscription, would disclosure of credit ratings only to its subscribers constitute “disclosure to the public” within

<sup>17</sup> Directive 2003/6/EC was repealed by Regulation (EU) No 596/2014 (Market Abuse Regulation or “MAR”), and references to the provisions contained therein are to be read as references to MAR according to the correlation table provided in Annex II of MAR.

<sup>18</sup> Directive 2003/6/EC was repealed by Regulation (EU) No 596/2014 (Market Abuse Regulation or “MAR”), and references to the provisions contained therein are to be read as references to MAR according to the correlation table provided in Annex II of MAR.

**the meaning of Article 10(2a) and would subscribers be permitted to trade on the basis of these credit ratings?**

**A5.10** Yes.

Further to their disclosure to a distribution list of subscribers, credit ratings are no longer to be considered inside information.

Article 2 of Regulation No 1060/2009 (Credit Rating Agencies Regulation or “CRAR”) “applies to credit ratings issued by credit rating agencies registered in the Union and which are disclosed publicly or distributed by subscription” and explicitly excludes from its scope those “not intended for public disclosure or distribution by subscription”.

Article 10(2a) of CRAR provides a presumption that credit ratings and rating outlooks are to be deemed inside information until their “disclosure to the public” without further specifying in which cases such public disclosure occurs.

Depending on the business model of the CRA, certain credit ratings could be disclosed exclusively to subscribers of distribution lists subject to the payment of a license fee and, therefore, they should no longer be deemed as inside information pursuant to Article 10(2a) of CRAR.

Article 7(1)(a) of MAR defines inside information as an information “that has not been made public” regardless of whom has published the information or by which means.

## **6. Questions and Answers on the Prevention and detection of market abuse**

### **Persons professionally arranging or executing transactions**

Updated: 1 September 2017

**Q6.1 Does the obligation to detect and report market abuse under Article 16(2) of MAR apply to investment firms under MiFID only or do UCITS management companies, AIFMD managers or firms professionally engaged in trading on own account also fall within the scope of that obligation?**

**A6.1** The definition of “person professionally arranging or executing transactions” laid down in point (28) of Article 3(1) of MAR is activity based, does not cross refer to definitions under MiFID and is independent from the latter, leading thus to consider that the scope of Article 16(2) of MAR is not only limited to firms or entities providing investment services under MiFID.

In the absence of any reference in the definition that would limit the scope and exclude particular categories of persons regulated by other financial European legislation, ESMA considers that the obligation to detect and identify market abuse or attempted market abuse under Article 16(2) of MAR applies broadly, and “persons professionally arranging or executing transactions” thus includes buy side firms, such as investment

management firms (AIFs and UCITS managers), as well as firms professionally engaged in trading on own account (proprietary traders).

Non-financial firms that, in addition to the production of goods and/or services, trade on own account in financial instruments as part of their business activities (e.g. industrial companies for hedging purposes) can be considered firms professionally arranging or executing transactions in financial instruments under Article 16(2) of MAR. The fact that they have staff or a structure dedicated to systematically deal on own account, such as a trading desk, or that they execute their own orders directly on a trading venue as defined under MiFID II, are indicators to consider a non-financial firm as a person professionally arranging or executing transactions.

It is reminded that detecting and reporting suspicious orders and transactions under Article 16(2) of MAR should be applied by “persons professionally arranging or executing transactions” through the implementation of arrangements, systems and procedures that are appropriate and proportionate to the scale, size and nature of their business activity

## 7. Questions and Answers on Managers' transactions

### Exchange rate

Updated: 26 October 2016

**Q7.1 For transactions carried out under Article 19(1) of Regulation (EU) No 596/2014 of the European Parliament and of the council (MAR) in a currency which is not Euro (EUR), which exchange rate should be used to determine if the threshold set forth in Article 19(8) MAR of EUR 5 000 has been crossed?**

**A7.1** If transactions are carried out in a currency which is not the EUR, the exchange rate to be used to determine if the threshold is reached is the official daily spot foreign exchange rate which is applicable at the end of the business day when the transaction is conducted. Where available, the daily euro foreign exchange reference rate published by the European Central Bank on its website should be used.

### Timing of the closed period

Updated: 13 July 2016

**Q7.2 Does the «announcement» of the interim or year-end financial results determines the timing of the closed period referred to in Article 19(11) of Regulation (EU) No 596/2014 (MAR)?**

**A7.2** According to MAR, there should be only one closed period relating to the announcement of every interim financial report and another relating to the year-end report.

The term «*announcement*» of an interim or a year-end financial report used in Article 19(11) of MAR is the public statement whereby the issuer announces the information included in an interim or a year-end financial report that the issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or national law. The date when the «*announcement*» is made is the end date for the thirty-day closed period.

With particular reference to the year-end financial report, the «*announcement*» is the public statement whereby the issuer announces, in advance to the publication of the final year-end report, the preliminary financial results agreed by the management body of the issuer and that will be included in that report. This can apply only if the disclosed preliminary financial results contain all the key information relating to the financial figures expected to be included in the year-end report. In the event the information announced in such way changes after its publication, this will not trigger another closed period but should be addressed in accordance with Article 17 of MAR.

In any case, persons discharging managerial responsibilities remain subject at all times to Articles 14 and 15 of MAR prohibiting insider dealing and attempted insider dealing, unlawful disclosure of inside information, as well as market manipulation and attempted market manipulation.

### Threshold calculation

Updated: 20 December 2016

**Q7.3** When calculating whether the threshold triggering the notification obligation under Article 19(1) of MAR is reached (5.000 EUR or 20.000 EUR), should the transactions carried out by a person discharging managerial responsibilities (PDMR) and by closely associated persons to that PDMR be aggregated?

**A7.3** No, the transactions carried out by a PDMR and by closely associated persons to that PDMR should not be aggregated.

This involves that where the overall transactions singularly carried out by either a PDMR or any closely associated person to that PDMR do not reach the threshold, those persons should not notify those transactions even where the threshold is reached aggregating all the transactions carried out by the PDMR and all the closely associated persons to them.

A practical example is a CEO buying 4.000 EUR of equity and her spouse buying another 2.000 EUR. In such a case, none of them has reached the 5.000 EUR threshold and thus a notification is not required.

### Price of gifts, donation and inheritance

Updated: 20 December 2016

**Q7.4** Which are the rules to calculate the price of gifts, donations and inheritance for the purpose of the notifications and disclosure of managers' transactions under Article 19 of MAR?

**A7.4** According to Article 10(2)(k) of Commission Delegated Regulation (EU) 2016/522, donations and gifts made or received or inheritance received are transactions to be notified under Article 19(1) of MAR.

The value of these transactions need to be taken into consideration for the purpose of calculating the cumulated amount of the transactions of a PDMR or a person closely associated to a PDMR, to assess whether the threshold (EUR 5 000 or EUR 20 000) referred to in Article 19(8) and (9) of MAR has been crossed, hence triggering the duty to notify and disclose all subsequent transactions.

The field 4(c) on “Price(s) and volume(s)” of the template in the annex to Commission Implementing Regulation (EU) 2016/523 (Implementing technical standards on the notification and public disclosure of managers’ transactions) specifies the data standards to be used for expressing the price, depending on the type of financial instruments concerned. In that respect, such template makes reference to data standards defined for the purpose of the transaction reporting under Regulation (EU) 600/2014 (MiFIR) and related technical standards. However, it does not explain the rules about the price to take into account to calculate the value of a donation, a gift or inheritance.

For the purpose of the threshold calculation, the price to consider for donations, gifts and inheritance is the last published price for the financial instrument concerned in accordance with the post trade transparency requirements under MiFIR (Articles 6, 10, 20 and 21) on the date of acceptance of the donation, gift or inheritance (i.e. the date of the transaction), or where such price is not available that day, the last published price.

In the period before MiFIR becomes applicable, the price to use will be:

- for shares admitted to trading on regulated markets (RM), the last published price in accordance with the post trade transparency requirements under Articles 30 and 45 of Directive 2004/39/EC (MiFID I) on the date of acceptance of the donation, gift or inheritance or where such price is not available that day, the last published price;
- for shares admitted to trading or traded on MTFs only, bonds and derivatives or financial instrument linked thereto, the last traded price on the trading venue where the concerned financial instruments are traded, on the date of acceptance of the donation, gift or inheritance, or where such price is not available that day, the last traded price before the date of acceptance.

During the interim, in the case of shares being traded on several venues (RMs and/or MTFs), then the concept of “most relevant markets in terms of liquidity” under MiFID I and specified in the Commission Regulation (EC) 1287/2006 implementing MiFID I should be used to determine the trading venue to consider when looking at the last traded price. For other instruments, the concept of trading venue of first admission should be used.

Furthermore, where debt instruments admitted to trading or traded on a RM or a MTF are only traded OTC (i.e. there is no trading on RM nor MTF), then the price to consider should be the last publicly available price for that debt instrument (whatever is the source).



However, when a notification has to be made in accordance with Article 19(1) of MAR and Article 2 of the Implementing technical standards on the notification and public disclosure of managers' transactions, the price field for a gift, donation or inheritance is expected to be populated with 0 (zero).

## Notification of shares received as part of remuneration package

Updated: 20 December 2016

**Q7.5 Do shares received by a PDMR as part of a remuneration package have to be notified pursuant to Article 19(1) MAR and Article 10(2)(i) Commission Regulation 2016/522 only upon the occurrence of certain conditions?**

**A7.5** The rationale of Article 19(1) of MAR is mainly to prevent insider dealing and to provide investors with a highly valuable source of information. A notification of entering into a remuneration package contract, according to which a PDMR is entitled to receive shares only upon the occurrence of certain conditions, is not covered by that rationale. Therefore, pursuant to Article 19(1) of MAR and Article 10(2)(i) of Commission Delegated Regulation (EU) 2016/522, the PDMR has to notify only upon the occurrence of the conditions and the actual execution of the transaction.

## Price of options granted for free

Updated: 20 January 2017

**Q7.6 Which are the rules to calculate the price of options granted for free to managers or employees for the purpose of the notifications and disclosure of managers' transactions under Article 19 of MAR?**

**A7.6** According to Article 10(2)(b) of Commission Delegated Regulation (EU) 2016/522, such transactions have to be notified under Article 19(1) of MAR.

The value of these transactions needs to be taken into consideration for the purpose of calculating the cumulated amount of the transactions of a person discharging managerial responsibility (PDMR) or a person closely associated to a PDMR, to assess whether the threshold (EUR 5 000 or EUR 20 000) referred to in Article 19(8) and (9) of MAR has been crossed, hence triggering the duty to notify and disclose all subsequent transactions.

The field 4(c) on "Price(s) and volume(s)" of the template in annex to Commission Implementing Regulation (EU) 2016/523 (Implementing technical standards on the notification and public disclosure of managers' transactions) specifies the data standard to be used for expressing the price, depending on the type of financial instruments concerned. In that respect, such template makes reference to data standards defined for the purpose of the transaction reporting under Regulation (EU)

600/2014 (MiFIR) and related technical standards. However, it does not explain the rules about the price to take into account to calculate the value of the received options.

For the purpose of the threshold calculation, the price to consider for the received options should be based on the economic value assigned to the options by the issuer when granting them. If such an economic value is not known, the price to consider should be based on an option pricing model that is generally accepted in the reasonable opinion of the PDMR. This model determines the price of the granted option based on variables such as the current share price of the issuer, exercise price of the option and time until expiry of the option. Other variables that can be used in the option pricing model are (risk free) interest rates, future dividends and implied volatility. The variables used for the price determination of the granted option depends on which general accepted option pricing model is used.

However, when a notification has to be made in accordance with Article 19(1) of MAR and Article 2 of the Implementing technical standards on the notification and public disclosure of managers' transactions, the price field for options granted for free to managers or employees is expected to be populated with 0 (zero).

### Closely associated persons under Article 3(1)(26)(d) of MAR

Updated: 6 July 2017

**Q7.7** According to Article 3(1)(26)(d) of Regulation (EU) No 596/2014 of the European Parliament and of the council (MAR) a closely associated person is, inter alia, «*a legal person, trust or partnership, the managerial responsibilities of which are discharged*» by a person discharging managerial responsibilities (PDMR) or by a closely associated natural person. Is the reference to «*the managerial responsibilities of which are discharged*» contained in Article 3(1)(26)(d) of MAR to be read in the same way as the definition of PDMR within an issuer contained in Article 3(1)(25) of MAR?

**A7.7** No, the reference to «*the managerial responsibilities of which are discharged*» in Article 3(1)(26)(d) of MAR should be read to cover those cases where a PDMR within an issuer (or a closely associated natural person) takes part in or influences the decisions of another legal person, trust or partnership (hereinafter "legal entity") to carry out transactions in financial instruments of the issuer.

For example, in the case of mere cross board membership, where a person sits in the administrative, management or supervisory body of an issuer and also in the board of another legal entity where they exercise executive or non-executive functions, without however taking part nor influencing the decisions of that legal entity to carry out transactions in financial instruments of the issuer, then that person should not be considered discharging managerial responsibilities within that legal entity for the purposes of Article 3(1)(26)(d) of MAR. Therefore, that legal entity should not be subject to the notification obligations under Article 19(1) of MAR, unless it is directly

or indirectly controlled by, is set up for the benefit of, or its economic interests are substantially equivalent to those of that person.

## Trading during closed periods and prohibition of insider dealing

Updated: 21 November 2017

**Q7.8 How should permission to trade in a closed period, which may be granted in certain circumstances to PDMRs in accordance with Article 19(12) of MAR, be considered in the context of Article 14 of MAR?**

**A7.8** The insider dealing prohibition contained in Article 14 of MAR applies during closed periods referred to in Article 19(11) of MAR in the same way as it does at any other time, and must therefore be complied with by PDMRs. This means that when an issuer allows a PDMR to trade under Article 19(12) of MAR, the general insider dealing provisions still apply and the PDMR must always give consideration as to whether or not the relevant transaction would constitute insider dealing.

## Types of transactions by PDMRs prohibited during closed periods

Updated: 21 November 2017

**Q7.9 Are the types of "transaction" by a PDMR prohibited during a closed period under Article 19(11) of MAR the same as those types of transaction subject to the notification requirements set out under Article 19(1) of MAR?**

**A7.9** Yes.

It is pointed out that Article 19(11) of MAR only applies to a PDMR when conducting transactions on its own account or for the account of a third party whereas the notification of transactions required under Article 19(1) of MAR also applies to persons closely associated to a PDMR.

## Application of the prohibition contained in Article 19(11) MAR to issuers

Updated: 12 November 2018

**Q7.10 Does the prohibition in Article 19(11) MAR encompass transactions of the issuer relating to its own financial instruments even if it is the PDMRs taking the decision or bringing a previous decision into practice?**

**A7.10** No. Article 19(11) of MAR prohibits PDMRs within an issuer, and not the issuer itself, to conduct "any transactions on its own account or for the account of a third party, directly or indirectly, relating to the share or debt instruments of the issuer [...]"

during a closed period of 30 calendar days” before the announcement of a financial report.

Since the actions of the PDMR, in their capacity of director or employee of the issuer, are not PDMR transactions for the account of a third party but transactions of the issuer itself, the prohibition of Article 19(11) is not applicable.

Nevertheless, it should be noted that any transaction carried out by the issuer during a closed period should be carefully treated, as the issuer remains subject to the prohibition of insider dealing contained in Article 14 of MAR.

Therefore, where the issuer is in possession of inside information relating to its own financial instruments, it will be prevented from trading on them unless it had established, implemented and maintained the internal arrangements and procedures laid down in Article 9(1) of MAR.

## **8. Questions and Answers on investment recommendation and information recommending or suggesting an investment strategy**

For the purpose of this section, it is recalled that:

Article 3(1)(35) of MAR sets out that "*investment recommendation*" means “any information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public”;

Article 3(1)(34) of MAR sets out that “*information recommending or suggesting an investment strategy means information:*

*(i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or*

*(ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument.”*

**Q8.1 Do communications made orally or via electronic means such as telephone calls and “chat” functions, or communications labelled e.g. “morning notes” or “sales notes”, constitute an “investment recommendation” under MAR?**

**A8.1** Any communication that meets the criteria of the definition of investment recommendation within the meaning of Article 3(1)(35) of MAR in conjunction with Article 3(1)(34) of MAR will be deemed to fall within the scope of the investment recommendation regime. When determining whether a communication is an “investment recommendation”, an assessment should be made based on the substance of the communication, irrespective of its name or label and the format, form, or the medium through which it is delivered (whether electronically, orally or otherwise). As such, whether a specific oral or electronic communication, or a communication labelled as “morning notes” or “sales notes”, may be considered an investment recommendation within the meaning of MAR, it should be established on a case-by-case basis.

Where a standardised communication, including oral or electronic communication, is structured and pre-planned for distribution channels and it implicitly or explicitly suggests an investment strategy in relation to a financial instrument or issuer, it should be regarded as “investment recommendation”.

## Communications not referring to one or several issuers

Updated: 26 October 2016

**Q8.2 Can communications that do not refer to either one or several financial instruments or issuers be considered investment recommendations under MAR?**

**A8.2** Communications that meet the criteria of the definition of “investment recommendation” within the meaning of Article 3(1)(35) of MAR in conjunction with Article 3(1)(34) of MAR will be deemed to fall within the scope of the investment recommendation regime.

In particular, Article 3(1)(35) of MAR sets out that “*investment recommendation*” means “*information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers [emphasis added], including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public*”.

Therefore, a communication that does not refer to either a financial instrument or an issuer, should generally not be considered an investment recommendation. However, the producer’s assessment as to whether the above communication may be investment recommendation should be conducted on a case-by-case basis.

Communication relating solely to spot currency rates, sectors, interest rates, loans, commodities, macroeconomic variables or industry sectors and not referring to a financial instrument or an issuer would be considered as investment recommendation where it contains information assessed as allowing a reasonable investor to deduce that the communication is implicitly recommending specific financial instruments or issuers and provided that the other criteria of the definition of “*investment recommendation*” within the meaning of Article 3(1)(35) of MAR in conjunction with Article 3(1)(34) of MAR are met. For example, an opinion on a specific sector that is composed of a very limited number of issuers may be considered an investment recommendation regarding those issuers.

### Main business is not to produce investment recommendations

Updated: 26 October 2016

**Q8.3** Would an investment firm which produces an investment recommendation be considered to fall within the scope of Article 3(1)(34)(i) of MAR, even though the production of such recommendation is not its main business?

**A8.3** With regard to an investment firm, any information that comprises direct or indirect investment proposals in respect of a financial instrument or an issuer will be considered as information recommending or suggesting an investment strategy as defined under point (i) of Article 3(1)(34) of MAR. This is regardless of whether or not the production of investment recommendations is the main business of the investment firm, noting that the condition “*whose main business is to produce investment recommendations*” contained in point (i) of Article 3(1)(34) of MAR concerns any other person than independent analysts, investment firms and credit institutions.

### Information implicitly recommending or suggesting an investment strategy

Updated: 26 October 2016

**Q8.4** Does material intended for distribution channels or for the public concerning one or several financial instruments that contains statements indicating that the concerned financial instruments are “undervalued”, “fairly valued” or “overvalued” fall within the definition of “investment recommendation” under MAR?

**A8.4** Such material which concerns one or several financial instruments admitted to trading on a regulated market or a multilateral trading facility or for which a request for admission to trading on such a market has been made, or, traded on a multilateral trading facility or an organised trading facility, is considered as information implicitly recommending or suggesting an investment strategy pursuant to Article 3(1)(34) of MAR, insofar as it contains a valuation statement as to the price of the concerned financial instruments.

Furthermore, material containing an estimated value such as a “quantitative fair value estimate” that is providing a projected price level or “price target”, or any other elements of opinion on the value of the financial instruments, is also considered to be information implicitly recommending or suggesting an investment strategy pursuant to Article 3(1)(34) of MAR.

As the material referred to above is an investment recommendation under MAR, it needs to comply with the relevant obligations and standards set out in MAR and Commission Delegated Regulation (EU) 2016/958 of the European Parliament and of the Council concerning the objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and the disclosure of particular interests and conflicts of interest by producers of such recommendations. In addition, a third party that disseminates such material is considered as a disseminator of investment recommendations and therefore needs to comply with the relevant obligations and standards set out in MAR and Commission Delegated Regulation (EU) 2016/958 of the European Parliament and of the Council.

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### Communications containing purely factual information

Updated: 20 December 2016

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**Q8.5 Do communications to clients containing purely factual information on one or several financial instrument or issuers constitute an ‘investment recommendation’ under MAR?**

**A8.5** In consideration of the definition of an investment recommendation within the meaning of Article 3(1)(35) of MAR, in conjunction with Article 3(1)(34) of MAR, any communication containing purely factual information on one or several financial instruments or issuers would not constitute an investment recommendation under MAR provided that it does not explicitly or implicitly recommend or suggest an investment strategy.

In this context, factual information might, among other things, include recent events or news relating to one or several financial instruments or issuers.

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### Communications on previously disseminated investment recommendations

Updated: 20 December 2016

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**Q8.6 Do communications intended for distribution channels or for the public which only report or refer to previously disseminated investment recommendation and do not include any new elements of opinion or valuation or confirmation of a previous opinion or valuation constitute an investment recommendation under MAR?**

**A8.6** No, such a communication will not amount to a new investment recommendation, but would still be subject to Article 7 of Commission Delegated Regulation (EU) 2016/958, if it is disseminated by the producer of the investment recommendation, and therefore such a communication shall include, the date and time of first issuance of the investment recommendation.

If a communication reports or refers to a former investment recommendation but contains either confirmation of the previous opinion or valuation or new elements of opinion or valuation, which may be based on new facts or events concerning the issuer which are considered in the valuation, it will be viewed as a new investment recommendation and all aspects of Commission Delegated Regulation (EU) 2016/958 would need to be considered.

In case a person disseminates recommendations produced by third parties, articles 8 to 10 of Commission Delegated Regulation (EU) 2016/958 need to be considered.

### **Recommendation on derivatives traded solely outside a trading venue**

Updated: 20 December 2016

**Q8.7 Are recommendations relating to derivatives traded solely outside a trading venue in scope of Article 20 of MAR?**

**A8.7** In line with Articles 2(1)(d) and 2 (3) of MAR, a derivative traded outside a trading venue is in scope of MAR insofar as its price or value depends on, or has an effect on the price or value of a financial instrument referred to in Article 2(1)(a), (b) or (c) of MAR.

If the price or value of a derivative traded outside a trading venue does not depend on or have an effect on the price or value of a financial instrument referred to in Article 2(1)(a), (b) or (c) of MAR, the derivative would not be in scope of MAR and therefore any recommendation relating to the financial instrument would not be in scope of Article 20 of MAR.

Therefore, firms are responsible for conducting their own assessment on a case by case basis as to whether a recommendation on a given derivative traded solely outside a trading venue is in scope of Article 20 of MAR and subject to the requirements of Commission Delegated Regulation (EU) 2016/958.

### **Identification of derivatives in investment recommendations**

Updated: 20 December 2016



**Q8.8** Where a recommendation relates to a derivative, how should it be determined whether a recommendation has been given on the same financial instrument, for the purposes of complying with Article 4(1)(h) of Commission Delegated Regulation (EU) 2016/958?

**A8.8** Where a unique identifier exists for the concerned derivative, such identifier has to be used to determine whether there has been a change in a previous recommendation given by the producer on the same financial instrument.

For as long as a unique identifier does not exist for a derivative instrument, all reasonable efforts should be made to identify such a financial instrument by other means, so as to comply with Article 4(1)(h) of Commission Delegated Regulation (EU) 2016/958. For example, these efforts may include establishing a proprietary taxonomy. In determining recommendations on the same financial instrument (for the purposes of Article 4(1)(h) of Commission Delegated Regulation (EU) 2016/958), common features of a given derivative contract, including but not limited to strike, underlying or maturity could be identified. Such an approach should allow producers of recommendations to provide meaningful disclosures to recipients and still comply with the requirements.

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### Recommendations on multiple issuers

Updated: 27 January 2017

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**Q8.9** How does Commission Delegated Regulation (EU) 2016/958 apply when the subject of the recommendation relates to multiple issuers independently?

**A8.9** When a recommendation refers to several issuers independently, for example as part of sectorial research, the requirements would apply independently to every issuer that is the subject of the recommendation.

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### Recommendations relating to several financial instruments independently

Updated: 27 January 2017

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**Q8.10** How does Commission Delegated Regulation (EU) 2016/958 apply when the subject of the recommendation relates to several financial instruments independently?

**A8.10** Where a recommendation refers to several financial instruments independently, such as part of sectorial research, the requirements would apply to each financial instrument that is the subject of the recommendation.

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### Recommendations on a derivative referencing an index

Updated: 27 January 2017

**Q8.11 How does Commission Delegated Regulation (EU) 2016/958 apply when the subject of the recommendation is a derivative referencing an index?**

**A8.11** If a recommendation relates to a derivative referencing an index of financial instruments, the derivative itself should be treated as a financial instrument subject to the requirements of the Commission Delegated Regulation (EU) 2016/958, and not the individual instruments that comprise the index.

## 9. Questions and Answers on Market soundings

### Financial instruments in scope of the market sounding regime

Updated: 1 September 2017

**Q9.1 Does the scope of Article 11 of MAR cover all communications of information to one or more potential investors prior to the announcement of a transaction, in order to gauge their interest in a possible transaction and the conditions relating to it?**

**A9.1** Under the market sounding regime outlined in Article 11 of MAR, the communication of information by an issuer, a secondary offeror, an emission allowances market participant or third party acting on their behalf or account (the Disclosing Market Participant – DMP) should be deemed to be made in the normal course of the employment, duties or profession of such a person where all the conditions contained in Article 11 of MAR are met, and therefore not constitute unlawful disclosure of inside information.

Article 11(1) of MAR concerns market soundings that gauge the interest of potential investors in a possible transaction in a financial instrument and the conditions relating to it such as its potential size or pricing. Those financial instruments have to be financial instruments covered by the MAR scope as specified in Article 2(1) of MAR:

- a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
- b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
- c) financial instruments traded on an OTF;

- d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

Where the financial instrument subject to the possible transaction is already admitted to trading (or a request for admission to trading has been made) or is traded on a trading venue, as for example when the new transaction relates to an increase of an existing issuance, then that transaction will fall within scope of Article 11.

Where the financial instrument subject to the possible transaction is not admitted to trading (nor a request for admission to trading has been made) nor traded on a trading venue, that financial instrument would not fall under Article 2(1)(a)-(c) of MAR. That financial instrument would fall under Article 2(1)(d) of MAR if its price or value depends on or has an effect on the price or value of another existing financial instrument in scope of MAR.

In such a case, to determine if Article 2(1)(d) applies, the DMP must assess on a case by case basis whether there is any relationship between the price or value of the financial instrument that is the subject of the sounding and any other existing financial instrument falling under Article 2(1)(a)-(c) of MAR such as, for instance, other financial instruments of the issuer in question or of a parent company. DMPs are expected to be able to document their assessment.

Where the DMP assessed that such relationship exists, then the financial instrument will be in scope of MAR and the related possible transaction will be in scope of the MAR market sounding regime.

If there is uncertainty as to whether there is a price or value relationship, such as where there are no data available regarding a new financial instrument, in order to receive the protection under Article 11, should it be subsequently shown that there was a relationship, an appropriate approach would be for the DMP to apply the provisions of Article 11 of MAR and the relevant delegated and implementing regulations.

## 10. Questions and Answers on Insider lists

**Subject of the insider list requirements**

Updated: 1 September 2017

**Q10.1** Are persons acting on behalf or account of the issuer (e.g. advisors and consultants) subject to the obligation to draw up, update and provide to the NCA upon request their own insider list under Article 18(1) of MAR?

**A10.1** Yes, the legislative aim of the insider list regime under MAR is to cover any person that, by virtue of its action on behalf or account of the issuer, has access to inside information.

Therefore, not only the issuer but also all the persons acting on behalf or account of the issuer that have access to inside information relating to the issuer (e.g. advisors and consultants) are subject to the obligation to draw up, update and provide to the NCA upon request their respective insider list under Article 18 of MAR.

### Issuer's responsibility in case of delegation

Updated: 1 September 2017

**Q10.2** When does the issuer remain fully responsible under the second subparagraph of Article 18(2) of MAR for the compliance with the insider list requirements by persons acting on behalf or account of the issuer?

**A10.2** The issuer remains fully responsible under the second subparagraph of Article 18(2) of MAR only where a service provider "*assumes the task of drawing up and updating the insider list*" of the issuer, on the basis of a specific delegation to that purpose.

The issuer is not responsible for the fulfilment of the insider list requirements of the persons acting on its behalf or account mentioned in Article 18(1) of MAR and first subparagraph of Article 18(2) (e.g. advisors and consultants) who are personally responsible for the obligation to draw up, update and provide to the NCA upon request their own insider list.

Where the person that "*assumes the task of drawing up and updating the insider list*" of the issuer under the second subparagraph of Article 18(2) of MAR is also a person acting on behalf or account of the issuer under Article 18(1) of MAR (e.g. advisors and consultants), that person will be responsible for the obligation to draw up, update and provide to the NCA upon request its own insider list. The issuer will remain responsible for complying with the insider list requirements in relation to its own insider list, the drawing up and updating of which has been delegated to the same person as part of a separate agreement.

## 11. Questions and Answers on emission allowances and emission allowances market participants (EAMPs)

### Time span for the calculation of the CO<sub>2</sub> equivalent emissions and the rated thermal input

Updated: 14 December 2017

**Q11.1** What period should be used to calculate whether one of the thresholds set out in Article 17(2) of MAR has been exceeded? As of when is this threshold deemed to be crossed?

**A11.1** A participant in the emission allowance market should use a calendar year period (one-year period that begins on January 1 and ends on December 31) for the annual calculation of the carbon dioxide equivalent emissions and the rated thermal input (RTI) of 31 December of the same year.

The calculated emissions over a given year (Y) or the RTI as of 31 December of a given year (Y) should be assessed against the minimum thresholds of 6 million tonnes a year of equivalent carbon dioxide or the minimum RTI threshold of 2 430 MW specified in Article 5(1)(a) and (b) of the Commission Delegated regulation (EU) 2016/522. Where either of these thresholds is exceeded, the market participant will be deemed to be an emission allowance market participant (EAMP) as defined in Article 3(20) of MAR as of 1 May of the following year (Y+1) and thus subject to the obligations applicable to EAMPs under MAR, including the requirement to disclose inside information concerning emission allowances it, or its parent undertaking or related undertakings, may hold. This approach for MAR purpose will be aligned with the compliance cycle of the EU Emissions Trading System stemming from Directive 2003/87/EC.

In practice, this means that the year of reference for the calculations should be 2016 to determine whether a participant is an EAMP between 3 January and 30 April 2018, and 2017 to determine whether a participant is an EAMP from 1 May 2018 onwards, until the next calculations become applicable on 1 May 2019.

It is reminded that the calculations should take into account all business, including aviation activities or installations, which a participant in the emission allowance market, or its parent undertaking or related undertaking owns or controls or for the operational matters of which that participant, or its parent undertaking or related undertaking is responsible, in whole or in part.

## Meaning of 'parent' and 'related undertaking' in Article 17(2) of MAR

Updated: 29 March 2019

### **Q11.2 What is the meaning of 'parent' and 'related undertaking' in Article 17(2) of MAR?**

**A11.2** Article 17(2) of MAR provides that an emission allowance market participant shall "*disclose inside information concerning emission allowances which it holds in respect of its business [...] or installations [...] which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part*".

For the purposes of defining the parent company, Article 30(2) of MAR refers to Directive 2013/34/EU. Article 2 points (9) and (10) of Directive 2013/34/EU define parent undertaking as "*an undertaking which controls one or more subsidiary undertakings*", and a subsidiary undertaking as "*an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking*". Considering also that the definition of a group in Directive 2013/34/EU comprises the parent undertaking and all its subsidiary undertakings, ESMA considers that also ultimate parent undertakings are relevant for the purposes of Article 17(2) of MAR.

With reference to the related undertakings, ESMA's reading is that: (i) in line with Article 4 of Regulation 1227/2011/EU (REMIT), related undertakings are "*either a subsidiary or other undertaking in which a participation is held, or an undertaking linked with another undertaking by a relationship within the meaning of*" current Article 22(7) of Directive 2013/34/EU, and (ii) for the purposes of Article 17(2) of MAR the relevant related undertakings are those of the parent undertaking of the EAMP.

## Disclosure of inside information concerning emission allowances, referring to installations of other undertakings of the group of the EAMP

Updated: 29 March 2019

### **Q11.3 Are EAMPs under the obligation to disclose inside information concerning emission allowances where such inside information regards installations of other undertakings of the group of the EAMP?**

**A11.3** Yes, in the circumstances explained below.

Article 3(1)(20) of MAR sets forth two cumulative requirements to be an EAMP: (i) being a person that enters “into transactions, including the placing of orders to trade, in emission allowances, auctioned products based thereon, or derivatives thereof”, and (ii) exceeding a threshold of carbon dioxide equivalent (or having had a rated thermal input exceeding a minimum threshold, where the participant carries out combustion activities).

As regards the first condition, ESMA’s technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2015/224) provides indications on several examples of participants to the emission allowances market. ESMA considers that market participants that enter into transactions or place orders to trade in emission allowances either directly and indirectly fall within the definition of Article 3(1)(20) of MAR. The latter is the case, for instance, for polluting companies that trade emission allowances through trading companies within the same group.

As regards the second condition, the minimum thresholds are provided for by Article 5 of the Commission Delegated Regulation (EU) 2016/522 and consist of carbon dioxide equivalent of 6 million tonnes a year or 2,430 MW of rated thermal input. The threshold applies “*at group level and relate to all business, including aviation activities or installations, which the participant in the emission allowance market concerned, or its parent undertaking or related undertaking owns or controls or for the operational matters of which the participant concerned, or its parent undertaking or related undertaking is responsible, in whole or in part.*”.

Hence, in the case of two participants to the emission allowances market, respectively A and B, that are part of the same group, if the threshold set in Article 5 is met by summing up their emissions, each of A and B is an EAMP and is individually subject to the obligation to disclose inside information concerning emission allowances under Article 17(2) of MAR. In other words, provided that the threshold is met at group level, both A and B are EAMPs, even if individually they are below the threshold of Article 5.

An EAMP has to disclose inside information concerning emission allowances where the installation of an undertaking that is a parent company of the EAMP or a related company (see A.5.6 above) has an impact on the EAMP’s demand of emission allowances.

For instance, an EAMP operating a fossil fuel power plant would be directly impacted in its demand of emission allowances by the establishment of a significant wind farm by a related undertaking. Namely, relevant production of renewable energies could allow the EAMP to keep any spare allowances to cover its future needs or to sell them to another company that lacks allowances. In light of this, the EAMP would have to disclose inside information concerning emission allowances regarding the establishment of a relevant plant producing renewable energy.

The EAMP would also be responsible for any delay of disclosure of the inside information concerning emission allowances pursuant to Article 17(4) of MAR.

Should there be, as in the case of A and B above, more than one EAMP in a group, the obligation to disclose the inside information concerning emission allowances falls on the EAMP whose demand of emission allowances is impacted by the parent or related company's business (that would also be responsible for any delay in the disclosure). Where both A and B are impacted, each of them would be obliged to disclose such information and the disclosure obligation is fulfilled once the inside information concerning emission allowances is published.