ESMA MAR CP 2019 – ICMA DRAFT response
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Introductory comments

Please make your introductory comments below, if any:

1. **Response context** – ICMA is a not-for-profit membership association, headquartered in Switzerland, that serves the needs of its wide range of member firms in global capital markets. As at October 2019 it has more than 580 members in 62 countries. Among its members are private and public sector issuers, banks and securities houses, asset managers and other investors, capital market infrastructure providers, central banks, law firms and others. European Transparency Register #0223480577-59. See: www.icmagroup.org.

   This response is primarily drafted on behalf of ICMA's primary market constituency comprised of banks that lead-manage syndicated debt securities issues throughout Europe. This constituency deliberates principally through:

   - the ICMA Primary Market Practices Committee, which gathers the heads and senior members of the syndicate desks of a number of ICMA member banks active in lead-managing syndicated debt securities issues in Europe; and
   - the ICMA Legal and Documentation Committee, which gathers the heads and senior members of the legal transaction management teams of a number of ICMA member banks active in lead-managing syndicated debt securities issues in Europe.

2. **International IG bond issuance perspective** – Unless otherwise stated, this response is primarily from the perspective of the syndicated cross-border issuance of investment grade (**IG**) vanilla bonds.

3. **Need for further consultation** – The consultation paper (**CP**) seems more like a 'call for evidence', in that it is quite open-ended and only occasionally seeks comment on specific proposals for ESMA advice to the European Commission. Consequently, any aspects not clearly addressed in the CP are likely to need subsequent consultation (by either ESMA or the Commission).

4. **Beware cost of change** – It is also worth noting generally that (i) any regulatory changes involve implementation cost (if only in terms of legal advice to confirm the nature of such changes) and (ii) the 2016 implementation of MAR compliance policies and procedures has resulted in significant sunk costs by market participants. Consequently, one should try to confirm (at least at an indicative level) that any proposed changes intended to alleviate regulatory burdens on market participants are of enough magnitude to offset the cost to market participants of implementing them.

5. **MAR's real impact will only be apparent after the current 'bull' market ends (especially re. pre-sounding/stabilisation)** – As a preliminary general comment, it should be noted that certain activities regulated under MAR (such as pre-sounding and stabilisation) are risk management tools for issuers. Whether MAR has caused these tools to become 'rusty' and less usable may only become apparent if systematic volatility consequently increases once current market sentiment turns from 'bullish' to 'bearish'.

   (a) **Pre-sounding** notably enables a borrower to privately check with a few meaningful investors whether the likely terms for a bond issuance transaction fits the borrower's corporate objectives, where this is not otherwise clear from existing information (e.g. secondary trading curves). This is particularly so for borrowers that are new or infrequent, either generally or in a particular currency/maturity segment (all the more so if there is sparse activity from other borrowers). If a borrower only discovered this after publicly launching the transaction and therefore had to cancel it, it would suffer a significant loss of goodwill from investors who would have wasted valuable resources preparing themselves for the new issue (due diligence, credit lines and liquidity arrangement, etc). This, in turn could prejudice investors' willingness to participate in future transactions, and in turn that borrower's future access to bond market funding.

Anecdotal reports indicate that the incidence of pre-sounding has substantially reduced since the introduction of MAR in 2016 as investors have reportedly increasingly refused to be sounded (at least in the investment grade context). Admittedly one NCA's initial finding (see UK FCA Market Watch 58) was that *"many firms were using"* the MAR sounding regime – but it also acknowledged having *"heard that [bull] market conditions were rendering market soundings less necessary"* (in the investment grade context particularly).

(b) **Stabilisation** enables mitigation of the downward impact on a new bond's price due to unexpected selling in the immediate after-market of a new issue. In the absence of such stabilisation, other primary investors could regret having participated in the new issue, rather than having waited to purchase more cheaply in the secondary market. Such a conclusion could again prejudice investors' willingness to participate in future new issue transactions, and in turn that borrower's future access to bond market funding. The incidence of actual stabilisation has reportedly decreased (with many current IG bond syndicate heads being unable to recall when they last stabilised a new issue and many of the experienced veterans in this respect having left their syndicate roles). Whilst this seems to be mainly a combined impact of both current bull market conditions (sufficient unsatisfied investor demand to balance any after-market selling) and tightened bank capital rules (and 'long' stabilisation beyond any overallotment 'short' has tended to be a net cost for syndicate underwriters), the relative procedural burdens of the MAR provisions have also been cited as a factor.

Recent years have been mainly characterised by being a 'seller's market', such that investors (as relatively 'forced buyers') have been participating generally in primary bond issuance transactions where they might otherwise have not been. The apparent status of the pre-sounding and stabilisation risk mitigants as 'rusty tools in the toolbox' has thus not really been tested. Only when the long-expected bear market materialises will the true impact of MAR's restrictions become apparent (including whether it may have had the unintended consequence of contributing to increased market volatility / systemic risk).

6. **Need for a real-time list of MAR Article 2.1(a)-(c) securities following MAR's extension to MTFs/OTFs** – Following MAR's 2016 extension to MTFs/OTFs, it is no longer possible to definitively identify in real-time 'EEA platform' securities – i.e. securities that are traded, admitted to trading or requested to be so admitted on an EEA trading platform (regulated market, MTF or OTF). Consequently, it is impossible to definitively identify at the relevant time whether any conduct relates to MAR-scope securities as defined under its Article 2.1(a)-(c), let alone under 2.1(d).

   Under Article 4 of MAR, trading venues are required to submit reference data for relevant financial instruments to NCAs who then subsequently transmit that data to ESMA for publication on its website by way of the Financial Instruments Reference Data System (the **FIRDS Register**). However, whilst trading venues are required to provide this information to NCAs before trading in the relevant instrument commences, NCAs must then transmit the information to ESMA *"without delay"* and ESMA is then required to make the information available via the FIRDS Register. Given the various steps necessary for the information to reach the publicly searchable FIRDS Register, ESMA notes that *"it is not able to provide any representation or warranty that the available content is complete, accurate or up to date"* and that *"given the scope and complexity of this project, including the various underlying data sources, changes may be received from reporting* *entities and subsequently published by the system on a daily basis"*. Moreover, MAR Article 4(2) further clarifies that the information on the FIRDS Register (or not as the case may be) *"does not limit the scope of [MAR]"*. This therefore introduces a considerable degree of uncertainty for firms when assessing the applicability of MAR under Article 2.1(a) to (c) (and, in turn (d)) by reference to the FIRDS Register.

There was no such practical problem historically under the previous MAD regime, since the regulated markets that were in scope were fewer in number and also more formalised and slower (so more visible) in their admission process that preceded any trading (including publication of an approved prospectus that could only realistically be done with the relevant borrower's involvement). In contrast many MTFs and OTFs can apparently admit and/or otherwise allow trading of securities, including as yet non-existent securities on a 'grey' ('if and when issued') basis. Whilst this arguably contributes to a more efficient trading landscape (with its attendant benefits), there is consequently an important need for a definitive real-time ability to identify 'EEA platform' securities. This could perhaps be done by EEA trading platforms reporting directly the securities concerned to a central mechanism as and when they are admitted or first traded or publishing them in a manner that enables them to be efficiently collated by external software.

7. **No ESMA feedback on ICMA's proposed improvements to the stabilisation safe harbour** – ICMA's January 2014 DP response (at #25-26) and October 2014 RTS CP response (at #16) proposed disentangling ancillary stabilisation from stabilisation purchases. However, this does not seem to have been reflected in ESMA's final draft RTS submitted to the European Commission or in the background commentary at paragraph 3.3.4 of ESMA's September 2015 Final Report. It would be helpful if ESMA could provide some specific feedback in this respect.

8. **Buyback SH extension to DCM** – It was suggested at ESMA's 5 November open hearing that the existing equity buyback safe harbour be extended to apply to debt. ICMA has previously supported such an extension (January 2009 CESR CP response at pp.3, reproduced in box) though subsequently stopped seeking one as explained in its June 2009 call for evidence response (at pp.12-13) in terms of cost of change (see #4 above) and not being required.

> *"Under the existing Directive there is no specific safe harbour principle for debt buybacks and there is also so far no further guidance from CESR on this matter. In the absence of such guidance and legal background banks are forced to place reliance on safe harbour principles established for share buy-back and/or previous FSA listing rules. We would welcome support by CESR to any European Commission efforts in relation to the introduction of a clear safe harbour principle for dealing with debt buy-backs."*

9. **Potential value in MISC CWG** – ESMA's Market Integrity Standing Committee (**MISC**) does not have its own consultative working group (**CWG**), unlike many other ESMA standing committees. Establishing such a group would be helpful for the MISC's policy work, as has been the case for ESMA's other standing committees. The term of such a CWG's tenure and the frequency of its activity could be modulated to the extent MISC is often focused on enforcement and supervision work rather than policy work.

MNPI – Definition

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?

Since the MAR's definition of inside information is relatively wide and open-ended (notably compared to the US's *scienter*-based definition), bond market participants often find themselves conservatively treating information 'as inside' when unable to definitively conclude whether it is either inside information or not inside information. This also impacts decision making as to whether information is subsequently 'no longer' inside information. This may have knock-on effects in a pre-sounding context, since persons being pre-sounded are unlikely to be willing to unilaterally conclude a different characterisation from the persons undertaking the pre-sounding (they can simply record not having reasoned a specific justification for the information not to be inside and so concluded that they will also by default treat it 'as inside').

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

In the context of investment grade bond markets at least, there is no perception of any type information, relating to MAR-scope securities, being outside MAR's current definition yet perceived as needing to be within it. The current definition is therefore 'sufficient' in that it covers all relevant information (and more besides). It is also unclear how the MAR definition of inside information could plausibly be widened further than it already is.

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?

See response to Q13.

MNPI – Front running

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

See response to Q14 regarding the sufficiency of MAR's current definition of inside information. In this respect, it should be borne in mind that a set piece of information may be more likely to be characterised as inside information in an illiquid market than in a liquid market (since trades are likelier to be price moving at a lower threshold size).

MNPI – 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?

The examples of misbehaviour set out at CP #104 (trading for proprietary benefit, without having provided a quote or where sufficient inventory) are already covered by the scope of MAR's prohibitions (and outside the scope of the permitted behaviours set out in Article 9.2), so it is unclear what further measures would be needed from a market abuse regulation perspective. From the distinct conduct of business perspective, pre-hedging in the context of new issuance was covered by ESMA's December 2014 Final Report on technical advice in the context of the recent MiFID review (see #14/#16 on p.89 and #5.i on p.92), and there are existing best interests, best execution and conflict of interest obligations in the context of MiFID/MiFIR which address the risks of inappropriate conduct in the context of pre-hedging. It would seem inappropriate to re-open such conduct of business aspects in the context of this MAR review without some substantive justification.

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

Pre-hedging enables financial firms to provide quotes to clients on the basis of narrower bid/offer spreads, consequently benefiting clients with more certainty at lower cost. This benefits the market generally in terms of reduced volatility and costs.

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

In the new bond issue context, a borrower planning to issue may wish to hedge its exposure to underlying interest rates and currency movements. It may approach a few financial firms to provide firm quotes in competition in this respect, who may in turn seek to pre-hedge some of their resulting exposure in the event they are appointed. The same thing may apply where investors similarly wish to limit their underlying exposures.

Delays – General

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?

It is worth noting that some issuers, notably in the securitisation context, are bankruptcy-remote special purpose vehicles (SPVs) that are, broadly speaking, pre-programmed as mechanical pass-throughs. It is unclear how such entities could 'operate' prescriptive systems and controls, so requirements (if any justified) should be kept at a sufficiently high level.

Q28: Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

See response to Q13.

Sounding – Obligatory?

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

1. **Current Article 11 sounding provisions not entirely obligatory** – CP #142 states *"that, when carrying out a market sounding, DMPs are under the obligation to follow the requirements set out in Article 11."*

2. Certain parts of Article 11 are indeed obligatory (for example its paragraphs 3, 6, 7 and 8), but not all of them. Notably, paragraph 4 merely deems certain conduct undertaken in accordance with paragraphs 3 and 5 to be legitimate for the purposes of Article 10, and does not create an obligation as such. Paragraph 5 sets out the general procedures that *"shall"* be followed, but only *"[f]or the purposes of"* the preceding 'deeming' to have effect. They are not obligatory *per se*.

3. The CP also states, at #143, that the obligatory nature referenced previously *"would be in line with CDR 2016/960 (whereby a number of requirements are imposed on DMPs regardless of whether inside information is expected to be disclosed in the course of the sounding)"*. Whilst indeed the terminology in the CDR RTS might sound like an obligation, namely that certain things again *"shall"* be done – it is to be read in its context. That context is paragraphs 9 and 10 of MAR's Article 11

that only empower regulatory technical standards in relation to paragraphs 4 and 5. Consequently the *"requirements"* are again for the 'deeming' to have effect, rather than being obligatory *per se*.

4. Finally, the CP also states, at #144/#145, that additional national-level sanctions are permitted by MAR's Article 30(1) for residual (and unspecified) *"infringements"* of MAR. Non-compliance with the provisions of MAR Article 11(4)/(5) and the related CDR RTS is not however an *"infringement"* of MAR since, as noted above, those provisions not obligatory *per se*.

5. The above is indeed a *"different reading"* from that which some in ESMA seem to have (as acknowledged in CP #147). It is the reading one hopes a European court would follow. It is also inconsistent with ESMA's answer to Q9.1 in its MAR Q&A, which refers to a disclosing market participant applying Article 11 MAR where it wishes to "*receive the protection under Article 11*" – such language would not have been needed if the Article 11 requirements were mandatory in any event. ICMA's 2017 Q&A request to ESMA sought to have this confirmed for the avoidance of doubt.

6. **Only change to MAR Article 11 itself can make the granular sounding procedures obligatory** – Consequently, if the EU co-legislators indeed want the procedures under MAR Article 11(4)/(5) and the related CDR RTS to be obligatory (and even *"regardless of whether inside information"* is involved as suggested in CP #143), then it is correct to say (as CP #148(b) does) that MAR Article 11 itself would need to be consequently amended.

7. **Disproportionate burden arising from such change (reduced sounding and so issuance)** – For new ('debut') or infrequent borrowers (notably in the emerging markets / high yield space), a week of face-to-face roadshow meetings is relatively impractical to record per the MAR sounding procedures (whether in terms of counter-signed minutes or voice recording). Many investors refuse to be sounded due to the logistical burden, and mobile recording devices are not technically secure (with few having remote dial-in recording functionality). Issuers faced (in the absence of sounding feedback) with having to initiate pricing on more generous terms (to avoid transaction failure) may, if in doubt, then simply choose to defer or cancel and move funding elsewhere away from the securities markets – i.e. not even attempt a bond issuance. (And ongoing bull market may be deceptively dampening perceptions as noted in #5 in the introductory remarks to this response). These considerations would be magnified where no inside information is even involved and, distinctly, further complicated where there is limited substantive nexus to the EEA (see further #2 in response to Q34).

8. **No proportionate justification for change (audit trail argument)** – It can indeed be argued (as suggested in CP #143) that ensuring an audit trail for NCA *post facto* investigation purposes (following a suspected miscommunication/misuse of inside information) is a secondary purpose of sounding procedures (after the primary purpose of incentivising market participants to handle inside information appropriately to avoid such miscommunication/misuse). It may be understandable that some NCAs may argue that this purpose should apply equally where a disclosing market participant (**DMP**) has concluded (under MAR Article 11(3)) that no inside information is involved – since it may indeed simplify the investigation work where the NCA considers that conclusion to be erroneous. However, this would be so only in presumably very few instances, at least in the Eurobond context (bearing in mind the conservative approach to characterisation outlined in the response to Q13). And there has been no reporting of widespread or egregious abuse in the context of the existing provisions. Mandating such intrusive procedures for everybody on the random chance that it might perhaps catch someone once seems to be significantly disproportionate.

9. **Safe harbours intrinsically voluntary** – Safe harbours, as a concept, are a procedure that afford protection from risk if entered. They are intrinsically voluntary – and are no longer perceived as safe harbours if made compulsory. By way of old analogy, ships can voluntarily choose to enter a port as a 'safe harbour' during a storm. Make this compulsory however, and such ships are just seen as having been impounded (shelter from the storm notwithstanding). Consequently, if MAR Article 11 is amended to make obligatory the procedures under MAR Article 11(4)/(5) and the related CDR RTS – then those procedures should no longer be cited as constituting a 'safe harbour'.

10. **No need for further *"full protection"* confirmation** – CP #148(b) suggests MAR Article 11 be amended to *"confirm the fact that DMPs carrying out market soundings in accordance with the relevant requirements should be granted full protection against the allegation of unlawfully disclosing of inside information"*. This already explicit in MAR Article 11(4) and so further amendment seems pointless.

Sounding – Definition

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?

1. **No drafting changes needed (beyond pending reconfirmation that "negotiating" is not sounding)** – CP #154 and related footnote 47 acknowledge the currently pending adoption of the SME listing package that explicitly reconfirms (albeit expressed as applying in the context of qualified investors only) that communication of information for the purpose of *"negotiating"* terms (rather than *"gauging interest"* per MAR's headline definition) is not sounding. Being a reconfirmation, it does not change the substance of the existing headline definition. But it has been supported by many SME market participants (including through ICMA's February 2018 response to the European Commission's proportionate SME environment consultation), as it puts to rest uncertainties of understanding some of them had. The reconfirmation technically applies beyond the pure SME context, which is fine since there is no substantive reason for it not to do so. For participants in the syndicated bond issuance markets, there do not seem to be any problems that are linked to the sounding definition itself. It should be noted however that views on the definition's appropriateness are coloured by the possibility that the MAR Article 11(4)/(5) and the related CDR RTS provisions might become obligatory. See also response to Q36.

2. **But proportionate NCA application important where compliance with local laws or otherwise limited substantive EEA nexus**

   (a) In today's globalised business world, many new issuance transactions are run centrally, so for example a global borrowing by a US company might well be run out of New York. Such jurisdictions may well have their own sophisticated regimes in operation to control the disclosure of inside information. So, it would seem disproportionate for an NCA to sanction a minor or technical deviation from granular EEA procedural requirements where the conduct was fully in compliance with the applicable local regime.

   (b) Distinctly following MAR's scope expansion to MTFs and OTFs, amplified by the provisions of Article 2.1(d), many securities with little, if any, meaningful nexus to the EEA have technically fallen under the scope of MAR (the exact extent is unclear as explained in #6 of the introductory remarks to this response). For example, an EEA MTF or OTF might, at its own initiative (without issuer knowledge), admit a security to trading. It might do this systematically, without any specific regard to the individual security's characteristics (other than any basic required checks e.g. by regulation for the issuer to have an LEI). The reason for doing this could be to maximise the platform's potential live functionality, and so competitive value to traders, in case any trading interest in the security might perhaps develop in future. For example, this could apply to a security where the denomination currency, the issuer, its chosen stock exchange listing, underwriters and marketing are all outside the EEA. Such a security would nominally be within the scope of MAR (even where there is little if any EEA-based actual trading interest), and so any sounding of a further 'tap' issue would nominally fall within the provisions of MAR Article 11. NCAs are unlikely to expect what is in essential substance non-EEA activity to comply with granular procedural EEA rules (particularly where any disclosure of inside information has been otherwise lawful, let alone where no inside information is involved), which local market participants may well be entirely (and justifiably) unaware of. We are aware some NCAs have indicated informally that they will take a pragmatic approach to such scenarios, but the need for more explicit derogations from the sounding (and potentially other MAR) requirements would become more pronounced were the Article 11 sounding procedures to be made obligatory.

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?

Given the perceived sufficiency of the existing sounding definition (see #1 in response to Q34), the interaction stages that should be covered are those that are already covered. Looking at it the other way round, interaction stages not covered (and rightly so) are notably (i) where there is no communication of information, (ii) after transaction announcement, (iii) where the purpose is not to gauge investor interest and/or (iv) where the interaction is by a person other than the issuer or a third party acting on its behalf. It is impossible to exhaustively illustrate every conceivable sounding scenario that might happen (which is why using a conceptual definition is important). In the bond issuance context, the most likely scenarios are where a borrower wishes to check whether the market's likely pricing range fits its corporate objectives (see further #5(a) in the introductory remarks to this response). It may also often involve checking views on potential key terms such as covenants and capital structures (in the high yield context) or complex contractual structuring aspects such as creditor hierarchies (in structured/ABS contexts). In the context of relatively established vanilla borrowers, sounding is likely to occur remotely (by phone or e-mails/chats) in a context of intra-day execution. In the context of debut or less-established vanilla borrowers, it is likely to occur during in-person meetings over a period of a few days or weeks – often in the wider context of (but separately from) 'general update' roadshows (where a company that could potentially issue and its advisers travel internationally to meet investors in succession to refresh them on the company's published information). In the structured/ABS context, it could be either remotely and/or in person and extend over a longer period of time (as the structuring gradually evolves). ICMA would be happy to organise for ESMA an introductory briefing by market practitioners on how they conduct 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?

The *"prior to the announcement of a transaction"* reference in the definition does not exclude bond issuance transactions where they are ultimately not (publicly) announced (either because they are cancelled/postponed or because they are executed on a private placement basis). In this respect, the definition does not limit itself only to the context of 'voluntary EEA admission' issuers that are within the scope of MAR's continuous disclosure obligation.

If ESMA considers that the reference is causing some to misunderstand the correct meaning as outlined above, then any amendment needs to allow for the fact that the reference is helpful and so should not be deleted - as it clarifies that the regime falls away once the impending transaction has been generally announced to the market. An appropriate amendment in this respect would be to add *"(if any)"*, so that the reference reads *"prior to the announcement <u>(if any)</u> of a transaction"*.

Sounding – Procedure 'simplification'

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?

The provisions of MAR Article 11(4)/(5) and especially its related CDR RTS are onerous and have been a disincentive to sounding as outlined in #5(a) in the introductory remarks to this response. This has been mainly from a formalistic perspective, in terms of (i) the time taken to apply the consequential internal procedures in each case or, in some cases, (ii) the effort involved (including cost of related legal advice to understand the regime) in establishing such procedures in the first place (which are avoided by investors who simply refuse to be sounded).

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)?

CP #160/#161 suggest, for the recording of soundings (under MAR Article 11(4)/(5) and its related CDR RTS), that the *"complex"* minutes option be eliminated, with audio recording being the only method. This is likely to further disincentivise sounding, notably in the case of face-to-face interactions that remain significant in the context of roadshows (see further response to Q35 and also #7 in response to Q33). Mobile recording devices are not always technically secure and there is limited availability of remote dial-in recording functionality. So rather than alleviating the costs and burdens around soundings, making audio recording obligatory would increase them. If ESMA indeed wishes to alleviate such costs and burdens, one could remove the requirement for explicit market sounding recipient (**MSR**) agreement to a DMP's written minutes. So the DMP would just submit its minutes to the MSR, who can always express any disagreement.

CP #162 queries whether there are ways to make the cleansing procedure simpler, particularly regarding postponed or cancelled transactions. There are no obvious ways to facilitate substantive cleansing (short of narrowing the definition of inside information). MAR currently provides (under Article 11.6) for the most that can done – a DMP notifies the MSR once the DMP itself is no longer treating the information as inside. But, as Article 11.7 rightly notes, the MSR must still assess for themselves whether they are in possession of inside information. As mentioned to an extent in #5(a) in the introductory remarks to this response, the value of the sounding process for borrowers is to test their desired issuance parameters in private. So, for example, mandatory post-sounding cleansing announcements would not be realistic, as this could just push borrowers away from sounding - and so potentially the bond markets altogether (which would not presumably be conducive to the success of CMU).

The importance (and so the challenge) of simplifying the granular procedures under MAR Article 11(4)/(5) and its related CDR RTS will be even greater if such procedures are made obligatory.

Insider list – Burden reductions

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.

The logistical burden of insider lists is one significant reason why many borrowers do not seek admission to an EEA trading platform.

The key purpose of insider lists is indeed (as noted in CP #164) to evidence who was in possession of or had access to inside information at a specific moment in time. (And as a corollary, insider lists can also to an extent be helpful for issuers to manage the confidentiality of inside information flows.) However, a single official identity number (such as a passport number) is sufficient for any name disambiguation in this respect – requiring inclusion in insider lists of any and all identity numbers does not seem proportionate.

In terms of requiring inclusion of a person's every contact detail (phone numbers, e-mail addresses etc), it seems unlikely that insiders premeditating insider trading would use such contact details for that purpose. So there might be scope for the *ex ante* requirement to be more limited, with such details provided on demand to NCAs.

Simplifying the insider list requirements accordingly would reduce administrative burdens whilst still supporting the objective of protection from insider trading.

PDMRs

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.

Issuers may be in possession during closed periods of unpublished accounting information that is inside information in respect of various securities – but not necessarily all securities. As a result many issuers apply a blackout at that time in relation to significant new issue transactions where such information might be relevant (since it could impact the issuer's credit rating and so the pricing of those securities). Any issuance during a closed period would only occur following careful consideration of all the factors, whether case by case or on a more consolidated basis. For example, issuers may execute small private placement transactions during such periods. Also, credit institutions notably often undertake low-volume structured issuance on a near-daily basis throughout the year as a service to their investor clients (who may want to invest in bonds whose performance is linked to an index) rather than being conceived as a funding tool. Given the small volumes involved, the issuer's credit rating is generally not relevant to the pricing of such securities. A blanket ban arising from the extension of the closed period would be disproportionate as it would adversely prevent investor clients from managing their portfolio needs, without substantive countervailing protective value. Any change would also need to be based on evidence of past misconduct, yet none has been cited in this context.

Distinctly, as a matter of form, proposals for regime scope extensions should be covered under a segregated heading in consultations (and not accidentally buried within the context of the initial scope heading).