Commodity Markets Council - Europe

Hume Brophy
41 Rue de la Science
1040 Brussels
Belgium

Secretariat
Tel: +32 (0)2 234 6860
Fax: +32 (0)2 649 2593
Eml: cmce@humebrophy.com
Wb: www.commoditymkts.org

29 November 2019

CMCE response to ESMA Consultation on MAR Review

GENERAL COMMENTS

- Commodity Markets Council Europe (CMCE) is the only association in Europe representing the range of commodity market participants - agriculture, energy, metals and other commodity market participants, benchmark providers, price reporting agencies, and trading venues operating in the EU, EEA, Switzerland and neighbouring countries.
- CMCE Members welcome the opportunity to respond to the consultation launched by ESMA on the review of the Market Abuse Regulation (MAR) in view of the future technical advice that ESMA will submit to the European Commission.
- After two and a half years of application of the MAR regime CMCE Members are of the view that it has generally proved appropriate and proportionate in its approach to commodity and commodity derivatives markets.
- Under MAR EU legislators extended the scope of the insider dealing regime for commodity derivatives which had previously been set under MAD, to cover a wider range of products, and underlying spot commodities. CMCE Members support the framework established and consider that it is still appropriate. CMCE Members see no need to change this framework and are concerned at the potential risks to the commodity markets, if this regime were changed.
- CMCE Members are of the view that the scope of MAR should not be extended to spot FX contracts.
- CMCE Members believe that the ESMA analysis related to the scope of application of the benchmarks provision needs to be interpreted in conformity with the BMR Annex II regime for commodity benchmarks and the applicable safeguards for journalism.
- CMCE Members understand that ESMA may seek simplification of the regime and contemplate further alignment between the regime applicable to securities markets and that for commodity derivatives markets. However, we strongly believe that such alignment is inappropriate and potentially dangerous, and that the reasons for distinct definitions of inside information are still valid and necessary.
- CMCE Members do support the current regime applicable to front running and strongly believe that firms should continue to be able to implement their own plans and strategies for trading, production and hedging.
- CMCE Members strongly believe that the current framework functions well when enabling the industrial participants to use commodity markets for hedging purposes. Any changes need to respect the principles of better regulation and should be appropriate and proportionate, hence the balance needs to be maintained between the interest of market transparency, market integrity and the legitimate interest of market participants on the commodity trading market.

SPECIFIC COMMENTS

Section 3.1 – Spot FX contracts

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

CMCE Members are convinced that the scope of MAR should not be extended to spot FX contracts. If spot FX contracts were brought directly within the scope of MAR, this would create a disproportionate burden for all the market participants. In particular, all firms trading in spot FX (i.e. almost all businesses and certainly all with a treasury function) would be required to implement and maintain surveillance and monitoring systems and be subject to a suspicious transaction and order reporting regime under article 16 of MAR. In itself this would entail significant system development and headcount costs for little or no obvious policy benefit.

CMCE Members note, however, that the definition of "benchmark" at article 3(1)(29) of MAR is capable of covering published spot FX prices (where they are used to determine the value of one or more "financial instruments") and that this, in practice, already brings a large portion of the spot FX market within the scope of market integrity protections provided by the "benchmark manipulation" limb of market manipulation at article 12(1)(d), which covers "any other behaviour which manipulates the calculation of a benchmark".

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

Section 3.2 – Scope of application of the benchmarks 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?

ESMA proposals as they relate to commodity markets will cover supervised entities and markets covered by Regulation No 1227/2011 on wholesale energy market integrity and transparency (REMIT). CMCE Members believe that ESMA will need to consult with the Agency for the Cooperation of Energy Regulators (ACER) pursuant to BMR Recital 64, which says that "*In cases where this Regulation captures or potentially captures supervised entities and markets covered by Regulation (EU) No 1227/2011, the Agency for the Cooperation of Energy Regulators (ACER) would need to be consulted by ESMA in order to draw upon ACER's expertise in energy markets and to mitigate any dual regulation*.".

CMCE Members have no comments on ESMA's analysis as regards benchmark administrators and supervised contributors who are covered by the BMR Title II governance regime for financial benchmarks.

CMCE Members have concerns regarding the ESMA analysis related to administrators of, and contributors to, commodity benchmarks covered by the provisions of Annex II of the Benchmark Regulation. We emphasize that Section 3.2 needs to be read in conformity with (1) the BMR Annex II regime for commodity benchmarks and (2) the applicable safeguards for journalism.

This is crucial to bear in mind when implementing the ESMA proposals to prevent any breakdown in the quality of the price assessment process, with negative consequences for the markets (see the details below).

- <u>ESMA should take account of the BMR Annex II regime for commodity benchmarks</u>

  The BMR establishes two distinct governance regimes:

  (1) Title II: for financial benchmark administrators and their contributors; and
  (2) Annex II: for certain commodity benchmark administrators and their contributors.

  We believe it would be appropriate for ESMA to refer to the BMR Annex II regime for commodity benchmarks in its analysis. It is important for ESMA to reflect in its technical advice the fact that BMR expressly provides for different regimes, so as to ensure preservation of the important distinction between Title II and Annex II regimes, in particular.

  Some of the examples from the ESMA consultation paper:

  - Paragraph 25 records that the Benchmark Regulation introduces "*new requirements for so-called supervised contributors*". However, these requirements, which are contained in Title II article 16, do not apply to supervised contributors to Annex II commodity benchmarks.
  - Paragraph 25 refers to *codes of conduct* for contributors. *Codes of conduct* are provided for in Title II Article 15, which again means they do not apply to Annex II commodity benchmarks, it also refers to other Title II provisions such as *oversight function requirements and record-keeping requirements* which do not apply to Annex II.
  - In Paragraphs 30 and 33, ESMA refers to Title II Article 14, which establishes the obligations of administrators to report infringements to the NCA. These obligations do not apply to Annex II benchmark administrators.

  The differences between the Title II and Annex II regimes reflect well-established differences of policy approach between IOSCO's *Principles for Financial Benchmarks* and IOSCO's *Principles for Price Reporting Agencies (PRA)*, which the BMR acknowledges "*serve as global standards for regulatory requirements for benchmarks*" (Recital 44).

  Example: ESMA's proposals to impose new obligations on the (voluntary) contributors to PRA benchmarks could, as IOSCO (Principles for PRAs, page 8) has warned," *result in some market participants to decrease or even cease their submission of data to PRAs*". UK energy regulator Ofgem similarly highlighted this risk in its "*Pricing benchmarks in gas and electricity markets – a call for evidence*" (2013) by noting: *"..some types of regulation may introduce risks to the process. In particular, greater regulatory scrutiny of the information flows could introduce a perception of risk (irrespective of whether the risk is real) to those providing the information. Regulation should increase the quality of the information provided but could reduce the willingness of parties to provide it. Information is provided on a voluntary basis and the simplest way to mitigate this risk may be to withdraw cooperation and decline to provide it. This, in turn, can lead to a breakdown in the quality of the price assessment process, with negative consequences for the markets and consumers."*[1]

  To prevent negative consequences as described by IOSCO and Ofgem, ESMA proposals should not be applied to contributors to Annex II benchmarks.

- <u>ESMA's analysis should take account of the safeguards for journalism</u>

  PRAs are editorial operations. Those who produce price assessments, referred to by the BMR as *assessors,* are journalists, who also produce news and analysis on commodity markets. Paragraph 16(a) of BMR Annex II refers to "***editorial*** *decisions in relation to the benchmark calculation process."*

[1] https://www.ofgem.gov.uk/publications-and-updates/pricing-benchmarks-gas-and-electricity-markets-call-evidence

ESMA should take account of and refer to the safeguards for journalism established under European and national laws and/or the examples of specific safeguards for journalism already provided for in MAR, REMIT and the BMR.

Some of its proposals, including broadening the powers of NCAs powers to require production of "*recordings of telephone conversations*", as contemplated in paragraph 51, would directly conflict with these protections if they were ever applied to PRAs. For further details please see the answer to Question 4.

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?

For the reasons noted below and in response to Question 3, CMCE Members do not agree with ESMA's proposal as it concerns administrators of, and contributors to, benchmarks covered by the provisions of Annex II of the BMR.

BMR

CMCE members note that BMR imposes a regulatory regime, applicable across a wide spectrum of benchmarks, designed to enhance the integrity of those benchmarks. BMR therefore aims at the same policy objective as MAR, with respect to benchmarks. BMR, however, has been carefully framed to reflect and consider the specific features of different types of benchmarks and administrators and is therefore applied in a proportionate manner, so as to ensure the continued availability of benchmarks while preserving their integrity. BMR already applies sanctions aimed at persons when acting in the capacity of benchmark administrators and supervised contributors to benchmarks other than Annex II.

As a result, CMCE Members are of the view that no additional specific sanctions regime should be applied. This would be unnecessary, confusing and could lead to unintended consequences with respect to the continued availability of benchmarks.

Journalistic Status of PRAs

Regarding administrators of Annex II benchmarks, price reporting agencies are editorial entities whose journalists produce the commodity price assessments used as benchmarks. Accordingly, any administrative sanctions and other administrative measures should be fully consistent with established safeguards for journalism.

For example, a safeguard for journalism is introduced in MAR Article 21 and Recital 77. A similar safeguard is also introduced in REMIT Article 2 relating to market manipulation, which provides as follows:

When information is disseminated for the purposes of journalism or artistic expression, such dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media, unless:
(i) those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question; or
(ii) the disclosure or dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of wholesale energy products;

Regarding supervised contributors, one of the most important differences between Title II and Annex II regimes is that Annex II does not impose obligations on supervised contributors. Hence, BMR Title II article 15 (*Code of Conduct*) and Title II Article 16 (*governance and control requirements for supervised contributors*) do not apply to contributors to Annex II benchmarks.

In conclusion, the BMR (in line with IOSCO's recommendations) imposes no obligations over supervised contributors to Annex II benchmarks. As noted in response to Question 3, both IOSCO and Ofgem have cautioned that extending regulation to contributors to such benchmarks could introduce risks into benchmark processes and a chilling effect on submissions.

Therefore, CMCE Members strongly believe that it would not be appropriate to extend *administrative sanctions and other administrative measures* to administrators and supervised contributors to Annex II benchmarks.

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?

CMCE Members have concerns regarding the ESMA proposal as it relates to administrators of, and contributors to, BMR Annex II benchmarks.

As described in response to Question 3, The BMR establishes two distinct governance regimes, Title II (for financial benchmark administrators and their contributors) and Annex II (for commodity benchmark administrators and their contributors).

In paragraph 50 of its analysis, ESMA refers to the powers in MAR 23 (2)(g) to: "*require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions*".

In Footnote 21, ESMA additionally refers to the following and very similar provision in BMR Article 41(1)(f) of BMR as justification for its proposal (emphasis added): "***In order to fulfil their duties under this Regulation,*** *competent authorities shall have, in conformity with national law, at least the following supervisory and investigatory powers: (f) require existing recordings of telephone conversations, electronic communications or other data traffic records held by supervised entities.*"

As the highlighted text makes clear, BMR Article 41 expressly limits its scope to the powers that NCAs require to "*fulfil their duties under this Regulation.*" The BMR's provisions relating to the retention and disclosure of records are contained in BMR Title II only (Article 8), hence the competent authorities only have these duties as regards the Title II benchmarks. This means that the national competent authorities have no duties of this kind in respect of Annex II benchmarks. This is one of the key differences between the Title II and Annex II regimes. Also, the administrators of Annex II benchmarks are required to appoint an independent external auditor to report each year on the administrator's adherence to its stated methodology criteria and with the requirements of the BMR.

Furthermore, if applied to price reporting agencies, the powers referred to in paragraph 50 of ESMA analysis would directly contravene established safeguards for journalism and have a chilling effect on voluntary submissions to commodity benchmark providers. These safeguards for journalism are recognized in Europe, see for instance the ECHR judgement from 15 December 2009 (Financial Times Ltd & Ors v UK), in which the ECHR held unanimously that an order requiring various media organisations to disclose original leaked documents which might have led to the revelation of a journalistic source constituted an unjustified interference with Article 10 ECHR (the right to freedom of expression).

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?

CMCE Members do not agree with this, and are not clear that the proposed measures are proportionate to the specific risks that ESMA is seeking to mitigate. In particular, CMCE Members note that it would not reflect the difference of approach taken under BMR to different types of benchmark – see below.

One of the key dangers to the integrity of commodity benchmarks is the reduction in levels of submission/contribution by market participants, who view merely participating in the process as a substantial regulatory risk. The submission/contribution is always voluntary in case of Annex II benchmarks, which means that the regulatory risk can result in a withdrawal of the contributor as the obligation to comply with the requirements could outweigh the benefit of contributing.

Key Features of Policy Approach under BMR

As described in response to Question 3, The BMR establishes two distinct governance regimes, Title II (for financial benchmark administrators and their contributors) and Annex II (for commodity benchmark administrators and their contributors).

In the case of *submitters*, this proposal would be inconsistent with the BMR's Annex II for commodity benchmarks, which imposes no obligations on supervised contributors.

Assessors are journalists who make **editorial** decisions in respect of the benchmark calculation process according to Paragraph 16 (a) of BMR Annex II.

Furthermore, BMR article 2(2)(e) provides the BMR does not apply to *(e) the press, other media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with **no control of the provision of that benchmark**."*

"Control of the provision of a benchmark" is the role of the benchmark administrator not that of an individual journalist fulfilling the role of assessor.

The role of an assessor is defined in Article 3(1)(12) as a person "*responsible for applying a methodology or judgement to input data and other information….*". Such a person is clearly not a benchmark administrator having control over the provision of a benchmark, as that role is described in Recital 16: "*An administrator is the natural or legal person **that has control over the provision of a benchmark** and in particular administers the arrangements for determining the benchmark, collects and analyses the input data, determines the benchmark and publishes it."*

The *sanctions and measure in Article 30 of MAR points (e), (f) and (g)* have been designed for investment firms. CMCE Members strongly believe it would not be appropriate and would contravene applicable safeguards for the media, to apply such sanctions to journalists and their sources.

Section 5 – Article 7 of MAR – Definition of inside information

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?

CMCE understands that ESMA is re-considering the difference between the definition of inside information for commodity derivatives and the definition for other financial instruments.

CMCE Members are concerned at the prospect of commodity markets becoming subject to equity market regulation. There is no reason in principle or in practice why these very different markets - which work on the basis of different information types – should be regulated on a uniform basis. In fact, to do so would risk seriously damaging the main function of the commodity derivatives market, which is to provide an efficient tool for commodity producers and users to hedge their risks.

CMCE Members are convinced that the definition of inside information applicable to commodity derivatives under MAR is appropriate and has been functioning well. There has been no material difficulty in applying the definition or in identifying information as "inside information".

The distinct definition of "inside information" for commodity derivatives, recognizes the fundamental difference between securities markets and commodity markets. In securities markets, information relating to an issuer of security is private information available to people by virtue of their relationship with that issuer (as officers, employees etc.) and that information is material to the price of the security.

In commodity markets, there is no “issuer” of a commodity, nor in the case of traded derivatives markets are participants typically “issuers” of commodity derivatives. Information relating to a commodity market participant is unlikely to be relevant to the price of a commodity or commodity derivative in the same way as information about a company is relevant to the price of its shares. Commodity prices are assessed on a more complex basis and taking into account multiple sources. Each participant gathers information through investing in analysis and research and, by virtue of investing in industrial plant, will acquire proprietary information. Each participant assesses supply and demand fundamentals by reference to a host of factors (including opinions as to, e.g. weather or other external factors). In this context, when MAD was first considered, and again when EU legislators devised MAR, careful consideration was given to this distinction to determine what kind of information market participants should be prohibited from using.

MAD and MAR were framed so as not to inhibit commodity producers and users from using derivatives to hedge their risks.

The change in the definition of inside information could have significant unintended consequences – including in the physically traded commodity markets – that would undermine market participants ability to buy or sell a commodity derivative contract to hedge risks to its spot market position. It could effectively prohibit firms making use of any information associated with the commodity that may have a significant impact on prices before it is released to the market. This would weaken the principal function of commodity derivative markets, in which the commodity producers, traders and consumers seeking to reduce risk relating directly to their commercial activities participate. If firms cannot use such information and hedge against the risks, this would lead to inefficiency and ultimately higher prices to consumers.

We note however the statement made by ESMA in paragraph 91 of the consultation paper: “The different bar set for the inside information concerning commodity derivatives and financial instruments may lead to the following: a non-listed commodity producer may be able to disclose to other parties information that, if the same firm was listed, would be treated as inside information. Those other parties receiving the information from the non-listed firm may be able to trade on that information, which would be considered as insider dealing if the same information was received from a listed firm”.

CMCE Members (which include listed and unlisted market participants) have not experienced any anomalous outcomes as a result of this feature of the regime. This is, in part due to the fact that information relating to a company is rarely, if ever, material to the price of a commodity in a manner which would make it eligible to be regarded as inside information for commodity derivatives.

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

Yes, CMCE Members are of the view that the current definition of inside information is effective when combatting market abuse, especially when preventing insider trading or improper disclosure.

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 price sensitive information which is not be covered by the current definition of inside information and which should be treated as inside information has been identified by CMCE Members.

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 price sensitive information which is not be covered by the current definition of inside information in relation to commodity derivatives and which should be treated as inside information has been identified by CMCE Members.

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?

CMCE Members consider that the fourth element of the definition of inside information in relation to commodity derivatives, namely that relevant information must be required or reasonably expected to be disclosed must be retained.

EU legislators have agreed for specific reasons to retain the additional condition (already mentioned in the text of previous MAD enacted in 2003) 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 (hereinafter "the disclosability criterion"). These specific reasons are still valid.

The main reason is that there are structural differences between commodity derivatives and securities markets that justify different approaches to the regulation of (mis)use of inside information. The main difference is that commodity market participants must be able to hedge their production needs and commodity price risks. It is therefore critical, that there is no general disclosure obligation (i.e., requiring the disclosure of all inside information relating to commodity markets irrespective of the disclosability criterion) and no restriction on the use of that information by firms needing to trade.

In particular, the current definition of inside information on commodity derivatives is framed to strike the appropriate balance between unfair information asymmetry (where one party has information which **is** required or reasonably expected to be disclosed under other rules, customs or practices) and the need to enable market participants to use information legitimately available to them to fulfil their hedging and trading needs.

The consequences of re-defining "inside information" for commodity derivatives without reference to the "disclosability" element would be adverse, significant and far-reaching, given the variety of possible underlying commodities and the global nature of commodities markets. Commodities firms, including energy utilities, oil and gas producers and suppliers, farmers and food producers, miners, refiners, and industrial users of commodities etc., are all engaged in commerce and trade, which essentially involves holding information which is relevant to existing or anticipated production, and to quality, storage and supply levels, and these parties will and must use that information in order to determine their trading and risk management needs and to fulfil their deliveries. If they were unable to use that information for trading in commodity derivatives or underlying spot commodities, they would be, at worst, unable to function as businesses and, at best, unable to use the commodity derivatives to hedge their risks.

If such firms were required to disclose all such information in their possession in order to cleanse it, so that they could trade, this would have equally damaging consequences. First, it would mean they could not hedge, other than from a distressed position, leading to increased overall costs of trading and production and therefore increased costs for consumers. Second, it would often be impossible for them legitimately to disclose all such information in their possession. Many firms will hold information subject to contractual confidentiality restrictions (e.g. under joint venture arrangements, which are particularly common in commodity markets). In other cases, the information held by a firm may – viewed on its own – give a misleading impression as to the overall supply and demand in the market (not every firm has all the information to hand necessary to form a correct objective view, by definition). Each firm's information gives it a subjective perspective on supply and demand. Requiring disclosure of some or all of that would likely lead to unhelpful and potentially misleading disclosures. Further, it would disincentivise firms from investing in research and analytic functions and would reduce the value of investment in some industrial plant (plant can provide information value to their owners), potentially impacting the level of investment in the real economy.

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.

CMCE Members are not aware of material hedging difficulties under MAR, therefore do not 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?

CMCE Members do not agree that the general definition of inside information of Article 7(1)(a) of MAR should be used for commodity derivatives for the same reasons as explained in our response to Question 17. We believe that there are structural differences between securities markets and commodity derivatives markets that justify the specific definition of inside information for commodity derivatives. EU legislators decided to have separate definitions of inside information for those reasons, which are still valid. As a result, we strongly believe that the general definition of inside information of Article 7(1)(a) of MAR should not be used for commodity derivatives.

Since the Market Abuse Directive (2003/6/EC), separate definitions were used for inside information for issuers of financial instruments and for commodity derivatives. Art. 1 of MAD established that inside information for commodities would need to be information that "users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets". During the ESMA public hearing on the MAR Review on 5 November 2019, ESMA acknowledged that one of the biggest challenges in relation to the definition of inside information under Article 7(1)(a) of MAR, is to ascertain the point in time when inside information comes into existence. Market participants raised concerns that the definition in Article 7(1)(a) may be too wide or vague, and that safeguards are required to avoid information being identified as potentially being inside information very early on in a transaction, thus unnecessarily blocking or restricting capital market transactions, which has a detrimental effect on market participants and liquidity.

The definition of inside information for commodities in Article 7(1)(b) avoids such risk by being more prescriptive, allowing market participants to better assess what constitutes inside information. The removal of the fourth element (the "disclosability" element) of the definition would expand the scope of information falling under this definition significantly and lead to the definition becoming unmanageable for commodity derivatives, given that it includes information that relates to either the commodity derivatives themselves, directly or indirectly, or directly to related spot commodity markets.

Unless there is an obligation to disclose or market expectation of disclosure of a certain type of information, there may be no specific forum or timeline for disclosure and so often no way for market participants to check whether information could be inside.

Also, if information is of a type that is "disclosable" to the rest of the market, market participants would expect to be able to price trades based on that information, - so that using it ahead of the market in those circumstances would amount to an unfair advantage. This level of information asymmetry would be unfair and MAR adequately and precisely addresses that in the definition.

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

CMCE Members understand that ESMA suggests clarifying that knowledge of pending orders should be inside information not just for persons charged with the execution of orders (as is the framework today) but also for other categories of person (including directors of an issuer, the issuer itself, institutional investors etc.).

We consider that the current scope is aimed at the knowledge of other market participants' orders. A person charged with execution of orders is highly likely to have knowledge of other market participants' trading intentions, and so their ability to trade on this information should be limited. A director of an issuer would not come into possession of knowledge about other market participants' trading intentions regarding the issuer as a result of his role as director.

CMCE Members therefore do not see any need to change the scope of the current framework.

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, CMCE Members consider that the current regime generally prohibiting front running client orders works well.

It is clear that front-running could have a greater adverse effect on a customer in an illiquid market (although each case will depend on its own facts), but this is relevant only to an assessment of the impact of the offence; it does not – and, in our view, should not – affect an assessment of whether or not the offence has been committed.

Front-running should be defined simply and clearly (as it currently stands), without variations for different market conditions.

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?

CMCE Members consider the key risk to be that of brokers front-running their clients. The risk is that the person who placed the order may be disadvantaged as a result of the broker using that information to trade or facilitates trades which will disadvantage that customer.

In other context, pre-hedging can be necessary and can work to the advantage of customers. For example, a firm may need to pre-hedge in order to establish whether and at what price it can accept an order. Without that ability, some orders would not be filled.

A balance in the legislation is therefore required. The current MAR regime is appropriately tailored to address the risks and balanced to enable the market to fill customer orders when required.

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

See our response to Question 22.

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

Pre-hedging is a feature of any commodity derivative market and not specific to any one instrument.

<u>Section 11 – Competent Authorities, market surveillance and cooperation</u>

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.

CMCE is concerned about the implication of reporting order book data, as this would entail reporting an order of magnitude more information than transaction reporting. Order book information is highly time sensitive and adding in reporting formats may reduce the performance of otherwise low latency environments.

The reportable information may also extend to include personal information, such as trader IDs. This would be a significant change in the reporting approach akin to that associated with MiFID II. That would potentially have a chilling effect on trading in the EEA as market participants may choose instead to trade under regimes which do not have the same reporting requirements. This impact was seen in the implementation of MiFID II on FX derivatives.

At this stage venues only register an order at the point of the final instruction leading to the order. Full order capture would be extremely costly or practically unworkable.

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

Trading venues already have record keeping requirements and obligation to make available on request. The incremental cost between recording as current and transmitting would be orders of magnitude more significant than the current volumes of transactions reported. ESMA's concerns regarding the sheer number of orders and transactions generated in the spot FX market (in the context of the questions regarding extension of MAR to spot FX) are relevant here.