

Call for evidence on pre-hedging

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1.- Target participants

All interested stakeholders are invited to respond to this call for evidence. This call for evidence is primarily of interest to investment firms, credit institutions, proprietary traders, market makers, asset management companies and in general persons operating on an ongoing basis in financial markets, but responses are also sought from any other market participants including trade associations and industry bodies, institutional and retail investors, consultants and academics.

2. - Information Note

In the course of its Market Abuse Regulation (MAR) Review, ESMA had made market participants aware that some NCAs had received STORs on pre-hedging behaviour, a practice that is not defined in EU law. Mixed views were expressed on the usefulness of pre-hedging and the risks associated with this practice. ESMA had described that, on the one hand, pre-hedging involves a risk management aspect, as it takes place when a dealer acting as principal undertakes a trade in anticipation of a client order in order to manage the risk associated with a possible trade stemming from that order. On the other hand, pre-hedging may fall within the scope of insider trading if a broker were to use the information received from the client to make trades for his own account, including potentially trades against the client.

Several market participants asked ESMA to issue guidance on what should be considered as MAR-compliant in terms of pre-hedging and what behaviour might constitute frontrunning. Guidance was also requested on procedural aspects of pre-hedging, such as the documentation required, transparency regarding pre-hedging arrangements by brokers to their clients, and internal policies of market makers.

In the final report on the MAR Review, ESMA acknowledged that there are fundamentally different views on pre-hedging. As a follow-up to the MAR Review, ESMA is therefore undertaking an analysis of that practice in the market.

The purpose of this call for evidence (CFE) is to promote discussion among stakeholders in order to gather further evidence on the practice of pre-hedging that could help ESMA to develop appropriate guidance.

Contents Section 2 of the CFE describes what pre-hedging is. EU law does not provide a specific definition of the practice of pre-hedging. That section explains the difference between hedging and pre-hedging practices, and furthermore underlines the essential difference between pre-hedging and illegal behaviour such as front running.

Section 3 provides a list of arguments critical and supportive of pre-hedging. That section provides an overview of the feedback received in the context of the MAR Review CP together with additional elements from selected research on this topic and sectoral guidance available in the market.

Section 4 analyses pre-hedging from the MAR perspective, examining whether a request for quote (RFQ) could be qualified as inside information. That section also provides guidance on a set of parameters that can be useful to evaluate the legitimacy of pre-hedging practices.

Section 5 discusses the provisions of MiFID II that firms need to comply with when engaging in pre-hedging and seeks feedback from market participants on how such provisions are currently applied. Particular focus is given to provisions governing conflicts of interest.

ESMA will consider the responses it receives to the CFE and then decide on the way forward. ESMA is also aware that the European Commission has conducted a targeted consultation on the Listing Act to make public capital markets more attractive for EU companies and facilitating access to capital for SMEs. ESMA therefore will monitor the outcome of that consultation and take it into account as appropriate.

3.- Submission of comments

The deadline for submitting comments is **30 September 2022**.

Respondents may send their comments through ESMA's website: www.esma.europa.eu. Both the paper of this consultation and the response form are available in the section [Consultations](#) (place the cursor on the word to obtain the link).

Likewise, please send a copy of your answers to the CNMV to the following email address: documentosinternacional@cnmv.es

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