29 November 2019
Frankfurt am Main,

BVI[1] Position on ESMA's Consultation Paper: MAR review report

GENERAL COMMENTS

Our members are asset managers providing management services to collective investment undertakings (CIUs) such as UCITS or AIFs. The Market Abuse Regulation (MAR) affects our members for two reasons:

- As institutional investors (buy side) they are clients of securities services providers such as brokers or banks (sell side) and as such they are interested in an efficient, transparent and integrated functioning of the financial market. They benefit from a strict supervisory system with the aim of protecting the integrity of the market.

- As issuers of CIU shares or units they are market participants. As such they have to promote market integrity and prevent unlawful behaviour in the financial markets such as insider dealing, unlawful disclosure of inside information and market manipulation. Under the European legislation, the UCITS Directive and the AIFMD already provide a strict framework for asset managers with the purpose of avoiding certain behaviour (such as fraud, insider offences, market timing or front running) and informing investors in CIUs about certain related circumstances. Moreover, these Directives explicitly require them to conduct their business activities in the interest of market integrity. Therefore, dealing with MAR that provides parallel legislation with the same objective is a very complex and burdensome task for asset managers. This applies all the more since the scope of the MAR is not very clear – in particular there is uncertainty under which circumstances any activity performed by an asset manager with regard to the units or shares of the funds he manages (depending on whether they are admitted to trading or not) or with regard to the financial instruments held by the CIUs he manages should be in scope or not.

In this respect, we welcome the initiative to review MAR. In view of the time table given by Article 38 MAR to provide a review report, however, we suggest focussing on the questions under review only. **All other topics, in particular with regard to the application of MAR rules for issuers of CIU shares/units, we request ESMA to separate the discussion in order to identify the practical and legal impact and to provide a consistent framework without time pressure. This is particularly important as overlaps and inconsistencies with CIU specific rules (such as those under the UCITS Directive and the AIFMD) should be avoided.**

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 112 members manage assets of more than 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22% Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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SCOPE OF MAR

1. Spot FX Contracts

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

We do not consider necessary to extend the scope of MAR to spot FX contracts. Instead, we support the usage of the FX Global Code of Conduct ('the Code') in the FX market as the code is designed to promote a fair, liquid, open and transparent foreign exchange market. However, in any case, we see the need to amend the Code at least under the upcoming review of the Code in 2020 by the Global FX Committee. This applies, in particular, for Principle 17 (last look), Principle 46 (custodian timestamp) and Annex 3 (Statement of Commitment: Adherence to the FX Global Code).

The past incidents of misbehaviour in the FX market were largely driven by FX traders within sell-side banks. The buy side was initially of the opinion that the Code should be mainly implemented by credit institutions and broker/dealers. Therefore, at the beginning of the creation of the Code, the active involvement of the buy side was low. However, more and more (EU) buy-side firms have implemented the Code and have already signed the adherence to the Code. Therefore, we believe that more involvement of the buy-side in the reform of the Code is strongly necessary. Concerning the current version of the Code, there is a feeling within the buy side that there was not enough feedback sought from this important part of the market and that the Code was largely put together with other market participants. This should be rectified within the review of the Code. In particular, we suggest that a revised version of the Code should be based on an overarching set of principles that all market participants sign up to, and then provide specific sections for each relevant sector of the market, e.g. sell side, buy side, electronic liquidity providers etc. Furthermore, relevant sectors could be additionally flagged for implementation by the above mentioned market participants. Such suggestions could further increase buy-side industry adoption and enhance legal certainty which requirements each sector needs to implement. Until now it is not clear for market participants what signing to the code means, i.e. tenor, what attestation to the current version means when a refresh/new Code is brought out, i.e. are you automatically attesting, do you need to re-attest, what happens if you don't agree/wish to/cannot currently attest to.

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

As described under question 1 and in view of the FX Global Code of Conduct, we do not consider necessary introducing additional regulatory changes such as extending the scope of MAR or the framework of MiFID/MiFIR. If spot FX contracts were to fall into the scope of the MAR, it will be challenging for the end users, market participants and national competent authorities alike in view of implementing surveillance systems and monitoring activities. In this context, we agree with ESMA's preliminary view about the structural changes that would need to apply to spot FX contracts.

2. Scope of application of the benchmark provisions

Q3: Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

In general, we do not agree. In particular, all prudential rules dealing with benchmark provisions should be covered in full under the BMR. The BMR was adopted in 2016 after the adoption of MAR with a clear objective to cover failures of critical benchmarks such as Euribor/Libor which can impact market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in EU Member States. This involves, in our view, also the prohibition of (attempted) manipulation of benchmarks. We therefore suggest deleting in the MAR all references to manipulation of benchmarks and, where required, to include the prohibition to engage in or attempt to engage in benchmark manipulation (including sanctions) in the BMR. This would lead to better (in particular more consistent and more stringent) regulation, supervision and application in practice. Moreover, this would also avoid a legal discussion which definition of a benchmark, the definition of BMR or MAR, shall apply in cases of market manipulation of benchmarks.

Q4: Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?
Q5: Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?
Q6: Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

In general, we see the need for strict sanction rules in order to prevent misbehaviour of administrators of benchmarks and supervised contributors. However, we do not see that the MAR is the right place for that. As described in our answer to **Q3**, the BMR was adopted in 2016 to complement the sanctioning regime provided by the MAR. In particular, the BMR establishes a common set of rules governing the production and use of benchmarks across different Member States including new rules ensuring the appropriate supervision of critical benchmarks, such as Euribor/Libor, the failure of which might create risks for many market participants and even for the functioning and integrity of markets of financial stability. Therefore, all relevant supervisory activities and sanctions with regard to benchmark-related market abuse such as manipulation of benchmarks resulting from activities of benchmark administrators or supervised contributors should be covered in full under the BMR.

ARTICLE 5 MAR – BUY-BACK PROGRAMMES (BBPS)

Q7: Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.
Q8: If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.
Q9: Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

Q10: Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.
Q11: Do you agree with ESMA's preliminary view?
Q12: Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

This section is not relevant for our members.

ARTICLE 7 MAR – DEFINITION OF "INSIDE INFORMATION"

1. Definition of inside information and its effectiveness in preventing market abuse

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

The diverging treatment of inside information relating to public disclosure versus the assessment of misuse for prosecution of insider trading for instruments brought into scope by Article 2(1)(d) of MAR is problematic and clarification would be welcome. In detail:

A "related instrument" is referenced to two underlying instruments, one of which is traded on an EU venue, hence bringing the related instrument within the scope of Article 2(1)(d), and the second of which is not traded on any public market anywhere in the world. The first underlying instrument represents a very small percentage of the related instrument's value – less than 5 per cent. The second underlying instrument (issued by a totally separate company) accounts for 95 per cent of the related instrument's value. A market participant has information about the second underlying instrument that would (if the latter were traded on an EU venue) be considered inside information. Because of the impact that it may have on the related instrument, that information is inside information in relation to the related instrument, and trading in the latter would be a breach of MAR – even though buying or selling the second instrument itself is not covered by MAR. Conversely, another market participant has inside information about the first of the underlying instruments. He cannot trade in the latter without breaching MAR. But if he buys the related instrument, he is on the fourfold test not trading on the basis of inside information because, in relation to the related instrument, the information has too small an impact to qualify as inside information – even though buying or selling the first instrument itself is covered by MAR.

The above situation creates an anomaly where MAR covers where the underlying instrument is outside the scope of MAR and fails to cover where the underlying instrument is within scope of MAR. This anomaly could be rectified in either of two ways: The first would be the insertion of a proportionality test in Article 2(1)(d) of MAR. The second would be an insertion of a clarification that insider dealing in respect of a related instrument would be within scope only to the extent that it represents an alternative method of taking advantage of information that affects the connected underlying instrument when the latter is within the scope of MAR. This emendation would match precisely the fundamental purposes of MAR – the protection of EU trading venues.

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

The definition of inside information should be streamlined and specified in order to give market participants more clarity as to what is permitted and what is not, and to facilitate compliance. This relates in particular to the following cases:

- **Deletion of the reference to a significant effect on the prices of 'related derivative financial instruments':** The question whether a piece of information may have a significant effect on the prices of derivative financial instruments related to a financial instrument to which MAR applies cannot be assessed with sufficient certainty. The price impact on such a derivative instrument depends on its structure, particularly the leverage. As there is no general transparency of any possible derivative instrument, it is factually impossible for market participants to make that assessment. Moreover, the protection provided by MAR appears only necessary where a derivative financial instrument is by itself in scope of MAR. Therefore, the additional reference in Article 7 (1)(a) MAR does not seem necessary and should be deleted.

- **Clarification of the interplay between intermediate steps in a protracted process and treatment of future circumstances as inside information, Article 7(2) and (3) MAR:** According to Article 7(3) MAR, an intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information. According to Article 7(2) MAR, a future event may also constitute inside information if it can reasonably be expected to occur. According to the ECJ ruling in the Geltl ./. Daimler case, this requires a realistic prospect that the future event will come into existence (item 49). However, many future events (if not most of them) are the development in a protracted process with multiple intermediate steps. It appears there is uncertainty if these intermediate steps may even have to be treated as inside information where they derive their potential to have a price impact from the significance or magnitude of the future event at a point in time when such event has not yet reached a "realistic prospect" to actually occur. Hence, a clarification would be useful that where the intermediate step does not have a potential to have a price impact related to the future event, it does not constitute inside information before the future event has a realistic prospect.

- As long as an issuer maintains his own results forecast, financial results, including those for an interim reporting period during a financial year, and the actual results stay within that forecast that fact should not constitute inside information irrespective of different expectations in the market. Therefore, as long as an issuer maintains his forecast and its results stay within such forecast, no any publication requirement should be triggered in addition to the regular financial reporting.

Q15: In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

We are not aware of information that our members would consider as inside information, but which is not covered by the current definition of inside information.

2. Inside information for commodity derivatives

Q16: Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

Q17: What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?
Q18: As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.
Q19: Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

This section is not relevant for our members.

3. Definition of inside information with respect to "front running conduct"

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

We would like to highlight that not only the MiFID II/MiFIR investor protection rules apply to front running behaviour. According to Article 25(4) of the Delegated Regulation (EU) No 231/2013 as well as to Article 27(2) of the UCITS Implementing Directive 2010/43, managers of AIFs or UCITS shall not misuse information related to pending investment fund orders, and shall take all reasonable steps to prevent the misuse of such information by any of their relevant persons. We therefore kindly ask ESMA to take into consideration that these rules also may prove useful where MAR is not triggered.

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

As described under Q20, the rules of the AIFMD (Article 25(4) of the AIFMD Delegated Regulation (EU) No 231/2013) already apply to front running behaviour, in particular taking into account all orders on behalf of an AIF (including assets which have an illiquid market). We do not see any need for adding in MAR specific conditions.

4. Pre-hedging

Q22: What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?
Q23: What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?
Q24: What financial instruments are subject to pre-hedging behaviours and why?

We understand that the relevance of market abuse of pre-hedging behaviours is focussed on the sell side in such a way that a broker could use information received from a client to trade on for its own account, including potentially trading against the client. We represent the interests of asset managers as the buy side, in particular as clients of brokers. Therefore, we are interested that potential conduct and market abuse risks resulting from aggressive pre-hedges by one or all brokers involved should be

avoided and supervised because such behaviour could impact the interests of asset managers acting as trustees for their investors.

ARTICLE 17 MAR – DELAYED DISCLOSURE OF INSIDE INFORMATION

Q25: Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.
Q26: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.
Q27: Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?
Q28: Please provide examples of cases in which the identification of when an information became "inside information" was problematic.
Q29: Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.
Q30: Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.
Q31: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.
Q32: Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

This section is not relevant for our members.

ARTICLE 11 MAR – MARKET SOUNDING

Q33: Do you agree with the proposed amendments to Article 11 of MAR?
Q34: Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?
Q35: What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?
Q36: Do you think that the reference to "prior to the announcement of a transaction" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?
Q37: Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

German asset managers act primarily on the buy side and are therefore interested in finding practical and clear solutions regarding market sounding practices. With regard to the current strict requirements of market sounding (in particular, administrative burden for persons receiving the market sounding and the sanctions involved), we have observed a sharp decline in market sounding practices going so far as

some asset managers (as part of the buy side) have internal rules to prohibit accepting market sounding information. Therefore, we support the idea to review the rules of market sounding because they are an important interaction between a seller of financial instruments and potential investors, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. Recital 32 of MAR also highlights that market sounding is a '*highly valuable tool*' and 'important for the proper functioning of financial markets'. Therefore it has been the intention of the legislator to facilitate market sounding and not to complicate it.

However, we do not agree with the proposed amendments to Article 11 of MAR. The current market sounding procedures as stated in Article 11 of MAR as well as the RTS and ITS adopted thereunder should (continue to) be a safe harbour provision and not a strict obligation. The legal nature as a safe harbour (conceptually comparable to Article 5 MAR relating to buyback programs and stabilisation) clearly follows from Recital 35 which states that '*There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information but they should not be able to take advantage of the exemption given to those who have complied with such provisions.'*

The sell side, however, possesses the information and is the one to decide whether and what information it will provide to the buy side. We believe that the sell side/issuer will in most cases possess more information than the buy side. The buy side regularly only knows the facts of a potential offer, whereas the sell side often possesses much more information. Duties imposed on the participants should take this fact into account.

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

While a simplification of the requirements and procedures is generally welcomed, the compulsory use of recording facilities could be counterproductive as there are a number of investors who insist on written minutes but show no interest in recordings. There may therefore be physical meetings in which no recording facilities are brought or present. Flexibility should be accorded in this regard.

Furthermore, when adding a market soundee to an insider list, his/her personal data such as the name, date of birth, national insurance number, personal telephone number and home address have to be captured. Since no firm shares these personal details and such details are not necessary, it should be clarified that compliance with these requirements should entail the capture of professional details only.

ARTICLE 18 MAR – INSIDER LIST

Q39: Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.
Q40: Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.
Q41: What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?
Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to

inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.
Q43: Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.
Q44: Do you agree with ESMA's preliminary view?
Q45: Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

We refer to our answers to **Q59 et seq**.

ARTICLE 19 MAR – MANAGERS' TRANSACTIONS

1. Appropriateness of thresholds and transactions to be notified once the threshold is reached

Q46: Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?
Q47: Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).
Q48: Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.
Q49: On the application of this provision for EAMPs: have issues or difficulties been experienced?
Q50: Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.
Q51: Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.
Q52: Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

BaFin already increased the threshold from Euro 5,000 to Euro 20,000 starting from 2020. From the viewpoint of an issuer, however, it makes no difference which threshold should apply because the report itself does not cause any appreciable expense. Hence, the expenditure for an issuer, in particular for UCITS or AIF management companies, is connected with the implementing process to identify such manager transactions. We therefore refer to our answers to **Q59 et seq**.

2. Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11)

Q53: Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?
Q54: Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.
Q55: Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

We refer to our answers to **Q59 et seq**.

3. Exemptions to the application of the closed period requirement

Q56: Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.
Q57: Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

We refer to our answers to **Q59 et seq**.

MAR AND COLLECTIVE INVESTMENT UNDERTAKINGS (CIUs)

1. Introduction

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

As described in the introduction to our response, dealing with the MAR that requires comparable rules as stated under the AIFMD and UCITS Directive is a very complex and burdensome task for asset managers. This applies all the more as the scope of the MAR is not very clear – in particular there is uncertainty under which circumstances any activity performed by an asset manager with regard to the units or shares of the CIUs he manages (depending on whether they are admitted to trading or not) or with regard to the financial instruments held by the CIUs he manages should be in scope or not.

In this context, we welcome ESMA's suggestion to analyse whether it is necessary to apply the MAR provision for issuers to management companies, in particular, to take into consideration that some of the MAR obligations for issuers might not have been intended to cover units/shares of CIUs. In our view, these analyses should be made in general for all requirements of the MAR and not only limited to the application of the PDMR obligations (Article 19 MAR), disclosure of inside information (Article 17 MAR) and insider lists (Article 18 MAR). However, we understand that according to ESMA only

units/shares of CIUs admitted to trading or traded on a trading venue should be in scope of Article 17 to 19 MAR.

In our view, the first question should be focussed on whether issuers of units/shares of CIUs which are already required to promote market integrity and prevent unlawful behaviour in the financial markets under the AIFMD or UCITS Directive (regardless of whether the CIU does have a legal personality or not) should be covered by the MAR or certain MAR rules. Here it should be taken into account that the UCITS Directive and the AIFMD already provide a strict framework for asset managers with the purpose of preventing certain behaviour[2] (such as fraud, insider offences, market timing or front running – please also see our answers to **Q20** and **Q21**) and requiring disclosure to investors in CIUs about certain circumstances. These Directives explicitly require them to conduct their business activities in the interest of market integrity in conjunction with sanctions and measures in the event of non-compliance with these rules. **Therefore, in ensuring legal and supervision consistency, we are in favour of covering conduct and sanction rules against market abuse and insider offences with regard to CIUs under the UCITS Directive and AIFMD only. This could lead to the need to analyse whether certain rules of the MAR with regard to CIUs are already not covered by the UCITS Directive or AIFMD. However, in any case, this will help to get a more consistent and efficient framework for both supervisory authorities and asset managers as issuers of units/shares of CIUs.**

Moreover, the organisational requirements and conduct rules of the AIFMD and UCITS Directive with focus on acting in the interest of market integrity including avoiding market timing and front running do not distinguish between the fact whether the CIU has a legal personality or not. Therefore, the fact that a significant number of CIUs do not have legal personality should not be the first question in order to decide if there is genuine need for MAR to be amended to explicitly include or exclude these entities. In our view it is just a question of who will be responsible for fulfilling the requirements, the management company or the legal entity of the CIU itself (we refer to our answer to **Q60**). In any case, there should be a level playing field between different vehicles of CIUs, regardless if they have legal personality or not.

However, with regard to the question raised if CIUs admitted to trading or traded on a trading venue should be differentiated with respect to other issuers, we would like to underline the following:

- Based on the UCITS Directive or AIFMD, assets under management in CIUs are not part of the balance sheet of the managing company (an asset manager either with a UCITS licence, AIFM licence or both). They manage the CIUs as trustees for and in the best interests of their investors based on agreed funds rules and investment strategies.

- CIUs do not belong to the management company as the issuer of the shares units/shares of a CIU. Any negative news of the management company itself does not impact the Net Asset Value (NAV) of the respective CIUs and the price of its units/shares. This is also the reason why there is no need to address a comparable ban of personal transactions (as it is required for other issuers) related to shares or debt instruments of the issuer 30 days before the announcement of an interim financial report or a year-end report that the issuer has to make. The same applies to the requirement to make the notification of the transaction public promptly. We therefore disagree with a simple comparison of the rules between the MAR and the UCITS Directive and AIFMD made by ESMA on

[2] Cf. Recital 13, 18, Articles 13, 23(1) and 27(2) of the Delegated UCITS Directive 2010/43, Recital 33 UCITS V Directive, Recital 74, Articles 14(1)a)+b)+e) and 103 UCITS Directive; Articles 25(4) and 63 of the Delegated Regulation (EU) No 231/2013, Recital 80, Article 12(1)b)+e), 47(5)+(6) AIFMD.

page 67 of the consultation paper without taking into account the specificities and the functioning of a CIU.

- The subscription and redemption of units or shares of CIUs is performed at the relevant NAV. The NAV is independent from the number of units or shares traded, it is calculated based on the value of the CIUs' assets (buys and sells of CIU units or shares lead to a proportionate buy and sell of the assets the CIU is invested in).

- The secondary market price of a CIU admitted to trading or traded on a trading venue is closely tied to its NAV. Managerial decisions in relation to the CIU have less significant impact on the share/unit price than in other issuers as the value of each single asset is not influenced by the CIU or its management company. This is particularly the case for passive (index-) funds (ETFs) which investment decisions are based on an index.

- Both UCITS and AIF are subject to ongoing disclosure of their NAV, half-yearly and/or annual reports and far more information than any other kind of financial instruments.

- Safekeeping of the assets in a CIU is done by independent depositaries/custodians, which also validates the NAV calculations of the CIUs.

2. Application of the PDMR obligations to CIUs

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

In addition to our answer to **Q58**, we do not agree that MAR should explicitly cover PDMR obligations for units/shares of CIUs admitted to trading or traded on a trading venue and their management companies. In detail:

- Decision makers for investment decisions (portfolio managers) are in practice not necessarily directors or supervisory board members of the management companies; also because of practices to delegate portfolio management tasks to third parties this is frequently not the case.

- Members of the board of an administration, management or supervisory body do not frequently have ac-cess to inside information in relation to the CIU, this is rather the exception.

- Funds listed on a regulated market or where CIUs have approved trading on regulated market are not the norm, and would largely consist of passive (index-) funds (ETFs). Members of the board of a passive CIU could have little exposure to price sensitive information regarding factors contributing to the index calculation. Any risks regarding index calculation should be covered by the BMR (see our answer to **Q3 et seq.**).

- Also, PDMRs can only buy and sell shares of the CIU without knowing the price, as asset managers have to ensure as a legal conduct rule under the UCITS Directive and AIFMD that market timing is not possible. There are also controls in place to prevent front running (please also see our answers to **Q20** and **Q21**).

- In contrast to managers of (listed) companies (non-CIU issuers), who might have business insights with impact on the issuer's share price (e.g. R&D results, sales figures), PDMRs of CIUs have only the same information about the respective assets of the investment funds like the market itself, i.e. information that is publicly available. In addition, as the assets of CIUs do not belong to the asset manager, any negative news of the asset manager does not impact the price of the respective CIUs. They might lead to an increased sell of the CIU's shares, but not to a price impact of the assets of the CIU.

- Management companies may suspend the issuance and redemption of fund units if exceptional circumstances exist which make a suspension appear necessary having regard to the interests of the investors. Price-sensitive information might constitute such circumstances.

Besides, CIUs' specific rules already address ESMA's concerns whilst taking into account the peculiarities of UCITS and AIFs. In particular, the comparison between MAR and UCITS Directive/AIFMD shows the following: The UCITS Directive and the AIFMD do not only establish obligations to inform about personal transactions by relevant persons (articles 13(2)(b) and (c) of Commission Directive 2010/43/EU and 63(1)o of Regulation 231/2013) but also by other persons which could have been advised or warned by such.

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

We strongly disagree with ESMA's preliminary view that the PDMRs of CIUs admitted to trading or traded on a trading venue should be extended to '*relevant persons*' from the management company of a CIU (regardless of whether the CIU has a legal personality or not). In comparison to the current term of 'managers transactions', the term of transactions of 'relevant persons' would involve much more persons (such as just employees outside the management body or senior executive) as it is required for other issuers and would lead to an not comprehensible and inappropriate extending of persons only for issuers of CIUs admitted to trading or traded on a trading venue. **We therefore do not understand why a much stricter regime shall apply for these CIUs for which the secondary market price is closely tied to its net asset value and where managerial decisions in relation to the CIU have less significant impact on the share/unit price than in non-CIU companies as the value of each single asset is not influenced by the CIU or its management company. This is particularly the case for ETFs.**

This applies all the more as the definition of '*relevant persons*' under the UCITS Directive and AIFMD also involves a natural person who is directly involved in the provision of services to the management company under a delegation arrangement to third parties for the purpose of the provision by the management company of collective portfolio management. This would lead to the situation that the management company would be responsible to report transactions of persons of a third company to the competent authority. This would also increase the risk of receiving insider information from the third party and would enable the management company of the CIUs not only to monitor insider information in their own company, but also in companies which provide portfolio management on the way of delegation. For these cases we would like to highlight that the UCITS Directive and AIFMD already have rules in place on how to deal with personal transactions where certain activities are performed by third parties (such as portfolio management). In these cases the management company shall ensure that the entity

performing the activity maintains a record of personal transactions entered into by any relevant person and provides that information to the management company promptly on request.[3]

Moreover, we are quite astonished to read ESMA's preliminary view that also the relevant persons of '***external service providers acting for the CIUs***' in question should be considered as PDMRs in case of CIUs. In our view, there must be a misunderstanding on ESMA's side who should be responsible for issuing and managing the CIU irrespective of whether the CIU has a legal personality or not. We strongly disagree to open the scope of PDMRs in cases of CIUs also for their external service providers. Hence, the only difference for the question who should fulfil the MAR requirements could be made to distinguish if the CIUs to be either externally or internally managed. This depends on the legal form of the CIU:

- CIUs are **internally managed** when the management functions are performed by the governing body or any other internal resource of the CIU. Where the legal form of the CIU permits internal management and where the CIU's governing body chooses not to appoint an external manager, the CIU is also the manager. Therefore, the CIU itself (as a legal person) has to comply with all rules of the AIFMD and UCITS Directive and to be authorised as such and would be responsible to fulfil the issuer obligations under MAR. In Germany, internally managed CIUs always have a legal personality.

- CIUs are **externally managed** when a third (legal) person has been appointed as manager by or on behalf of the CIU, and that through such appointment is responsible for managing the CIU. In these cases, the CIU could have a legal personality or not. In particular, in Germany, CIUs without legal personality based on a contractual agreement (such as the German term 'Sondervermögen') are externally managed in any case. Also in these cases the (external) management company is required to comply with all rules of the AIFMD and UCITS Directive and to be authorised as such and would be responsible to fulfil the issuer obligations under MAR.

In both cases, where the CIU is internally or externally managed, it is possible to delegate certain tasks (such as portfolio management or administrative services) to third parties such as external service providers. This must be strictly separated from the questions which person should be considered as PDMRs in the meaning of the MAR and in the context of CIUs.

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

We refer to our answer to Q58. We are in favour of covering conduct and sanction rules against market abuse and insider offences with regard to CIUs under the UCITS Directive and AIFMD only.

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

[3] Cf. Article 63(2) subparagraph 2 of the (AIFMD) Delegated Regulation (EU) No 231/2013; Article 13(2) subparagraph 2 of the (UCITS) Implementing Directive 2010/43/EU.

We strongly disagree that other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime. In particular, the tasks and responsibilities of depositories are strictly regulated and supervised under the UCITS Directive and AIFMD. Any potential impact on their activity as investors, for example, would be captured, if applicable, by the relevant Directive (UCITS or AIFM) which takes better into account the CIU's particularities. For further comments, we refer to our answer to Q60.

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

We do not agree with ESMA preliminary view that, if it were considered necessary extending PDMR obligations to CIUs, Article 19(1)(a) of MAR should expressly refer to 'units' of CIUs. In this respect, we refer to our answers to **Q58 et seq.** In any case, however, there should be a level playing field between different vehicles of CIUs, regardless if they have legal personality or not.

3. Disclosure of inside information regarding CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved

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

In our view, the management company authorised to manage the CIU should be responsible for the publication of inside information, regardless if it has a legal personality or not. However, with respect to our answer to Q58, CIUs or their management companies are already subject to very strict disclosure obligations with regard to any events that may affect the shareholder/unitholder to subscribe or redeem shares/units. Therefore, the disclosure to investors or the public should be covered under the AIFMD or UCITS Directive only. We are aware that this could lead to the need to analyse whether certain disclosure rules of the MAR with regard to CIUs are not yet covered by the UCITS Directive or AIFMD. However, in any case, this will help to get a more consistent and efficient framework for both supervisory authorities and asset managers as issuers of CIUs.

4. Application of insider lists to CIUs for which the admission to trading or the trading of its financial instruments has been requested or approved

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

The legal status of investment vehicles may differ depending on jurisdiction. Due to the different legal regimes, this may result in a different interpretation of what could constitute inside information. However, in the very few and rare cases a CIU generates inside information in relation to its units/funds the management company has the possibility to suspend the issuance and redemption of fund units (see our answer to **Q59**)

COMPETENT AUTHORITIES, MARKET SURVEILLANCE AND COOPERATION

1. Establishment of an EU framework for cross-market order book surveillance

Q66: Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of

new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

These questions are not relevant for our members because they do not qualify as trading venues. However, we share ESMA's view that the transaction reporting required for investment firms under MiFIR and the analysis of transaction data by the relevant NCAs are performed for market abuse purposes and no more action is needed for these firms.

Q67: Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.
Q68: In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

These questions are not relevant for our members because they do not qualify as trading venues.

2. Cum/ex and multiple withholding tax reclaim schemes

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

In our view, the market abuse framework is already very strict and does not need to be complemented with conduct rules in the context of multiple withholding taxes reclaim schemes. However, if it will be necessary to achieve a better supervision of market practices, competent authorities should be able to cooperate and share information with each other, including an exchange of information across the EU.

SANCTION AND MEASURE

1. Appropriateness of introducing common rules on the need for all MSs to provide administrative sanctions for insider dealing and market manipulation

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

We do not see to the need to modify the MAR in this respect.

2. Cross border enforcement of sanctions

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

We are not able to analyse whether and to what extent amendments of EU law for ensuring cross-border enforcement of sanctions will be needed. In any case, ensuring cross-border enforcement of the MAR sanctions is relevant as an important part of the MAR framework.

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