ESMA Consultation Paper – MAR Review Report

About NFU

NFU – Nordic Financial Unions is an organization that promotes the interests of the Nordic financial trade unions in Europe. Through a high level of competence and dialogue, NFU contributes to shaping a sustainable financial sector, fundamental for job creation. Currently, NFU represents seven trade unions in the bank, finance and insurance sector in Denmark, Finland, Iceland, Norway and Sweden.

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Consultation Paper replies

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.

NFU is, in a general context, in favor of extending the scope of the Market Abuse Regulation to cover other trading venues, including over-the-counter facilities – thus covering a greater variety of financial instruments. It is important to ensure that potential gaps in the current regulation, which have occurred from developments in markets and instruments, are covered, and that all instruments are subject to identical requirements and proper, efficient regulation.

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.

The challenge with spot FX contracts indeed lies with not having them included under MiFID

II/MiFIR and in the supervision scope of NCAs. Regulatory changes, if any, that would facilitate such inclusion needs to ensure reference to and subsequent changes of the scope of current whistleblowing mechanisms and procedures in connected legislation.

Such changes would allow for employees to have an active role in reporting actual or potential breaches internally and externally in the context of spot FX contracts, thus actively contributing to addressing market abuse.

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?

For the purpose of coherence, we would suggest broadening the definition to include a reference to sustainability benchmarks, which were recently adopted as part of the work with the Action Plan: Financing for Sustainable Growth.

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?

According to BMR Article 3(1)(6), ´administrator´ can be defined as both natural and legal person, and ´supervised contributors´ is defined as a supervised entity that contributes input data to an administrator located in the Union. As explained in the consultation, the reason why these two categories are not included in the ´Administrative sanctions and other administrative measures´ was that these concepts were not defined in EU law and only introduced by BMR in 2016. As such, it is insufficient to only include these concepts in the scope of Article 30. MAR Article 3 (Definitions) needs to be amended to firstly define these concepts, based on the BMR or other considerations. Their respective inclusion then needs to be reflected in the legal text overall. In this way, the inclusion will level the playing field for these two concepts which goes beyond their inclusion in the scope of sanctions only, to also include other aspects of MAR, including whistleblowing mechanisms.

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?

As mentioned in our reply to Q5, any amendments to the text need to be met with amendments to Article 3 (Definitions).

Overall, Article 23 should also make reference to data integrity and privacy issues, and specifically Article 23 (4), while providing appropriate protection, should be strengthened to also include discretion and anonymity of the person in question.

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?

Please note our answer to Q4.

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.

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

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

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

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?

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

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

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?

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.

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?

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)?

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.

We agree with the assessment that a differentiation between actual and potential access of information could be useful, especially in the context of assigning individual responsibilities and labelling within compliance departments with regards to inside information. Given the dynamics of operation on one hand, and the exposure to inside information on the other which imposes responsibility on employees, we find that it is important that employees are made aware of the company processes, procedures and scope of responsibilities surrounding

inside information and that sufficient training and competence development is provided to ensure correct implementation by employees.

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.

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?

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.

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.

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 visà-vis market timing or front running issues.

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

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

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.

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.

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

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

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?

Q66: Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

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

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

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

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 agree with ESMA´s view that there is no need to modify MAR at this stage and in the context of the appropriateness for introducing a standing option for administrative sanctions, given that the same infringements might already be subjected to criminal sanctions following national laws. We find that such an amendment would also imply further changes to MAR, including and not limited to provisions for Member States to establish appropriate procedures to ensure that a person is not to be tried or punished again for an offence for which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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

We find that the proposal needs to make a stronger distinction between the purpose of taking measures to ensure better coordination and cooperation among NCAs, which given the cross-border nature of work in the financial sector has its benefits, and the enforcement of sanctions on a cross-border level that should be put into NCAs capacity. The latter could interfere with national law and legal frameworks that define and administer sanctions and go in an opposite direction of national practices. At the same time, it is relevant to consider other elements that might be affected with the cross-border enforcement of MAR sanctions, connected to access to financial and legal help, assistance, human and labour rights

considerations, differences in sanction proportionality, and more. Therefore, NFU suggests following national practices and taking a cautious approach to cross-border enforcement of sanctions, as it touches upon a wide range of areas including human and labour rights.