Amafi | ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

AMAFI / 19-113
28 November 2019

ESMA CONSULTATION
MAR Review
-
AMAFI's answer

About AMAFI

***Association française des marchés financiers* (AMAFI)** is the trade organisation working at national, European and international levels to represent financial market participants in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 150 members operating for their own account or for clients in equities, fixed-income, structured products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI has been highly involved in the elaboration of MAR (and before that of MAD 1) regime and issued several guidance for our members on MAR regime and thanks ESMA for this opportunity to comment on its Review report.

Summary of AMAFI's Answer

Summary

Scope of MAR

AMAFI considers that it is not necessary to extend the scope of MAR to FX contracts and rather suggest a wider enforcement of the FX Global Code of Conduct.
We would favour better alignment with BMR.

BBPs

AMAFI supports ESMA proposals for simplification of the reporting and transparency obligations of BBPs.
We would suggest that similar reflections be conducted on stabilisation programs to simplify the reporting obligations as well.

Definition of Inside Information

AMAFI does not think that the current definition should be amended, even more with respect to front running or pre hedging points.
For commodities derivatives, except for a missing reference to REMIT, no change is needed within MAR current regime of inside information.

Market Soundings

AMAFI fully agrees with the need to amend current definition on markets soundings and made several suggestions in what ways and why (**including a proposed amendment of Article 11**) in its detailed answer below.

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Most important issues to tackle are clarifying the disapplication of the regime for EuroPPs and early look meetings as well as further alleviation of the requirements where there is no inside information.

Insider lists
AMAFI believes in the usefulness of insider lists but supports proposals to make the regime **more effective and less burdensome, both for issuers and investment firms** acting on their behalf; especially considering the personal data included in the lists.

Managers' transaction
AMAFI disagrees with the proposal to extend Article 19(11) to issuers as well as to persons closely associated with PDMRs.

Surveillance Framework
AMAFI supports the need for a better harmonisation of reporting formats of order book data.
AMAFI is opposed to amend MAR with relation to multiple withholding tax reclaim schemes.

Sanction and measure
AMAFI supports the objective of a harmonised base of administrative sanctions/ measures across the EU, especially if the intention is to facilitate their cross-border enforcement of market abuse related sanctions.

AMAFI wishes to raise two important other concerns on issues not raised in the Consultation Paper:

(1) **Definition of Investment recommendation and its regime should as well be amended in our view** to tackle several and important issues.

(2) On **Accepted Market Practices (AMPs), AMAFI considers that Article 13 of MAR should be amended to clarify the exact role of ESMA** in the process of acceptance of AMPs.

OTHER MAR ISSUES NOT ADDRESSED IN THE ESMA CONSULTATION PAPER

Like ESMA encouraged market participants to do so, AMAFI wishes to comment on some MAR issues that are not addressed in the Consultation Paper (CP) and on which we would like to share experience and proposals for improvement of the regime.

- ### Investment recommendations (IR)

Investment recommendation MAR regime has been one of the most problematic issue of MAR regime for AMAFI members. They have been struggling ever since MAR is in force, first because of the scope of investment recommendation (and how it articulates with MiFID II concepts of investment advice and investment research) and, second, because many requirements of level 2 text applying to those investment recommendations (mostly conflict of interests' disclosures and obligations in relation to objective presentation) are burdensome and operationally difficult to implement and comply with, as we can testify, no interest from clients.

(1) Issues from the definition of MAR investment recommendation (IR)

IR regime may **materially affect the sales, sales trading and trading departments of investment services providers that exchange significant volumes of information flows with investors** on a daily basis. Any information flow that falls within the scope of MAR IR must comply with specific production and presentation restrictions that were not originally designed with the characteristics of some of these communications in mind.

MAR aims to create an obligation to present IRs in an objective and transparent manner, with disclosure of conflicts of interest, because such recommendations represent the opinion of a provider that is likely to encourage investors to adopt a particular investment strategy. This is typically the case for **MiFID investment research**: such research is produced within an organisational structure that makes it possible to implement the restrictions associated with MAR IR, notably because it is the result of in-depth reflections of the financial analyst and follows a strict, pre-determined drafting, approval and distribution process. In contrast, the market information flows relayed by salespeople and sales traders in wholesale trading rooms are inherently designed to be instantaneous and responsive and could not be prepared within a framework similar to that used for investment research without losing their value to customers. It is impossible to see how to apply conflict of interest disclosure requirements, assuming conflicts can even be identified, because the information is often purely factual, containing no opinion as such.

This issue relates to a wording issue we had with IR current definition is the reference to "distribution channels ***or for the public***". **MAR did not repeat a very important definition of this notion that we had under MAD 1** texts. Indeed, previous article 1(7) of the MAD 1 implementing directive *2003/125/EC* provided that "*Likely to become publicly available information*" means "*information to which* ***a large number of persons*** *have access*".

Deprived in MAR from that necessary clarification, some interpreted IR definition as not requiring to be sent to a large audience and that even where the communication is sent to a very few people, even more than one (!), can qualify this communication as an IR. Hence a potential huge number of communications may now be considered as IR whereas it was surely not the objective of MAR. That flaw should be fixed in our opinion.

That is why **AMAFI would recommend that MAR revision will address the definition of IR to amend it in a way that sales memo would be explicitly excluded from the scope and that the last reference of the "public" should be clarified in the same way it was under MAD**.

(2) Burdensome requirements applying to IR for a very low interest from clients

AMAFI members have been facing a lot of operational issues where implementing some of the requirements from Delegated regulation 2016/958 on MAR IR. For instance, requirements of Article 4 (h) and (i) even more are burdensome considering the current definition of IR and led to very complex questions when applying to derivatives instruments notably.

Generally speaking, AMAFI members consider that information made available to clients in compliance with MAR requirements on IR do not seem to have an interest for them as testified by a very low number (like 0) of internet connections (when using websites) or clients' request to stop receiving the information (when using emails).

That is why **AMAFI recommends to further analysis on the relevance of those requirements, in the light of amendments needed on the definition itself of IR, and a cost-ratio in depth analysis.**

- ## Accepted Market Practice (AMPs)

AMAFI considers that MAR review exercise should include an analysis as well on the role of ESMA in Accepted Market Practices (AMPs).

As far as the liquidity contracts as AMPs are concerned, ESMA relied on its opinion (Opinion ESMA70-145-76 « *Points for convergence in relation to MAR accepted market practices on liquidity contracts* ») to assess whether an AMP on liquidity contract could threaten the market confidence in the Union's financial market. Such approach, in our view, justified as for seeking European convergence, goes beyond MAR level 1 text and is contrary to the framework and objectives of MAR AMPs. ESMA is not supposed to define conditions but to actually issue an opinion on the compatibility of the AMPs with MAR. Moreover, an AMP is precisely considered within its national context because, like MAR provides it is "*legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned*". That is why "*An accepted market practice can only be established by the competent authority responsible for the market abuse supervision of the market concerned*". In that respect, seeking for European convergence within AMPs context make very little sense to us. Finally, through its Opinion, ESMA determined the legal standard for those AMPs which conditions the delivery of a positive opinion on its part, while it has no power to enact such a standard.

AMAFI consider that, in compliance with recital 42 and Article 13 of level 1 text of MAR, it is the exclusive role of NCAs to issue conditions or requirements attached to each AMP. ESMA should only issue a general opinion on whether such practice, as defined by the relevant NCA, is compatible with MAR and "*would not threaten the market confidence*" in the EU. To avoid in the future further legal uncertainty detrimental to those necessary practices, AMAFI would recommend slightly amending Article 13 of MAR to clarify that.

Article 13 of MAR

[…]
3. Before establishing an accepted market practice in accordance with paragraph 2, the competent authority shall notify ESMA and the other competent authorities of its intention to establish an accepted market practice and shall provide the details of that assessment made in accordance with the criteria laid down in paragraph 2. Such a notification shall be made at least three months before the accepted market practice is intended to take effect.

4. Within two months following receipt of the notification, ESMA shall issue an opinion to the notifying competent authority assessing the compatibility of the accepted market practice with paragraph 2 and with the regulatory technical standards adopted pursuant to paragraph 7. **That opinion aims at assessing** ~~ESMA shall also assess~~ whether the establishment of the accepted market practice **as defined by the competent authority** would not threaten the market confidence in the Union's financial market. The opinion shall be published on ESMA's website.
[…]

Scope of MAR

- **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.

AMAFI considers that it is not necessary to extend the scope of MAR to FX contracts.

Firstly, as exposed by ESMA in paragraph 16, a Global Code of Conduct – designed especially for FX activities – is applied by several market participants (included most of AMAFI's members). AMAFI considers that such Code is more suitable than MAR for monitoring the integrity of the FX market. Indeed, contrary to MAR, this Code has been drafted considering specificities of FX activities and covers already main issues of MAR (conflicts of interest and handling of confidential information). In that respect, AMAFI believes that the Code both fits most of MAR objectives and is better designed to FX specificities.

Secondly, by considering FX specificities, the Code goes beyond MAR obligations in some issues which are specific to the FX contract. For example, "last look" practice is dealt with into the Code (Principle 17) and not with MAR.

Like outlined by ESMA in paragraph 17, "*it might be advisable waiting for the Code to be more deeply embedded into the market* […] *before promoting an amendment of MAR in that respect*". In order to help a wider application of the Code and not to generate distortion of competition between the actors that already adhere to it and the others (which do not adhere), ESMA could promote adherence to this Code (just as the European Central Bank does – link) and / or give it the status of "Professional Standard".

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.

If the European Commission decided to apply MAR to spot FX contracts – inclusion to which AMAFI is opposed to (see answer to Q1) – **AMAFI agrees with ESMA developments** on the fact that important changes should be done into MAR to adapt its requirements to FX specificities as well as introducing a proper level of proportionality for those instruments. If such an amendment would be made, this would imply that FX spot contracts are financial instruments which would have huge and totally undesirable effects on MiFID II scope (that is not applicable to such contracts but only applies to financial instruments). As such, MiFID II scope issues should be considered separately through a dedicated consultation paper on MiFID II and not via a MAR review report.

Also, some MAR requirements would be highly complex and costly to implement to spot FX like surveillance and detection of potential market abuse (MAR, Article 16).

The cost / benefit ratio of such amendment is negative, in our view. On one hand, regarding costs, as it would have huge impacts on MAR and on other regulations such as MiFID II it would cause significant expenses. On the other hand, regarding benefits as we already have a Code which better covers this activity there does not seem to be any benefit to make this change.

- **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?

EU legislation is largely structured on a sectoral basis, fulfilling different purposes, which has led to some divergences between various EU instruments, such as overlaps, inconsistencies in definitions etc.

Whilst generally minor, those unintended divergences not only create an additional burden for entities subject to those rules, but also undermine the supervisory convergence which ESMA has been mandated to take an active role in, which may in turn create higher risk of, potentially involuntary, non-compliance.

Accepting that it would be unrealistic to try and achieve full alignment in the very short term, ESMA should place a major imperative on the process of achieving coherence in the Union's legislation.

AMAFI therefore fully supports alignment between MAR and BMR with respect to definitions and sanctions. Like ESMA outlined in the paper, such alignment should be done once the review of BMR is done.

✓ *Sanctions against (attempted) benchmark manipulation and powers of NCAs*

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?

See answer to Q3.

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?

See answer to Q3.

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?

See answer to Q3.

ARTICLE 5 MAR – BUY-BACK PROGRAMMES (BBPS)

- **Reporting obligations of BBPs**

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

Yes, AMAFI fully agrees.

Like ESMA outlined in the CP, Article 5 of MAR is quite challenging by requiring to report each transaction relating to the buy-back programme not only to the NCA of the trading venue where the shares are admitted to trading but also to those of each trading venue where they are traded.

Indeed, issuers are often not aware of all trading venues where their shares are traded and as well have difficulties identifying the relevant NCA in relation to some trading venues.

Also, the content of the information that must be reported must be called into question since the detailed format is over demanding for a low added value.

Therefore, **AMAFI agrees and support the need to modify the reporting mechanism** under Article 5(3) of MAR.

Going further, AMAFI considers that a **similar reflection should be conducted on reporting mechanism of stabilisation operations** under Article 6(4) of Delegated Regulation 2016/1052 for reporting of stabilisation transactions, where, likewise, potentially several NCAs are identified as relevant authority.

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.

Yes, AMAFI agrees with the fact that the reporting mechanism should be modified. We agree as well with the proposal of Option 3 (i.e. only report to the NCA of the market the most relevant in terms of liquidity) that would be indeed the best way forward.

Option 1 is not good since we believe that modification of the reporting obligation of BBPs should be made.

Option 2 has the merit to reduce the number of NCAs to which issuers must report and would be less burdensome that the current regime and quite pragmatic. However, the drawback of Option 2 is that it could prevent, in some cases, to privilege the most concerned NCA where, **shares are actually traded elsewhere** than the exchange of first admission to trading.

That's the merit of Option 3 that ensures that the most concerned NCA receives the information and still allows others to receive it as well upon requests. Option 3 remain relatively easy for stakeholders to apply since the identification of the most relevant market in terms of liquidity is an information directly provided by ESMA in its MiFID data base (Equity Transparency Calculation Results with the field "MRMTL" (*Most Relevant Market in Terms of Liquidity*). From such information, it easy to deduce from it the relevant NCA.

- **Simplification of the reports for BBPs**

Q9 Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

Yes, AMAFI agrees with ESMA proposal to remove the obligation of issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR since NCAs can have access to it under MiFIR.

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

Yes, globally.

As a preliminary comment, **such list is very welcome since the content of the reporting is not today harmonised.** To our knowledge, only AMF and BaFIN clarified what fields they respectively require but there are divergences between them. There should be a clear harmonisation in all European countries on the reporting requirements. In that respect, ESMA proposal is very welcome.

The **list as proposed by ESMA includes all necessary information**.

Most fields included in ESMA list seem relevant, except maybe field 3 ("*trading venue transaction identification code*") that is not really a valued information for market participants (even if for NCA it could be). Also, in many cases, fields 7 ("*buyer identification code*") and 12 ("*buyer decision maker code LEI*") could be redundant.

Along with LEI fields, **AMAFI would suggest adding Names of the issuer and of the Executing broker**. That would help the understanding for market participants and the public (even though for NCA, LEI are probably enough).

Also, it is of the utmost importance that the **list set up by ESMA is one of maximum harmonisation and make it compulsory to prevent each NCA to remove or add fields.** Again, there should be a clear harmonisation in all European countries on the reporting requirements. It would foster even more the harmonisation if only one language (e.g. in English) could be enough, if possible.

- **Transparency of transactions related to a BBP**

Q11 Do you agree with ESMA's preliminary view?

Yes, we agree with ESMA's preliminary view that the publication of disaggregated format is not useful for market participants. Solely the aggregated format is.

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

It could be useful to have aggregated data on a monthly basis as well.

ARTICLE 7 MAR – DEFINITION OF "INSIDE INFORMATION"

- **Effectiveness of the definition of "inside information" in preventing market abuse**

  ✓ *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?

None that would justify changing the current MAR definition.

In AMAFI's view, current definition of inside information is sufficient to cover all information relevant for NCAs and market participants to effectively monitor market abuse.

The other merit of such definition is that it is stabilised for a long time now and as such, all stakeholders share a collective and mature understanding of it, including a comprehensive cases law of interpretation. Any change to it at this point would mostly create regulatory and legal instability which is detrimental to the financial market as a whole. It would imply implementation costs (like staff training, compliance costs in updating procedures and internal policies) without any evidence of that such change is needed, in our opinion. Considering all regulatory reforms that are happening at the same time, we should promote that, in that field, only necessary amendments or changes are contemplated to avoid any unnecessary further instability.

In a context where the role of markets is becoming increasingly central in financing the economy, it is essential not to create regulatory instability that could affect investor confidence and hence the smooth functioning of these markets. For AMAFI, the cost-benefit ratio does not justify the need to change the definition of inside information.

That being said, it is worth mentioning that AMAFI members still face some issues in qualifying the information as inside information or not, for Debt Capital Markets most likely.

For Equity activities, it is quite straightforward, but it is not as easy for debt instruments. Those issues are, in our opinion, not directly linked to the definition itself of inside information but to the specificities of debt instrument where many parameters could have impact on the “price sensitive” effect of an information. Perhaps some level 3 Guidance could help in the matter to provide some comfort to market participants by, for instance, providing a list of relevant criteria to take into account for assessing inside information in the context of Debt issuance. It would also mitigate the risk that, being overcautious, some would systematically qualify the information as inside information (and the prejudice such practice would have in terms of efficiency and risk-based approach…).

Finally, the moment where the information is qualified as inside information is an important point. AMAFI wish to outline that market participants assess necessary *ex ante* the possible significant effect on the relevant prices for deciding if the information is insider. On the other hand, NCAs can rely on *ex post* information when investigating potential market abuse cases. It seems often easier to consider *ex post* that the information should have been considering as insider information. Therefore, ESMA could perhaps usefully provide guidance to NCAs to remind that the assessment is being done *ex ante* and should not rely on the actual *ex post* effect on the price.

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

Yes.

Like answered in the previous question, yes, in AMAFI’s view, current definition of inside information is sufficient to cover all information relevant for NCAs and market participants to effectively monitor 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?

No, we have not.

<u>Inside information for commodity derivatives</u>

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?

No, **we have not identified price relevant information which is not covered by the current definition of inside information relating to commodity derivatives**, which is appropriate as it recognises the structural difference between information on an issuer of securities and information on a commodity derivative contract.

With regard to the special definition of inside information for emission allowances under MAR, it is still unclear for gas and power market participants what constitutes ‘inside information’ in relation to emission allowances, which is not already covered by the definition of inside information under Article 2(1) REMIT.

It is our experience that in practice all potential inside information concerning emission allowances and derivatives thereof, as well as concerning power and gas markets (both physical and financial) is already sufficiently covered and published under REMIT. Therefore, we believe that the current definition of 'inside information' in relation to emission allowances of MAR creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants and this without any obvious benefits. We emphasize the importance of the coherence of the definition of inside information in respect of commodity derivatives under both MAR and REMIT as wholesale energy market participants are active in both physical and financial markets, in particular to hedge their commercial physical positions. Information that is not (incl. own trading strategy and plans) inside information under REMIT, should not constitute inside information under MAR neither.

Consequently, we propose to introduce a r**eference to the definition of inside information of REMIT**[1] **into MAR**. This would mean that wholesale energy market participants would have to comply exclusively with the *lex specialis* REMIT definition of insider information with regard to emission allowances, and power and gas commodity derivatives. This approach substantially reduces complexity for the real economy.

In respect of listed **agricultural commodity** derivatives markets, **no specific concern** has been mentioned about the current MAR definition. In particular, the current definition allows market participants to share a common understanding of the information that should qualify as inside information.

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?

The definition of inside information in relation to commodity derivates and **the additional criteria that it should relate to disclosable information to be made public is key** to allow commodity producers to hedge their commercial risks via commodity derivatives transactions. EU legislators have agreed for specific reasons to retain the additional condition already mentioned in the previous MAD, namely *that the inside information has to be reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets*. These specific reasons, which were mentioned by the EU Commission in its legislative MAR proposal and impact assessment, are still valid.

A specific definition for inside information for commodity derivatives is justified by the **differences between commodity derivatives and security markets, which require a different approach** to regulating inside information. The main difference is that commodity market participants must be able to hedge their physical production needs and related commodity price risks. It is therefore key that a different definition of inside information applies to commodity derivatives.

Any general disclosure obligation (by applying the general definition of inside information under MAR) would dramatically restrict the ability of physical market participants to hedge, other than from a distressed position, and this in turn would lead to increased overall costs of trading and production for those participants and therefore increased costs for consumers.

In conclusion, for commodity derivatives, priority should remain to give comfort for market participants that **they can perform their hedging interventions without being exposed to regulatory uncertainty via too wide a definition** in a domain where disciplinary case-law is limited.

[1] As both article 2(1) of REMIT, as well as recital 12 of REMIT so as to clarify that one's own trading plans and strategy do not constitute inside information.

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.

We are not aware of material hedging difficulties and from that perspective we don't see a need to change the current definition of Article 7(1)(b) of MAR.

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?

Like developed in answers to Q 16 and 17, **AMAFI disagrees with applying the general definition of inside information to commodity derivatives.**

Globally speaking, we would rather recommend remaining MAR unchanged so as to favour legal and regulatory stability, like explained in our answer to Q 15.

No specific concern has been noted for agricultural listed derivatives. For energy commodities, again, we would recommend that MAR refer to REMIT definition of inside information like explained in our answer to Q 16.

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

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

None.

AMAFI does not believe that any change should be made on the definition of inside information to include "other" cases of front running.

AMAFI considers that the **current definition of Article 7(1)(a) does already include the orders**. If information related to a client order is of a precise nature, not public and likely to have a significant effect on the relevant prices of financial instruments, it might be considered as an inside information.

In that respect, Article 7(1)(d) may create confusion that orders would only be considered as inside information for "*persons charged with the execution of orders*". One can further argue that such wording is too restrictive as other people within an investment firm can have access to a pending order without being *the* person in charge of the order. A solution could be to remove Article 7(1)(d). An alternative solution would be to keep but amend it and prefers the wording known in MiFID II for designating staff involved in execution of client orders and relate to the persons whom conversations and communications are to be recorded in compliance with Article 16(7) of MiFID II.

On the issue of front running, **we would like to point out that "front running" behaviour and insider dealing are two very different things.**

Like ESMA noted in the paper, "front running" behaviour (meaning acting based on a client order to take benefit from it, for our own account or for another client on the detriment of the first client) is already and properly covered by MiFID II which is the proper regulatory framework to do so. The issues at stake is treating clients fairly and managing conflicts of interests.

In some cases, it may be that in top of those MiFID II issues, the client order could be for some reasons considered as inside information. If that the case, based on the current definition of inside information, it would be consider as insider dealing. But it should be clear that it could not be systematically the case.

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

No.

AMAFI consider that the liquidity of a market or a financial instrument is indeed relevant to assess the possible effect on the prices, hence for qualifying inside information.

However, it does not seem appropriate to amend the current definition of inside information to include specifically that element since many other elements would also have to be included as well. Also, it would be detrimental to add specific conditions on liquidity for front running behaviour because liquidity is relevant not only for front running and it would be misleading to imply that it is.

Lastly, that amendment would imply that investment firms would then have to formally implement such criteria of liquidity in their surveillance systems set up in compliance with article 16.2 of MAR for insider dealings detection which is operationally and technically burdensome, highly complex and extremely costly.

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?

AMAFI disagrees with development made in ESMA paper that implies that pre hedging behaviours most likely affect the market price and qualify as insider dealing.

First, like front running behaviour, pre hedging behaviour and insider dealing are two very different things and MiFID II already provide requirements aiming at preventing of impacting negatively the client and managing potential conflict of interests raised by such practice. Also, it is inaccurate in our view to consider that request for quotes "*often*" meets the definition of inside information because request for quote will not be precise enough to qualify as an inside information since we cannot reasonably expect that the client will actually deal on the basis of the quote.

Like ESMA noted, pre hedging also help reducing disruptive effects of large orders on the market and it that way is beneficial to the integrity of markets. Therefore, we disagree with qualifying pre hedging as possible market price manipulation. Also, like said before, we disagree with the assumption that a request for quote is inside information.

Unlike ESMA, AMAFI considers that it is quite unlikely to have pre hedging behaviour qualifying as market abuse.

Also, pre hedging is an important function for the smooth operation of financial markets, benefitting clients by allowing brokers to provide increased liquidity to their clients and provide the quality of execution expected by clients (including, but not limited to, price). The main risk that could arise from pre hedging behaviours is a conduct risk and the potential prejudice for the client where like ESMA noted in § 102, many firms act in the same time on the same quote that is more likely to have an impact on the price that could impact negatively the client. On the other hand, precisely thanks to pre hedging, the firm can reduce its risk and therefore offer a better price for the client. By doing so, it helps to achieve its best execution duties.

Therefore, in AMAFI's view, the stake is the better possible management of clients' orders around fair execution. Ultimately, clients should be made aware and somehow consent to pre hedging activities. Such transparency towards clients contributes to make their concern and benefit primary objective of pre hedging practices.

In any case, it would be highly detrimental for clients and the market to somehow confirm the assumption that pre hedging is a market abuse practice since it would put an end to that practice and its benefits both for the client and the market.

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

Like answered to the previous question, pre hedging behaviours provide benefits to the firms because it helps reducing their market risks when answered to a request for quote. Pre hedging benefits clients since firms can offer a better price to their quote in line with their best execution duties. Pre hedging benefits to the functioning of the market as well as improving liquidity and volatility by reducing market impacts of orders.

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

Many financial instruments (and most notably listed derivatives) are subject to pre hedging for the reasons provided in previous answers.

ARTICLE 17 MAR – DELAYED DISCLOSURE OF INSIDE INFORMATION

No AMAFI answers to that section since the issue is out the scope of AMAFI (It is primarily an issuer question).

ARTICLE 11 MAR – MARKET SOUNDING

- **Enforceability of market soundings**

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

Partially.

AMAFI agrees with the proposed amendments to Article 11 but on the condition that those only apply where market soundings imply the transmission of inside information.

AMAFI agrees with the obligatory nature of the requirements of Article 11 but considers that this obligatory nature only makes sense where inside information is transmitted.

Indeed, the primary objective of the regime is to capture transmission of inside information as clearly stated in recitals 34, 35 and 36 of MAR. Transmission of information that is not inside information is far less relevant in that respect. Also, the protection against the allegation of unlawful disclosure of inside information would be of no use.

That is why we would suggest that ESMA clarify that the requirements set out in Article 11 are indeed **compulsory where inside information is passed on. In the absence of inside information, AMAFI suggests that ESMA:**

- **(i)** **Preferably, leave the regime optional** for DMPs who want to benefit from the protection in case their analysis concluding that there is no inside information is overturned; or – if not possible:
- **(ii)** **keep a binding regime but that should be lighten** considering that there is no inside information. For instance, requirements (or parts of) of Article 11(5) relating to record keeping most notably could be waived.

Similarly, AMAFI believes that it would be beneficial for the industry if ESMA could foster harmonisation in relation to administrative sanctions for non-compliance with the market sounding regime but, again, only as far as inside information is passed on.

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

Q34 Do you think that some limitation to the definition of market 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?

Yes, absolutely.

AMAFI fully shares ESMA analysis that some limitation to the definition of market sounding should be introduced.

We have identified 4 types of needed limitations:

(1) Limitation needed as regards the purpose of interactions.

AMAFI fully shares ESMA analysis that the current definition of market sounding is too broad and may cover a wide range of interactions, including in particular those **aimed at directly offering a deal or a transaction to one or more potential counterparties**.

AMAFI wishes to share 2 examples of such situations:

(i) Euro PPs

Euro private placement (Euro PP) transactions[2] should be explicitly excluded from the definition of market soundings[3].

Euro PPs do not satisfy the definition which provides that "*communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors*". While information is indeed communicated "*prior to the announcement of a transaction*", this is not undertaken "*to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing*".

[2] i.e. the transactions defined by the *Charter for Euro Private Placements (Euro PP) – Industry guidance document* dated June 2014, available at www.euro-privateplacement.com.
[3] See AMAFI professional standard (*AMAFI 14-11a&b*) on market soundings, particularly §6 and Annex 1 describing the characteristics of Euro PP transactions as laid out in the abovementioned charter.

In other words, when preparing a Euro PP, the aim is not to contact a few selected investors to identify specific terms of a transaction with a view to maximising its chances of success with the many other investors to which it is to be offered, but **rather to identify potential investors with which all the terms (including contractual) of the deal may be negotiated**. Indeed, the involvement of investors once the issuer's desire to conduct a Euro PP is known is a necessary and integral part of preparing the transaction. It is only because the investors are participants in the discussions that the transaction may be put together and executed.

Discussions with investors are not aimed in any way at preparing a transaction that might be initiated whether or not the investors who are contacted acquire the securities that are ultimately issued: **interaction with investors are part of the offering process itself and make up the process of negotiating the component parts of the transaction**, including the legal terms and financial conditions[4].

(ii) "Secondary" block trades

Besides primary market transactions, there are situations[5] where an ISP might query institutional investors with a view to conducting a secondary market transaction involving a block trade or disposal of a holding. These situations fall within the scope of market soundings if they involve "*such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors*" (*MAR, Art. 11(1)b*). In some situations, those operations may be subject to the market sounding provisions (where it involves very large blocks of instruments, it may be necessary, before proceeding with the block trade itself, to sound out potential investors by passing on information about the proposed deal (such as volume, price and even identity of the seller), which could in some cases have a material impact on the price of the financial instruments in question). But other are not: ESMA[6] said that when, in its discussions with investors, **the professional is not trying to gauge the conditions relating to the potential size or pricing of a transaction, but actually trying to negotiate and conclude the transaction[7], these actions do not qualify as market soundings**. It added that in this case, MiFID 2 provisions apply and shall not overlap with those of Article 11 of MAR.

That is why AMAFI supports the conclusion set out in SME listing package that explicitly sets out that "*communication of information to those investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of bonds by an issuer* […] *shall not constitute a market sounding*".

We would recommend extending this statement to all issuers and not only SME issuers and **to amend article 11 to explicitly exclude from the scope of market sounding "*communication of information in order to offer a deal or a transaction to one or more potential counterparties*"**

(2) Limitation needed as regards the stages or the timeline of interactions.

Again, AMAFI agrees with ESMA that depending on the various stages of the interaction, market sounding should or should not apply to interactions between DMPs and potential investors. In a nutshell, if those interactions happen at a very early stage or, on the contrary at a very late stage, it makes no sense to apply market sounding regime. Likewise, if the interactions with investors are spread out or staggered over a very long period, the regime is not fit either.

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[4] See AMAFI professional standard (*AMAFI 14-11a&b*) on market soundings that provided that Euro PP transactions do not fall within the scope of the regulations on market soundings.
[5] By « secondary » block trade, AMAFI does not mean to refer to operations as placing existing securities through accelerated book building that are here assimilated to "primary" transactions.
[6] ESMA/2015-1455 §70.
[7] This is the same reasoning than the one laid out before on EuroPP. The standard stated that the definition of market soundings did not extend to contact with investors within the framework of an order execution activity not intended to "*gauge the interest of potential investors in a possible transaction*" but rather to negotiate the terms of a transaction conducted directly within the framework of these discussions.

It is typically the case for Euro PP transactions as explained above. It is also true for M&As, captured by article 11(2), the conditions set out in which are very unlikely to apply in practice. This can be explained by the fact that interactions in an M&A context are too staggered over time to make the regime relevant. Also, common practises in that area are so far removed from market standard exchanges with institutional investors that it makes it very complicated for professional to apply such formal requirements as provided in MAR market sounding regime.

(3) Limitation needed as regards the mandate provided by the issuer.

Another criterion from the definition of market sounding that could be improved is the one that DMPs is "*acting on behalf or on the account*» of an issuer. AMAFI believes that that condition should be emphasised in the text (for instance, like "*A market sounding comprises the communication of information, by or on behalf of a person referred to* …").

The notion of "*acting on behalf or on the account*" could also be further clarified, through level 3 texts. It could usefully be developed for instance that such mandate does not require to be in writing but that it must be firm and not only possible.

AMAFI would like to share one example where the concept of mandate is particularly relevant.

Securitisation transactions

Securitisation transactions are carried out on behalf of a client (the transferor), which transfers a portfolio of assets (such as claims or bonds) to a securitisation vehicle (the issuer), which then issues debt securities. An investment firm may contact potential investors in advance about their interest in the future securities issue. In securitisation transactions, the issuer, i.e. the securitisation vehicle, is merely a means to transform the client's asset portfolio into financial securities. Accordingly, the issuer has no will of its own (since the vehicle did not exist when contact was made).

It is therefore hard to say that the firm is acting on behalf and on the account of the issuer when it contacts investors. However, it might be considered to be working on behalf and on the account of the transferor. In this case, though, the transferor on whose behalf and account the firm is acting is not an issuer, a secondary offeror of financial instruments, an emissions allowance market participant or a third party acting on behalf or on the account of one of the three parties. For this reason, these contacts do not appear to come under the scope of the MAR provisions on market soundings. That being said, confidential information that could potentially be communicated to investors during this phase shall be covered at the very least by a confidentiality agreement.

(4) Limitation needed as regards the nature of the financial instrument.

AMAFI members also face issues as regards the different nature of financial instruments. If market sounding regime is relevant for financial instruments that, by nature, may involve potential inside information (later designed as "financing product"); it is not the case for some financial instruments ("investment product") where this risk does not exist. Typically, for investment products like structured securities or notes issued by investment firms ("structured EMTNs"), one may argue that given the current definition of market sounding, MAR regime could literally apply to interactions that exist prior to issuance of structured EMTNs.

Indeed, an investment firm may issue structured EMTNs that it believes may meet investor expectations. As part of this, the firm may contact investors that might be interested in these notes in order to adjust the issuance terms to reflect potential demand. Accordingly, the question arises as to whether this contact with investors comes under the market sounding rules because this type of contact appears to fall within the scope of market soundings as defined by MAR Article 11(1).

However, these situations need to be analysed in the context of MAR and the provisions governing market soundings: while the application of the sounding rules is not linked to the communication of inside information, the fact remains that the objective is to be able to detect and take effective action against situations resulting, following transmission to investors, in the use of inside information or of confidential information that is subsequently reclassified as inside information (*see MAR, Recitals 34, 35 and 36*).

The situations considered here, though, involve saving products rather than financing products. While for the latter there is a genuine risk that inside or confidential information about the issuer could be transmitted, it is hard to see how this could be the case for the issuance of a saving product such as a structured EMTN, since it has no other objective than to facilitate marketing with respect to investor expectations.

Further confirmation that the market sounding framework does not apply to saving products is provided by the fact that the European co-legislators never intended this to be the case. On the contrary, they exclusively targeted investment products, as evidenced by the following two MAR recitals: market soundings "*are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned*" (*MAR, Recital 32*). "*Examples of market soundings include situations in which the sell-side firm has been in discussions with an issuer about a potential transaction,*[…]*; where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment* […] *"* (*MAR, Recital 33*).

Based on that, there does not appear to be any reason why market sounding rules should apply to contact with investors aimed at adjusting the issuance terms for structured EMTNs to ensure that these products match investor needs as closely as possible. That is why AMAFI **recommends adding a recital in level 1 text explicitly clarifying such exclusion.**

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?

As per our answer to the previous question, AMAFI agrees with ESMA that depending on the various stages of the interaction, market sounding should or should not apply to interactions between DMPs and potential investors. In a nutshell, if those interactions happen at a very early stage or, on the opposite at a very late stage, it makes no sense to apply market sounding regime. Likewise, if interactions with investors are spread out or staggered over a very long period, the regime is not fit.

Stages of the interaction between DMPs and potential investors that should not be covered by the definition of market soundings are:

- Where there is no communication of information;
- After transaction announcement;
- Where the purpose is not to gauge investor interest and/or
- Where the interaction is by a person other than the issuer or a third party acting on its behalf.

Stages of the interaction between DMPs and potential investors depend as well on the nature of the financial instruments concerned. An absolute answer cannot be provided and the DMP shall ensure an ex ante casuistic approach to know when to implement the market sounding rules in a relevant way.

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?

Yes, we believe that the reference to "*prior to the announcement of a transaction*" in the definition is appropriate. Otherwise, it would capture interactions that should not be considered as market soundings.

It is further important that condition of "*prior to the announcement*" should not be interpreted in a restrictive way.

The notion of "announcement" here is meant to include any way of making the principle of the transaction public, by providing for instance the main characteristics of the transaction and an indicative or forecasted timeline. AMAFI wishes to share one example below:

Pilot fishing / Early looks meetings

Pilot fishing or – more usually now called "early look meetings" - is a technique used during initial public offerings (IPOs) whereby an ISP advising the issuer suggests that the company's management meet with selected investors to tell them about the issuer's business and position relative to other firms in the sector.

Initial public offerings (IPOs) on a regulated market have the peculiarity of involving, by definition, securities that are initially unlisted (and have not yet been the subject of a request for admission to trading). Accordingly, the first question that needs to be asked is: do these transactions fall within the scope of MAR as defined by Article 2? In the absence of securities that are listed or for which a request has been made for admission to trading on a market covered by MAR, inclusion in the scope of MAR may occur only if the conditions of Article 2(1) (d) are satisfied[8], i.e. there are listed financial instruments within the issuer (or its group) that have an effect on or whose own price depends on the price of the instruments offered within the IPO. This type of situation is relatively common in the mid/large cap universe, but remains highly exceptional among small caps, leading many IPOs to be excluded from the scope of MAR and hence from the scope of market soundings.

However, if the answer to the first question is yes and the proposed transaction falls within the scope of MAR, because say the issuer has issued listed bond securities or because it is the subsidiary of a listed company, it becomes necessary to consider the specific conditions relating to the application of market sounding rules defined in MAR Article 11(1) and in particular, the condition of "*prior to the announcement*"

Early look meetings during IPOs – at least as common practice in France - are made **only after a press release announcing the forthcoming operation, along with its main characteristics and an indicative or forecasted timeline**. Therefore, interactions with investors during those meetings are not made ***prior** to the announcement of a transaction* but actually after. As such, early look meetings do not and should not fall within the scope of market soundings.

Anyway, the notion of "*announcement*" is sufficiently wide to include any form of publicity of a transaction.

- **Simplification of the market sounding procedures and requirements**

Q37 Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

As developed in our answers below, the most problematic situations are:
- Euro PP transactions – where the regime should not apply
- Early looks meetings – likewise
- M&A operations, as captured by Article 11(2), that should be removed.

Also, generally speaking, **for all market soundings where there is no inside information** (as outlined in our answer to Q33) the regime has proven to be too burdensome and this probably explains why an increased number of investors no longer wish to participate in market soundings which is detrimental to the efficient functioning of the market.

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[8] MAR, Art. 2.1 (d): "*This Regulation applies to the following [...] 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*".

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)?

Like ESMA, AMAFI believes that the **cleansing procedure** is one of the most problematic requirements.

To make it work in practice, investment firms have no choice but to take huge risks by assessing that the information will cease to be inside information at the end a pre-determined period of time even though one can never guarantee that it will indeed be the case for failed or parked transactions.

At the very least, the regime could be amended to remove such obligation if the transaction is confirmed, in order to reduce the administrative burden of DMPs. It has no value for persons receiving market soundings since they are necessary well aware that and when the transaction is made public.

In that respect, paragraph 6 of Article 11 could be removed or, alternatively, reduce to cases where the information ceases to be inside information before the transaction is made public.

Finally, AMAFI considers that there is room for **simplifying record keeping requirements**, again especially needed for soundings in the absence of inside information.

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Conclusion on needed limitations in the definition of Market Soundings

AMAFI believes that limitations to the definition of market sounding should be introduced as regards to:
- (i) the purpose of interactions with potential investors and,
- (ii) reaffirm the principle of a mandate provided by an issuer (or assimilated)

(AMAFI proposes amendments of Article 11 below to that end)

but also:
- (iii) the stage or the timeline of such interactions, and
- (iv) take into account the nature of financial instrument.

As to possible and welcome amendments to Article 11 of MAR, AMAFI suggests the following:

Article 11
Market soundings

1. A market sounding comprises the communication of information, **made by or on behalf of a person referred to in point (a), (b) or (c)**, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors by:
(a) an issuer;
(b) a secondary offeror of a financial instrument, in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors;
(c) an emission allowance market participant; ~~or~~
~~(d) a third party acting on behalf or on the account of a person referred to in point (a), (b) or (c)~~.

A market sounding does not comprise the communication of information relating to a transaction or a deal aimed at offering a deal or a transaction to one or more potential counterparties.

~~2. Without prejudice to Article 23(3), disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company to parties entitled to the securities, shall also constitute a market sounding, provided that:~~
~~(a) the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities: and~~
~~(b) the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger.~~
[…]
5. For the purposes of paragraph 4, **and provided that the market sounding will involve the disclosure of inside information**, the disclosing market participant shall, before making the disclosure:
(a) obtain the consent of the person receiving the market sounding to receive inside information;
(b) inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by acquiring or disposing of, for his own account or for the account of a third party, directly or indirectly, financial instruments relating to that information;
(c) inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by cancelling or amending an order which has already been placed concerning a financial instrument to which the information relates; and
(d) inform the person receiving the market sounding that by agreeing to receive the information he is obliged to keep the information confidential.

~~6. Where information that has been disclosed in the course of a market sounding ceases to be inside information according to the assessment of the disclosing market participant, the disclosing market participant shall inform the recipient accordingly, as soon as possible.~~
~~The disclosing market participant shall maintain a record of the information given in accordance with this paragraph and shall provide it to the competent authority upon request.~~
OR
6. Where information that has been disclosed in the course of a market sounding ceases to be inside information, before the transaction is made public, according to the assessment of the disclosing market participant, the disclosing market participant shall inform the recipient accordingly, as soon as possible.

Article 18 MAR – Insider list

- **Usefulness of insider lists**

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

Yes.

AMAFI agrees with ESMA's view considering that insider lists are a useful tool to monitor insider information as well as for investigating possible market abuse infringements.

However, we do believe that some adjustments are necessary to make the system less burdensome both for issuers and persons acting on their behalf like investment firms ("ISP") and more efficient (see our answers below).

- **Content of the insider lists**

  ✓ *Actual access versus potential access to inside information*

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

Yes.

AMAFI believes that insider list regime should be amended to make it more effective.

We fully share ESMA's view considering that insider lists should only include persons who effectively accessed a piece of inside information and not those who could have done that. Indeed, such approach lead to an "inflation" in the number of persons included with negative consequences like increasing the issuer/ISP requirements to notify each insider, to monitor - where relevant - personal transactions of those so-called "insiders" and ultimately reduce the effectiveness as well as the relevancy of the insider lists for NCAs.

On the other hand, one may argue that if ISPs are keen on including only actual insiders and not all potential insiders (e.g., staff from IT, legal, risks and compliance and/or controllers), it must be clarified as well that they should not be required to perform dedicated monitoring to ensure that those potential insiders really did not receipt the information. In other words, NCAs should not be able to blame an ISP who did not put on its insider list someone who did not receive the information through usual legitimate channel but who had access to it and decided on its own to retrieve it (and acted on it). Otherwise, it could be considered too risky for the ISP not to include those potential insiders. Indeed, AMAFI members outline that in a context of increasing digitalisation and development of clouds, it became more difficult to avoid that some people may have access to information that they are not supposed to have. Therefore, it would be useful to initiate a more in-depth and collective analysis on this question, with ESMA and NCAs, and considering IT and new technologies context, so as to provide sufficient comfort to market participants to that respect.

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?

AMAFI understand that this question address 2 issues:

(1) Ensure that only actual insiders are included in insider lists

Like developed above, AMAFI agrees with ESMA that changes in MAR insider list regime are welcome to clarify that only actual – and not all potential – insiders are to be included in insider lists (and provided that further comfort is provided to ISPs in that respect).

(2) Ensure that insider lists are provided to NCAs within a short time period (by SME issuers?)

In AMAFI's view, insider lists are already provided within a short time period by ISPs.

As far as the regime for SME is concerned, AMAFI believes that adjustments of MAR requirements for such issuers are indeed welcome.

However, on the particular issue of insider lists, considering the interconnection between insider lists of issuers and those of persons acting on their behalf, consequences of those adjustments for the latest remain somehow unclear : how the ISP who advise a SME issuer on a operation implying inside information is supposed to draw and maintain a full insider list in compliance with the current regime if the issuer itself is not and will not include the ISP in his insider list ?

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

Q42 What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

Even if AMAFI does not have an opinion on impacts for auditors and notaries, we may fear some negative consequences with widening too much the scope of persons supposed to draw insider lists.

The current definition of MAR has the merit to set up a clear scope of the requirement: that the person should act on behalf or an account of the issuer.

Otherwise, the risk is that issuers may feel comfortable to share insider information with a wider range of persons considering that they will draw insider lists and therefore mitigate the risk of undue transmission of the information. Also, it would increase significantly the tasks of NCAs to identify all those persons and retrieve their insider lists. At the end, it is unclear if such measure would really improve the effectiveness of the regime.

✓ *The role of the permanent insider section*

Q43 Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

Yes, AMAFI considers useful maintaining the permanent insider section as long as it remains optional.

Within some investment firms for instance, a few people have always access to inside information, irrespective of their operational role in a particular transaction: for example: top management and compliance staff. On the other hand, some people may have access, on a "need to know" basis, to inside information on one transaction because they will take a part to it. To monitor in an efficient way the circulation of inside information, it is necessary to maintain the possibility to separate permanent insiders and event-based insiders.

Also, this section helps reducing the burdensome of drawing and maintaining insider lists.

Lastly, since the section is optional anyway, AMAFI does not see any negative effect to keep it in the future new regime but in removing it.

✓ *Reduction of the administrative burden for issuers regarding insider lists*

Q44 Do you agree with ESMA's preliminary view?

Yes, AMAFI fully supports the need to reduce the administrative burdensome for insider lists but not only for issuers, for ISPs as well.

AMAFI agrees with the proposal to amend Article 18 to specify that lists should only include one contact natural person for each relevant legal person.

That means that issuer will be able to include, for example, the name "Firm A" for the ISP A advising him on the operation (and M. X, as the natural contact person within Firm A) but without detailing each person from staff within Firm A that had access of inside information. Those persons will already be included in Firm A's insider list. Conversely, Firm A's insider list will not include each natural person within the Issuer that had access to inside information but only "Issuer" (and M. Y, as the natural contact person for the Issuer).

This point is also relevant for managing personal data ISP are facing with MAR insider lists (see our answer to next question below).

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.

Yes, we do.

Another suggestion that would support more efficiently insider lists' objectives while reducing administrative work would be **to remove some compulsory fields of the template provided in Annex I** of Implementing Regulation 2016/347 that are highly difficult to maintain all the time in all insider lists for all insiders.

Fields like "*Date of birth*", "*National Identification Number*", "*Personal telephone numbers*" and "*Personal full home address*" are personal data and such sensitive to retrieve and maintain in insider lists. First those data are burdensome to retrieve and keep up to dated. For some individuals, especially located outside UE, there is an issue of a potential conflict between MAR and data privacy requirements. Also, even for individuals located within UE, some employees may refuse to provide some personal data (personal phone number for example). Those issues outline the difficulty to complete and maintain permanently fields with personal data.

Provided that NCAs confirm that those fields are really necessary for their market abuse investigations (?), it should be outlined that only a relatively minor number of insider lists drawn by ISP are actually requested by NCAs. Therefore, a solution could be to only require adding those fields and data at NCAs actual requests. In other words, ISPs would not have to maintain full insider lists with those last fields all the time (but only the 7 first columns).

In AMAFI's view there is nothing in MAR legislation anyway requiring insider's personal data to be stored in specific insider lists IT systems and therefore preventing personal data from being stored in two different sites or information systems. AMAFI believes that ISPs are free to keep these data in a dedicated IT system for insider lists or in the HR system, for example. If this option is taken, however, the ISP must still be able to quickly provide the regulator with all the information required pursuant to MAR.

In all cases, it should be clarified somehow that where the ISP cannot be held liable for being unable to provide the NCA some of those personal data, provided that there is evidence of its efforts to obtain this information or the barriers under local law that prevent it from accessing such information.

ARTICLE 19 MAR – MANAGERS' TRANSACTIONS

No AMAFI answer on questions relating to that section since the issue is out the scope of AMAFI (It is primarily an issuer question); except for Q55 to 57, for issuers are credit institutions or investment firms.

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.

AMAFI sees no benefits on extending the requirement of article 19 (11) to issuers and further agrees with ESMA's views on the number of downsides.

Indeed, as ESMA points out, trading prohibitions for issuers would prohibit issuers to finance and refinance themselves during the closed period through securities issuances, particularly for investment firms and credit institutions whose securities are listed. Issuers will not be able to provide secondary market on its own securities during the closed period and therefore drastically limit on-going refinancing of credit institutions, most notably through program issuance of structured product (Medium Term Notes and short-term paper programs). Indeed, for structured products, the issuer is the only liquidity provider. With such prohibition, he will no longer be able to perform securities buy backs during closed periods. This will have material adverse impacts on the issuer itself and investors.

Also, one may argue that relevant staff involved in those activities of structured product issuance do not have access by nature to inside information, by virtue of (i) organizational measures like information barriers, (ii) internal procedures managing conflicts of interest and (iii) internal processes against undue circulation of inside information. If by exception or inadvertently that would be the case, then issuers would apply articles 14 and 15.

Q56 Likewise, AMAFI does not believe that this prohibition should be extended to persons closely associated with PDMRs since they are difficult to identify and much less likely to hold inside information prior to the publication of financial results than the PDMRs. We are of the view that since persons closely associated with PDMRs are already subject to (i) insiders dealing prohibition and (ii) notification disclosures of Article 19(1), there is no need to impose any further restrictions to protect market integrity.

To avoid undue restrictions on certain closely associated persons, we are of the view that the scope of transactions conducted "*indirectly*" by a PDMR should be narrowed only to transactions conducted by legal entities which are directly or indirectly controlled and managed by such a PDMR.

- **Exemptions to the application of the closed period requirement**

Q57 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.

No comment.

Q58 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.

With respect to the exemption in Article 19(12)(b) we would like to clarify the scope covered by the following terms:

- "*qualification or entitlement of shares*": it should be clarified that this notion includes the exercise of a right to receive shares as dividend payment (e.g. scrip dividends). Indeed, the period during which PDMR can exercise their right to receive payment of dividends in share may occur during a blackout period. One can infer from Article 19(11) that such PDMR cannot exercise their right to receive the payment of a dividend in shares which we believe is unfair and creates an unjustified restriction. We believe that insider dealing prohibition is sufficient to ensure market integrity. Indeed, if a PDMR is in possession of an inside information, it will not exercise its option to receive the dividend in shares.

- "*transactions where the beneficial interest in the relevant security does not change*": we believe that the wording should expressly include the pledge or another form of security interest over shares.

MAR AND COLLECTIVE INVESTMENT UNDERTAKINGS (CIUS)

No AMAFI answer on questions relating to that section since the issue is out the scope of AMAFI (It is primarily an issue for asset managers).

COMPETENT AUTHORITIES, MARKET SURVEILLANCE AND COOPERATION

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

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

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

AMAFI fully supports of the setting up of a framework permitting the cross-market order book surveillance. Indeed, it would really improve the capacity of NCAs to detect market abuse cases at the benefit of the well-functioning of the market and public confidence.

As it is stated in the CP, the first step to achieve this goal is to harmonise formats for providing order book data to NCAs. AMAFI agrees with ESMA that the harmonisation should be based on the ISO 20022 methodology and on the use of XML templates in accordance with this methodology.

As a trade association, AMAFI is not in the capacity to assess whether a daily reporting (on all the order book or a subset of the order book) or an ad-hoc transmission mechanism would be preferable and to measure the cost linked to each solution.

That being said, here is no doubt that the new regime will incur additional costs for trading venues that, at the end of the day, will be supported by their members.

To mitigate the overall costs of the new requirement, and having in mind that the cross-market order book surveillance will give NCAs a powerful tool to detect market abuse cases, AMAFI is of the view that ESMA and the Commission should **consider to reduce the constraints set up in article 16 paragraph 2 of MAR** (REGULATION (EU) No 596/2014) when orders or transactions are placed or executed on a trading venue. This suggestion is made as well considering that with regulatory reform that took place since 2003, especially MiFID II/MiFIR, NCAs are now far more equipped in terms of data reported and surveillance systems that it would make sense to reassess the role of investment firms in the detection of market manipulation, to gain in efficiency and reduce the overall costs of such surveillance for the whole industry.

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

See our response on Q66.

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.

See our response on Q66.

- ### Cum/ex and multiple withholding tax reclaim schemes

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

Like pointed out in "the ESMA's report", "*the terms "integrity of the market" is commonly understood as a reference to the sound and orderly functioning of the financial market (threatened by breaches of financial legislation such as market manipulation and insider dealing). In this respect, in abstracto, the practices described above, even if they were considered illegal under tax law, per se do not necessarily threaten the integrity of the market*". It further ads that if "*On the other hand, and depending on the concrete circumstances of each case, one may find that large-scale, long running tax schemes which are fraudulent, and which are perpetuated through the financial markets, can create disorderly markets or can result in abusive market practices and can therefore have harmful consequences to the integrity of the market*", it recognises that "***At this stage, based on information available to ESMA, no direct connections between these tax practices and disorderly markets or abusive market practices has however emerged***".

On that basis, AMAFI disagrees with the affirmation in § 312 of MAR review report that "*such schemes may have negative impacts on the integrity of the financial markets*" and rather considers that, as today, no genuine demonstration have been made to conclude that cum/cum practises do represent a threat to the integrity of the financial markets that needs to be addressed through MAR.

Whereas MAR objective is - and should be focusing on - prevention of market abuse and preservation of the integrity of the market, **we do not support the proposal to amend MAR to extend powers of NCAs to investigate and sanction behaviours beyond insider dealing and market manipulation**. Similarly, we disagree with the proposal that NCAs should use their MAR or MIFID surveillance tools to do so and to the proposal of granting them power to issue sanctions.

We believe that it is of utmost importance that NCAs should focus on effectively combat market abuse. AMAFI considers that such extension of their scope would be detrimental to the efficiency of their surveillance (also conditioned to their means and resources).

It could also lead to divergences between NCAs to what is or should be considered as “unfair behaviours” beyond what we *know* constitutes market abuse and at the end, detrimental to the level playing field across UE, and so, contrary to MAR objective.

In addition, it cannot be overlooked that the concern identified here is already taken into account in various Member States through anti money laundering framework.

However and considering the issue involved, **AMAFI does not object to the proposal of granting the NCAs the possibility to cooperate and share information with tax authorities upon request across the EU**, but rather outlines, again, that it should not deflect NCAs away from their primary task to combat effectively market abuse.

SANCTION AND MEASURE

- **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.

Under its MAD review, the EC identified that the sanctioning regimes in place in Member states “*foster regulatory arbitrage and impair the ultimate objectives of market integrity and transparency*" as far as financial services are concerned.

One of the aims of MAR was therefore to establish a harmonised set of administrative sanctions and measures. However, Article 30(1)(2) of MAR provides that Member States may decide not to lay down rules for administrative sanctions where the infringements are already subject to criminal sanctions in their national law.

The ESMA report does however raise the question of the effectiveness of criminal proceedings in the countries which exercised this option – we indeed note that only Germany imposed criminal sanctions for market abuse in the year 2017, meaning conversely that no sanctions were imposed at all in Denmark, Finland, Ireland and Poland for market abuse.

In order to reduce the risk of regulatory arbitrage, there should be a fully harmonised base of administrative sanctions/ measures across the EU, especially if the intention is to facilitate their cross border enforcement – an option should nevertheless still be given to Member states in order not to breach the *ne bis in idem* principle, for instance by providing that criminal sanctions and administrative sanctions of a criminal nature may not be applied to the same offence.

- **Cross border enforcement of sanctions**

Q71 Please share your views on the elements described above.

AMAFI supports ESMA's analysis on the need to ensure that NCAs can exercise equal, strong and deterrent sanctioning regimes against financial misconduct. As aforementioned, steps should be taken to avoid, as much as possible, regulatory arbitrage across the Union and races to the bottom between Member states.

AMAFI is of the view that the current regime, albeit of a patchwork nature (combination of Article 25 MAR, Article 9 of Commission Implementing Regulation (EU) 2018/292, Council Framework Decision 2005/214/JHA and the judgment of the Court of justice of the EU in the Balaz case (C-60/12)), permits cross border enforcement of sanctions.

It should nevertheless be noted, with regards to the Framework Decision, that, even though its Article 5(3) provides for the applicability of the Decision to offences not listed in Article 5(1), its purpose has little, if not nothing, to do with financial services – which begs the question of the fitness for purpose of said Decision to market abuse related offences.

In addition, framework decisions, now abolished, are similar to directives in that they require implementation in national law. Unlike directives however, they do not entail any direct effect. Given that Member states are only bound as to the result to be achieved, there will necessarily be differences in terms of how this Framework Decision has been transposed and as a result as to how pecuniary sanctions may be enforced.

Consequently, NCAs face increased legal uncertainty in enforcement of market abuse that is detrimental to the supervisory convergence within the UE.

AMAFI would therefore supports a harmonisation effort in order to ensure the smooth cross border enforcement of market abuse related sanctions.