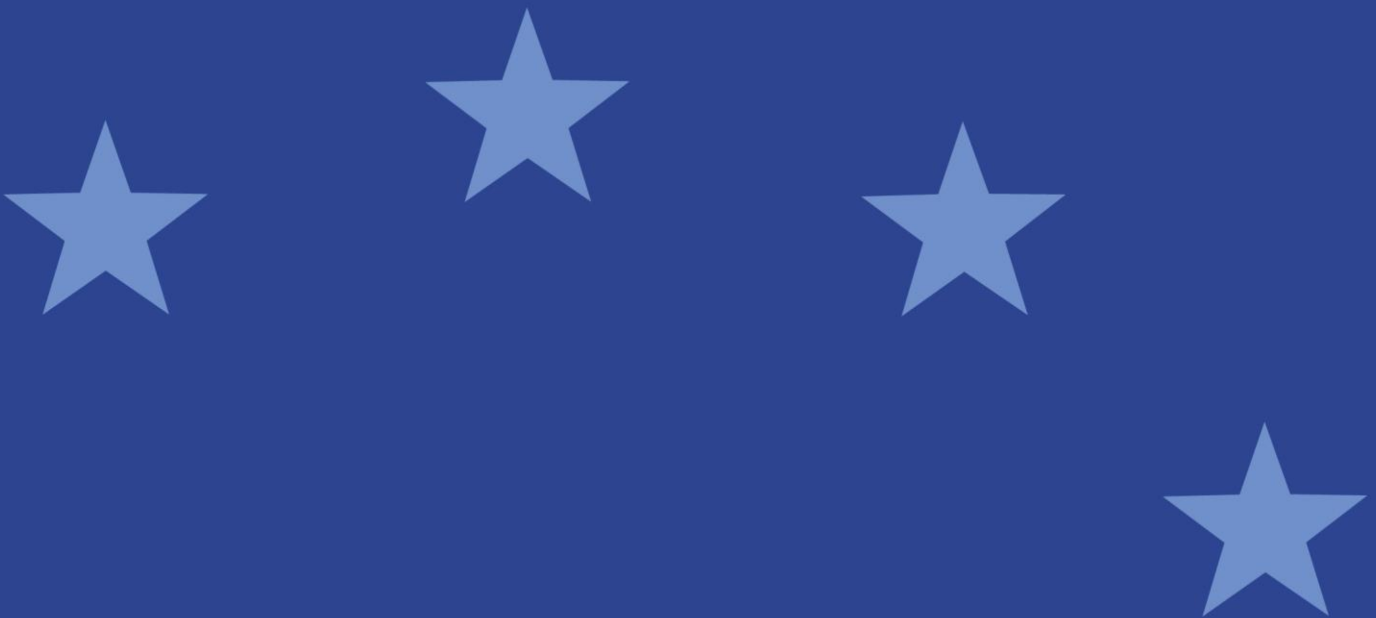
European Securities and Markets Authority

Consultation Paper

Draft technical standards on the Market Abuse Regulation



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Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by Wednesday 15 October 2014.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper?

This paper may be specifically of interest to any investor that deals in financial instruments and emission allowances subject to the Market Abuse Regulation, issuers of instruments in the scope of the Regulation, financial intermediaries, operators of trading venues and participants in the emission allowance market.

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Annex I: Summary of questions

Annex II: Legislative mandate to develop technical standards

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Annex IV: Draft regulatory technical standards for the conditions that buy-back programmes and stabilisation measures must meet, the appropriate arrangements, systems and procedures for disclosing market participants conducting market sounding and the criteria, procedures and requirements for establishing an accepted market practice and for maintaining, terminating and modifying the conditions for its acceptance

Annex V: Draft implementing technical standards on systems and notification templates to be used by disclosing market participants conducting market sounding

Annex VI: Draft regulatory technical standards on the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

Annex VII: Draft implementing technical standards on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information, the precise format of insider lists and for updating insider lists, and the format and template for notification and public disclosure of manager's transactions

Annex VIII: Draft regulatory technical standards on the technical arrangements for objective presentation of investment recommendation or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest

Acronyms used

AMP	Accepted Market Practices
CDS	Credit default Swap
DP	Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation, published on 14 November 2013
DA	Delegated act to be adopted by the European Commission
DMA	Direct Market Access
EAMP	Emission allowances market participant
ITS	Implementing technical standards
MAD	Market Abuse Directive; Directive 2003/6/EC of the European Parliament and the Council on insider dealing and market manipulation (market abuse)
MAR	Market Abuse Regulation
MTF	Multilateral trading facility
MS	Member State
OAM	Officially Appointed Mechanism
OTF	Organised trading facility
PD	Prospectus Directive - Directive 2003/71/EC
PDMR	Person discharging managerial responsibilities within an issuer of a financial instrument, an emission allowance market participant, auction platform, an auctioneer or an auction monitor.
RM	Regulated Market
RTS	Regulatory technical standards
STR	Suspicious transactions report
STOR	Suspicious transactions and orders report
TD	Transparency Directive – Directive 2004/109/EC

I. Executive Summary

Reasons for publication

On 12 of June 2014, the EU Regulation on market abuse (MAR) was published in the Official Journal of the European Union[1] (OJ) and entered into force on the 2 July 2014. MAR aims at enhancing market integrity and investor protection. To this end MAR updates and strengthens the existing framework[2] by extending its scope to new markets and trading strategies and by introducing new requirements.

On 14 of November 2013, ESMA published a Discussion Paper[3] (DP) to seek the views of interested parties on ESMA's policy orientations and initial proposals for MAR implementing measures. The DP covered all the MAR implementing measures, which can be divided into three groups:

(i) Technical advice to the Commission,

(ii) ESMA technical standards, and

(iii) Guidelines.

This Consultation Paper (CP) is the follow-up of the DP with respect to ESMA technical standards, and it is based on the MAR text as published in the OJ.

This CP on the draft technical standards is published without prejudice to separate CP on technical advice to the European Commission on delegates acts, published by ESMA at the same time.

The purpose of this consultation is to seek comments on the draft technical standards developed by ESMA and on their rationale, included in section II to IX of this CP.

Background

The Regulation (EU) No 1095/2010 establishing the European Supervisory Authority (ESMA Regulation) empowered ESMA to develop draft regulatory and implementing technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU or implementing acts under Article 291 TFEU.

Articles 10(1) and 15(1) of ESMA Regulation state that before submitting draft technical standards to the Commission, ESMA shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft technical standards concerned or in relation to the particular urgency of the matter.

[1] Market Abuse Regulation No 596/2014 (OJ L 173, 12.6.2014, p. 1) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0001.01.ENG

[2] Market Abuse Directive No 2003/6/EC (OJ L 96, 12.4.2003, p.16)

[3] Discussion Paper: ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf

MAR was voted by the European Parliament and the Council on 16 of April 2014, and will be applicable 24 months after its entry into force, i.e. by July 2016. It requires ESMA to develop draft regulatory and implementing technical standards in relation to several provisions.

Article 5(6) of MAR requires ESMA to develop draft regulatory technical standards to specify the conditions that buy-back programmes and stabilisation measures must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions.

In relation to market sounding, Article 11(9) of MAR requires ESMA to develop draft regulatory technical standards to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the new market sounding's requirements. ESMA is empowered by Article 11(10) of MAR to develop also draft implementing technical standards to specify the systems and notification templates to be used by persons to comply with some specific market sounding's requirements.

Article 13(7) of MAR requires ESMA to develop draft regulatory technical standards specifying the criteria, the procedure and the requirements for establishing an accepted market practice, and the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance.

In relation to prevention and detection of market abuse, ESMA is empowered by Article 16(5) to develop draft regulatory technical standards to determine appropriate arrangements, systems and procedures to comply with the requirements, as well as the notification template to be used in case of reporting.

Article 17(10) of MAR requires ESMA to develop draft implementing technical standards to determine both the technical means for appropriate public disclosure of inside information, and the technical means for delaying the public disclosure of inside information.

Article 18(9) of MAR requires ESMA to develop draft implementing technical standards to determine the precise format of insider lists and the format for updating the same.

Article 19(15) requires ESMA to develop draft implementing technical standards concerning the format and template in which the information related to managers' transactions is to be notified and made public.

Article 20(3) requires ESMA to develop draft regulatory technical standards to determine the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

Contents

The CP is divided into eight main sections, covering all the topics for which draft technical standards are required following the order established in MAR. In Annex IV to VIII, the proposed text of the draft technical standards is presented. The draft technical standards have been organised as follows:

- Annex IV contains the draft regulatory technical standards related to: (i) buy-back programmes and stabilisation measures, (ii) market soundings, and (iii) accepted market practices.

- Annex V contains the draft implementing technical standards related to market soundings.

- Annex VI contains the draft regulatory technical standards related to prevention and detection of market abuse.

- Annex VII contains the draft implementing technical standards related to: (i) disclosure of inside information and delay of disclosure of inside information, (ii) insider lists, (iii) managers' transactions.

- Annex VIII contains the draft regulatory technical standards related to investment recommendation or other information recommending or suggesting an investment strategy.

In the preparation of the draft technical standards, ESMA has carefully analysed and considered the responses to the DP, which notably provided useful insight into market best practices. The interested parties also had the opportunity to provide their comments on ESMA's proposals at an open hearing held on 15 January 2014.

Next steps

ESMA will consider the responses it receives to this CP, and will finalise the draft technical standards for submission to the European Commission no later than 12 months after the entry into force of MAR.

ESMA will hold an open hearing on the published CP in Paris on 8 of October 2014. Registration for the hearing will be available in the relevant section of the ESMA website in due course.

II. Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Introduction

1. This section deals with the relationship between buy-back programmes or stabilisation measures on the one hand and the provisions of the prohibition of insider dealing and market manipulation on the other hand. Stabilisations as well as trading in own shares within buy-back programmes can be legitimate in certain circumstances and should therefore not be automatically considered as market abuse. For example stabilisation transactions provide support for the price after the offering of securities during a limited time period in case they come under selling pressure, thus reducing sales pressure generated by short term investors and maintaining an orderly market in the relevant securities. This is in the interest of those investors having subscribed or purchased those relevant securities in the context of a significant distribution, and of issuers. In this way, stabilisations can contribute to greater confidence of investors and issuers in the financial markets.

2. However, stabilisations of financial instruments as well as buy-back programmes can also give false or misleading signals to the market and/or secure an artificial price level. Therefore, it is necessary that such activities are carried out under certain conditions, such as transparency, price and volume limitations.

3. So, Article 8 of Market Abuse Directive No 2003/6/EC (MAD) states that the prohibitions of insider dealing and market manipulation should not apply to trading in own shares in 'buy-back' programmes or to the stabilization of a financial instrument, provided that such trading is carried out in accordance with implementing measures adopted to that effect - "safe-harbour-principle". Such implementing measures had been introduced by the Level 2 Regulation No 2273/2003.

4. Similarly, Article 5(1) of MAR states that the prohibition of insider dealing (Article 14) and market manipulation (Article 15) do not apply to trading in own shares in buy-back programmes when the programme fulfils the requirements defined in the Article 5(1) of MAR. According to Article 3(17) of MAR "buy-back programme" means trading in own shares in accordance with Articles 21 to 27 of Council Directive No 2012/30/EU.

5. Therefore, the details of the buy-back programme have to be disclosed prior to the start of trading and transactions of the programme have to be reported to the competent authority and subsequently have to be disclosed to the public. Moreover, certain limits with regard to price and volume have to be met.

6. Besides, to benefit from the exemption the buy-back programme should pursue the specific purposes listed under Article 5(2) of MAR. These sole legally allowed purposes have to be either the reduction of the capital of an issuer or the compliance with obligations arising from debt financial instruments exchangeable into equity instruments, share option programmes or other allocations of shares to employees or to members of the administrative management or supervisory bodies of the issuer or an associate company.

7. According to Article 5(4) of MAR , the prohibitions of insider dealing and market manipulation also do not apply to trading in securities or associated instruments for the stabilisation of securities where the stabilisation is carried out for a limited period, where relevant information about the stabilisation is disclosed and notified to the competent authority of the trading venue, where adequate limits with

regard to price are complied with and provided that such trading complies with the conditions for stabilisation laid down in regulatory technical standards (RTS). According to Article 3(2)(d)) of MAR, "stabilisation" means a purchase or offer to purchase securities, or a transaction in associated instruments equivalent thereto, which is undertaken by a credit institution or an investment firm in the context of a significant distribution of such relevant securities exclusively for supporting the market price of those securities for a predetermined period of time, due to a selling pressure in such securities. The term "significant distribution" is further defined in Article 3(2)(c) of MAR as an initial or secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed.

8. According to Article 5(6) MAR, ESMA should develop draft RTS "*to specify the conditions that buy-back programmes and stabilisation measures must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions*."

II.1 Buy Back programme

II.1.1 General conditions that buy-backs must meet

9. Article 5(1) and (3) and Article 3(17) MAR use the term "shares". "Associated instruments" are only mentioned in the context of stabilisations (Article 5(4) and Article 3(2)(d) MAR). Accordingly, buy-backs with associated instruments such as derivatives (compare Article 2(2) of Regulation No 2273/2003) do not fall under the safe harbour and the mandate in Article 5(6) MAR does not foresee further work on this issue.

II.1.2 Disclosure and reporting obligations

Channels of public disclosure

10. For shares that are admitted to trading on a regulated market (RM), an adequate public disclosure should mean the use of the information dissemination and storage mechanism(s) set up in the Member State (MS) as part of their implementation of the disclosure made in accordance with the procedure laid down in the Transparency Directive No 2004/109/EC (TD). In the case of shares only traded on trading venues different from a RM, the same mechanism should be used for storage and for dissemination.

11. The majority of respondents to the Discussion Paper ("DP") agreed that the information dissemination and storage mechanism, set up in each Member State pursuant to the Transparency Directive requirements, or a comparable mechanism should be used for public disclosure. However, the Transparency Directive provisions do not apply to issuers of financial instruments traded only on MTFs. Therefore ESMA considers that the information and storage mechanism to be used should be the one defined under Article 17(1) and specified through the ITS developed under 17(10), with the posting for 5 years on the issuers' websites serving as storage for the disclosed information in the case of financial instruments traded only on MTFs. One respondent asked for further discussion and work on what would be the expected rules and practice if there is a buy-back where the relevant shares are linked to other financial instruments which are traded on a non-regulated market. ESMA would like to highlight that it was the Level 1 decision that according to Article 5(1) MAR buy-backs with associated

instruments such as derivatives do not fall under the safe harbour and that the mandate in Article 5(6) MAR does not foresee further work on this issue.

Content of public disclosure

12. According to the current regime (Article 4(4) in combination with Article 4(3) of Regulation No 2273/2003) the issuer must publicly disclose each transaction related to buy-back programmes, including the information specified in Article 20(1) of Directive 93/22/EEC, i.e. details of the names and numbers of the shares bought, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned.

13. However, it is important that the information to the public is readable and understandable. Thus, there is a need for striking a balance in the case of a large buy-back programme, including a high number of transactions as it seems too burdensome and also rather confusing for an investor if every single transaction is disclosed (and stored) via the channels to be used for public disclosure. It is more comprehensible for an investor to access aggregated figures on a daily basis. The competent authority will still be provided with details on every single transaction, so that there is no loss of information. Therefore ESMA proposed in the DP that the aggregated volume per day and per venue is published on the website of the issuer as well as the volume-weighted average price per day and per venue.

14. The majority of respondents to the DP agreed that in the case of large buy-back programmes the disclosure of aggregated figures on a daily basis is adequate and sufficient. A significant number of respondents opposed the publication of further transaction details on the issuer's website stating that the disclosure of data involving individual transactions may be confusing. ESMA therefore maintains its proposal that the aggregated volume per day and per venue is published on the website of the issuer as well as the volume-weighted average price per day and per venue.

15. One respondent strongly objected to any requirement that issuers disclose the name of the investment management firm or the names of the client as counterparties to such trades. They also required clarification regarding the term "means of identifying the investment firms concerned". ESMA confirms that "means of identifying the investment firms concerned" is referring to the investment firm that is conducting the buy-backs for the issuer and is not referring to the counterparties of buy-back transactions.

Deadline for public disclosure

16. According to the current regime (Article 4(4) of Regulation No 2273/2003), the issuer must publicly disclose transactions related to buy-back programme no later than the end of the seventh daily market session following the date of execution of such transactions. As the current system seems to work mostly efficiently it should be maintained.

17. The majority of respondents to the DP agreed with maintaining the current deadline of 7 market sessions; however a few respondents disagreed and requested a shorter deadline. ESMA believes that the existing deadline of 7 days seems to be a good balance between transparency and administrative burden and that if market participants are willing to disclose earlier they can of course voluntarily do so.

Disclosure towards competent authorities

18. According to the current regime (Article 4(3) of Regulation No 2273/2003) the issuer must report each transaction related to the buy-back programme, including the information specified in Article 20(1) of Directive 93/22/EEC (i.e. details of the names and numbers of the shares bought, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned).

19. Although no specific deadline for the disclosure towards competent authorities is set out in MAR, ESMA considers it practical to use the same deadline as for the public disclosure (7 market sessions).

20. The above-mentioned Article 4(3) also specifies that this disclosure should be made to the competent authority of the RM on which the shares have been admitted to trading. However, considering the extension of the scope of MAR to include also instruments traded on MTFs, it is highly likely that buy-back transactions have to be reported to more than one competent authority across Europe in cases of multiple listings. ESMA was therefore considering whether a single competent authority should be determined for this reporting. The majority of respondents to the DP were supportive of having a single competent authority to whom reporting of buy-back transactions should be made. The new MAR regime aims to establish more transparency across the Union, and the final text of MAR Article 5(3) clearly specified that the issuer should report to the competent authority of the trading venue on which the shares have been admitted to trading or are traded, the details of each transaction relating to the buy-back programme. For these reasons, ESMA now considers that not determining a single competent authority (i) is fully in line with MAR Level 1, which clearly specifies in Article 5(3) that in order to benefit from the exemption the issuer shall report to the competent authority of the trading venue on which the shares have been admitted to trading or are traded, each transaction relating to the buy-back programme carried out on this venue and thus does not contradict the relevant provision; (ii) brings the required immediate transparency to those authorities having a supervisory interest (i.e. the ones supervising the trading venues); and (iii) avoids the need of setting up complex (and probably lengthy) mechanisms for exchanging information between competent authorities.

II.1.3 Conditions for trading

Price and time limitations

General Approach

21. Under the current regime (Article 5(1) of Regulation No 2273/2003), the issuer must not purchase at a price higher than the highest price of the last independent trade or the highest current bid. As the current system seems to work mostly efficiently it should be maintained.

22. Furthermore, ESMA wishes to clarify that in order for the price conditions set out in the draft technical standard to apply and to avoid any risk of circumvention through OTC trading, only the buy-back transactions carried out on a trading venue where the shares are admitted to trading or traded should benefit from the "safe harbour". This would be in line with the approaches currently in place in many Member States and would also ensure that the shareholders are treated equally in case of buy-back as required under the Second Company Law Directive (Directive 2012/30/EU).

Multi-listings

23. When shares are multi-listed on different trading venues, a number of respondents proposed that the price limitations should be applied to the execution venue on which the shares are purchased. ESMA

therefore intends to make the price restriction dependent on the last price/bid of the relevant trading venue where the purchase is planned. This rule is clear, simple and easier to follow.

24. A number of respondents disagreed with ESMA's initial proposal to restrict buy-backs to a price which is equal to or lower than the last traded price or last current bid on the most liquid market, as they felt issuers should continue to have the ability to look at every trading venue.

Auctions

25. The price formation process during the end of auctions is especially sensitive for potential market manipulations, for example in the form of "marking-the close". ESMA has been considering possible order placement restrictions during this phase. Although a significant amount of respondents agreed to the option presented in the DP that issuers should not enter any orders to purchase shares during the last third of the auction time, for instruments only traded on auctions an order placement restriction might limit considerably the possibility to trade and therefore ESMA does not want to restrict these kinds of auctions. So where a share is traded through a continuous trading process during the market session, the safe harbour should not cover orders which are placed or modified during an auction (for example opening-, mid-day-, closing auction or auction after volatility break) that may take place on the concerned market. However, where a share is solely traded on a trading venue through an auction process (no continuous quotation), orders placed under a buy-back programme may participate in the auction with the benefit of the safe harbour.

26. Additionally ESMA believes that when orders are placed during an action the market should have some time to react during that auction and therefore orders should not be placed during the last instant before the end of the auction.

Volume limitations

27. Under the current regime (Article 5(2) of Regulation No 2273/2003), the issuer must not purchase more than 25% of the average daily volume of the shares traded over a period of reference. In cases of extreme low liquidity the issuer may exceed the 25% limit if he provides information and explanations to the competent authority in advance, discloses this adequately to the public and does not exceed 50% of the average daily volume (Article 5(3) of Regulation No 2273/2003). ESMA was considering maintaining these volume limitations. Some market participants expressed their desire for some guidance regarding "extreme low liquidity" and others were in accordance with the cumulative criteria for defining extreme low liquidity put forward in the DP. However, considering that no competent authority, except one for small cap issuers, has reported cases of extreme low liquidity situations justifying the application of the extended volume limitations, ESMA does not consider it necessary to maintain such a possibility. Furthermore, this would avoid having to provide a strict definition of "extreme low liquidity" as this depends much on a case-by-case assessment considering the characteristics of the specific instrument and venue. Finally, would the possibility to exceed the 25% limit on a trading venue basis be maintained, this may potentially result in different volume limits on the different trading venues where the shares are traded. To mitigate the risk of circumvention and abusive use of such an exception, ESMA believes that the competent authority of the trading venue should be in position to object to the proposed extension of the volume limits and that buyback transactions should always take place on the venues where the 25% volume limit applies as long as they exist.

28. A closely related issue concerns the way in which the daily average volume should be calculated when the relevant shares are traded on different venues. There are trading venues where shares can be listed

by third parties without notification to the issuer. It seems too burdensome to oblige the issuer to check each and every trading venue with rather insignificant volumes in order to perform an accurate calculation across venues. ESMA proposes to make the calculation per relevant venue where a purchase is planned. This rule is clear, simple and easy to follow.

29. Although not explicitly discussed in the DP, ESMA considers that the approach applied under the current regime to define the period of reference for calculating the daily average volume for the purpose of the volume limitations remains valid.

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

II.1.4 Restrictions to trading

30. Under the current regime (Article 6) of Regulation No 2273/2003), particular restrictions apply to the selling of its shares by an issuer during the buy-back programme as well as to trading during closed periods and when inside information has been delayed.

31. However, the same article also foresees exemptions to the trading restrictions, notably when the buy-back programme in place is a time scheduled programme or is lead managed, independently, by an investment firm/credit institution. In addition, the selling restriction does not apply to an issuer that is an investment firm/credit institution and that has appropriate "Chinese Walls" in place.

32. ESMA considers adequate to continue to impose the same restrictions to trading and selling during a buy-programme and to maintain the same exemptions to these restrictions. The majority of respondents were in agreement with this proposal. One respondent though disagreed with the related exemptions, stating that the "Chinese Walls" rules could be very different from state to state. However the "Chinese Walls" rules should be more harmonised with the new MiFIR/MiFID II regime.

II.2 Stabilisation measures

II.2.1 Restrictions regarding the time of stabilisation measures

33. Stabilisation activities may give false or misleading signals regarding the supply of the relevant securities or may secure an artificial price level. Therefore, stabilisations should be carried out only for a limited time period ("stabilisation period"). However, the beginning, duration and end of the stabilisation period may be different depending on the relevant securities:

Shares and securities equivalent to shares

34. In the case of an initial offer of shares or securities equivalent to shares, the time period should start on the date of commencement of trading of the relevant securities on the trading venue and last no longer than 30 calendar days thereafter. Should the initial offer publicly announced take place in a MS that permits trading prior to the commencement of trading on a trading venue, the time period should start on the date of adequate public disclosure of the final price of the relevant securities and last no longer

than 30 calendar days thereafter. However, such trading must be carried out in compliance with the rules, if any, of the trading venue on which the relevant securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.

35. In case of a secondary offer, the time period should start on the date of adequate public disclosure of the final price of the relevant securities and lasts no longer than 30 calendar days after the date of allotment.

Bonds and other forms of securitised debts (not convertible or exchangeable into shares or into other securities equivalent to shares)

36. In respect of bonds and other forms of securitized debt (which are not convertible or exchangeable into shares or into other securities equivalent to shares), the time period referred should start on the date of adequate public disclosure of the terms of the offer of the relevant securities (i.e. including the spread to the benchmark, if any, once it has been fixed) and end, whatever is earlier, either not later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or not later than 60 calendar days after the date of allotment of the relevant securities.

Securitised debt convertible or exchangeable into shares or into other securities equivalent to shares

37. In respect of such securities the stabilisation period should start on the date of adequate public disclosure of the final terms of the offer of the relevant securities and end, whatever is earlier, either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or not later than 60 calendar days after the date of allotment of the relevant securities.

II.2.2 Disclosure and reporting obligations

38. Transparency is a prerequisite for prevention of market abuse. Market integrity therefore requires the adequate public disclosure of stabilisation activities by issuers or by entities undertaking stabilisations, acting or not on behalf of these issuers, and, methods used for adequate public disclosure of such information should be efficient.

39. For offers under the scope of application of the Prospectus Directive No 2003/71/EC PD), the relevant transparency conditions have been, according to the legal framework of Regulation No 2273/2003, the transparency conditions of that directive. ESMA considers these transparency conditions as sufficient and efficient and suggest for the above stated cases no changes to these transparency-conditions.

40. For offers which do not fall under the scope of the PD it is necessary to adequately publicly disclose the fact that stabilisation measures may be undertaken right before the opening of the offer period of the relevant securities, that there is no assurance that they will be undertaken and that they may be stopped at any time. In ESMA's point of view the beginning and end of the period during which stabilisation measures may occur need also to be adequately publicly disclosed as well as the fact that stabilisation transactions are aimed to support the market price of the relevant security during the stabilisation period.

41. The identity of the "stabilisation manager" i.e. the entity which was undertaking the stabilisation, unless this is known at the time of publication, must be publicly disclosed before any stabilisation activity is being started.

42. If an overallotment facility or “Greenshoe options” exists, the existence and maximum size of the overallotment facility or Greenshoe option, the exercise period of the “Greenshoe option” and any conditions for the use of the overallotment facility or exercise of the “Greenshoe option” has to be published as well.

43. Within one week after the end of the stabilisation period, it must be adequately disclosed whether or not stabilisation measures were undertaken, the date at which stabilisations started, the date at which stabilisations last occurred, the price range within which stabilisations were carried out, for each of the dates during which stabilisation transactions were carried out.

44. According to Article 9 of Regulation No 2273/2003, the transparency conditions could be fulfilled either by the issuer/offeror or by the entity which was undertaking the stabilisation. However, in ESMA’s point of view a clear allocation of responsibilities seems preferable. Having in mind that the entity which is actually undertaking the stabilisation has, as the result of the stabilisation activities conducted by that entity, the original data which has to be disclosed and is closest to this activities, ESMA considers that this entity should be exclusively responsible with respect to the transparency

45. In order to allow competent authorities to supervise stabilisation activities, the “stabilisation manager”, must record each stabilisation order and transaction with, as a minimum, the information specified in [Article 23 MiFIR] extended to financial instruments other than those admitted or going to be admitted to the RM. In the case of several investment firms or credit institutions undertaking the stabilisation measures, one of those should act as a central contact point for any requests from the competent authority of the trading venues on which the relevant securities have been admitted to trading.

46. Furthermore, the details of all stabilisation transactions must be notified to the competent authority of the relevant market. As under the existing legal framework, the transactions have to be reported no later than the end of the seventh daily market session following the date of execution of the relevant transaction. However, it could be argued that this is a too broad period as the details of the transactions are known to the entity which is undertaking the stabilisation already on the day when the transaction has been carried out although nothing prevents the reporting to take place anytime within this 7-day period.

47. The responsibility to fulfil the reporting obligations also needs to be clarified. Therefore, ESMA suggests determining an exclusive responsibility. In this context it seems preferable that the entity which is actually undertaking the stabilisation measures is responsible for fulfilling the reporting requirements as this entity has all relevant information available.

48. Another issue arises where the relevant securities are listed in different countries and stabilisation measures are being undertaken simultaneously in different countries. In the DP ESMA was considering whether the reporting could be centralised to one competent authority in order to facilitate surveillance. But considering that MAR aims to establish more transparency, and taking into account that the final text of MAR clearly specified the relevant competent authorities which should receive the details of all stabilisation transactions conducted on their trading venue (see Article 5(5)), ESMA now considers that not determining a single competent authority, and thus requiring multiple reporting in case of stabilisation measures taken simultaneously in different MSs: (i) is fully in line with MAR Level 1 and thus does not contradict the relevant provision; (ii) brings the required immediate transparency to those authorities having a supervisory interest (i.e. the ones supervising the trading venues); and (iii) avoids the need of setting up complex (and probably lengthy) mechanisms for exchanging information between competent authorities.

II.2.3 Price conditions

49. In order to avoid that stabilisation measures are used to push the price, specific price conditions have to be met. ESMA is of the opinion that, in the case of an offer of shares or other securities equivalent to shares, stabilisation measures of the relevant securities should not under any circumstances be executed above the offering price.

50. In the case of an offer of securitised debt convertible or exchangeable in shares or other securities equivalent to shares, stabilisation of those instruments should not under any circumstances be executed above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

II.2.4 "Ancillary stabilisation"

51. "Ancillary stabilisation" means the exercise of an overallotment facility or of a "Greenshoe option" by investment firms or credit institutions, in the context of a significant distribution of relevant securities, exclusively for facilitating stabilisation activity. Overallotment facilities and "Greenshoe options" are closely related to stabilisation by providing resources and hedging for stabilisation activity. Particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilization when it results in a position not covered by the "Greenshoe option".

52. ESMA's point of view is that ancillary stabilisation has to be undertaken in accordance with the relevant (general) disclosure and reporting conditions for stabilisation measures. Furthermore, the relevant securities may be over allotted only during the subscription period and at the offer price. A position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the "Greenshoe option" may not exceed 5 % of the original offer. Although some market participants stressed that the limit of 5% is too prohibitive and that over-allotting beyond 5% should also be within the "safe harbour", ESMA believes that the existing rules have work well in practise and therefore should not be changed.

53. Aside from that, the "Greenshoe option" may be exercised by the beneficiaries of such an option only where relevant securities have been over allotted and the "Greenshoe option" may not amount to more than 15 % of the original offer. In addition, the exercise period of the "Greenshoe option" must be the same as the relevant stabilisation period. Finally, the exercise of the "Greenshoe option" must be disclosed to the public promptly, together with all appropriate details including in particular the date of exercise and the number and nature of relevant securities involved.

II.2.5 Sell side trading during stabilisation periods and "refreshing the green shoe"

54. ESMA is of the opinion that sell transactions cannot be subject to the exemption provided by Article 5 MAR. The purpose of this exemption is to allow the price of the security to be supported and this is achieved by the purchase, rather than the sale of securities. Therefore ESMA's view is that selling securities that have been acquired through stabilising purchases, including selling in order to facilitate subsequent stabilising activity, is not a behaviour that can be characterized as being for the purpose of price support, which is the objective of stabilisation as defined in Article 3(2d) MAR. For this reason, such sales of securities are not covered by Article 5(1) MAR, nor any further acquisitions conducted after such sales. So, "refreshing the greenshoe" falls outside the scope of the safe harbour and is not covered by the exemption provided by Article 5(1) MAR.

55. Nevertheless, this does not imply that sell transactions will necessarily be abusive. Although such sales will not be regarded as abusive solely because they fall outside the scope of the safe harbour, they

should nevertheless be carried out in a way that minimises market impact and in due consideration of the prevailing market conditions.

II.2.6 "Block-trades"

56. ESMA is of the opinion that "block-trades" are not considered for the purpose of the stabilisation as primary or secondary issuance by the issuer and thus should not be subject to the exemption provided by Article 5(1) of MAR. Stabilisation as a price support measures is not designed to assist an investment bank in placing a line of stock between clients.

57. A number of respondents highlighted that a distinction should be drawn between "private" block trades that are not protected by the stabilisation safe harbour and publicly announced placements that can constitute "significant distributions" under Regulation 2273/2003 for which the stabilisation safe harbour is available.

58. Ultimately, ESMA considers that only the operations that meet the criteria of the significant distributions as defined in Article 3(2)(c) should be considered for the purpose of the stabilisation.

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

III. Market soundings

Introduction

59. Article 11(1) of MAR defines a “market sounding” as a 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. Article 11(4) states that, when a “disclosing market participant” (DMP) discloses inside information to a potential investor, in the course of a market sounding in accordance with the conditions in Article 11(3) and (5), this should be deemed to have been made in the normal course of the exercise of a person’s employment, profession or duty, and therefore not constitute market abuse.

60. Article 11(10) of MAR requires ESMA to develop draft RTS to determine arrangements and procedures for persons to comply with the requirements of Article 11. Paragraph 11 of the same article requires ESMA to develop draft ITS to specify the systems and notification templates to be used by persons to comply. This part of the CP explains ESMA’s position on the draft technical standards developed under Article 11 of MAR. The technical standards will apply to DMPs when conducting market soundings.

61. It should be noted that ESMA is also required to issue guidelines addressed to persons receiving market soundings. For the sake of simplicity these persons should be referred to as “potential investors”. ESMA will consult on these guidelines, which will supplement the draft technical standards for DMPs, in due course.

62. For the purposes of this paper the term DMP should encompass any person listed in Article 11(1) and (2), as defined in MAR Article 3(32) while the term “market sounding beneficiary” should identify the entity on behalf of or on the account of which the market sounding activity is conducted (the market sounding beneficiary and the DMP may coincide).

III.1 General remarks

III.1.1 Link to the market sounding beneficiary

63. A market sounding can be conducted by a wide variety of different parties, including, third parties acting on behalf or on the account of an issuer, a secondary offeror, an emission allowance market participant or a person intending to make a takeover bid for the securities of a company or a merger with a company.

64. Competent authorities have observed that market soundings in many cases will typically take place at a stage at which no written agreement has been concluded between the third party acting on behalf of the market sounding beneficiary and the market sounding beneficiary. Therefore, and taking into account requests for clarification in the feedback to the DP, it seems important to clarify what is meant by the term “acting on behalf of or on the account of” for the purposes of Article 11(1)(d). ESMA’s view is that this should include situations in which a third party, in order to prepare a transaction in which it is acting at the request of a market sounding beneficiary, sounds out potential investors with a view to determining the characteristics of that transaction. The third party is deemed to be acting at the request of the market sounding beneficiary if it is taking part in the transaction under the market sounding beneficiary’s mandate, including where the instructions are oral or written and where they are issued as part of discussions, which the third party has initiated with the market sounding beneficiary or in connection with a request for proposals by the market sounding beneficiary. In a situation involving a syndicate, each member of the syndicate is considered to be a DMP acting on behalf of the market

sounding beneficiary for these purposes. This ensures each DMP has the opportunity to avail itself of the protection afforded by Article 11.

65. Given the speed with which deals are often closed (it is not uncommon for the request for proposal to be sent an hour or two before the mandate is awarded), in many cases soundings are actually performed in the days before the request for proposal, for example in the form of organised testing. Accordingly, ESMA believes that an additional situation in which the third party could be considered as acting on behalf of a market sounding beneficiary would be when the third party has obtained from the market sounding beneficiary enough information to lead it to believe that a deal launch is highly probable.

66. Nevertheless, situations where a DMP questions investors on its own initiative, without consulting the potential market sounding beneficiary, should not be considered as market soundings under Article 11. These forms of questioning/enquiry are often used to assess whether the time is right to pitch an idea to an issuer. The aim is then to gauge investors' appetite for a virtual corporate finance transaction, with the aim of pitching it to the market sounding beneficiary if appropriate. It may ultimately lead to a new issue. However, since it is not made at the request of a market sounding beneficiary or in order to prepare a transaction envisaged by a market sounding beneficiary, it is not likely to convey inside information and hence should not be considered as market soundings in the sense of Article 11.

III.1.2 Clarification on 'Block trades'[4]

67. Undertaking a block trade can be compared to (and may amount to) a placing. Critically, as these involve very large blocks of instruments being offered at a discount to the prevailing market price, it may be necessary to sound out potential investors with inside information before proceeding with the block trade itself. Inside information (e.g. the volume and price of the trade, and where the communication is conducted on a "names" basis, the identity of the seller) is passed on to potential investors.

68. Market soundings related to and conducted prior to undertaking a block trade where the DMP is acting on behalf of a secondary market offeror will be captured within the scope of Article 11. Such soundings - i.e. "*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*" - will usually take place in cases where blocks are so significant that their size, in relation to the average trading volume or market capitalisation, would impede their execution within the average trading day or where the information about the block trade would be likely to have a significant effect on the price of the financial instrument.

69. However, it is important to note that the sounding provisions in Article 11 do not aim to create any overlap with MiFID requirements (e.g. record keeping, taping of telephone conversations regarding the provision of investment advice or other investment services). In other words, when, in relation to possible counterparties, the professional is not trying to gauge the conditions relating to the potential size or pricing of a transaction, i.e. it is not conducting a sounding as defined in Article11(1) of MAR, but actually trying to conclude the transaction, then Article 11 will not apply.

[4] Please note that the term 'block trade' is not being used as a technical defined term.

III.1.3 Other scope issues

70. In line with what is proposed in II.1.2 on block trades, it should be noted that market soundings prior to and in relation to a private placement are within the scope of Article 11 provided that it fulfils the criteria set out in Article 11(1).

71. More generally, in response to comments and requests for clarification on when the MAR market soundings regime applies, ESMA would refer readers of this CP to Article 2 of MAR determining scope and Article 6 which defines inside information.

III.1.4 Other remarks

72. It is important to note that the market soundings regime under MAR is not intended to inhibit relations between the issuer and its investors. Indeed, Recital 32 states 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. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile*". Rather, the market soundings regime is intended to provide a clear framework within which such disclosures can be made legitimately and, providing requirements are complied with, DMPs can be afforded a measure of protection against allegations that they have committed market abuse through improper disclosure of inside information.

III.2 Proposed standards prior to conducting a market sounding

73. Article 11(3) requires the DMP to make an assessment as to whether the market sounding will involve the disclosure of inside information. It also requires a written record to be maintained and updated of its conclusion and the reason for the conclusion. This part of the paper sets out related requirements that that DMP should take into account when making any sounding. Some transactions may involve a relatively large syndicate, for example bond issues. In these cases, and taking into account feedback to the DP, it may be more practical for an agreement to be reached between the lead managers of the syndicate. If such an approach is taken any agreement reached should be made clear to any syndicate members if they are to engage in any market soundings directly and seek to avail themselves of the protection in article 11(1).

III.2.1 Determining what information to disclose

74. The DMP should determine what information it intends (and is appropriate) to disclose to potential investors over the course of a sounding. Generally this will be information related to the exact characteristics of the possible transaction in relation to which it intends to sound out investors. However, it may also include other information not necessarily directly related to the possible transaction but providing important context to the transaction. Information disclosed by a DMP should enable a potential investor to make a sufficiently informed assessment. So, for example general information about the issuer such as its financial standing could be useful. However, it should be noted that any inside information about the financial standing of the issuer should have been made public by the issuer, unless delayed disclosure is justified. At the same time, the DMP should avoid disclosing additional inside information that is not useful.

75. In the case of a syndicate, the DMPs should have arrangements in place to seek to ensure that the members agree on the information that will be disclosed to investors.

III.2.2 Characterising the information to be disclosed

76. Prior to conducting a market sounding, the DMP is required under Article 11(3) to assess whether the information to be provided to the person it intends to sound is or is not inside information under Article 7. As part of this assessment the DMP should also determine the expected time period when the transaction is expected to be made public.

77. In the process of characterising the information to be disclosed in a market sounding at the request of a market sounding beneficiary, the DMP or, in a syndicate, any DMP in direct contact with the market sounding beneficiary, should inform the market sounding beneficiary, before proceeding with the market sounding, that it is considering the information to be passed via the market sounding activity to be inside information. The DMP should inform the market sounding beneficiary also of the content of the information that it intends to disclose.

78. It should be noted that in all cases it is the DMP's ultimate responsibility to characterise the information to be disclosed as inside information or not, taking into account all the information it holds. For this purpose, a DMP should keep a record of the due diligence made, i.e. its own considerations as well as any discussion undertaken with the market sounding beneficiary, and an explanation justifying the conclusion regarding the nature of the information. This should also include all the relevant information that contributed to the conclusion such as any opinion provided by the market participant beneficiary as to whether or not the information is inside information, and the source of that information.

79. In the case of a syndicate, the DMP should take all reasonable steps to ensure that the members agree on the DMP's assessment regarding the information to be disclosed.

80. There may be circumstances where members of the syndicate, based on their own assessment regarding the nature of the information, disagree among themselves as to the categorisation of this information. This may be as a result of the members holding different information. In these cases, syndicate members should characterise the information as inside information.

81. As noted in paragraph 61 above, guidelines for potential investors will follow in due course.

III.2.3 Determining which investors to question

82. Before conducting a market sounding, as a good practice, the DMP should determine the type and number of investors he/she intends to question. Feedback was received requesting further clarity on this issue. ESMA considers that the type and number will depend on the circumstances, such as the subject matter of the market sounding, the issuer and type of financial instruments involved, and the willingness of potential investors to be sounded.

83. In the case of a syndicate, the DMP should make its best efforts to ensure that the same investor is not questioned by several syndicate members in relation to the same transaction.

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

III.3 Timing of market soundings

84. When planning the market sounding process, the DMP should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the anticipated date for the launch of the potential transaction. However, ESMA recognises that the actual time lag between the sounding and the launch of the transaction is beyond the DMP's control, due to market factors such as matters on the market sounding beneficiary side. ESMA notes the feedback which indicated the increasing market practice of transactions taking place within a 24-48 hour period following a sounding, but recognises the time-lag will vary depending on the circumstances including the complexity of the proposed transaction. In light of this it does not propose to further clarify the principle set out at the outset of this section.

85. Based on feedback, ESMA maintains its proposal not to restrict the hours in which market soundings can take place.

III.4 Obtaining potential investor's agreement

86. Article 11(5)(a) requires the DMP to obtain the consent of the potential investor with whom they intend to conduct a market sounding before providing the information to them.

The potential investor's wish (not) to receive inside information

87. The Discussion Paper proposed three possible options for requirements on DMPs related to obtaining the consent of potential investors. Whilst a majority of respondents favoured option 1, a significant number stated potential investors such as buy-side firms should not be prevented from expressing their general wishes to DMPs (i.e. support for option 2). ESMA proposes to proceed on the basis of option 2, set out in the paragraph below.

88. As well as seeking and recording the consent of the potential investor to receive inside information in relation to an individual transaction, the DMP should also keep a list of those potential investors that have informed it that they do not wish to be sounded in relation to potential transactions. Potential investors may wish not to be approached in relation to a particular type of transaction rather than all potential transactions. It should be the responsibility of the potential investor to keep the DMP updated if its wishes change. DMPs will not be required to continually approach the potential investors on its list to ensure the list remains up-to-date, although it may be in their commercial interest to reconfirm the position with potential investors. This approach is clearly going to be more effective in avoiding inadvertent disclosure, albeit moderately more burdensome.

III.5 Record keeping requirements imposed on the DMP

III.5.1 General Rule

89. The record keeping requirements stem from Article 11(3), second paragraph of Article 11(5), Article 11(6) and Article 11(8). As a general rule the DMP will need to keep a record, in a durable medium, of its compliance with all the processes and procedures provided for in the technical standards developed under Article 11. These records are key for demonstrating that market soundings have been appropriately carried out, allowing the DMP to demonstrate the lawfulness and legitimacy of their activities, in addition to serving as an important audit trail for competent authorities when conducting investigations.

90. The record keeping requirements stemming from Article 11(8) should apply in relation to every type of market sounding, irrespective of whether inside information is part of the communication or not. The highest risks of market abuse occurring are in the course of the conversations which take place before the occurrence of a formal market sounding that comprises of inside information. Therefore, ESMA believes that precautions should apply in relation to all market sounding activities.

91. ESMA received some feedback that soundings which do not comprise of inside information are out of scope of its mandate. ESMA has also received feedback that there are cases where DMPs do not categorise information as inside information but the recipient of that information disagrees with that view. Taking this into account, there is a risk that inside information is passed in the course of a market sounding that is categorised by the DMP as not containing inside information. Therefore, ESMA's view is that it is appropriate to apply record keeping requirements for market soundings where the DMP categorises the information as not inside information under Article 11(3), in order to allow the DMP to avail itself of the protection under Article 11 also under these circumstances.

92. The alternative approach of only capturing market soundings assessed by the DMP as involving the disclosure of inside information would likely result in DMPs either inadvertently disclosing inside information in practice or otherwise routinely categorising information as inside information (where it may not be price sensitive) in order to benefit from the protection in Article 11. This would create risks to market integrity in the market sounding process and could cause confusion for potential investors. Article 11(8) clarifies that all the records related to market soundings must be retained for a period of at least 5 years.

III.5.2 Standard template for the scripts

93. In order to have a more consistent approach to soundings across the industry, the DMP should be required to create a template and use it as a script for each sounding. As concerns the feedback received that market soundings not including inside information should not be covered by Article 11, ESMA is of the view that the use of scripts, in the form of standard template for scripts, to guide DMPs in the steps to follow and the information items to cover in addressing potential investors is a necessary procedure to assist the DMP in properly fulfilling the record keeping requirements as explained in section II.5.1. Such an obligation applies to all soundings, irrespective of whether they include inside information. Furthermore, on the basis of feedback, ESMA recognises that soundings may take place through means other than recorded lines, for example in face-to-face meetings or through written communication such as emails. The content of the template should be used also in these situations.

94. Whilst the standard template for the scripts can be tailored for specific transactions, it should always contain at least the following:

    i. A statement noting that the conversation is classified as a market sounding;

    ii. Confirmation that the DMP is speaking to the right person (in the case of oral communications) and, if yes, consent by the potential investor to proceed with the conversation;

    iii. Where the DMP has assessed the information not to be inside information:

        a. A statement warning the potential investor that even though the DMP has made an assessment that no inside information will be passed during the sounding , there is the risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor, could become inside information.

b. A statement clarifying that, in any case, the potential investor is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential.

c. confirmation of the market sounding recipient's consent to be sounded.

iv. Where the DMP has assessed the information to be inside information:

a. A statement explaining that the DMP has made an assessment and considers the information to be inside information.

b. A reference to the fact that, by giving its agreement to proceeding with the sounding, the person will receive information which the DMP has characterised as inside information and the potential investor is obliged to keep such information confidential;

c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid;

d. A reminder that obligations and prohibitions apply to the possession of inside information and that administrative and criminal penalties may be incurred in the event of a breach.

e. Consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014;

v. The information regarding the transaction determined in accordance to § II 2.1.

95. The DMP may use a simplified standard script when questioning potential investors with whom it has an on-going relationship and who have previously confirmed to the DMP that are aware of the consequences of holding inside information. In this case, the DMP may disregard point iv(d) above.

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

III.5.3 Lists of persons sounded

96. There was general support for the DP proposals regarding sounding lists. ESMA received feedback that such lists should not include a record of employees to whom information was subsequently distributed by the person sounded, but only the employees who were actually sounded. ESMA's proposal is only intended to include employees who were actually sounded. In light of the feedback there are slight changes and clarifications to the proposals which should result in more flexibility. The DMP should be required to maintain accurate sounding records in relation to each potential transaction, providing:

- the names of all firms and employees at those firms who were sounded by the DMP;
- the date and time of each sounding , including follow up calls;

- the contact details used (e.g. telephone numbers, emails) for the sounding.

97. Providing regulators with the ability to access and review such information when requested would be valuable in an enforcement investigation, both to the regulator (who would be able to establish the facts more quickly) and to the firms (who would need to spend less time reviewing their systems, procedures and previous transactions and be ready to provide information upon regulators' request).

Q5: Do you agree with these proposals regarding sounding lists?

III.5.4 Point of contact at the potential investors, if any

98. The DMP should keep a list of the relevant contact information and details of the designated person or designated contact point responsible for receiving sounding approaches on behalf of the potential investor if such a contact exists and if so where such information has been provided by the potential investor. Taking into account feedback, this approach is more proportionate compared to ESMA's proposal in the DP.

99. Unless the DMP has good reasons to think the contact information is not up to date, it should only contact that person.

100. The forthcoming ESMA guidelines for persons receiving market soundings will also address this issue.

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

III.5.5 Recorded communications

101. DMPs should ensure all market soundings and subsequent discussions or communications are recorded on a durable medium. Market sounding conversations conducted by phone should take place on company recorded mobiles and land lines. ESMA appreciates feedback to the DP that market soundings may also take place through other means such as face-to-face meetings. Where conference meetings are held, there should be a sufficient written record of the meeting, including the date, time, meeting attendants, where applicable confirmation of going through the DMP's script, and details of the conversation. The content of such written record should be agreed by the parties involved, for instance by obtaining the signature of the potential investor. Alternatively, there may be a video or tape recording; in these cases no signature would be required. Besides, every document and material the DMP provides to potential investor should be kept. Written communications, audio and video recording, as well the document and material provided by the DMP during the sounding, should be stored in a retrievable way. Article 11(8) clarifies that these records must be retained for a period of at least 5 years.

102. This is a sensible and practical step, both for DMPs (who may have a genuine business need to conduct soundings on a mobile phone, if out of office hours) and the regulator (who will be in a better position to access the relevant information without having to base assumptions on circumstantial evidence).

103. During the market sounding process/discussions, including the cleansing process, particularly in the case of the postponement or cancellation of a transaction, it may occur that additional inside information is transmitted by the DMP. In such cases, ESMA is of the opinion that the same record keeping and assessment requirements as for the initial transmission should apply.

Q7: Do you agree with these proposals regarding recorded communications?

III.5.6 Written confirmations of market soundings passing inside information

104. In response to the DP, there was mixed feedback on whether the DMP should provide to the potential investors with a written confirmation of their agreement to receive inside information as well as its implications, using a durable medium, in the shortest possible time after the market sounding is conducted. Those who supported the proposal in the DP suggested confirmations should be a high level standardised summary and should not be required prior to the market soundings involving inside information, which ESMA has taken into account.

105. On balance, ESMA consider that such a requirement is not needed as the agreement of the potential investor will be kept through the records of all the communications between the DMP and the potential investor.

III.6 The DMP's internal processes and controls

III.6.1 Preparing and reviewing the procedure governing market soundings

There was broad consensus with ESMA's proposals on the DMP's internal processes and controls in the DP though there were specific comments which ESMA has taken into account. The DMP should draw up and maintain operational procedures setting out how to carry out the market soundings to ensure their compliance with Article 11(3) to (8). The procedure should be reviewed periodically and updated if necessary. The procedures should include, inter alia, the standard scripts and confirmation and how market sounding records are kept, especially when these records relate to telephone recordings.

III.6.2 Employees of the DMP responsible for conducting the market sounding

106. DMPs should take the necessary steps to:

- limit the number of employees responsible for conducting the market sounding, having regard to the nature and characteristics of the transaction;
- ensure employees responsible for conducting market soundings are properly trained and understand the key risk and obligations arising from market soundings. This should include training in relation to assessing whether information is inside information as well as conducting the market sounding process;
- limit the number of employees who are not responsible for conducting the market sounding having access to the information, to those with a need to know basis for such access. If the DMP is a regulated firm, they should ensure that clear internal arrangements, with the

objective of preventing access to and unduly transmission of inside information, are established to ensure that inside information is not generally divulged to its other employees who are not responsible for conducting the sounding. However, and taking into account feedback, information may be shared with the other employees, for example with select private side employees, on a need to know basis;

- reduce as much as possible the time between the moment when inside information is disclosed to the employees conducting the market sounding (if distinct from the ones in contact with the issuer for the forecast transaction) and the moment when it becomes necessary to conduct market soundings with investors.

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

III.7 Cleansing

107. The DP proposed two possible options based on an agreement between DMPs and potential investors on a cleansing strategy, prior to a market sounding taking place. A large majority of respondents viewed both options as unworkable. As a consequence, the cleansing strategy option is not proposed anymore.

108. In order to bring as much clarity as possible to the potential investors as to the expected date at which the transaction is likely to become public, ESMA suggests this date should be part of the assessment conducted by the DMP prior to the sounding (see II.2.2) and also part of the information passed to potential investors in the course of the sounding (see II.5.2).

109. On the basis of the responses received to the DP, ESMA considers it is not possible to go beyond this point and to clarify what should happen, for example, in cases where a transaction is abandoned or postponed for the following reasons:

    - the information may remain inside information without the DMP having a clear view of whether the issuer intends to ultimately proceed with the transaction or not;
    - communicating an abandonment of the transaction to the potential investor may in itself be a communication of inside information;
    - the issuer may be reluctant to publicly communicate the postponement or abandonment of a transaction because it could reflect badly on them.

110. Because of the risks involved for the DMP to improperly cleanse the potential investor, it is not appropriate to provide an obligation for the DMPs to cleanse the potential investors at some precise point. In any case, potential investors will always have the option to decline a sounding if the risk is deemed too high.

IV. Accepted Market Practices

Introduction

111. Article 13(7) of MAR requires ESMA, in order to ensure consistent harmonisation of Article 13, to develop draft RTS specifying the criteria, the procedure and the requirements for establishing an accepted market practice (AMP) under paragraphs 2, 3 and 4 of article 13, and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance.

112. ESMA (CESR) has made a distinction between practices and activities carried out in financial markets. As ESMA (CESR) pointed out in the first set of CESR guidance and information on the common operation of MAD2003, market practice means the way an activity is handled and executed in the market. Activities would cover different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling. In the view of ESMA (CESR), activities were and are considered to be too broad to qualify for the status of accepted market practices.

113. According to Article 3 (1) (9) of MAR, accepted market practice means a specific market practice that is accepted by a competent authority of a given Member State in accordance with Article 13. Recital 42 of MAR states that an accepted market practice can only be established by the competent authority responsible for the market abuse supervision of the market concerned. Besides, a practice that is established by a competent authority in a particular market cannot be considered applicable to other markets unless the competent authorities of such other markets have accepted that practice.

114. ESMA understands that the word “specific” relates to conditions characterising an AMP that should typically find justifications on a national basis and thus should be better addressed by local competent authorities. ESMA is of the view that, when in conjunction with “market practices”, the word “specific” refers to practices in a particular market that are notably fitted for the purpose of, or intended to apply to, enhancing liquidity and efficiency that relate to a financial instrument.

115. Specific practices in conformity with the rules of a trading venue (regulated market, MTF or OTF) would be sufficient in itself to promote market integrity and therefore the question of giving the practice AMP status would not arise. For instance, if the trading venue allows entering “iceberg orders”, these orders should not be considered by themselves as manipulative. On the other hand, no specific practices in conformity with the rules of a trading venue should be considered by themselves as licit. For instance, in particular circumstances “iceberg orders” might be deemed manipulative.

116. ESMA considers it important to emphasize that Article 13(1) of MAR requires that any behaviour related to an AMP must be first of all carried out for legitimate reasons. It means that the concerned market practices correspond to activities which could theoretically fall under the definition of “market manipulation” but because they are performed for legitimate reasons and comply with a certain number of criteria, in the end are not deemed to constitute “market manipulation”. ESMA understands that the inapplicability of the prohibition of Article 15 of MAR benefits both the interested party and the person performing the AMP if the behaviour is carried out for legitimate reasons and in conformity with an AMP.

117. In view of both Recital 42 and Article 19 of MAR, ESMA recognises that the establishment of an AMP is the responsibility of individual national competent authorities and a practice which one competent authority considers as an AMP, may not be viewed as such by another, as the particular AMP relates to

a specific national market which operates in a specific context that may not be appropriate to other EU markets. This is due to the fact that the approval of an AMP is mainly a national responsibility, in which ESMA is granted a pivotal role in terms of assessing the compatibility of a proposed market practice with the legislative framework and monitoring the practical implications of AMPs.

IV.1 Approach regarding the extended scope of MAR

118. MAR has extended the scope of market abuse. Consequently, and in accordance with Article 2(1), AMPs may cover any financial instrument covered by MAR, including financial instruments admitted to trading on a RM, or for which a request for admission to trading on a RM has been made; financial instruments traded, admitted to trading or for which a request for admission to trading on a MTF has been made and financial instruments traded on an OTF.

119. Furthermore, the fact that Article 2(3) of MAR includes within its scope transactions that take place outside a trading venue (OTC transactions) sets forth the question of its compatibility with some of the AMPs criteria of article 13 (2). ESMA is of the view that it would be too restrictive to dismiss practices that may be performed outside a trading venue especially when this way of trading is put on equal footing as trading on trading venues in Articles 2(3) and 2(4) of MAR. Besides it would not be coherent with the purpose of Article 13 to exclude transactions that take place outside a trading venue (OTC trading); particularly in financial instruments which most of the trading is conducted OTC. However, ESMA is of the opinion that since Article 13(2)(a) requires the market practice to provide for a substantial level of transparency to the market, Competent Authorities will have to consider carefully whether this necessary criterion is met for OTC trading when they conduct the assessment of a particular market practice.

120. The vast majority of respondents to the DP agreed with ESMA`s approach taken in relation to OTC trading. Notably, respondents generally thought that OTC transactions should not be “per se” excluded from the scope of AMP but that they required a further assessment from competent authorities to determine if they meet the criterion of substantial transparency level. This assessment of the OTC applicability is necessary so that the established AMP will not raise any doubt in terms of contravening some of the criteria set out in Article 13 (2).

Q9: Do you agree with ESMA’s view on how to deal with OTC transactions?

IV.2 Status of firms that can perform an AMP

121. In relation to the status of firms that might perform an AMP, ESMA considered in the DP that only the following persons should be entitled to perform AMPs: persons who are in any case subject to supervisory duties from regulators, MiFID authorised persons, persons subject to prudential supervision in a Member State or permitted to carry out regulated activities (together, “supervised persons”). This way fairness, efficiency and market integrity would be fostered and the risks mentioned in Article 13 (2) (e) of MAR would be less likely to arise. In this respect, ESMA was of the view that when the beneficiary of an AMP delegates or instructs a third party to execute an AMP, it should do so to a supervised person. This requirement would allow sound surveillance and supervision activities by the competent authority of the practices that might be deemed manipulative.

122. There were mixed views in the responses to the DP in relation to this topic. On one hand, roughly half of the respondents thought that ESMA`s recommendation - that only supervised persons should perform AMPs- is overly restrictive. The other half agreed with the approach taken by ESMA as there might not be sufficient oversight if non- supervised persons are in the scope of AMP.

123. ESMA would like to flag that in many situations, services that can be provided while executing an AMP may be very close to, or overlap with, some of the investment services listed in Annex I Section A of Directive 2004/39/EC of the European Parliament. Furthermore, in some cases firms executing an AMP may hold interested party's money or assets in its accounts. Therefore, requiring the status of supervised person for the firms performing an AMP would be beneficial from a prudential supervision perspective and to adequately protect investors and market participants as well as interested party´s assets.

124. However, it should be noted that the MAR text does not indicate that such restriction to supervised persons can be imposed. Consequently, ESMA considers that setting a criterion of being a supervised person to perform an AMP would be advisable though leaving the corresponding competent authority with the discretion to assess whether a particular AMP warrants such a condition to be required.

125. ESMA would like also to clarify that this condition refers only to persons executing an AMP and not to the direct beneficiary of an AMP (e.g. issuers).

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

IV.3 Process and requirements conceived to establish maintain and terminate a market practice

126. Article 13(2) specifies the criteria that a competent authority should take into account when deciding to establish an AMP and Article 13(3) and (4) describe the role of ESMA in the assessment of the intended AMP that the competent authority has to notify prior to this taking effect.

127. ESMA understands that for the purpose of the mandate, to ensure consistent harmonisation, it should offer high level principles for the procedure and requirements for establishing an AMP so that these do not unnecessarily hinder the process. A too detailed set of provisions may achieve undesirable inflexibility.

128. Besides, ESMA thinks that though acceptance of an AMP is a matter of national discretion, it would be beneficial to achieve some degree of convergence in the way the process is handled internally.

IV.3.1 Criterion of adequate transparency (art. 13(2)(a))

129. ESMA proposes that the criterion encompasses various principles:

    a. Principle of adequate transparency "before starting the execution of an AMP" - any established AMP should have a substantial level of ex ante transparency. ESMA thinks that the following non exhaustive factors should be taken into account by competent authorities when assessing whether an AMP has an adequate level of transparency and

public disclosure. The more relevant aspects of the objective(s) and details of the practice to be carried out should be evaluated prior to the start of the AMP. These would include, as a way of illustration, the following elements; i) identities of the all the interested parties in the AMP (liquidity provider, financial intermediary, issuer, major shareholder) ii) identification of the financial instrument (s) on which the AMP would apply, iii) time-length of the AMP and conditions leading to interruption, suspension or cancellation, iv) identification of markets (trading venues on which the participants will intervene), v) if relevant, number of financial instruments and cash available in the accounts used to execute an AMP, vi) when necessary, reference to the maximum limits for cash and number of financial instruments.

b. Principle of adequate transparency "during the execution of an AMP". This would include, as a way of illustration, elements such as; i) details of trading activity –number of trades executed, aggregation of the volume traded, average size of the orders/transactions and average spreads quoted, prices and volumes of executed trades if considered necessary (ESMA is of the opinion view that when there are numerous transactions in a single session a daily aggregate figure should be provided), ii) any other relevant information related to the concerned AMP that guarantees the transparency of the practice during the execution of the AMP (for instance, resources available –cash, financial instruments-, identity of possible additional appointment or change of intermediaries executing the AMP, transfer of cash or financial instruments between the issuer`s and the intermediary`s accounts, etc.,.), iii) details about orders and transactions executed and a report on how the contract has been implemented, should be provided by interested parties to the competent authority according to a predefined timeframe.

c. Principle of adequate transparency "after the execution of an AMP". In the event of a termination or amendment of the AMP, the following elements should be disclosed; i) proper disclosure of the transactions made, ii) reasons or causes of the termination of the AMP, iii) any subsequent change of the above mentioned factors.

130. ESMA would like to note that the majority of respondents agreed with the proposed transparency requirements. Moreover, several contributors to the DP expressed the idea that transparency obligations should not be exempted unless a strong reason applies but that competent authorities should have the discretion to waive some disclosure obligation in certain circumstances. There were a few calls for more flexibility and proportionality on these transparency requirements. ESMA understands that the demand for flexibility in applying the criteria is already met in the current proposal.

IV.3.2 Criterion of practice ensuring a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand (art. 13(2)(b))

131. AMPs should not inhibit the interaction of the demand and supply of a financial instrument by limiting the opportunities for other market participants to respond to transactions. However, as Article 13 (2g) foresees, AMPs might in some instances be implemented to protect retail or other class of investors. Competent authorities should be in a position to explain why this specific protection is needed.

132. Competent authorities should consider the extent to which and where deemed necessary the requirement that persons performing an AMP must have the following non-exhaustive list of features: a) are members of a trading venue where the AMP is performed, b) comply with the general rules and

particular requirements imposed by the trading venue or market; c) maintain its records of orders and transactions relating to the AMP performed so that they can be easily distinguished from other trading activities; d) implement internal procedures with respect to the AMP that allow these practices to be immediately identified and the records readily available to the competent authority upon request; e) possess effective compliance and audit resources and a framework to enable it to monitor the AMP and are able to demonstrate at any time to the competent authority that its AMP meets the principles and criteria of the Regulation.

133. The market membership requirement attracted a lot of interest from the industry. Generally, most of the responses were of the view that for several reasons (appropriate supervision and compliance with corresponding rulebooks of trading venues) persons performing AMPs should be members of the trading venue in which the execution is carried out. However, a few responses pointed out that this option would be seen as too limitative.

134. ESMA reiterates that it thinks advisable for supervisory reasons and in order to strengthen compliance with market rules that persons executing AMPs are members of the market in which the AMP is carried out. However, ESMA proposal allows some flexibility to competent authority to consider or not the extent to which and where deemed necessary require that persons performing an AMP are not members of a trading venue where the AMP is executed.

135. ESMA envisages that a Principle of fairness and efficiency of the AMP should make feasible that competent authorities are in a position to get information on the impact of the established market practice against at least some main parameters. For illustrative purposes these could be the following ones: i) weighted average price of a single session, ii) daily closing price, iii) volume traded before and after establishing a market practice, iv) volatility of the financial instrument.

136. Competent authorities should be also be capable of evaluating, when necessary, the establishment of or compliance with acceptable trading condition rules like to the following ones; i) introduction of bid/offer prices (not higher or lower than the prevailing market price or last trade) or ii) price within price ranges, as well, when applicable of limits on positions (relative to several parameters, total issuance, average daily volume etc.).

137. There was unanimity in considering the factors offered by ESMA as appropriate to ensure a high degree of safeguards and proper interplay of the forces of supply and demand and general agreement that AMP may in some instances protect specific market participants (retail clients).

Principle of appropriate transaction recording and order entry

138. In the DP, ESMA consulted on the principle of appropriate transaction recording and order entry considering that the transactions coming from the performance of an AMP should be recorded, when appropriate, on special separate accounts and that orders introduced should be entered separately (individually) without aggregating orders from several clients. Generally, there was consensus among respondents on such a principle as it would deliver adequate audit trail to competent authority for checking compliance with the various criteria the AMP should met. Besides, it is fair to note that those respondents who thought that only MiFID firms should be allowed to perform AMPs indicated the usefulness of applying accordingly the same MiFID record-keeping requirements.

139. Therefore ESMA reiterates that it is desirable that orders coming from an AMP are introduced and entered separately (individually) without aggregating orders from several clients and that an appropriate transaction and order recording is an essential criterion to be assessed when accepting a

market practice. This will not only allow the AMP to be adequately monitored, supervised and potentially investigated, but will also assist in safeguarding the operations of the markets.

Principle of persons performing an AMP to act independently

140. ESMA thinks that, generally but notably in the case of equity liquidity contracts, the principle of independency of action of the firm executing the AMP should be recommended by competent authorities. In this respect the issuer or other interested party should not instruct the firm performing the AMP on how to conduct trading. However, in some instances competent authorities may accept AMPs where the actions of the firms executing the AMP may be influenced or informed by the issuer or other interested parties. Competent authorities should however be in a position to explain why those situations can be accepted. Persons performing an AMP should also avoid any conflict of interest with the issuer, interested parties or clients.

141. A majority of contributors to ESMA´s paper agreed with the principle for persons performing an AMP, acting independently and trying to avoid any conflict of interest. However, there were few responses claiming that in some instances competent authorities may accept AMPs where the actions of the firms executing the AMP may be influenced or informed by the issuer or other interested parties. ESMA thinks the content of the answers generally falls in the line expressed in its proposal.

IV.3.3 Criterion of the market practice to have a positive impact on market liquidity and efficiency (art. 13(2)(c))

142. ESMA thinks that liquidity should not be narrowly defined and that recognised AMPs should incorporate practices that generally have a positive impact on how quickly a financial instrument can be converted into cash. Therefore and for illustrative purposes AMPs might include practices that have a positive impact on at least some of the following variables: volume traded, number of orders in the order book (order depth), execution speed, spread, regularity of quotations etc.

143. Concerning market efficiency ESMA is of the opinion that this concept presents itself the more the market price is an unbiased and where there is a fair estimate of the true value of the financial instrument. Therefore, since the probability of finding inefficiencies in an financial instrument decreases as the ease of trading on it increases and since to be efficient a market (financial instrument) needs to be liquid traded, AMP should somehow foster some regularity of quotations and/or transactions and avoid large price fluctuations in cases where there is very limited supply or demand for a financial instrument.

144. ESMA recommends that competent authorities should therefore accept AMPs that include some of the following objectives (non-exhaustive list): i) promote regular trading of illiquid financial instruments, ii) minimize price fluctuations due to excessive spreads and limited supply or demand of a financial instrument without at the same time having a significant impact in the market, iii) avoid abusive squeezes, iv) provide quotes when there is the risk of not having counterparties for a trade, v) provide transparency of prices, facilitate the evaluation of fair and actual prices in markets where most trades are conducted outside a trading venue, f) facilitate orderly operations where a participant has a dominant position.

IV.3.4 Criterion of the practice taking into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice (art. 13(2)(d))

145. ESMA understands that competent authorities should consider the following aspects when assessing that an AMP takes into account the trading mechanism of the relevant market and enable market participants to react properly and in a timely manner to the new market situation created by that practice:

    a. Competent authorities should consider the extent to which AMPs do not alter price formation processes in a trading venue.

    b. Competent authorities should consider the extent to which an AMP facilitates the evaluation of prices and orders entered into the order book. In this respect, trades or orders (when not executed outside a trading venue) related to AMPs should be executed or introduced in accordance with the trading rules of the corresponding trading venue. AMPs whose trades or orders are effectively monitored in real time by the market operator is an important factor which competent authorities should consider when assessing the AMP.

    c. ESMA is of the view that AMP´s orders or transactions related to liquidity provisions should not be performed during periods when stabilisation and buy-back operations are carried out. However, ESMA accepts that this view might be challenged in certain extraordinary situations. Therefore, in the event that competent authorities allow AMPs to be performed during stabilisation or buy-back periods they should be in position to evidence why this coincidence in timeframe is advisable or necessary.

    d. Competent authorities should consider the extent to which information about an AMP is generally available and adequately disseminated. In this respect interested parties that disclose AMP`s information through trading platforms´ web pages should ensure this availability and dissemination. ESMA would recommend that AMPs foresee in those cases that there is simultaneous release of information through the interested parties` web pages as well.

    e. Competent authorities should also all evaluate the establishment of special trading periods or phases when an AMP`s activity should be limited or restrained, these could be: auction phases; takeovers, IPO`s, capital increases, secondary offerings, etc.,. ESMA deems necessary that Competent Authorities give special care to AMPs performed during any kind of auction (opening, closing etc.).

146. Respondents generally agreed with ESMA`s approach to this criteria and completely approved the need to establish an ex-ante list of situations when the AMP should be suspended or restricted. This may help to create more certainty and guidance around the practice. ESMA would like to draw attention to the fact that these lists would normally be elaborated by competent authorities when establishing or accepting a practice. ESMA thinks advisable to clarify that this question refers to the list of precise situations that should lead to the suspension or restriction of the benefit stated in Article 13(1), when a person is executing a particular AMP and does not relate to the general criteria for termination referred in Article 13(7).

IV.3.5 Criterion about the market practice not creating risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the whole Union (art.13(2)(e))

147. ESMA`s view is that competent authorities and ESMA should be in a position to verify, at all times, the effect that an established AMP might have in other trading venues or markets. ESMA thinks that an AMP should contain, in order not to create risks for the integrity of, directly or indirectly, related markets, in the relevant financial instrument within the whole Union, the following non-exhaustive and indicative list of features:

   a. Notification obligation to the competent authority. Information to the competent authority must be compulsory; transactions should be reported to the competent authority on a regular basis. Additionally, ESMA is of the view that whenever an AMP is established by a written contract between interested parties, they should provide a copy of the written form to the competent authority.

   b. Proportionality. Resources (cash or financial instruments) granted to relevant persons/liquidity provider/intermediary performing an AMP should be proportionate and commensurate with the objectives of the later. ESMA is of the view that, as a general rule, AMPs should not grant firms implementing it with resources that make possible hindering or reversing market trends or creating a ceiling or a floor in the price of the related financial instrument.

   c. Fair compensation for the services provided. To the extent possible, competent authorities should encourage fixed compensation for services provided within an AMP. ESMA is of the opinion that AMPs should try to avoid variable compensation related to volume carried out or number of trades executed.

   d. Adequate separation of assets. Competent Authorities should request that liquidity providers or investment firm executing the AMP ensure, where appropriate, an adequate separation of assets.

   e. Clear indication of duties taken on by the contracting parties in an AMP. Competent authorities should promote that established AMP provide a clear definition of duties shared by the parties.

   f. Adequate internal structure for firms performing an AMP. Any party in charge of trading according to the AMP should ensure that there is an organisational structure and adequate internal arrangements so that trading decisions related to the AMP remain confidential from other units within the firm and independent from orders to trade that it receives from clients, portfolio management or orders placed on its own account. ESMA acknowledges that there might be situations where such internal arrangements might not be strictly necessary (for instance where the interested party is a liquidity provider that works at the same time as a specialist on the stock in accordance with a contract with the trading venue). In these cases competent authorities should be then in a position to accept and explain why the absence of such internal arrangements is permissible.

   g. Adequate reporting between the interested party/issuer and the person executing the AMP. AMPs should determine the process by which the issuer and the financial

intermediary will send each other the necessary information so that each of them fulfills their respective legal or contractual obligations (if applicable).

h. Adequate exchange of information among regulators. With the aim of providing Competent Authorities with the possibility of verifying the effects that an AMP might have on other venues or jurisdictions, the acceptance process to establish a market practice should encourage an adequate exchange of views among regulators.

148. The vast majority of respondents supported the principles set out by ESMA.

IV.3.6 Criterion about the outcome of any investigation of the relevant market practice by any competent authority or by another authority, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, irrespective of whether it concerns the relevant market or directly or indirectly related markets within the Union (art. 13(2)(f))

149. ESMA thinks that Competent Authorities should verify and be in a position to justify that there has not been any adverse result of investigation or supervisory practice in the markets they supervise that might question the AMP to be accepted.

150. Competent Authorities should report to, or inform ESMA and other Competent Authorities about any significant breach of regulation resulting from any investigation involving an AMP. This communication, which is not intended to be a case by case one, would help Competent Authorities that have established similar AMPs to monitor them.

151. Any sanction resulting from an investigation involving an AMP should trigger an evaluation process from the Competent Authority that has accepted it, to check out its appropriateness. The evaluation process should be somehow similar to the one competent authorities perform when determining whether an established AMP should be maintained.

IV.3.7 Criterion about the structural characteristics of the relevant market, inter alia whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail- investors' participation in the relevant market (art. 13(2))

152. When AMPs concern financial instruments traded on markets where retail investors participation is relevant, competent authorities should carefully assess the impact the AMPs might have on retail investors´ interests.

153. Competent Authorities should notably evaluate the extent to which those AMPs increase the probability of retail investors to find counterparty with lawful objectives in low-liquidity financial instruments without adding risks to them.

IV.4 Procedure and requirements conceived to establish, maintain, terminate or modify the conditions for the acceptance of a market practice

154. The overriding principle required in Article 13(2) second paragraph is that only Competent Authorities are able to establish an AMP and evaluate, before presenting it to ESMA and other competent authorities for their appraisal, whether a practice fulfills the conditions set out in the article. Any AMP would be then being established on the basis of an assessment aimed at appraising the peculiarities of a national market.

155. Furthermore, conditions characterising an AMP typically find justifications on a national basis and thus should be better addressed by the competent authority of the jurisdiction where the AMP is going to be applicable, being related to particular circumstances. A practice that a competent authority considers is an AMP, may not viewed as such by another. The most widely accepted practice so far in the EU is that of "liquidity contracts". This practice has been accepted in France, The Netherlands, Portugal, Italy, Greece and Spain and is particularly essential to small and medium firms' financing.

156. ESMA would like to note that although not specifically mandated for and though acceptance of an AMP is a matter of national discretion, it considers advisable to offer some guidance on how a Competent Authority should initiate the process of establishing an AMP and the way the process should be handled internally. In this respect ESMA would mainly refer to the measures proposed in Article 3 paragraphs 1 to 3 of the Commission Directive 2004/72/EC that sets out the process that Competent Authorities must follow when establishing an AMP. As a way of illustration this process should at least contain a period of consultation, when appropriate, with other competent authorities and other relevant bodies such as representatives of issuers, market operators, financial services providers, consumers and other authorities. ESMA also considers it pertinent that Competent Authorities publicly disclose their decision regarding the establishment of an accepted market practice.

157. Besides, ESMA thinks that, it would also be beneficial to offer a common format so that Competent Authorities have a consistent tool to evaluate an accepted market practice that is used to notify ESMA. This common format would facilitate the communication process as well as ESMA`s assessments when issuing an opinion set out in Article 13(4), the compatibility of the AMP with Article 13(2) and regulatory standards adopted and the fact that it would not threaten the market confidence in the Union`s financial market .

158. In order to establish an AMP Competent Authorities should pursue the subsequent process.

IV.4.1 Notification of a new AMP

Competent Authorities when considering establishing an accepted market practice should notify ESMA and other CAs of its intention

159. The notification of intent should be sent by mail/email simultaneously to a contact point within ESMA and within the national competent authorities, through a pre-identified contact list to be set-up and regularly maintained by all competent authorities and ESMA. This should include a contact person(s) within the competent authority sending the notification: name, telephone (including mobile if any), email, title. Contact person should be able to assist ESMA or other competent authorities in dealing with technical questions on the proposed AMP within the CA.

160. In relation to the requirement set out in Article 13(3) of MAR to provide ESMA and other competent authorities of; a) the intention of establishing an AMP and b) details of the assessment, these should be made following the criteria set up in Article 13(2), ESMA thinks the assessment should be included in the content of the notification of the intention.

161. ESMA deems necessary to provide a common format for assessing AMP´s. The format could be somehow similar to the one provided in the first set of guidance and information on the common operation of the MAD (ref. CESR/04-505b). The format is provided in the Annex 1 of the Draft RTS in Annex IV to this CP.

Competent Authorities should provide details of the assessment made according to criteria laid down Article 13(2)

162. Accordingly, ESMA proposes that the content of the notification should include, in addition to the intention to establish an AMP, at least, the following elements:

a. identification of the Competent Authority that notifies the AMP;

b. an in-depth description of the practice and identification of the types of financial instrument and trading venues on which the AMP will be performed;

c. details of the assessment made according to Article 13(2), along with a Competent Authority's explanatory note about the compliance of the AMP to the criteria of Article 13(2);

d. reference to the last date for ESMA to publish its view in order for the competent authority to make a decision according to national legislation;

e. rationale for why the practice would constitute market manipulation.

Notification of intent should be made not less than 3 months before the AMP is intended to take effect.

163. In accordance with Article 13(3), notifications of intent to establish an AMP can be, in general, made any time, 3 calendar months in advance before they are intended to apply. In addition, in line with Article 13(11), second subparagraph of MAR, AMP´s established by CA´s before the entry into force of MAR, will need to go through the process described in Article 13(3), that is, they will need to be notified to ESMA as well. This means in practice that there is no grandfathering clause for AMP´s granted before the entry into effect of MAR.

164. ESMA thinks it convenient to clarify the process for notification to ESMA, set out in Article 13(11), of AMPs that have been established before the date of entry of MAR. In this sense, competent authorities of jurisdictions where AMPs have been established before the entry into force of MAR, should notify ESMA about their decision to continue this practice, within 3 months of the entry into force of the regulatory technical standards. These AMPs should continue to apply until ESMA has issued an opinion following the process of Article 13(4) second paragraph. In those cases, Competent Authorities should notify them to ESMA following the criteria, the procedure and the requirements for establishing an AMP specified in Article 13 paragraphs 2, 3 and 4.

ESMA should issue an opinion to the competent authority in question, within 2 months following the receipt of the notification and should publish it on its website

165. It should be noted that the 2 month period of Article 13(4) of MAR is a maximum period. In the event ESMA is able to issue a view of the notified AMP within this period, it should have the possibility of reserving the right to publish the opinion earlier.

166. After the reception of the notification of intent, ESMA or any ESMA member should be able to request a conference call and/or a period for submitting questions, if they consider it necessary, to express preliminary concerns or disagreement, if any, with the notifying authority's assessment. Submitting questions or comments as soon as possible would allow the notifying authority to gather further information and provide necessary additional clarifications.

167. If after the conference call or period for submitting questions no member of ESMA has expressed concerns/disagreement/ on the referred AMP, this will be circulated to the members of the Board of Supervisors for further consideration and/or endorsement. ESMAs opinion should be published on ESMAs website in accordance with Article 13(4).

168. Any fundamental or significant modification or change (in the sense that those could affect the basis or substance of the AMP or the assessment done) in any AMP established should be considered as a new AMP and thus follow the process of new AMP to be established.

169. ESMA´s opinion, even if it is negative, should be published in its website according to Article 8(1)(k) of Regulation 1095/2010 and according to the goals set out in Article 29 of the same regulation.

170. ESMA, once the AMP has been recognised by the national regulator and has not issue a negative view, should also publish the content of the AMP on its website in the standard ESMA format and provide a link to the national legal text.

IV.4.2 Review and termination of AMPs

171. As part of the supervisory approach competent authorities may determine whether an established AMP should be maintained. ESMA understands that for this purpose, MAR does not preclude competent authorities to review, at any time, any established AMP. However, Article 13(8) compels competent authorities to do the review, at least every two years.

172. The review should, at least, cover:

    a. an assessment of whether the initial conditions are still satisfied (compatibility of an AMP with the legislative framework, market practice, market conditions, etc.,

    b. an evaluation of whether there is any situation (modification of one or more of the conditions from acceptance etc.) deserving action from the competent authority (re-notification; re-assessment and consultation of ESMA and updated opinion).

173. ESMA would like to highlight that it understands Article 13(7) does not refer to CAs` exercise of supervisory activities leading to the specific surveillance or investigation cases of persons performing

an AMP or interested parties, with the purpose of verifying compliance with conditions of any particular AMP or with the criteria laid out in Article 13(2), but to the evaluation of the AMP itself.

174. ESMA proposes the following reasons for termination of an AMP (non-exhaustive list);

a. the activities of persons performing do not longer meet the conditions determined by the AMP or the criteria of Article 13 (2),

b. activities related to the AMP have not been executed for a significant period of time or object has become unfeasible ,

c. The competent authority understands the continuation of an AMP might adversely affect the integrity or efficiency of the markets under its supervision ,

d. The competent authority has good reasons to suspect that acts contrary to the provision of MAR are being of have been carried out by any interested party according to the AMP,

e. situation falls within any general termination provision included in the AMP itself.

175. ESMA thinks helpful to make clear that general termination clauses of an AMP mentioned above should not be understood as particular causes of temporary suspension or restriction or as specific termination provisions stipulated in a contract signed by between interested parties and persons executing AMPs.

176. Competent Authorities should communicate simultaneously to ESMA and all CAs, following the provisions offered before, any termination of an AMP. ESMA should then remove publication of the terminated AMP from its web page. Terminated AMPs might subsequently be established again by competent authorities by initiating the establishment process.

V. Suspicious transaction and order reporting

Introduction

177. Article 16 of MAR relates to the prevention and detection of market abuse. Paragraph (1) of this article requires operators of trading venues to establish and maintain effective arrangements, systems and procedures for preventing and detecting market abuse and attempted market abuse. It also imposes the obligation on venues to report suspicious transactions and orders to competent authorities without delay. It should be noted that these obligations do not differentiate between RMs, MTFs or OTFs.

178. Article 16(2) imposes obligations on persons professionally arranging or executing transactions to establish and maintain effective arrangements, systems and procedures to detect suspicious transactions and orders and to report them to competent authorities without delay.

179. Article 16(3) requires ESMA to develop draft RTS to determine appropriate arrangements, systems and procedures as well as notification templates to be used by persons to comply with the requirements of Article 16(1) and 16(2).

180. ESMA (CESR) has previously addressed the subject of suspicious transactions reports (STRs) in the first and third sets of CESR guidance and information on the common operation of MAD, respectively CESR/04-505b and CESR/09-219. This includes advice on the method of reporting suspicious transactions and the content and reporting format for STRs. ESMA drew upon this previous work when developing the proposals in relation to suspicious transactions and orders reports (STORs) that were set out in the DP published in November 2013.

181. In light of the responses received to the DP, and with continuing regard to the above referenced CESR guidance, this section of the CP sets out ESMA's position on the draft technical standards to be developed under Article 16 of MAR.

V.1 The reporting obligations

V.1.1 Attempted market abuse (including reporting of orders)

182. By definition (see Article 16(1) and 16(2)), it will be necessary to report suspicious orders whether or not they have been executed (e.g. where a firm has refused to place an order for a client), as well as transactions that might constitute market abuse or attempted market abuse. Taking on board comments to the DP, ESMA would draw attention to the fact that persons professionally arranging or executing a transaction (Article 16(2)) are required to submit such reports when there is reasonable suspicion of market abuse or attempted market abuse.

183. A small number of respondents expressed concern that it would be difficult to implement the proposals in the OTC space. MAR dictates however that the obligation to submit STORs does extend to OTC derivatives trading, where the underlying instrument is traded on a RM, a MTF or an OTF and also applies irrespective of the trading capacity in which the order is entered or the transaction is executed (i.e. on own account, on behalf of a client), and irrespective of the types of clients concerned (e.g. institutional, professional, retail).

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

V.1.2 Clarification of trading venues in MiFID 2

184. Article 16(1) of MAR requires operators of trading venues to report orders and transactions that could constitute market abuse or attempted market abuse. For this purpose, they need to establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing market manipulation and attempted insider dealing and market manipulation, in accordance with Article 31 and 54 of MiFID II. As it is evident that trading venues will not necessarily pick up the same range of signals of market abuse as intermediaries, it is also reasonable to expect that their obligation to submit STORs will be triggered in different ways and at different times. Nevertheless, all trading venues ultimately in the scope are under the same obligation with respect to Article 16(1).

V.2 Level of suspicion required

V.2.1 Timing of STORs

185. A large number of respondents to the DP expressed concern about the two week timeframe in which submission of a report would be expected. Clarification was requested as to whether this is two weeks from the time of the suspected breach (e.g. the actual transaction), or two weeks from the point at which reasonable suspicion is formed. A small number of respondents were of the view that regardless of the start point, two weeks is not enough time to submit a report and a further few warned that the requirement to submit a report within two weeks could lead to over-reporting and result in lower quality submissions.

186. Article 16(1) and (2) state that reports should be made “without delay”. In light of the feedback received, ESMA would clarify that reports should be submitted as soon as possible once reasonable suspicion is formed, and that generally, this should be within two weeks of the suspected breach. ESMA recognises, however, that occasionally a suspicious transaction or order may only be detected sometime after it has actually occurred. In such cases, ESMA would expect the reporting person to be able to justify, if requested, the delay according to the specific circumstances of the case. ESMA would make clear that entities should not only notify transactions and orders which they consider suspicious at the time of the transaction, but also transactions and orders which become suspicious retrospectively in the light of subsequent events or information (such as new orders and/or transactions by the same person). ESMA does not believe therefore that these proposals will lead to over-reporting and the submission of lower quality reports, or that two weeks is not generally enough time for submission given that the requirement to submit an STOR applies when reasonable suspicion of market abusive behaviour has been formed. At this point, preliminary analysis will have been conducted and it will, in most instances, be a case of the reporting entity conveying the required information within the STOR template.

187. Responses received in relation to the “batching” of reports - waiting for a sufficient number of suspicious orders and/or transactions to justify a submission, were in agreement with ESMA’s view that this practice is inappropriate.

188. An entity who has already submitted a STOR can subsequently become aware, for instance through internal enquiries it has pursued, of additional information that could be relevant to supplement the already submitted STOR. Competent authorities are open to receiving such additional information. If

there is a doubt on this question, the entities can discuss informally with competent authorities whether a particular order or transaction should be reported.

189. In order to facilitate timely submission, STORs can be reported by telephone as long as this is followed up by written confirmation in the appropriate form.

Q12: Do you agree with ESMA's clarification on the timing of STOR reporting?

V.2.2 Partial view

190. Entities may not be in a position to determine whether or not transactions or orders are suspicious, for instance if they know that they are just one of a number of brokers a client uses and, as a result, they are unable to see the full trading picture. A clear majority of respondents agreed with ESMA's analysis that entities should generally base their decision on what they see and/or know.

191. In the DP, ESMA went on to note that entities should not make unreasonable presumption unless there is good reason to do so. A small number of respondents commented that unreasonable presumptions should not be made. In light of these comments ESMA proposes that entities should avoid presumptions about other activity. However, entities have to take into consideration all information available to them, such as public disclosure of other trades. Also, there might be instances where there are good reasons or certain indications for suspecting something which the entity does not know for sure. It should be clearly stated in the STOR if this is the case.

192. An important principle underlying this point is that the responsibility for determining whether to make STORs rests solely with the entity under the reporting obligation. Taking into account feedback to the DP, ESMA would clarify that in the situation where a chain of market participants are involved in a transaction, each entity has its own obligation to report suspicions. Reporting by one entity in the chain does not absolve another of its duty to report its own suspicions in relation to the same or connected transactions or orders.

V.3 Detection

V.3.1 Proactive surveillance

193. Paragraphs (1) and (2) of article 16 MAR impose an obligation to establish and maintain effective arrangements, systems and procedures to be able to detect suspicious orders and transactions. This duty necessarily requires a minimum level of granularity and detail in the information being reported, and effective record-keeping (audit trail relating to the whole activity).

V.3.2 Automated surveillance systems

194. In the DP ESMA asked whether firms should establish automated surveillance systems, explaining that the correct approach will most likely depend on the size and nature of the entity concerned as well as the particular activity it performs.

195. Provided that the level of monitoring is appropriate for and proportionate to the size and nature of the business of a particular entity, then ESMA would consider that entity to have complied with the obligation in Article 16(2) to establish and maintain effective arrangements, systems and procedures to

detect suspicious orders and transactions. However, as explained in the DP, once an entity starts to undertake a certain level of activity, particularly if in that business there is little or no contact with the front office who might otherwise detect a potentially suspicious order or transaction; it will be very difficult to meet this requirement without an automated system.

196. There was a high degree of divergence among respondents as to whether entities should be required to establish automated surveillance systems, with a large number of respondents concerned that this would be disproportionate. ESMA would like to take this opportunity to reiterate that, for a business with a limited dimension, it could be appropriate for an automated system to be 'off-the shelf' and relatively simple, whereas, for more complex and sophisticated entities, a more elaborate and bespoke system would be necessary to monitor effectively. In any event, the automated system should cover the full range of trading activities undertaken by the firm and, if required, the firm must be able to explain to their competent authority how they manage the output (alerts) from their chosen system and why this level of automation is the appropriate one for their business.

197. It was highlighted by a small number of respondents that human analysis also plays an important role in the detection of orders and transactions that could be market abusive. The most effective form of surveillance will likely be an amalgam of both automated and human forms.

198. There was overwhelming agreement that trading venues should be required to have an IT system which allows ex post reading and analysis of the order book. ESMA therefore proposes that the systems that trading venues should have in place for the purpose of market abuse detection under Article 16(1) should include an IT system to read and analyse order book data on an ex post basis. This would be of particular relevance in an automated trading environment to analyse the activity and dynamics of a trading session, for instance by using a slow motion replaying tool.

Q13: Do you agree with ESMA's position on automated surveillance?

V.3.3 Detection: other issues, such as training and culture

199. Effective monitoring involves much more than just a surveillance system and must include comprehensive training and a culture within an entity that is genuinely dedicated to monitoring and reporting suspicions of market abuse or attempted market abuse. There was overwhelming agreement that training plays a key role in staff's ability to detect suspicious behaviour.

200. However, whilst training is essential and plays an important role in increasing the number of qualitative STORs, it must be underpinned by appropriate monitoring and detection systems. Without this, it is much more difficult for training to produce the desired outcome. Experience of some competent authorities is that some of the very best STRs come from the front office staff.

201. In response to feedback on who is responsible for reporting any suspected breach, ESMA would clarify that where entities do have automated surveillance systems and a dedicated surveillance team (who may well be middle or back office), the duty for detection lies with the individual who has a suspicion, wherever in the structure of an entity he/she may sit. This is notwithstanding the fact that the ultimate legal responsibility for reporting to the competent authority lies with the operator of the trading venue or any person professionally arranging or executing transactions, whether that person is a legal entity or a natural person.

202. Entities should ensure that effective training in the detection of market abusive behaviour is provided to all relevant staff. Given the new offence of attempted manipulation, training programmes will need to reflect the need to ensure that staff, and in particular front office staff, are mindful of behaviours which could constitute attempted market abuse. Accordingly, it will also be essential that the training surrounding the effective arrangements, systems and procedures is comprehensive and robust, so that all staff is confident of their ability to detect suspicious orders and transactions.

203. Feedback to the DP suggested it would be inappropriate for ESMA to be specific with regards to training and adopt a one size fits all approach due to the variety of activities and business structures. ESMA confirms that it does not deem it appropriate to provide granular details of training programme's content or structure, as further respondents highlighted, effective training will need to be tailored to the business of the firm. It should have regard to, but not be limited to, the firm's size, structure, systems and activities.

V.4 Content of STORs

204. A clear majority of respondents either fully agreed with the content and layout of the template set out in the DP, or partially agreed – providing specific suggestions in relation to certain aspects. An STOR should provide clearly presented and accurate information, sufficient to enable a competent authority to promptly assess the validity of the suspicion and to initiate a follow-up investigation as appropriate. As all or most well-founded STORs will result in such follow-up investigations, as previously mentioned, the priority is to highlight and report the key points of a suspicion without delay.

205. Where STORs relate to the extended provisions of MAR - e.g. reports of attempted market abuse or transactions and orders where complex derivatives are involved - clarity in the narrative section of the STOR form for describing the suspected breach or attempted breach is paramount. Feedback to the DP suggested a blank field or free text box for notes, should be included in the template. Accordingly, ESMA proposes for the fields in the STOR to allow for the insertion of free-text, such that entities can provide as much relevant information as possible.

206. A small number of respondents called for flexibility in the template, noting that information for all of the fields is not always available and requesting that entities should be allowed to leave certain sections blank where this is the case. Firms should complete as many fields in the report as possible, insofar as they have, or at reasonable effort can obtain, that information. A minority of respondents were of the opinion that personal data such as individual names and positions should not be included within the form and that the competent authority can request this at a later date if necessary. ESMA maintains that such data is required in order for competent authorities to be able to determine what follow-up enquiries or investigation they may need to make. Where an investigation commences, time is of the essence.

207. Taking the DP responses into account, and building on existing formats, content and guidelines, ESMA believes that new harmonised STORs should be structured in accordance with the template presented in the Annex I of the draft technical standards presented in Annex VI of this CP.

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

V.5 STOR template

208. According to Article 16(3) of MAR, ESMA is asked to develop RTS on notification templates to be used by persons subject to the reporting obligation.

209. There was broad consensus among the respondents to the DP that a common template would be useful. A large majority of respondents also agreed that the template should be electronic in format.

210. ESMA remains of the view that a single harmonised reporting form should be used across the EU as this will ease compliance in markets that are becoming increasingly cross-border in nature, and also facilitate the sharing of STORs between competent authorities in cross-border investigations. Besides, ESMA believes that the STOR form should be in electronic format, and subject to adequate levels of security.

Q15: Do you have any additional views on templates?

V.6 Record-keeping

211. There was broad agreement with ESMA's proposal that all entities should keep a record of STORs actually submitted for at least five years. ESMA also asked in the DP whether entities should be required to retain records of "potentially suspicious transactions" which have been examined but which have not been reported to the competent authorities - i.e. "near-misses". There was a high degree of divergence in views on this aspect, with a number of respondents requesting clarification of what constitutes a near-miss.

212. One respondent noted that it would be difficult to justify the retention of such records to the client and to the public. ESMA is of the view that this is justified as access to records of near-misses is a very effective way to assess compliance with the STOR for entities and for competent authorities. Improving the consistency and completeness of these records can only help this supervision. Furthermore near-misses can serve as a useful tool for investigative and enforcement purposes.

213. In a world where the reporting obligation will encompass a wider range of instruments and behaviours, subjective judgments made by entities as to whether a suspicion exists will play an even greater role. It can be argued that competent authorities' access to records of these judgments has also become more important.

214. ESMA recognises that there is no formal definition of a "near-miss". Nevertheless, ESMA's view is that it is not particularly difficult for an entity to identify at the time those cases where it has considered seriously whether to submit a report but has decided against doing so. In such circumstances, the entity should keep a record of the transaction or order that gave rise to this consideration and, in summary form, its own reasons for not making a report to the CA. In ESMA's view, this is arguably part of the activity audit trail required under the proactive surveillance duty upon entities (please see section on "Automated surveillance").

215. Entities submitting STORs and competent authorities to whom they are submitted should ensure that records of reports are kept confidential.

Q16: Do you have any views on ESMA's clarification regarding "near misses"?

VI. Technical means for public disclosure of inside information and delays

Introduction

216. Article 17 of MAR requires issuers of financial instruments to publicly disclose inside information as soon as possible. As specified in Article 17(1) paragraph 3, this requirement applies only to issuers who requested/approved admission to trading or who have approved trading of their financial instrument on a trading venue. The inside information to disclose should directly relate to the concerned issuer. When an inside information is disclosed to a third party in the normal course of the exercise of an employment, profession or duty and unless that third party is bound by duties of confidentiality, the issuer is required to (i) simultaneously disclose the inside information to the public in the case of intentional disclosure, or (ii) promptly disclose the information in the case of non-intentional disclosure. By exception to the immediate public disclosure requirement, an issuer, under its own responsibility, may delay the public disclosure of inside information provided that certain specific and cumulative conditions are fulfilled.

217. The public disclosure requirement and the possibility of delaying disclosure were already included in Article 6(1) to (3) of MAD. However, Article 17 of MAR is amending and complementing the current MAD in a number of areas of relevance for the delay in public disclosure:

- Expansion of the scope to issuers of financial instruments traded only on a MTF or an OTF, provided that these issuers have requested admission to trading on a MTF or have approved trading on a MTF or an OTF.
- Expansion of the scope to emission allowances market participants (EAMP), unless they are exempted on the basis of thresholds to be determined in an EU Commission delegated act (Article 17(2)).
- Incorporation in MAR of the manner in which the issuer should disclose inside information and of the requirement to post for 5 years that information on its website (Article 17 (1)).
- Introduction of the possibility for SME growth markets issuers to post inside information on the trading venue website instead of their own website (Article 17(9)).
- Introduction of an additional possibility of delaying public disclosure, under certain conditions, in order to preserve the stability of the financial system (Article 17(5)).
- Introduction of notification requirements to the competent authority in case of delay in disclosure of inside information (Articles 17(4) and 17(5)).

218. With respect to delaying disclosure, MAR introduces two distinctive notification duties, depending on which type of delays applies:

- An ex-post notification to the competent authority in the general cases of delays (Article 17(4)), covering both issuers of financial instruments and EAMP, so called “general” delays.
- A notification for prior consent by the competent authority for delays to preserve the stability of the financial system (Article 17(5)). This ex-ante notification could be used only by issuers of financial instruments which are credit institutions or financial institutions.

219. Article 17(10) mandates ESMA to develop implementing technical standards specifying:

a. The technical means for appropriate public disclosure of inside information by issuers, including SMEs growth market issuers, and by EAMP; and

b. The technical means for delaying the public disclosure of inside information under Articles 17(4) and 17(5).

220. Finally, ESMA would like to recall that the issuers covered by the provisions in Article 17 are the issuers of financial instruments as defined under Article 3(21) of MAR, and this definition could not be restricted to issuers of securities under the Prospectus Directive framework, as suggested by some in response to the DP.

VI.1 Means for appropriate disclosure of inside information

221. Article 17(1) requires issuers of a financial instrument to publicly disclose as soon as possible inside information in a manner which enables fast access and complete, correct and timely assessment of the information by the public. It should be noted that these criteria are the ones currently set out in Directive 2003/124/EC implementing MAD. Where applicable, information should also be disclosed in the officially appointed mechanism (OAM) under the Transparency directive No 2004/109/EC (TD). The disclosed inside information should also be posted on the issuer's website and maintained there for a minimum of 5 years.

222. Article 17(9) intends to limit the burden for SME growth market issuers by allowing the posting of inside information on the SME growth market trading venue instead of the issuers' own websites. However, this does not relieve these issuers from the obligation to publicly disclose inside information in accordance with the manner specified in Article 17(1) that should enable fast access, complete, correct and timely assessment by the public.

223. ESMA understands that the requirement in Article 17(1) to publish the information in the OAM (the national mechanism for centrally storing Regulated Information under the TD) "where applicable" means that only issuers who have requested or approved admission of their financial instruments to trading on a Regulated Market (RM), the only type of trading venue in scope for the TD, are required to do so. Consequently, this requirement does not apply to the issuers of financial instruments only traded on MTFs or OTFs, although this does not prevent such issuers to also use the OAM as a central storage mechanism.

224. ESMA is also empowered to detail the public, effective and timely disclosure of inside information by an EAMP (Article 17(2)), as the final text of MAR explicitly empowers ESMA to draft technical standards in this matter (Article 17(10)(a)).

225. In addition, Article 17(8) requires issuers or EAMPs to make an effective and complete public disclosure of the inside information disclosed to a third party not owing duties of confidentiality. Such public disclosure should be made simultaneously with the transmission to the third party in the case of an intentional disclosure, and promptly thereafter in the case of non-intentional disclosure.

226. In this respect, ESMA considers that the way and manner in which the inside information transmitted to a third party should be made public, should not be different from any other disclosure of inside information pursuant to Article 17(1). It would be inefficient and confusing for issuers and EAMPs to adopt a different approach for public disclosure of information transmitted to a third party.

VI.1.1 Channels for appropriate public disclosure

227. Article 2 of the Commission Directive 2003/124/EC implementing MAD already specifies the means and time limit for public disclosure of inside information.

228. It notably refers to Articles 102(1) (publication in a newspaper) and 103 (language) of Directive 2001/34/EC (admission of securities to official stock exchange listing and information to be published). These articles were repealed since the implementation of the Transparency Directive No 2004/109/EC (TD).

229. Under the TD, inside information is Regulated Information and should therefore be disclosed to the public in accordance with the provisions set out in Article 21(1) of the TD and in Article 12 of its implementing directive No 2007/14/EC. In short, information should be disclosed by the issuer in a non-discriminatory manner, through the use of a media allowing dissemination throughout the EU and whose operators should not necessarily be located in the territory of the Home Member State (MS) of the issuer. The implementing directive further specified minimum standards for the dissemination of regulated information that relate to:

- Dissemination to as wide as possible public and almost simultaneously across MSs (synchronisation);
- Communication in unedited full text to the concerned media;
- Security of the communication and liability in case of systemic errors or shortcoming in the concerned media;
- Information the issuer should be in position to provide upon request of the competent authority in relation to the communication to the media (e.g. date and time, security information; medium of communication; embargo information…).

230. Article 20 of TD specifies the language in which the regulated information should be disclosed. In particular, TD Article 20 dictates the following:

   a. Where securities are admitted in a RM only in the home MS: language accepted by the competent authority in the home MS; home MS may allow the issuer to choose between (i) language accepted by the competent authority in the home MS, or (ii) a "language customary in the sphere of international finance".

   b. Where securities are admitted on a RM both in the home MS and in one or more host MS(s): same as a), plus a language accepted by competent authority/ies of the host MS(s), or a "language customary in the sphere of international finance", at the choice of the issuer.

   c. Where securities are admitted on a RM in one or more host MS(s), but not in the home MS: a language accepted by competent authority/ies of the host MS(s), or "language customary in the sphere of international finance", at the choice of the issuer.

   d. By way of derogation of the above points, where securities whose denomination per units amounts to at least EUR 50,000 are admitted to trading on a RM in one or more MS(s): language accepted by the home and the host competent authorities or a "language customary in the sphere of international finance", at the choice of the issuer.

231. It should be noted that the TD only covers securities admitted to trading on a RM, whereas MAR's scope covers financial instruments (as defined in Article 3(1)), also when they are only traded on MTFs

and OTFs. In order to specify the means for appropriate disclosure by issuers of MTF/OTF instruments, ESMA considers that similar requirements and standards than those set out in the TD should apply, including the language of the disclosure. In practice, this implies that inside information about the MTF/OTF issuers should be disclosed as if it was regulated information under the TD. These issuers should use the same mechanisms and channels as the one set for implementing disclosure under the TD in the MSs. This would thus allow capitalising on existing and rather reliable channels, already known by the market and the various actors in the dissemination of the information, and would avoid important resources being allocated to developing new and particular mechanisms for disclosure by MTF/OTF issuers.

232. In addition, such an approach has the merit of certainty both for the issuer (when the information is disseminated in such a way, the issuer is ensured that the disclosure has been done properly) and for the public which knows thus the channels through which inside information has to be disclosed.

233. There was vast support by the respondents to the DP on the approach in which the requirements set out in the TD for the dissemination of information will apply to all issuers of RM/MTF/OTF financial instruments.

234. ESMA considers that information made public directly by the issuer by using only other ways of publication (e.g. newspapers, television), including the posting on a website (issuers website or market operator's website for SME issuers) and mobile or web-based social media (e.g. blogs, social networking sites), would not meet the requirements of proper dissemination of inside information, and thus of appropriate public disclosure. The mere availability of information, which means that investors must actively seek it out, is therefore not sufficient notably for ensuring fast access to the inside information. Accordingly, dissemination should involve the active distribution of information from the issuers to the media, with a view to reaching investors.

235. Article 19 of TD requires an issuer to simultaneously file to the Home competent authority of the issuer the regulated information they disclose, information that the competent authority may publish. However, the TD offers the possibility to exempt the issuer from such filing of regulated information when the information is to be disclosed under Article 6 of MAD.

236. Considering that under the TD the filing of inside information to the competent authority can be exempted, and that the publication of inside information by the competent authority is optional, ESMA is of the opinion that the publication of inside information on the competent authority's internet site only, should not be considered as a means to ensure appropriate disclosure of inside information, unless the competent authority´s means for disclosure of inside information meet the requirements of proper dissemination and of appropriate public disclosure set out in the TD.

237. Some respondents to the DP asked for lighter requirements to be applicable for certain types of financial instruments traded only on a MTF/OTF, and they also criticised an alleged "transposition" of the TD requirements to MTF and OTF. First, lighter requirements for financial instrument traded only on MTF/OTF are not included in MAR level 1, and thus cannot be introduced in the technical standards. Second, ESMA is not proposing to apply the full TD regime to MTF/OTF, but just to use the same dissemination mechanism of inside information as the one identified under the TD: OAM, being a storage (and not a disclosure) mechanism, would not be required for issuers whose financial instruments are traded only on a MTF/OTF.

238. In the context of appropriate means of inside information disclosure to be used by EAMP (Article 17(2)), ESMA considers that the same approach as the one proposed for issuers of financial instruments should be followed. Thus the same requirements and standards should apply with the exception of the language. Considering that the emission allowance market is a rather integrated market with a number of global players, including financial and non-financial entities, ESMA considers that the language to be used for the appropriate dissemination of inside information to the public should be a language accepted by the relevant competent authority for notification purposes, plus a "language customary in the sphere of international finance", or alternatively only a "language customary in the sphere of international finance" (this approach is consistent with the one included in the ACER's Guidance on REMIT[5], though the Guidance explicitly refers to English, in paragraph 7.2.2).

239. In relation to the application of the appropriate disclosure requirement to EAMP, an issue was raised by a number of commentators, who asked for clarification on the interaction between the REMIT regime (Regulation No. 1227/2011[6]) and the upcoming MAR regime. Some of the respondents suggested that disclosure according to the REMIT should discharge of any obligation under MAR and vice versa. This issue was not covered in the DP due to a lack of explicit empowerment in the MAR provisional text available at the time.

240. However, the final text of the empowerment under Article 17(10) clearly refers to EAMP as well, and therefore the issue has been included in this Consultation Paper. Besides, recital 51 of MAR states: "*Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011 [*REMIT*], the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content*".

241. The following is a summary of the requirements under REMIT for the channels of public disclosure of inside information in order to gauge the potential overlap with the proposed MAR L2 regime. This comparative analysis does not affect in any way the obligations under REMIT, and has the only scope of identifying in which circumstances the requirements under the two regimes can coincide.

242. Details on the process of dissemination of inside information under REMIT are included in the ACER (non-binding) Guidance on the application of REMIT[7]. In particular, the ACER Guidance proposes a dual approach for disclosure of inside information:

    a. if platforms for the disclosure of inside information exist, for instance operated by Transmission System Operators (e.g. RTE-UFE transparency initiative) or energy exchanges (e.g. Nord Pool Spot, EEX Transparency platform etc.), or if transparency platforms exist in accordance with Regulations (EC) No 714/2009[8], (EC) No 715/2009[9], including guidelines and network codes adopted pursuant to those Regulations, including

[5] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (3rd edition): http://www.acer.europa.eu/remit/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf

[6] Regulation on wholesale energy market integrity and transparency: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF

[7] See previous footnote.

[8] Regulation on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF

[9] Regulation on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0036:0054:en:PDF

Commission Regulation (EC) No 543/2013[10], market participants should use such platforms, if not otherwise specified in relevant rules and regulations, or by the competent National Regulatory Authority (NRA), i.e. an electricity and/or natural gas national authority.

b. if adequate platforms do not yet exist or simultaneously to a publication through a platform for the disclosure of inside information, market participants may, at least for an interim period and unless otherwise specified, publish inside information which they possess on their own website. However, where such a disclosure mechanism is chosen, it is important that disclosure of inside information enhances the level of transparency across the EU and does not distort the dissemination of information. Information should therefore be disclosed in a manner ensuring that it is capable of being disseminated to as wide a public as possible, including the media. Social media should only be used as additional sources not replacing website publications.

243. The following minimum IT requirements, defined in ACER Guidance chapter 7.2.2, should be fulfilled both by the platforms (point a. above) and market participants' own websites (point 2. above), in order to ensure effective disclosure of inside information:

a. Inside information should be disclosed to the public on a non-discriminatory basis and free of charge;

b. Inside information should be made available via an RSS feed specific for the disclosure of inside information, allowing easy and fast access by the public;

c. Inside information should be kept available for the public for a period of at least 2 years;

d. The information should be published in the official language(s) of the relevant Member State and in English or in English only;

e. Minimal unavailability consistent with market expectations should be ensured; and

f. Effective administrative arrangements designed to prevent conflicts of interest with market participants should be ensured (applicable only for platforms).

244. In respect to the first approach, Article 4(4) of REMIT level 1 considers that disclosure through such platforms constitutes a "simultaneous, complete and effective public disclosure". Only those platforms meeting the requirements foreseen under MAR, and further specified in the technical standards on the technical means for appropriate public disclosure, would be considered as appropriate dissemination channels under MAR. In these cases a single disclosure of inside information would satisfy both regimes, REMIT and MAR, at the same time. A crucial characteristic that a channel of disclosure under MAR must have, is the ability to actively distribute the (inside) information with the goal to reach all the interested parties. As already said, the mere availability of information on a website, implying that investors must actively seek it out, is not sufficient for ensuring effective disclosure of the inside information. Those platforms used under REMIT that are able to disseminate information in such a manner, would clearly be considered appropriate also under the MAR regime.

[10] Regulation on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:163:0001:0012:EN:PDF

245. The second approach, i.e. the use of the market participants' own website, is not mentioned in REMIT level 1 and it is introduced, as an interim solution, by the non-binding ACER guidance. The use of market participants' own website cannot be considered proper public disclosure under MAR. When this approach is used by an EAMP in scope both under REMIT and MAR, it would have to be complemented with the use of a channel of appropriate disclosure of inside information which meets the characteristics required under MAR (as described in this section of the consultation paper).

246. The rationale behind this assessment takes into account two factors: firstly MAR requirements need to be fulfilled by all EAMPs, even when they are subject to REMIT; secondly, in order to avoid duplication, EAMPs should be allowed to use a single channel for disclosure of inside information that is considered as appropriate under both regimes. That is why, where possible and for their own benefit, EAMPs are encouraged to use a channel of disclosure satisfying both frameworks at the same time.

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

VI.1.2 Posting on the issuer's website

247. Under Article 17(1) of MAR, an issuer of financial instruments should post on its website all inside information it is required to disclose and should maintain these information on the website at least for 5 years. It should be noted that EAMP are not subject to this requirement.

248. With respect to SME Growth markets issuers, under Article 17(9) of MAR, the requirement for the issuer to post on its own website is waived when inside information is published on the website of the SME Growth market operator provided that:

- The issuer has decided to post the disclosed inside information on the market operator's website where its instruments are traded, and
- The market operator is providing this facility for issuers on its market.

249. Although Article 17(9) does not explicitly refer to a minimum of five years maintenance of the inside information posted, it is assumed that inside information should remain published on the SME Growth market operator's website for at least five years.

250. The same article refers to the SME Growth market operator's website only, thus websites which are not the ones of the trading venues (e.g. industry association's website, as suggested by a few respondents to the DP) cannot be used to satisfy this requirement.

251. As previously mentioned, posting inside information on a website alone, is not a sufficient means for ensuring appropriate disclosure. Therefore, the posting of inside information on the website of the issuer or the SME Growth market operator, where relevant, should occur without delay, once the inside information has been appropriately disclosed. It may be argued that posting on the website could occur simultaneously to the public disclosure but this would increase the risk of unintentional disclosure on the website before the appropriate disclosure.

252. ESMA considers that the website where inside information is posted by the issuer in fulfilment of Article 17(1) and 17(9) should have the technical features to allow the following:

    a. The access to the website should be non-discriminatory and free of charge.

    b. Inside information should be easy to find: located in an easily identifiable and dedicated section of the website (e.g. "investors relations" section), that is immediately accessible with no ambiguity regarding its content, that will include only the inside information disclosed by the issuer without been mixed with marketing communications of that issuer.

    c. Considering the five year record keeping, previously disclosed inside information should be easy to find, for instance via an archive-type of tool; disclosed inside information should notably be clearly dated.

253. The DP paragraph 247 referred to Article 2(3) of the Commission Directive 2003/124/EC implementing MAD, that includes a requirement that "any significant changes in already publicly disclosed inside information should also be publicly disclosed as soon as possible after the change occurs", and the DP was proposing to maintain this requirement in the MAR level 2 measures. The responses received on this issue were mixed: in particular, many comments expressed the opinion that changes in inside information would trigger the disclosure requirements only when the change itself constitutes inside information. In light of the feedback received, and considering the diverse implementation of this requirement across MSs, ESMA decided not to include it in the MAR technical standards. Clearly, as rightly highlighted by the commentators to the DP, when the change in inside information constitutes an inside information itself, this information is covered by the inside information's provisions within MAR.

VI.2 Technical means for delaying disclosure of inside information

VI.2.1 Article 17(4): "General" Delay

254. For the delays foreseen under Article 17(4), an "ex-post" notification to the competent authority is required to (i) inform about the existence of the delay, and (ii) provide the written explanation on how the conditions for delaying were met. MAR allows the possibility for the explanation to be provided only upon request of the competent authority, if permitted under national law. The draft technical standards to be prepared by ESMA cannot limit or restrict the discretion allowed to MSs in this matter.

255. The notification to the competent authority of the information about the delay and, where relevant, of the explanation, should take place immediately after the delayed inside information has been disclosed.

In order for the authority to be quickly informed to conduct any monitoring activity it may wish, the notification should be provided by the issuer by the most expeditious means. ESMA also considers that the act of notifying should not be delayed intentionally or negligently, and should be integrated in the issuer's general process for disclosing inside information.

256. All notifications should always be provided by the issuer to the competent authority in a manner that could be recorded by both the issuer and the competent authority, therefore written notification is considered the standard form. Would national law allow for the explanation about the delay to be provided upon request of the competent authority, the issuer should provide it in writing either together with the information about the delay or at a later stage, after the information about the delay has already been notified. Oral transmission of the fact that the disclosure was delayed is not perceived by ESMA as sufficient since it does not ensure proper record or audit trail of the transmission within the competent authority nor within the issuer. The use of recorded telephone communication is not considered a viable option either, as the explanation of the delay is required in a written form by Article 17(4), and it is not desirable to allow for different means between the explanation piece and the first notification.

257. This proposal was widely supported by the majority of the respondents to the DP.

258. Consequently, ESMA suggests that both the information about the delay and the explanation are provided in written form, using electronic means of transmission accepted by the relevant competent authority, to dedicated contact point(s) within the competent authority. The competent authority should make clear how the notification process operates (e.g. on its website).

Format and Content of the Notification

259. For the sake of promoting a harmonised approach to the notification to the competent authorities and to ensure consistency in the information notified by the issuers across Europe, ESMA proposes to specify the content of the information to be provided.

260. In terms of content, a distinction should be drawn between the notification of the information about the delay and the related explanation, as they are not necessarily transmitted simultaneously to the relevant competent authority. ESMA is mindful not to overburden issuers with requirements in terms of information to be provided, which should nonetheless be sufficient for the competent authority to conduct any supervisory action and activity needed.

261. With respect to the information about the delay, i.e. the issuer informing that the inside information that has just been publicly disclosed was delayed, ESMA suggests to include the following information in the notification:

a. the identity of the issuer: full official name;

b. the identity of the person within the issuer making the notification (name, surname, positions, contact details: emails, professional phone number);

c. identification of the disclosed inside information that was delayed (title of the disclosure statement, reference number assigned by the dissemination system if available);

d. date and time of the public disclosure of the relevant inside information;

e. date and time of the decision to delay the disclosure of inside information;

f. the identity of the persons having taken part in the decision making process for delaying.

262. Point b. in the previous paragraph is of crucial importance to allow competent authority to directly contact the relevant person in a timely-efficient manner, in cases where the competent authority needs to quickly communicate with her/him.

263. When recording time, the relevant time zone should be specified (for example CET or GMT). "Date and time" items are crucial information and should be as granular as possible, as they could play a decisive role in insider-dealing investigations.

264. Where the explanations are not notified simultaneously by the issuer with the information about the delay, but provided on a later date upon request of the competent authority, it is expected that the above mentioned pieces of information (letters a) to f)) are also included in that notification to avoid any confusion.

265. In addition, the issuer is requested to provide explanation as to how the three conditions of Article 17(5) were met. Therefore, beyond the identification information (presented above) to introduce the notification, the explanatory notification should be structured around the three conditions and filled in with free text by the issuer:

- Describing the legitimate interest at stake;
- Specifying its assessment on how the omission of the inside information would not be likely to mislead the public;
- Describing how the confidentiality of the delayed inside information is ensured, notably what information barriers have been put in place internally for non-required persons within the issuer and vis-à-vis third parties. Without prejudice of the need to identify the persons within the issuer who decided about the delay, it is not considered necessary to nominatively identify the persons within the issuer who had access to this delayed information, as they should already be included in the insider list.

266. The explanation should reflect the initial assessment conducted by the issuer of the conditions to fulfil. It should be as specific as possible and provide sufficient rationale as to the assessment conducted. To the extent possible and where appropriate, the issuer can refer to the examples that will be included in MAR guidelines as referred to in Article 17(11) of MAR. When there is a change on how the conditions are originally met, a new assessment of the conditions should also be included in the explanation as well as its timing. Thus the explanation should contain an item on date and time of any evaluations of the decision to delay (or decisions to prolong the delay), if applicable.

267. The notification should be drafted in the same language as the language in which the inside information is disclosed, so the rules of the TD for the language of regulated information should be followed to determine the correct language, including for financial instruments that are only admitted to trading or traded on MTFs or OTFs.

268. In the DP, views were sought as to whether common templates for notifications of delays were considered necessary in order to increase the harmonisation of the notifications across the EU, and facilitate the rapid preparation of the notifications by the issuer. About half of the respondents to the DP said that a common template is not required, and some of them proposed the template to be an option rather than a binding obligation. In light of the comments received, ESMA has decided not to

impose common templates for notification of delays, preferring to focus on defining clearly the expected content.

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

Records to be kept within the issuer

269. MAR specifies that the disclosure is delayed under the issuer's responsibility. Delays in disclosure of inside information are decided by the issuers themselves. The issuer are therefore expected to have in place a minimum level of organisation and a process to conduct a prior assessment whether an information is an inside information, whether its disclosure needs to be delayed and for how long. There should be responsible person(s) appointed within the issuer to take such a decision. Such person or persons should be clearly identified within the issuer and should have the necessary decision making power to do so (e.g. a managing board member or a senior executive director) considering the major importance of the decision. ESMA does not consider appropriate to specify which positions such person(s) should have within the issuer, considering the variety of organisational structures issuers may have, but the issuer should ensure that a responsible person is always available. In addition, before taking a decision concerning the delay of publication of inside information, these person(s) should conduct an assessment on whether the three conditions set forth in Article 17(4) for delaying are fulfilled[11]. Considering the requirement for the issuer to be able to provide written explanation concerning the delay, the above mentioned decisions and information should be recorded together with the relevant reasons supporting such decisions.

270. Similarly, there should also be an assessment conducted within the issuer to put an end to the delay and ensure that the inside information is eventually publicly disclosed in an appropriate manner. This decision to publish will also trigger the duty to notify the competent authority about the delay and, where relevant, to provide the explanation in writing.

271. Throughout the period of delay, the issuer should ensure that the conditions for the delay are constantly fulfilled, particularly the condition concerning the confidentiality of the delayed inside information. Would the confidentiality be no longer maintained, including due to rumours that are sufficiently accurate to indicate that a leak of information has occurred, and irrespective from where the breach of confidentiality originates from, the issuer must publicly disclose this inside information (Article 17(7)). Again, the decision to disclose taken in this context would trigger the duties to notify the competent authority about the delay and where relevant to provide the explanation in writing. Therefore, keeping records of the outcome of the on-going monitoring of the conditions of the delays is needed.

272. In particular, Article 17(7) does not mention that the leak of the rumour has to come from the sphere of the issuer in order to trigger the duty to disclose the inside information as soon as possible. If this would be the case, in order to decide whether the disclosure is required or not, an investigation

[11] The three conditions are:
- the immediate disclosure would likely prejudice his legitimate interests;
- the omission would not be likely to mislead the public; and
- the issuer of a financial instrument or emission allowance market participant is able to ensure the confidentiality of that information.

(potentially time-consuming) has to take place to detect the source of leak, whereas Article 17(7) requires disclosure to the public "as soon as possible".

273. Against this background, and taking into account the support received from the majority of the respondents to the DP, ESMA considers that, as part of the technical means for delaying disclosure of inside information, the issuer should have the necessary internal records in place to evidence the following:

    a. the process for assessing and deciding on the starting and ending point of delaying the inside information is designed;

    b. the fulfilment of the conditions for the delay, both initially and on an on-going basis during the delay period, are set up and kept under regular view (a new record is needed just when there has been a change in the original conditions);

    c. responsibilities within the issuer are clearly allocated, notably for (i) deciding about the delay and its ending, (ii) ensuring the on-going monitoring of the conditions of the delays (in particular confidentiality), and (iii) providing the requested information about the delay and the explanations to the competent authority;

    d. the delayed inside information is properly handled and managed within the issuer as well as with respect to third parties in order to limit to the extent possible, if not avoid, any breach of confidentiality during the delay period.

274. With respect to point d) above, Article 3(2) of Directive 2003/124/EC implementing MAD specifies certain requirements for ensuring confidentiality of the inside information, and also dictates that access to such information is controlled by the issuer. So, ESMA considers that records should also be kept of the means put in place within the issuer for delaying the disclosure of inside information in order to:

    i. deny access to non-required persons;

    ii. ensure awareness of the persons accessing delayed inside information about the legal and regulatory duties as well as of the sanctions attached; and

    iii. immediately disclose the inside information in case of breach of confidentiality.

275. For the sake of clarity, ESMA considers that the procedures and arrangements that are expected to be in place within the issuer should be effective, though appropriate to the circumstances of the concerned issuer as well as the number of persons involved in the process of delaying inside information, in order to allow for the relevant records to be kept. In other words, ESMA considers that the more persons are involved in the process and know about the inside information, the more stringent the procedures and arrangements to put in place should be.

276. Finally, a respondent to the DP suggested that the internal arrangements should include system of written acceptance of the internal procedures by the employees (e.g. electronically based declaration platform) as non-compliance with a procedure may be a motive for contract termination. ESMA considers that issuer should be required to ensure that their staff is aware of the procedures, but would not prescribe any particular system to put in place as "a one size fit all" approach is not adapted to the wide variety of issuers in terms of types and structures.

Q21: Do you agree with the proposed records to be kept?

Emission Allowance Market Participants

277. ESMA is of the view that for specifying the technical means for delaying disclosure of inside information related to EAMPs, no argument would support following a different approach than the one proposed for issuers of financial instruments. Thus the same requirements and standards should apply with the exception of the language.

278. Considering that the emission allowance market is a rather integrated market with a number of global players, including financial and non-financial entities usually internationally active, ESMA considers that the language to be used for the notification of information about the delay and the explanations should be a language accepted by the relevant competent authority for notification purpose, and a "language customary in the sphere of international finance", or only a "language customary in the sphere of international finance".

VI.2.2 Article 17(5): Delay to preserve the stability of the financial system

279. Unlike the "general" delay under Article 17(4), Article 17(5) of MAR specifies a particular type of delays, applying to a limited category of issuers of financial instruments, namely credit institutions and financial institutions. This type of delay can be resorted to only in exceptional circumstances in order to preserve the stability of the financial system and to protect the public interest.

280. For these specific cases of delay, the concerned issuers should seek prior consent from their competent authority, which should consult with other relevant authorities as indicated in Article 17(5) of MAR before deciding on the delays. Consequently, the issuer has to notify the competent authority of its intention to delay disclosure. In the relatively short period during which the competent authority decision is pending, the issuer is clearly not required to publicly disclose the inside information until the competent authority responds with its decision. Article 17(6) clarifies that where the competent authority does not consent the delay of public disclosure, the issuer should disclose the inside information immediately and cannot apply the provision of Article 17(4) instead.

281. ESMA considers that the technical means for recording in case of delay disclosure of inside information under Article 17(4) should be the same as the ones for delays falling under the circumstances covered by Article 17(5).

282. However, in such exceptional circumstances, the relevant inside information has not yet been disclosed to the public. So, particular care should be given to the handling of that inside information in the communication process between the issuer and the competent authority. The information contained in the notification is particularly sensitive as not only will the notification include the evidence of the fulfilment of the conditions for delaying, but the inside information itself will be included. In addition, the consultation between relevant authorities will require the content of the notification of intent to be exchanged (fully or partially) among them. Consequently, ESMA considers that secured channels for communicating the notification of intent and its content should be used, such as encrypted emails or similar channels of communication.

283. ESMA considers that the issuer's notification of intent should be made in writing to ensure the audit trail and record keeping of the evidence (notably with the view for the competent authority to proceed with the at least weekly assessment of the conditions for the delay, as required by Article 17(6)). For similar reasons, once the written notification of intent has been received, the competent authority's

decision of consent or no consent should be provided in writing to the concerned issuer. However, this is without precluding oral discussions between the issuer and the competent authority, and the possibility of oral pre-warnings. Time is of essence both for the issuer and the competent authority in order to quickly initiate the process of assessment and of consultation between relevant authorities, to reach a decision on whether the delay can be consented to and to decide whether the public and the market should be immediately informed. ESMA considers that the decision taken may also be communicated orally by the competent authority to the issuer, as long as a written communication, provided by a secure channel, confirms as soon as possible the content of the oral communication, i.e. the decision of the competent authority. This is particularly relevant in the case the competent authority does not consent to the delay; the issuer should be in position to rely on the oral pre-warning to proceed immediately with the public disclosure of the relevant inside information.

284. When consenting on delaying the disclosure of inside information, Article 17(6) requires the competent authority to "ensure that the delay is only for such a period as is necessary in the public interest". Considering that the competent authority has to assess at least on a weekly basis the continuous fulfilment of the conditions for delaying (Article 17(6)), the communication should inform the issuer about the timing of the next planned assessment. However, this should not prevent any assessment to be conducted meanwhile, if changes affecting the conditions occur.

285. For the sake of preserving financial stability or ultimately ensuring proper information of the market, the issuer and the competent authority should inform each other of any new element, development or information that may affect the fulfillment of the conditions for delaying. This is without prejudice of the duty for the issuer to immediately disclose the inside information in case of breach of confidentiality in accordance with Article 17(7). This approach was widely supported by the majority of the respondents to the DP.

286. The respondents to the DP almost unanimously welcomed the comprehensive framework proposed. Some of them commented that the competent authority should assess every trading day whether the three conditions continue to be met, as once a week is not frequent enough. The reference to a week time period is included in MAR level 1 (Article 17(6)) and thus cannot be amended in MAR level 2. However it should be noted that competent authorities are free to adopt more frequent evaluations if considered necessary, bearing in mind they have to evaluate the conditions "at least" on a weekly basis.

VII. Insider List

Introduction

287. Article 18 of the MAR provides for the creation, maintenance and update of insider lists by issuers or any person acting on their behalf or on their account. It specifies that the insider list should comprise all persons working for issuers "*under a contract of employment or acting as advisers, accountants, credit rating agencies or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies*". Pursuant to Article 18(8), these requirements also apply to EAMPs and auction entities, namely auction platforms, auctioneers and the auction monitor.

288. Recitals 56 and 57 provide the context for the provisions on the creation, maintenance and 'renewing and revision' [updating] of insider lists envisaged by the MAR and as such provides a useful illustration of the overarching objective of Article 18.

289. According to Article 18(9), ESMA should develop ITS on the precise format of insider lists and the format for updating insider lists referred to in this Article.

290. ESMA's mandate in Article 18(9) to develop a precise format for insider lists provides an opportunity to design a document which will facilitate issuers and those acting on their behalf or on their account, in the creation, updating, storage and submission of insider lists. It will also facilitate compliance with the Regulation by issuers listed in more than one Member State. A precise format will further assist the examination of these lists by competent authorities.

VII.1 General approach

291. Insider lists are an important tool for competent authorities when investigating possible market abuse, but national differences have existed with regard to the data included in insider lists, which have imposed unnecessary administrative burdens on issuers, EAMPs and auction entities. Data fields required for insider lists should therefore be uniform in order to minimise the associated costs.

VII.2 Precise format of insider lists

292. According to Art 18(3) and (4) insider list should document at least:

- the identity of any person having access to insider information;
- the reason for being included in the list;
- the date and time at which such person obtained access to inside information;
- the date and time at which such person ceased to have access to inside information.

293. The date at which the insider list was created and updated. Regarding the identity of any person having access to insider information ESMA proposes to include the following information about the relevant person in the insider list to ascertain that identity:

- Name: First name, surname, birth surname;

- Home Address: Address, postal code and city, country;
- Work address;
- ‘National Identification Number’ (if applicable, in accordance with national law), or otherwise, the date and place of birth;
- Home, work and mobile telephone numbers;
- Personal and work e-mail addresses.

294. The majority of responses to the DP expressed concerns on the extent of information ESMA proposed to have included in the insider list. Many respondents do not see a need for all the data required, to implement MAR. It was argued that the proposal would not decrease administrative burdens on issuers, as the requirements include numerous data fields that are not necessary for the identification of persons. Some respondents do not believe that insider lists should be databases where issuers have to duplicate personal data, in particular the name at birth, date of birth and place of birth. Also some respondents have the opinion that the scope of data required is too large.

295. ESMA understands the concerns expressed by respondents to the proposed scope of the data that is to be required in an insider list under MAR. However, ESMA would like to emphasize the necessity of receiving adequate information to perform the important task of protecting the integrity of the financial markets and detecting possible insider dealing. In particular, it is critical that competent authorities receive sufficient information to determine whether people with access to inside information have connections with or have communicated at critical times with those who have undertaken suspicious trades - orders.

296. Taking into account the responses to the DP on the content of the insider list, ESMA proposes that the data and place of birth is included as an alternative to the ‘National Identification Number’ in the MS where the latter does not apply, as a way to ensure unequivocal identification of the insider.

297. Regarding the reason for inclusion on the list, ESMA considers it appropriate to include the function and employer’s/company name (if an outside agent i.e. third party working for the issuer, the EAMP and the auction entity), of the insider on the insider list as the company name is relevant in making a distinction between the issuer, the EAMP or the auction entity, subsidiaries or professionals acting on behalf of its issuer or on its account.

298. ESMA proposes to require the inclusion, indicatively, of the following categories of persons in the insiders list, as long as they have access to inside information: Members of the management and/or supervisory board, executive officers such CEOs, persons discharging management responsibility, related staff members (such as secretaries and personal assistants), internal auditors, persons having access to databases on budgetary control, or balance sheet analyses, persons, who work in units that have regular access to inside information. With respect to third parties working for the issuer the EAMP or the auction entity, the following non-exhaustive list of categories of professionals, where these categories of professionals have access to inside information, should be included in the insider list: auditors, attorneys, accountants and tax advisors, managers of issuers (like corporate and investment banks), communication and IT agencies, rating agencies, investor relation agencies, investment analysts/journalists.

299. Regarding the date and time at which such person obtained inside information and the date and time at which such person ceased to have access to inside information, these are priority fields which require the inclusion of specified dates and times in an insider list. When recording the time, it is proposed that the relevant time zone should be specified (for example CET or GMT).

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

300. Several respondents indicated that a single-document (consolidated) approach should not be required as it is too complex and too difficult to manage by issuers and to comprehend by competent authorities. Other respondents posited that a single integrated insider list may be appropriate to issuers but that it would not be suitable for regulated firms working on the instructions of different issuers. In that case regulated firms would be more likely to keep deal specific insider lists.

301. Other respondents indicated that although the issuer is fully responsible for the complete insider list, there is no need for maintaining an aggregate insider list in case of a delegation to agents or advisors (third party working for the issuer). Hence, if the issuer provides the competent authority with separate insider lists, the format of these should be in the requested format.

302. Taking into account the reactions to the DP, ESMA proposes to create flexibility for the issuer, the EAMP or the auction entity. Although the issuer the EAMP or the auction entity is fully responsible for the complete and comprehensive list of insiders, there are different approaches that could be considered:

    a. General lists per issuer, EAMP or auction entity (Template 1: General Insider List), consolidating all the projects or events having triggered the duty to draw up and maintain an insider list and including all insiders for each specific inside information;

    b. Deal-specific/event based insider lists (Template 2: Deal specific/ Event Based Insider List), relating to a unique inside information and including all the insiders in respect to that particular inside information.

303. Furthermore, in case of a third party acting on behalf or on the account of the issuer, the EAMP or the auction entity (third party), issuers also could consider whether to provide to the CA:

    a. a single consolidated insider list, fully and solely maintained by the issuer, the EAMP or the auction entity; or

    b. separate insider lists (i.e. the insider list of the issuer, the EAMP or the auction entity itself and the insider list(s) of the third party(ies).

    Whatever approach is taken, the lists provided must be in the appropriate format (either template 1 ''General Insider List'' or template 2 ''Deal-specific/event based insider list'') to allow the requesting competent authority to reconstruct the comprehensive picture of all the insiders in relation to a particular piece of inside information.

304. Annex I of the Implementing Technical Standards presented in Annex VI of this CP includes the proposed format of the insider list for the templates referred to in the above in the paragraphs above for delivery of relevant information to the competent authority. It is anticipated that this harmonised approach would decrease the administrative burden for competent authorities, issuers, EAMPs and auction entities, as well as their agents.

305. Uploading the insider list on an electronic system is for market surveillance, and in the context of the current electronic environment, the usual or most effective means of communication. ESMA proposed in the DP that the insider list should be sent to a competent authority in an electronic, machine-readable format (e.g. MS Excel, comma-separated or plain text format). In the DP, ESMA also proposed that the insider list should be submitted to the competent authority in an encrypted email or any other channel that the competent authority offers, provided it has the same level of security.

306. A clear majority of the respondents to the DP supported the proposed electronic format. Quite a few of these respondents suggested making use of MS Excel because they find it a simple and easily accessible solution. However, a few respondents indicated that a more secured electronic format should be considered without however proposing one. A minority of the respondents were explicitly in favour of more flexibility, for example an email or written submissions. Others were afraid of the potential administrative burden, especially for small companies.

307. A clear majority of respondents were also of the opinion that ESMA should not prescribe technical details on the provision of the information (e.g. standards to use, length of the information fields). Most of them indicated that the technical format is too detailed and prescriptive. Furthermore, they emphasized the importance of flexibility in the manner of providing the required information.

308. ESMA is of the opinion that it is important to keep the electronic format as a requirement but provide for some flexibility as to the exact format to be used in the delivery of the requested information, as long as such format allows reading and processing by computers and is transmitted via a secured channel. ESMA also notes that MS Excel is one of the acceptable formats.

Q23: Do you agree with the two approaches regarding the format of insider lists?

VII.3 Language of the insider list

309. An overwhelmingly majority of responses to the DP supported ESMA's proposal that the Insider lists should be submitted in the official language of the relevant competent authority or in language which is customary in the sphere of international finance, providing thus an option to the issuers, the EAMPs and the auction entities as well as to persons acting on behalf or on their account. Therefore, ESMA continues to propose to implement it, unchanged, in the ITS.

VII.4 Procedure for updating insider lists

310. In accordance with Article 18(5), the insider list should be kept by the issuer, the EAMP or the auction entity or, if applicable, the person acting on his behalf or on their account for period of at least 5 years after being drawn up or updated. The use of an electronic document updated on a continuous basis both by issuers, the EAMP or the auction entity, and those acting on their behalf or on their account should ensure that the relevant insider list on a specific date and time (in the preceding 5 years) can be provided to the competent authority on request.

311. A clear majority of the respondents agreed on the proposed procedure for updating insider lists. The importance that the insider list creates a full chronology of (past) events (the updates should not change previous information) was also stressed. One respondent suggested that more guidance is needed on the governance and process regarding maintaining and updating the insider list (e.g. who is

authorized to make such change?) and that the insider list should be updated promptly and suggested the following: "without undue delay but at the latest within the same day when the underlying circumstance or event materialized (e.g. new persons were involved into the project".

312. Although ESMA thinks that the governance and process regarding maintaining and updating the insider list is important and furthermore supports the suggestion that an insider list should be updated without undue delay but at the latest within the same day when the underlying circumstance or event materialized, it does not want to be too prescriptive on these points. However, it is essential that the information is up to date when competent authorities request any inside list and that the list is provided to them without delay.

313. Regarding the date on which the list of insiders was created and the date and time when the list was updated, ESMA would like to stress that it is important that the updates on the insider list, taking into account the 5 years retention period, should not mean that the content of the previous versions is lost and should be retrievable.

VII.5 SME Growth Markets

314. Although an exemption from maintaining a contemporaneous insider list is available in Article 18 of MAR to issuers on an SME Growth Market, ESMA considered in the DP that, in order for the obligations to provide an insider list on request of a competent authority to be complied with by these issuers, certain internal systems and/or processes need to be put in place by said issuers. So, ESMA suggested that relevant information be recorded in these internal systems/ processes in order to facilitate the effective fulfillment of the requirement to provide an insider list on request to the competent authority.

315. While support for the principle of the prescription of such internal systems/processes was expressed by a clear majority of respondents to the DP, some respondents expressed the view that ESMA should not mandate the types of systems or processes that issuers on SME would need to put in place.

316. ESMA remains of the opinion that it is advisable for issuers on SME Growth Markets to have in place appropriate internal systems and/or processes for the relevant information to be recorded, so as to facilitate the effective fulfillment of the requirement on such issuers to produce an insider list on request. However, reflecting on the responses received to the DP and in order to ensure that the exemption in article 18 does have the intended effect of reducing the administrative burden on SME growth market issuers, ESMA is only requiring that these issuers are able to provide an insider list containing the appropriate information and can submit it in the proper format, without requiring the establishment internal systems and/or processes nor prescribing their form or content.

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VIII. Managers' transactions: format and template for notification and disclosure

Introduction

317. Article 19 of MAR sets out a transactions notification requirement for persons discharging managerial responsibilities within an issuer of a financial instrument ("PDMRs") as well as persons closely associated with them ("closely associated persons"). This obligation, which aims to improve the transparency of financial markets, was already included in MAD but has been modified by MAR in a number of key domains, notably the scope.

318. MAR has generally extended the scope of the financial instruments covered to financial instruments admitted to trading, or for which a request has been made to trade on a RM and a MTF, and those traded on an OTF. However, it should be noted that the notification and disclosure requirements of PDMRs/closely associated persons' transactions will only apply to those issuers that have requested or approved admission to trading/trading of their financial instruments on one of the venues.

319. In this context, the scope of instruments falling under this obligation, together with the obligation itself, is defined in Article 19(1) of MAR as follows:

- PDMRs, and closely associated persons, of an issuer are required to notify, to the issuer itself and to the relevant competent authority (defined in 19(2)), every transaction on their own account relating to shares or debt instruments of that issuer, or to derivatives or other financial instruments linked to the shares or debt instruments of the issuer;
- PDMRs, and closely associated persons, of an EAMP are required to notify, to the EAMP itself and to the relevant competent authority (defined in 19(2)), every transaction on their own account relating to emission allowances, to auctioned products based on emission allowances or to derivatives relating to emission allowances.

320. In addition, Article 19(10) introduces the same obligation to PDMRs, and closely associated persons, of any (i) auction platform, (ii) auctioneer and (iii) auction monitor (together "auction entities") involved in the auctions of emission allowances (i.e. auctions held under EU Regulation No. 1031/2010), in so far as the transactions of the PDMRs, and closely associated persons, involve emission allowances, auctioned products based on emission allowances or derivatives relating to emission allowances. Those persons have to notify their transactions to the auction entity, as applicable, and to the competent authority where the auction entity, as applicable, is registered.

321. Issuers, EAMPs, and auction entities are responsible for ensuring that the information regarding the transactions in scope is made public across the EU. Alternatively, MSs national law may provide that it is the responsibility of the relevant competent authority to make such information public.

322. MAR sets out a reduced timeframe for notification that has to be provided promptly and no later than three business days after the transaction, compared to the five days established in MAD implementing Directive No. 2004/72.

323. ESMA is mandated to draft implementing technical standards concerning the format and the template to be used for the notification and publication of the PDMRs' and closely associated persons' transactions. Article 19(6) provides the list of information to be provided:

a. Name of the person;

b. Reason for notification;

c. Name of the relevant issuer or emission allowance market participant;

d. Description and identifier of the financial instrument;

e. Nature of the transaction(s) (e.g. acquisition or disposal), indicating whether it is linked to the exercise of share option programmes or to the specific examples set out in Article 19(7);

f. Date and place of the transaction(s); and

g. Price and volume of the transaction(s). In the case of a pledge whose terms provide for its value to change, this should be disclosed together with its value at the date of the pledge.

VIII.1 Means for transmission

324. Article 19 does not prescribe particular means for notification of transactions by the PDMRs and closely associated persons to the competent authority and to the issuer, the EAMP or the auction entity. ESMA maintains its views that the safety and integrity of the information should be ensured no matter what form of transmission is used and that, in this context, secured electronic communication is preferred.

325. A respondent to the DP suggested that the format of notification to the competent authority should be an electronic output per data format ordinary in the sphere of modern electronic communication. This was understood as a request not to be too prescriptive but to allow for a wider range of electronic formats, which is in line with ESMA's proposal although these electronic formats should be accepted by the concerned competent authority.

326. Another respondent proposed that notification to the competent authority should be conducted via the Compliance function of the issuer. However, ESMA considers such a proposal as not in line with the MAR provisions and outside the scope for ITS empowerment.

327. With respect to the disclosure, the means by which an issuer and an emission allowance market participant should ensure that the information is made public is specified in Article 19(3) as being in accordance with the standards to be established by ESMA for the disclosure of inside information in Article 17(10). So, ESMA is not proposing particular standards in that respect.

VIII.2 Approach from notification to disclosure

328. Article 19(1) states that PDMRs "*shall notify the issuer or the emission allowance market participant and the competent authority referred to in the second subparagraph of paragraph 2*:

a. In respect of issuers, of every transaction conducted on their own account relating to shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto;

b. In respect of emission allowance market participants, of every transaction conducted on their account relating to emission allowances, to auction products based thereon or to derivatives relating thereto."

329. Providing that a transaction relates to a financial instrument or emission allowance in the scope of the notification requirements, the venue or place where that transaction has been conducted is not relevant in determining whether a transaction is reportable. In other words, any transaction irrespective of where it was conducted (i.e. on a RM, on a MTF, on an OTF or OTC) should be notified.

330. In addition, Article 19(1) refers to every transaction. Therefore, the notifications to be received by the competent authorities and the issuers, the EAMP or the auction entities should detail every transaction, however it is not expected that a notification is sent for each individual transaction. To limit the burden, a PDMR or a closely associated person should send a single notification listing and detailing all the transactions carried out in the relevant instruments for a particular day.

331. However, with regard to the disclosure to the public by issuers, EAMPs, or auction entities, or alternatively by the relevant competent authority if provided under national law, although it is important that the information to the public is readable and understandable, there may be a need for striking a balance in case a PDMR or a closely associated person has carried out, during a single day and on the same venue, one transaction that resulted in practice in a large number of execution trades or several transactions. It might be too burdensome and also rather confusing for an investor if every single transaction is disclosed via the channels to be used for public disclosure. In fact, it might be more comprehensible for an investor to be provided with aggregated figures.

332. Below are the alternatives for aggregation that were presented in the DP:

- Option 1: Aggregation could be limited to transactions in the same financial instrument executed on the same day and at exactly the same price and may be aggregated by purchases and by sales but not netted.

- Option 2: Aggregation could be based on a per order basis: the transactions resulting from the execution of an order could be aggregated and the price to be reported would be the average weighted price.

- Option 3: All the transactions on a financial instrument carried out on the same day could be aggregated but not netted, indicating the timeframe of the executions and the price range (lowest and highest prices of executed transactions) and/or the weighted average price.

333. The majority of respondents were supportive of the third option for aggregation, although some suggested a variation of this, in which the timeframe of the executions would not be disclosed and the highest and lowest prices (not weighted average price) would be disclosed. Another respondent also suggested an alternative option where all transactions on a financial instrument carried out on the same day would be aggregated and reported at the average price or as agreed with the broker or dealer.

334. ESMA considers that the third option and its variance are more succinct as it would provide a single set of data (price and volume) for a particular instrument per day. For example for the same day and the same financial instrument, for both buy and sell transactions:

- Under option 1, you will be presented with:
  - For Price 1, volume x
  - For Price 2, volume y
  - For Price 3, volume z etc.

- Under option 2, you will be presented with:
  - For Order 1, volume a and price m

- For Order 2, volume b and price n
- For Order 3, volume c and price o etc.

- Under option 3 or variants, you will be presented with:
  - Price P, volume V

335. ESMA considers that a proper balance between readability/understandability and the burden for the PDMR is achieved with the following aggregation method, which is a simplified version of option 3 (no indication of the timeframe of the executions):

- All the transactions on a financial instrument carried out on the same day could be aggregated but not netted. For aggregated volume of buys and aggregated volume of sells per day and per trading venue, including OTC, the highest and lowest prices and the weighted average price should be reported.

336. ESMA is proposing to have a single template for notification, which will contain two sections. The first section should contain information on a transaction per transaction basis (i.e. non aggregation), to specifically allow the competent authority to fulfill its monitoring and supervisory tasks. The second section should be used by PDMRs and closely associated persons to notify transactions in an aggregated form. The issuer, EAMP or auction entity will in turn then proceed with the publication of this information. Annex II of the draft ITS presented in Annex VII of this CP contains the template which ESMA believes comprises the information required for on the one hand the notification to the competent authorities and on the other hand the notification to the issuer, EAMP or auction entity for the purpose of disclosure to the public.

337. In accordance with the 3rd paragraph of Article 19(3), national law may provide for a competent authority to make public the information notified. If this is the case the relevant competent authority should make public the aggregated information provided in section 2 of the template.

338. In the event that a notification made and disclosed is required to be retracted, the notifying party should resubmit a notification including in the "comments" field of section 1 of the template the reason for doing so, and in the relevant field of section 2 of the template the information that the resubmission is amending a previous notification. If the notification made and disclosed is erroneous, an explanation of this should also be specified in the comments field and the new notification, fully compiled, will then need to be resubmitted. Such an approach is considered by ESMA as simpler and clearer, more cost-efficient and less burdensome than an approach based on the designing and use of an "ad-hoc" cancellation template.

Q24: Do you have any views on the proposed method of aggregation?

VIII.3 Specification of the content

339. In relation to content, a few respondents to the DP were of the view that the draft template for notification to the competent authority is asking for more information than is necessary, notably personal data such as the address and telephone number of the PDMR. It was suggested that the draft template for disclosure to the public, which does not include such data, would be sufficient.

340. ESMA believes that the content of the information to be notified to competent authorities and to be disclosed to the public using the proposed single template should be specified so as to ensure a

consistent application of the requirements, to facilitate the reporting process and to provide comparable information to the public.

341. Therefore with respect to the notifying party information, ESMA proposes the following:

a. In relation to the name:

i. For natural persons; the first name and the last name.

ii. Where the notifying party is a legal entity, the full name including legal form as provided for in the register where it is incorporated (if applicable), complemented by the Legal Entity Identifier (LEI) if available,

b. For PDMRs, the position occupied within the issuer should be indicated e.g. CEO, CFO.

c. Where the notifying party is a closely associated person:

i. For the first section of the template, the association with the relevant PDMR should be mentioned using the categories identified in the definition of a closely person (e.g. spouse, children…) and indicating the name and position of the relevant PDMR within the issuer, EAMP or auction entity.

ii. For the second section of the template (information for public disclosure), a status flag indicating that the notifying party is a closely associated person and the name and position of the relevant PDMR within the issuer, EAMP or auction entity. No further detail about the type of association or identification of the closely associated person is required.

d. In the first section of the template, the address details: the full address (e.g. street, street number, postal code, city, state/province) and the country should be informed. By address, ESMA understands the personal address of the PDMR or the closely associated person.

e. In this first section, ESMA also expects the personal phone number and email address to be filled in, so as to allow the competent authority to be able to quickly get in contact with the PDMR or the closely associated person would this be required or necessary.

342. With respect to the name of the relevant issuer, EAMP or auction entity,-the full name of the company and the LEI code should be included.

343. Under the details of the notified/disclosed transaction are expected:

a. A description of the financial instrument concerned:

i. An indication as to the nature of the instrument: a share, a debt instrument or a derivative or a financial instrument related to a share or a debt instrument, or an emission allowance, an auction based product relating to an emission allowance or a derivative on either of the previous.

ii. the identification code as defined under MiFIR implementing texts

b. A description of the transaction type: using where applicable the type identified in the Delegated Act adopted by the Commission (ref XXX).

c. The price and volume: the standards set up for transaction reporting under MiFIR should be used.

d. The date of execution, the standard data format to use is the one defined under MiFIR implementing text.

e. The place of location should indicate the trading venue identification code as defined under MiFIR implementing texts or mention "OTC" if the transaction was not executed on a trading venue.

344. A national identification number should also be included in the notification template, where applicable, using the type of number used in the particular Member State of the notifying party.

345. ESMA is aware that the application dates of the MAR technical standards and of the MiFIR implementing texts referred to define the data standards to be used in certain fields of the notification template do not coincide and notes that Article 39(4) of MAR covers this issue.

Q25: Do you agree with the content to be required in the notification?

IX. Investment recommendations

Introduction

346. Article 20(1) of MAR does not change significantly the approach set out in the current MAD on investment recommendations, establishing that persons who produce or disseminate investment recommendations or other information recommending or suggesting investment strategies should take reasonable care to ensure objective presentation and to disclose their interests or indicate conflicts of interests concerning the financial instruments to which that information relates.

347. Since the mandate defined by Article 20(3) of MAR - developing draft RTS to determine the technical arrangements for the categories of person referred to in Article 20(1)[12], for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest - is very similar to the one that was given for Level 2 measures under the current MAD, ESMA holds the view that current Level 2 measures set out by Directive 2003/125/EC may constitute a sound benchmark for responding to the mandate.

348. Nevertheless, several relevant issues arise with respect to the scope and the opportunity to update the regulatory framework.

349. In the current MAD framework, the definitions of "recommendations" and of "research or other information recommending or suggesting an investment strategy" are provided at Level 2 (Article 1(3) and (4) of Implementing Directive 2003/125/EC). On the contrary, Articles 3(1)(34) and 3(1)(35) of MAR provide the definitions of "investment recommendation" and "information recommending or suggesting an investment strategy" at Level 1 and are understood to include research, morning notes and technical analysis as well as newspaper articles and radio, TV or Internet interviews.

IX.1 Scope

Scope: Relevant persons

350. The current MAD Implementing Directive 2003/125/EC establishes two sets of rules. The first set relates to the "production of recommendations" and contains provisions on fair presentation of recommendations and the disclosure of interests or conflicts of interest (Articles 2-6). The second set refers to the "dissemination of recommendations produced by third parties" (Articles 7-9).

351. Both sets of rules include "general standards" applicable to all so-called "relevant person", i.e. a natural or legal person producing or disseminating recommendations in the exercise of his profession or the conduct of his business, and additional obligations for a specific sub-set of persons, namely independent analysts, investment firms, credit institutions, any other person whose main business is to

[12] Following the approach outlined by the Implementing Directive 2003/125/EC, the last paragraph of Article 20(3) states that "*The technical arrangements laid down in the regulatory technical standards referred to in paragraph 3 shall not apply to journalists who are subject to equivalent appropriate regulation in a Member State, including equivalent appropriate self-regulation, provided that such regulation achieves similar effects as those technical arrangements. Member State shall notify the text of that equivalent appropriate regulation shall be notified to the Commission*".

produce recommendations or any natural person working for them, that, directly or indirectly, expresses a particular investment recommendation. For the sake of simplicity we name all the persons within this specific set “financial analysts”.

352. Article 3(1)(34) of MAR specifies that: “"*information recommending or suggesting an investment strategy*" means information:

    (i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or

    (ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument”.

    For the sake of clarity, persons mentioned in category (i) of Article 3(1)(34) will be referred to as “qualified persons”, whereas persons mentioned in category (ii) will be referred to as “non-qualified persons”.

353. It is appropriate to continue to associate to qualified persons under MAR Article 3(1)(34)(i) those rules set out for financial analysts by the Implementing Directive 2003/125/EC. The category of non-qualified persons under MAR article 3(1)(34)(ii) represents a wide and diverse group of persons. In fact, this second category includes both professionals whose main business is not related to the production of investment recommendation as well as non-professional persons “*which directly proposes a particular investment decision in respect of a financial instrument*”. Some respondents to the discussion paper (DP) highlighted the risk that the full set of requirements envisaged by Implementing Directive 2003/125/EC for “relevant persons” could apply to an extremely wide set of circumstances, particularly given the current technological platforms that allow virtually anyone (whether an employee of a regulated firm or not) to disseminate his opinions to a potentially large audience. ESMA is aware of the issue, but does not believe that the spectrum of people mentioned in Article 3(1)(34)(i) and (ii) can be limited through level 2 measures to only relevant persons as defined under the current MAD regime

354. Against this background, ESMA suggests a twofold approach based:

    a. on a general set of requirements applying to any person mentioned in MAR Articles 3(1)(34)(i) and 3(1)(34)(ii); and

    b. on applying a set of additional requirements to any person mentioned in MAR Article 3(1)(34)(i) and also to those persons mentioned in MAR Article 3(1)(34)(ii) that are considered “experts”. For this purpose, an “expert” should be considered a person who falls outside Article 3(1)(34)(i) and who repeatedly proposes particular investment decisions in respect of financial instruments and:

        - holds himself out as having financial expertise or experience, or

        - puts forward his recommendation in such a way that other persons would believe he has financial expertise or experience.

355. By way of illustration, an expert can be a person who analyses companies or markets and issues with a certain frequency information recommending or suggesting an investment strategy or investment recommendations; has already been producing information recommending or suggesting an investment strategy or investment recommendations in the past; who has relevant number of followers; and whose proposals of investment decision could (fully or partially) are relayed by third parties, such as media.

356. Taking into consideration the extended scope of MAR in terms of persons covered by the provisions on investment recommendations, this proposal ensures a proportionate approach by imposing more stringent requirements on those persons posing higher risks in terms of market integrity and investor protection, thus promoting a risk-based approach for the enforcement of the rules and at the same time avoiding the creation of onerous monitoring obligations in areas of little or low risk.

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

Scope: Relation with MIFID

357. MiFID created two categories of investment research: the first one that is presented as objective or independent, and the second one that does not meet that standard and is labelled as a marketing communication. As stated in Recital 28 of the MiFID Implementing Directive 2006/73/EC, both categories of research are intended to sit under the MAR definition of investment recommendations.

358. Some respondents to the DP indicated there is a risk that the wording of MAR Article 20(1), *"persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy shall take reasonable care to ensure that such information is objectively presented",* fails to include non-independent research. In this respect, ESMA clarifies that requirement is not intended to apply only to those recommendations that are held out as being objective or independent.

359. Furthermore, ESMA points out that tailored personal recommendation emanating from sales departments should not fall within the notion of investment recommendation. In fact, according to Recital (3) of Implementing Directive 2003/125/EC: "*Investment advice, through the provision of a personal recommendation to a client in respect to one or more transactions relating to financial instruments (in particular informal short-term investment recommendation originating from inside the sales or trading department of an investment firm or a credit institution expressed to their client), which are not likely to become publicly available, should not be considered in themselves as recommendations within the meaning of this Directive*".

360. At the same time, ESMA confirms that so called "morning notes" - i.e. short research sent to clients in the morning that concern several financial instruments and where producers comment and update their previous investment recommendations in the light of news reported by media - fall within the

notion of investment recommendations, even when they just repeat the content of previous investment recommendations. More generally, irrespective of the label attached to a note, as long as a note meets the MAR definition of "investment recommendations" (Article 3(1)(35)) or of "information recommending or suggesting an investment strategy" (Article 3(1)(34)), it is in scope of MAR Article 20(1) and (3).

Publication of recommendations "intended for distribution channels or for the public"

361. Following the same approach of Article 1(3) of Implementing Directive 2003/125/EC, Article 3(35) of MAR establishes that investment recommendations that fall under MAR's scope are those "intended for distribution channels or for the public". In this respect, Article 1(7) of Implementing Directive 2003/125/EC already provides the following definition of 'distribution channels': "*a channel through which information is, or is likely to become, publicly available. 'Likely to become publicly available information' shall mean information to which a large number of persons have access*".

362. Illustrative examples of "distribution channels" are, among others, the following: a Regulatory Information System, media specialised in disseminating information (news agency, news provider, a newspaper, etc.), or the website of the producer.

363. In addition ESMA holds the view that an investment recommendation is intended for distribution channels or for the public not only when it is intended or expected to be made available to the public in general, but also when it is intended or expected to be distributed to clients or to a specific segment of clients[13], whatever their number, as a non-personal recommendation, i.e. without the provision of the investment service of investment advice. ESMA considers that a too narrow definition of "investment recommendation intended for distribution channels or for the public" would entail the risk of leaving some investment recommendations provided to investors unregulated, without investors being in a position to know that the recommendation received is not regulated.

364. In other words, ESMA believes that a "large number of persons" should have access to the recommendation irrespective of the nature of the channels through which the recommendation is distributed. For example, a recommendation is likely to become publicly available both when it is distributed via an electronic data dissemination system (including e-mail messages and faxes) and when it is put on the web site of the producer (even if it is accessible only by its clients or a segment of its clients), or it is disseminated through social networks[14].

365. ESMA considers that when a person is a financial analyst, an economist, an experienced or professional investor or an expert assumed to regularly analyse companies or markets their recommendations are likely to reach a large number of persons even when this information is transmitted through short messages to their followers. In addition, these messages are often likely to have an immediate impact on the market when they are disseminated during trading hours, especially on less liquid financial instruments.

[13] "Client" according to MIFID means any natural or legal person to whom an investment firm provides investment and/or ancillary services. In this paper, "segment of clients" shall mean any classification or categorisation of clients that the producer of the recommendation may define according to internal rules or to the provisions of MIFID.

[14] The reasoning developed in this paragraph cannot be extended to personal recommendations: see CESR, Understanding the definition of advice under MiFID, questions & answers, 19 April 2010, CESR/10-293 and part 4 of CESR's Technical Advice to the European Commission in the context of the MiFID Review - Investor Protection and Intermediaries, 29 July 2010, CESR/10-859.

366. Several respondents to the DP have emphasised that today recommendations are easily distributed or re-distributed via the internet. For example, a recommendation sent to a few clients can be quickly re-distributed to a “large number of persons” thanks to platforms for sharing information within the internet. Someone has also suggested to look at the investment recommendation itself in order to detect whether it reveals the intention of the producer/distributor in relation to the extent to which the recommendation should be distributed, i.e. whether the recommendation is intended or expected to be made available to the public, to clients, or to a specific segment of investors. In all those cases the recommendation is clearly not a personal recommendation as defined by MiFID.

367. As to the opportunity of establishing a threshold in relation to what constitutes “large number of persons” for the purpose of determining that an investment recommendation is intended for the public, respondents exhibited mixed reactions. While many agreed on a qualitative approach, others suggested considering the US rule according to which information sent to more than 15 receivers is assumed to be an investment recommendation. ESMA does not agree with this latter approach and does not propose any threshold in relation to what constitutes “large number of persons”.

IX.2 Date and time of dissemination

368. ESMA considers that the date in which the investment recommendation is made available through a distribution channel, or distributed for the first time to a group of persons, is to be considered the date in which the investment recommendation was first released for distribution, as provided for in Article 4(1)(e) of Implementing Directive 2003/125/EC.

369. In this respect, considering the high speed of intraday price changes, it is relevant the indication of the expected time, during the day, in which the investment recommendation is first disseminated. In this way receivers can understand whether the market price has already incorporated the content of the information.

IX.3 Production of recommendations

IX.3.1 Identity of the producers

370. According to Article 2 of Implementing Directive 2003/125/EC, any recommendation has to disclose clearly and prominently the identity of the person responsible for its production, in particular the name and job title of the individual(s) who prepared the recommendation and the name of the legal person responsible for its production. Where the relevant person is an investment firm or a credit institution, or is neither an investment firm nor a credit institution but is subject to self-regulatory standards or codes of conducts, the identity of the relevant competent authority or a reference to those self-regulatory standards or codes of conduct must be disclosed.

371. Following respondents’ indications, ESMA confirms the above requirements in the draft technical standards, while specifying, in order to be more proportionate, that the name and job title of the individual(s) who prepared the recommendation and the name of the legal person responsible for its production should be provided, only in cases when the individual(s) acted in his capacity as an employee.

IX.3.2 Objective presentation of investment recommendations

372. Article 20(3) MAR requires ESMA to develop draft regulatory technical standards to determine the technical arrangements, for the various categories of person referred to in Article 20(1), for objective presentation of investment recommendations or other information recommending an investment strategy.

General standard

373. ESMA considers that the general standard on objective presentation of investment recommendations, applicable to any person mentioned in MAR Article 20(1), can be based on the current general standard for fair presentation of recommendations included in the Implementing Directive 2003/125/EC.

374. According to Article 3 of Implementing Directive 2003/125/EC, the general standard of fair presentation of recommendations for all relevant persons includes that: a) facts are clearly distinguished from interpretations, estimates or opinions; b) all sources are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated; c) all projections, forecasts and price targets are clearly labelled as such and that the material assumptions made in producing or using them are indicated.

375. These standards have been included in the draft technical standards but some of them have been re-categorised in an attempt to be more proportionate, taking into consideration the fact that MAR captures a wider scope of persons under the persons who are neither qualified persons nor experts.

Additional obligations for qualified persons and experts

376. Article 4 of Implementing Directive 2003/125/EC prescribes additional obligations for "financial analysts", as referred to above. The implementing directive establishes that financial analysts have to ensure notably that: any basis of valuation or methodology used to evaluate or to set a price target are adequately summarised; the meaning of any recommendation made, which may express the time horizon of the investment, is adequately explained and any appropriate risk warning, including a sensitivity analysis of the relevant assumptions, is indicated; the planned frequency, if any, of update of the recommendation and major changes in the coverage policy previously announced are disclosed; the change in the recommendation compared to the last recommendation issued during the previous 12-months concerning the same financial instrument or issuer, and the date of the earlier recommendation, are indicated clearly and prominently.

377. ESMA considers that these additional obligations should be applicable to qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii),as previously defined.

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why

Transparency of the methodology for qualified persons and experts

378. Typically, a research on a specific financial instrument or issuer could range from a few lines or pages, where it updates customers on the latest news, to as many as dozens of pages. In applying the requirement of Article 4(1)(b) of Directive 2003/125/EC about the summary of the basis of valuation or

methodology used and according to observed practices, "financial analysts" are asked to give more indications on the underlying methodology used only in the latter case since it is assumed that in the former case customers can retrieve details from previous research or can contact the "financial analysts" for further direct clarifications.

379. In addition, it has been noted that research does not always allow readers to have a clear understanding of the logical and computational steps that lead to specific target prices.

380. In the DP ESMA was considering whether there is a need for requiring that research exhibits more details on the methodologies used and their underlying assumptions, especially for research that modifies previous target prices.

381. With respect to access to the information about the methodology and underlying assumptions used, ESMA considers that the recommendation can include the indication of the location where detailed information can be directly and easily accessed, unless there have been changes in the methodology and the underlying assumptions which should then be reflected in the recommendation itself.

382. Some respondents have acknowledged that there is inadequate discussion on research's methodologies and that transparency is not always sufficient; others emphasised that existing market incentives for financial analysts have naturally brought to more transparency, even in absence of strict regulatory requirements. Therefore, following a cost-benefit logic, ESMA prefers to extend transparency requirements, especially when there is a change in methodologies adopted, irrespectively of whether this lead to a change in the target price.

383. These requirements should not be limited to qualitative reasoning, that many respondents rightly consider crucial, but also encompass quantitative analyses and numerical calibrations. Since most of such analyses and calibrations are well defined in the literature, transparency of the same should not put at risk the underlying Research & Developments investments. Nevertheless, in order to protect such investments, ESMA sees that when producers of recommendations adopt a proprietary model they do not need to disclose the underlying methodology in detail, provided that they make clear that results are based on a proprietary model, what are the key factors of such model and to what extent results depart from those outlined by traditional models.

384. In the same vein, ESMA considers that qualified persons and experts should seek, as a best practice, cross-recommendation consistencies in the methodologies adopted by commenting on possible divergences. For instance, recommendations produced by the same person and related to companies that belong to the same industry or to the same country should exhibit consistent common factors.

385. Following the approach described in the section "Scope: relevant persons", these obligations regarding the transparency of the methodology are applicable to qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii), as previously defined.

386. Moreover, qualified persons and experts should maintain a list of all investment recommendations produced on any issuer and disseminated during the preceding 12-month period. This list should contain the basic information for each recommendation, such as the date of release, the identity of the producer, the price target and the relevant market price at the time of dissemination, the direction of the recommendation and the validity time period of the price target and of the recommendation.

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

IX.3.3 Disclosure of interests and conflicts of interests

387. Article 20(3) of MAR requires ESMA to develop draft regulatory technical standards to determine the technical arrangements for disclosure of particular interests and indications of conflicts of interest.

General standard

388. Article 5 of Implementing Directive 2003/125/EC (“*General standard for disclosure of interests and conflicts of interest”*) requires the disclosure of all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation, in particular where relevant persons have a significant conflict of interest in one or more financial instruments which are the subject of the recommendation or with respect to an issuer to which the recommendation relates. Where the relevant person is a legal person, that requirement applies also to any person working for it and involved in preparing the recommendation. Disclosure includes: i) any interests or conflicts of interest that are accessible or reasonably expected to be accessible to the persons involved in the preparation of the recommendation, and ii) any interests or conflicts of interest known to persons who, although not involved in the preparation of the recommendation, had or could reasonably be expected to have access to the recommendation prior to its dissemination. These standards have been included in the draft technical standards

Additional obligations for qualified persons and experts

389. Article 6 of Implementing Directive 2003/125/EC sets forth additional obligations in relation to disclosure of interests and conflicts of interest for recommendations produced by “financial analysts” (as referred to above), including disclosure of major shareholdings and other significant financial interests that exist between the person or related legal persons and the issuer as well as, where applicable, a statement about particular activities (e.g. liquidity provision; management of an offer) conducted by the financial analyst on the issuer’ financial instrument and particular agreement it have had with the issuer for the provision of investment services or production of recommendation. Recommendations produced by investment firms or credit institutions should contain the following further disclosures: i) in general terms, the effective organisational and administrative arrangements set up for the avoidance of conflicts of interest with respect to recommendations, ii) whether the remuneration of the persons involved in preparing the recommendation is tied to investment banking transactions performed by the investment firm or credit institution, iii) whether those natural persons received or purchased shares of the issuer prior to a public offering of such shares and, if the positive, the price and date of purchase, iv) on a quarterly basis, the proportion of all recommendations that are ‘buy’, ‘hold’, ‘sell’ or equivalent terms, as well as the proportion of issuers corresponding to each of these categories to which the investment firm or the credit institution has supplied material investment banking services over the previous 12 months.

390. Respondents largely agreed that ESMA should keep the approach adopted in Article 6 of Implementing Directive 2003/125/EC, including Article 6(5) that allows for a separate disclosure of conflicts of interests where the additional obligations for financial analysts would be disproportionate in relation to the length of the recommendation distributed.

391. ESMA considers that these additional obligations should be applicable to qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii) as previously defined.

392. It may also be problematic that the remuneration of the persons involved in preparing the recommendation is tied up the trading fees received by the investment firm or credit institution in relation to the instruments covered by the recommendation produced. Therefore, ESMA is also considering whether the existence of such a link should also be disclosed as an indication of conflict of interests in order to allow investors to be fully informed.

Thresholds for conflicts of interest for qualified persons and experts

393. In order to ensure the objectivity and reliability of the investment recommendations produced by qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii), significant financial interests held in relation to the issuer in the concerned financial instrument or conflicts of interest between these persons and the concerned issuer should be disclosed.

394. Currently, the disclosure requirement set out in Article 6(1)(a) of the Implementing Directive 2003/125/EC for "financial analysts" is based on a threshold applicable to major shareholdings, i.e. at least when shareholdings exceeds 5% of the total issued share capital. It should be noted that Article 6(1)(a) gives an option to MSs to provide for lower thresholds than 5% which has been applied effectively by some MSs. Therefore, in the view of achieving the goal of a "single rulebook", it seems necessary to agree on uniform disclosure criteria set at an appropriate level.

395. In addition, ESMA aims at introducing a further disclosure requirement for net short positions opened for reasons different from market making activities, while no thresholds are considered for positions in debt instruments such as bonds, structured finance products and related derivatives contracts (e.g., CFD, equity swaps or derivatives on indexes or baskets).

396. Following the feedback received to the DP, and considering that nowadays a number of MSs already apply a threshold which is below 5%, ESMA believes that a common lower threshold should be defined. Before dealing with the new proposed threshold, it is relevant to explain the context in which a new threshold would operate. In this respect, ESMA is considering the following dual approach:

a. Where an investment recommendation, or any other information recommending or suggesting an investment strategy, refers to an issuer and no specific reference to any of the issuer's financial instruments is made, a disclosure of long and short positions in the issuer's shares (as defined respectively in the Transparency Directive and the Short Selling Regulation) is required, only when these positions are above the thresholds defined below.

b. In the second case, where an investment recommendation, or any other information recommending or suggesting an investment strategy, refers in particular to one or more financial instruments of an issuer, a disclosure regarding the holding of those particular financial instruments is required, and no thresholds are applicable (also in the case where the financial instruments are the issuer's shares), plus a disclosure regarding long and short positions in the issuer's shares (as defined in the Short Selling Regulation) is also required, only when these positions are above the thresholds defined below.

397. Also when the threshold is not breached, where positions or holdings are likely to lead to conflicts of interest, recommendation's producers should disclose those conflicts in line with the general disclosure

requirements of Article 5 of the existing Implementing Directive 2003/125/EC, now incorporated in the draft technical standards.

398. In relation to the thresholds applicable to long and short positions in an issuer's shares, ESMA is proposing the following level:

- 0.5% for long and short positions.

399. This lower threshold would bring the benefit of equally enhancing transparency both in long and short positions. The 5% threshold has proved itself too high in order to properly disclose conflict of interest. ESMA is aware that the administrative burden is likely to increase following a lower threshold, but also believes that the advantages of the new threshold exceed the attached drawbacks.

400. Besides, any shareholding held by the issuer (who is the object of the recommendation) exceeding 5% of the total issued share capital of the person producing the investment recommendation (or of related person) should be disclosed in the recommendation.

Details on the distribution of previous recommendations for qualified persons and experts

401. Article 6(4) of Implementing Directive 2003/125/EC outlines additional obligations in relation to disclosure of conflicts of interest for "financial analysts" and requires the disclosure of "the proportion of all recommendations that are 'buy', 'hold', 'sell' or equivalent terms, as well as the proportion of issuers corresponding to each of these categories to which the investment firm or the credit institution has supplied material investment banking services over the previous 12 months". The same obligations should now apply to qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii).

402. As indicated during the consultation, most producers of investment recommendations usually disclose these pieces of information in the research or on their websites. Thus, the benefit of introducing more disclosure largely outbalances the related cost for producers.

403. Finally, respondents did not appreciate the introduction of an explanation of the difference between the target price and the current market price because this is deemed somewhat implicit in the research, or because is due to factors that are typical of the methodology adopted. For instance, stock target prices estimated through discounted cash flow (DCF) analysis are more likely to depart from the current market price than those estimated through market multiples. Nevertheless, as some respondents put forward, it has been noted that sometimes financial analysts do not express clearly the underlying holding period of the recommendation, as it should be for a full understanding of the difference between target and current market prices.

Requirement to properly disclose conflicts of interest

404. Another issue that might benefit from further clarification relates to the improper disclosure of conflicts of interest. Based on practical experience, ESMA has observed that disclaimers in analysts' report can be ineffective. An example of such ineffective disclaimers in analysts' reports is set out below.

"*The publisher and the authors reserve the right at any time to buy or sell stock in the companies described herein*" or "*The publisher and/or its clients may take or hold short or long positions in*

the stock discussed in the report" or "*The publisher may hold short or long positions in the stock(s) mentioned*".

405. Therefore, ESMA considers that a position is disclosed properly and effectively when it is clearly and prominently disclosed, and deems appropriate to clarify that the content of such disclaimers should be clear, precise and comprehensive. The disclosure must cover all financial instruments linked to the issuer potentially impacted by the recommendation expressed by the analyst.

406. Someone argued that general disclaimers would protect from the possibility that a trading position disclosed at the time the recommendation is first released could be outdated, and therefore misleading, if the receiver reads it at a later date. In this respect, ESMA recommends a clearer indication of this risk rather than leaving it to a generic disclaimer.

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

IX.4 Non-written recommendations

407. Implementing Directive 2003/125/EC prescribes that MSs should ensure that most of the requirements for the production of recommendations be adapted in order not to be disproportionate in the case of non-written recommendations. ESMA is not indicating in the RTS the adaptation necessary for non-written recommendations, but prefers an approach whereby an assessment is made on a case-by-case basis.

408. Moreover, it has been considered whether it might be appropriate to clarify the meaning of non-written recommendations. In such cases the risk of not being complete, thus allowing for circumvention and arbitrage opportunities, should be taken into account.

409. Following the mixed reactions received during the consultation, ESMA wishes to provide more clarity in this field also in order to harmonise current practices. As a first step it seems necessary to put forward that non-written recommendations refer to recommendations given according to a wide range of modalities: meetings, road shows, audio/video conference calls, radio, TV or website interviews, etc.

410. As for objective presentation requirements, non-written recommendations should follow the same rules set out for written recommendations. As for conflicts of interest, it has been argued that usually non-written recommendations rely on already produced written recommendations. In this case, it is

crucial that receivers, listeners or attendees are addressed to the written recommendation where conflicts of interest are properly outlined. In particular, provided that the relevant document is available free of charge to the public, the non-written recommendations should first acknowledge that a conflict of interest exists, and then it should indicate where the relevant document can be directly and easily accessed. Where a non-written recommendation does not actually rely on written recommendations, ESMA considers that producers should disclose conflicts of interest in a complete way.

IX.5 Dissemination of recommendations produced by third parties

411. ESMA holds the view that current Level 2 rules for dissemination of recommendation produced by third parties should still apply under the new regime. Article 8(1) of Implementing Directive 2003/125/EC requires that whenever a person disseminates recommendation produced by a third party in a substantially altered way, the recommendation should clearly indicate the alterations in detail. In addition, if the alteration consists of a change of the direction of the recommendation (such as changing a 'buy' recommendation into a 'hold' recommendation), the disseminator should provide further indications. ESMA is considering whether the latter additional requirement should also be triggered by changes of the target price.

412. In addition to the above changes, ESMA considers the issue put forward by several respondents according to which there is a need to regulate the summarised publications of investment recommendations carried out by research magazines, newspapers or data providers that receive tips on recommendations just disseminated by producers or authorised disseminators.

413. Such summarised dissemination usually reports brief indications of the producer, the related financial instrument, the target price, etc. and can therefore result misleading without the publication of the full picture outlined by the producer, including required information on conflicts of interest.

414. Article 8(4) of Implementing Directive 2003/125/EC (applicable to all relevant persons) establishes that "*in case of dissemination of a summary of a recommendation produced by a third party, the relevant persons disseminating such summary shall ensure that the summary is clear and not misleading, mentioning the source document and where the disclosures related to the source document can be directly and easily accessed by the public provided that they are publicly available*".

415. Article 9(1)(b) of Implementing Directive 2003/125/EC (applicable just to "financial analysts") requires that intermediaries or "financial analysts" that disseminate recommendations produced by a third party should disclose the additional information set out by Article 6 on their conflicts of interest, unless the producer, i.e. the third party, has already disseminated the recommendation. ESMA considers that the latter condition risks allowing for the circumvention of the general requirements set out by Article 6. ESMA also thinks that the intermediaries that disseminate a recommendation might have a particular interest in doing so that could usefully be disclosed to the readers of the recommendation.

416. Finally, ESMA shares the view that where the producer and the disseminating persons belong to the same group the latter should be exempted from the requirements if it does not select the investment recommendations it disseminates but just serves as a channel to clients.

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

Annex I: Summary of questions

Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

Market soundings

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

Q5: Do you agree with these proposals regarding sounding lists?

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

Q7: Do you agree with these proposals regarding recorded communications?

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

Accepted Market Practices

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

Q12: Do you agree with ESMA's clarification on the timing of STOR reporting?

Q13: Do you agree with ESMA's position on automated surveillance?

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

Q15: Do you have any additional views on templates?

Q16: Do you have any views on ESMA's clarification regarding "near misses"?

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Technical means for public disclosure of inside information and delays Qx:

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

Q21: Do you agree with the proposed records to be kept?

Insider list

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

Q23: Do you agree with the two approaches regarding the format of insider lists?

Managers' transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

Q25: Do you agree with the content to be required in the notification?

Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

Annex II: Legislative mandate to develop technical standards

Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority empowers ESMA to develop

- draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU; and

- draft implementing technical standards, to be submitted for endorsement to the Commission and to be adopted by means of implementing acts under Article 291 TFEU.

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse contains the following paragraphs conferring powers on ESMA to draft RTS and draft ITS in various fields.

Article 5(6)

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the conditions that buy-back programmes and stabilisation measures referred to in paragraphs 1 and 4 must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 11(9)

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in paragraphs 4, 5, 6 and 8.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 11(10)

In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to specify the systems and notification templates to be used by persons

to comply with the requirements established by paragraphs 4, 5, 6 and 8 of this Article, particularly the precise format of the records referred to in paragraphs 4 to 8 and the technical means for appropriate communication of the information referred to in paragraph 6 to the person receiving the market sounding.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 13(7)

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards specifying the criteria, the procedure and the requirements for establishing an accepted market practice under paragraphs 2, 3 and 4, and the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 16(5)

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine:

(a) appropriate arrangements, systems and procedures for persons to comply with the requirements established in paragraphs 1 and 2; and

(b) the notification templates to be used by persons to comply with the requirements established in paragraphs 1 and 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2016.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 17(10)

In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine:

(a) the technical means for appropriate public disclosure of inside information as referred to in paragraphs 1, 2, 8 and 9; and

(b) the technical means for delaying the public disclosure of inside information as referred to in paragraphs 4 and 5.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 18(9)

In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the precise format of insider lists and the format for updating insider lists referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 19(15)

In order to ensure uniform application of paragraph 1, ESMA shall develop draft implementing technical standards concerning the format and template in which the information referred to in paragraph 1 is to be notified and made public.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 20(3)

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine the technical arrangements for the categories of person referred to in paragraph 1, for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Annex III: Preliminary high-level cost-benefit analysis

Introduction

The Market Abuse Regulation (MAR) was published on 12 June 2014. It aims to update and strengthen the existing framework to ensure market integrity and investor protection provided by the Market Abuse Directive (MAD), notably by addressing identified gaps in regulation of new markets, platforms and over-the-counter (OTC) trading in financial instruments as well as in regulation of commodities and commodity derivatives.

The scope of MAR is therefore broader compared to the MAD. Whereas MAD applied to instruments traded on a Regulated Market, the MAR will also apply to instruments traded on other types of venues and OTC trading. This recognises the increased inter-connectedness of markets and of trading strategies.

ESMA has to develop technical standards on a range of topics. ESMA has sought assistance from an external consultant on some of the technical standards with respect to data collection and the cost analysis in order to ultimately produce a detailed cost-benefit analysis when submitting the final draft technical standards to the Commission.

The CBA in this CP therefore provides only a high level and preliminary cost-benefit analysis.

For the scope of this section, the benefits and costs of having fully harmonised and detailed conditions, requirements, formats or templates, along the lines described in the Consultation Paper, are evaluated against a scenario where no harmonisation is provided and National Competent Authorities (NCAs) have discretion to determine them locally.

Section 1 - Draft RTS to specify the conditions for trading, restrictions on timing and volume, disclosure and reporting requirements, and price conditions for a buy-back programme or stabilisation to be exempt from the MAR

To prevent potential market abuse in own-trading of shares or other securities, ESMA has proposed a number of technical standards surrounding buy-backs and stabilisations. They can be broadly classified under disclosure and reporting standards and operational standards, the latter referring to particular conditions of executions of the buyback programmes and stabilisation measures in terms of timing of the transactions, price and volume conditions and trading restrictions.

	Qualitative description
Benefits	For the purpose of ensuring adequate public disclosure of buy-back programmes and stabilisation measures information, the use of the information dissemination and storage mechanism(s) prescribed under the Transparency Directive 2004/109/EC for public disclosure of shares admitted to trading on a RM or, for other issuers, those established for the public disclosure of inside information, should facilitate the implementation of the requirement by issuers and EAMPs, would maintain consistency and avoid unnecessary complexity being

	introduced. They should also facilitate access to information by investors and competent authorities. In terms of reporting, the requirement of disclosure of the aggregated volume per day and per venue and the volume-weighted average price per day and per venue should facilitate the understanding of the publicly disclosed information compared to analysing individual transactions. The requirements will also provide greater certainty and enable the issuer to appreciate that its obligations have been discharged. The trade reporting requirements to the competent authority of the trading venue where the transactions were conducted provide a clear regime and allow the concerned authority to discharge its functions. The suggested approach to continue to apply most of the MAD trading conditions, limitations and restrictions should facilitate the implementation of the requirements as well as the monitoring of their compliance by competent authorities, thus promoting market integrity. The simplification proposed with respect to the volume limitation (no extension of the volume threshold possible in case if extreme low liquidity) should enhance legal certainty.
Compliance costs	The main costs will be borne by the issuer. One-off compliance costs would essentially relate to the understanding of the new requirements for channels of disclosure and the preparation of internal systems and procedures for dissemination and storage (for issuers active on RM this cost is minimal considering the current MAD requirements). The on-going compliance costs will relate to the implementation and maintenance of the internal procedures as well as to the actual publication. From an issuer or a stabilisation manager's perspective, the reporting requirements may increase the administrative burden and the complexity of reporting process by having potentially to report to more than one authority.

Section 2 – draft RTS on appropriate arrangements, systems, procedures and record keeping requirements for disclosing market participants conducting market soundings and related draft ITS on systems, notification templates, and technical means for communication of market soundings

Market sounding is "a communication of information, prior to the announcement of a transaction, to one or more potential investors". It can constitute an improper disclosure of inside information unless certain conditions are fulfilled by the disclosing market participant (DMP). The technical standards will establish the internal procedures and arrangements DMP should have in place, the information and the way they communicate with the persons receiving the sounding and the records they need to keep.

	Qualitative description
Benefits	The technical standards should not only provide for clarity and legal certainty by defining a common set of rules but also promote a consistent approach across Member States on how to conduct the sounding while reducing the risk

	of abuses and benefitting also the recipients of the market soundings. Furthermore, it facilitates the supervisory and investigative activities of the competent authorities. Overall, the main benefit would be enhanced market integrity.
Compliance costs	Compliance costs are likely to arise from adapting processes and potentially IT systems regarding communication with the persons receiving the sounding and the extensive record keeping requirements for all market soundings. Recipients of market soundings could also be impacted by the requirements. For instance, would the processes applied by DMPs be too burdensome for the recipients of the market sounding, the recipients may choose to be sounded less frequently, in particular in cases when inside information is disclosed through the market sounding. The beneficiary of the sounding (e.g. issuers) could then have less information on demand for new issuance which, in turn, could lead to less (or less optimal) capital market activity.

Section 3: Draft RTS on criteria, procedures and requirement for establishing an AMP and for maintaining, terminating and modifying the conditions of its acceptance

As under the current MAD regime, an accepted market practice (AMP) can only be established by the competent authority responsible for the market supervision of the market the AMP concerns. MAR does however define a set of criteria to be considered in the assessment conducted by the concerned authority and requires a Europe wide consultation through ESMA.

	Qualitative description
Benefits	In specifying further the assessment criteria and the procedures related to the acceptance, modification and termination of the AMP, ESMA considers that main benefits will result from a clearer and common set of rules, ensuring thus consistency in the assessment to be conducted and ultimately enhancing market integrity across European markets. Furthermore, designing a common template for the notification of intention to accept an AMP and for the publication of an established AMP will facilitate the consultation process between competent authorities and with ESMA. A common template will also provide greater transparency of such practices through increased comparability of established AMP, in particular if they are similar in nature.
Costs to regulator	In terms of costs, most of the implementation costs will be borne by competent authorities and ESMA, but they are not expected to be significant. However, the status of the firm performing the AMP (whether it needs to be supervised or not) could be a cost-driver: the supervisory cost for the competent authority would increase if the firm performing the AMP is a non-supervised firm

Compliance costs	Compliance firms are not expected to be significant. However, the status of the firm performing the AMP (whether it needs to be supervised or not) could be a cost-driver also for firms: the costs to implement trading control and compliance systems with the firm performing the AMP would increase if the firm performing the AMP is a non-supervised firm.

Section 4: Draft RTS on arrangements, systems, and procedures as well as notification templates to be used by trading venues and those professionally arranging trades for the detection, prevention, and reporting of potential market abuse.

The standards proposed by ESMA address the level of suspicion required leading to a STOR, record keeping and reporting formats, the timing of reporting, how proactive different market participants, namely the operators of trading venues and persons professionally arranging transactions, should be in monitoring the market and proper training of staff.

	Qualitative description
Benefits	A common STOR format will benefit the competent authorities by achieving a greater consistency of the reported information, thus facilitating the analysis and exchange of the STORs received for supervisory and investigatory purposes. Furthermore, a consistent format will enable firms that are required to submit STORs to more than one competent authority (e.g. financial groups constituted of several firms located in different Member States). Thus the administrative burden will be reduced.
Compliance costs	The main expected costs would relate to investments in systems and procedures for surveillance and reporting. There are also likely to be costs for training of staff that is needed to develop a culture in firms dedicated to monitoring, detecting, and reporting suspicions of market abuse. However, many firms have systems and surveillance in place ahead of the current requirements of MAD, which mitigates the cost increase for those firms. Another mitigating factor regarding costs is that necessary systems have to be proportionate to the size and activities of the firm.

Section 5: draft ITS on technical means for public disclosure of inside information and for delaying the disclosure of inside information.

Dissemination of inside information	
	Qualitative description
Benefits	The main benefits of proposing technical standards for the dissemination of inside information that rely upon the requirements set out in the Transparency Directive are to promote the same effectiveness of the dissemination, and thus transparency, to the markets and investors. This approach also ensure a certain continuity between the MAD and the MAR disclosure regimes by capitalising on existing and well-known disclosure mechanisms, and thus avoiding potential disruptions to market integrity during the transition from MAD and

	MAR.. Furthermore, adopting a set of common criteria for the publication of inside information on the website of the issuer (or potentially the ones of the trading venues, in case of SME) will provide clarity and legal certainty on how the information should be posted and stored from the perspective of the issuers while promoting accessibility to that information to the extent possible.
Compliance costs	The costs relating to the dissemination of inside information are likely to be mainly incremental costs to be borne especially by the particular sub-set of issuers and EAMPs who are now covered for the first time by the Market Abuse Regulation. Expected on-off costs will relate to the understanding of the new requirements and the preparation of internal system and procedures to use the dissemination mechanisms. The on-going costs of actually disseminating the inside information are not likely to be significant and would largely depend on the number of publications. The posting and storage on the websites will essentially imply cost for amending the existing website, and potentially in some instances the creation of a suitable website, in order to comply with the “posting on the website” requirement. However, most of the websites should be already able to accommodate the specifications of this requirement.

Delaying the disclosure of inside information	
	Qualitative description
Benefits	Although the possibility to delay the disclosure of inside information is not a new provision, the obligation to notify the delays, ex-post or ex-ante, to the competent authority is a new requirement under MAR. Establishing clear rules is a way to ensure enhanced market integrity through better informed competent authorities and easier processing of the notifications. Specifying the internal record keeping requirements for issuers ensures a proper audit trail, but should also assist in promoting a consistent approach within the issuers' community on how to handle the process of delaying the disclosure of inside information. Furthermore, standardising the content of notification and explanation of the delay is expected to reduce the issuer's preparation burden for these communications.
Compliance costs	The main expected on-off and on-going costs for issuers are likely to relate to the understanding to the applicable standards and to the design, implementation and maintenance of the record keeping requirement. Other cost drivers to consider are the nature of the means for transmitting notifications to competent authorities (e.g. electronic vs. paper) and the level of security required for these transmissions.

Section 6: Draft ITS on the format of insider lists and the format for updating insider lists

The implementing technical standards (ITS) on the format and template for insider list should ensure uniform application across the EU which is not currently the case under MAD. The stakeholders directly impacted by the ITS are the issuers and those acting on their behalf or on their

account as well as EAMPs, auction entities[15], and competent authorities. Investors and market participants would be indirectly impacted through the increased market integrity they should overall entail.

The majority of the draft technical standards relating to insider lists concern the format of the lists, the data fields required, and submission of the lists.

	Qualitative description
Benefits	The use of common format and templates for setting up, maintaining and submitting to the competent authority the insider list, and the determination of procedures for updating the list will facilitate the implementation by those subject to the requirements, in particular when their instruments are admitted to traded or traded in venues in different Member States. Consistency would be thus achieved, which in turn will assist the processing and examination by competent authorities of the lists submitted to them upon request. A harmonised approach vis-à-vis the format of the insider list will decrease the administrative burden for competent authorities, issuers and those acting on their behalf or on their account, EAMPs and auction entities whereas the requirement of numerous data fields will provide adequate information to competent authorities for performing the task of protecting the integrity of the financial markets and detecting possible insider dealing, consequently giving market participants greater confidence in the financial markets.
Compliance costs	Costs for issuers, EAMPs and auction entities will include training costs for staff, systems investment to keep the insider lists in electronic format and appropriately submit them to the competent authorities, and staff time dedicated to maintaining lists. The main cost drivers identified relate to: o the number of data fields required in the list, as it will impact the extent of the administrative burden for the issuers, EAMPs and auctions entities, their one-off cost of developing data collection and integrating the template in the internal processes and the on-going cost of the resources dedicated to the maintenance of the list. o Whether an insider list format (single electronic document) is prescribed or some flexibility is offered to issuers and third parties for the internal set up and maintenance of the list as now proposed in the CP. o The nature of the means of transmission of the insider list to the competent authority upon its request (e.g. electronic vs. paper). o The level of security required for the transmission to the competent authority. With respect to SME Growth market issuers, requiring them to be able to provide an insider list containing the appropriate information and to submit it

[15] According to Article 18(8), the requirement to draw up and maintain insider lists applies to emission allowances market participants (EAMPs) as well as to auction platforms, auctioneers and the auction monitor, hereinafter referred to as “auction entities”.

	in the proper format to the competent authority upon request, without neither requiring the establishment of internal systems and/or processes nor prescribing their form or content, should allow to achieve the objective of reducing their administrative burden and operational costs while not creating major risks in terms of market integrity.

Section 7: Draft on the format of notification and disclosure of transactions by persons discharging managerial responsibility and closely associated persons (PDMRs).

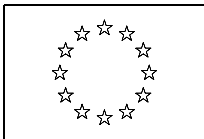
	Qualitative description
Benefits	The implementing technical standards (ITS) on the format and template in which information on manager's transactions is to be notified and made public should ensure uniform application across the EU. Overall, the use of common format and a single template both for the notification and for the disclosure of the PDMRs' transactions will facilitate the implementation of the notification requirements by PDMRs and the disclosure requirements by issuers, EAMPs and auction entities. Requiring aggregation of transactions for the part of the notification that is to be made public will reduce the number of transactions to be publicly disclosed by issuers, and will make the information more meaningful and the understanding of the embedded data easier. It will also facilitate the comparability of the information about PDMR dealings across Europe, providing the market and the investor with greater transparency, which in turn will enhance the confidence of the market. Requiring the details of all transactions in the same notification template to the competent authorities will assist them in supervision and monitoring and ultimately enhance market integrity.
Costs to regulator	For competent authorities, the design of systems for receiving the notification and their maintenance will constitute the main costs
Compliance costs	PDMRs as well as issuers, EAMPs and other auction entities will need to familiarise themselves with the proposed twofold template, which will imply on-off costs for understanding the rules, including training of staff. Issuers, EAMPs and auction entities will need to developing a process for data collection and reporting. The expected on-going cost will essentially relate for PDMRs to preparing the notification in accordance with the format and transmitting them, whereas the issuers, EAMPs and auction entities will bear the cost for preparing the publication of the information. The main costs drivers are expected to relate to the level of details required in the content of the template, the nature of the means for transmitting notifications to competent authorities and issuers, EAMPs and auction entities (e.g. electronic vs. paper), and the level of security required for the transmission, and whether there would be a need for issuers to reprocess the notifications received from PDMRs before proceeding to the publication.

Section 8: Draft RTS on the technical arrangements relating to objective presentation and disclosure of interest or conflicts of interest by those producing or disseminating investment recommendations or investment strategies.

ESMA has proposed draft technical standards aiming at ensuring that investment recommendations or other information suggesting an investment strategy are objectively presented and that interests or conflict of interests are properly disclosed by the persons who produce or disseminate them. For that purpose, ESMA has used the existing requirements set out in Directive 2003/125EC implementing MAD as well as a similar approach, which determines standards applicable to producers and to disseminators. For each category, general standards to be applied are defined. In addition additional and more demanding standards will be imposed on a sub-set of persons.

	Qualitative description
Benefits	These standards largely deal with information to be included in an investment recommendation by its producers or to be disclosed by the disseminators of a recommendation produced by a third party. Such a common set of standards will thus improve transparency and market confidence.
Compliance costs	Most of the costs would be linked to the additional information that were not requested in the current regime, such as more details about the valuation methodologies, the list of previous recommendations produced or the new requirements introduced with respect to reporting of long and short positions. Particular cost drivers to consider relate to the clarification of the requirements for non-written recommendations, and the reallocation of some of the additional standards currently in place under MAD, that now will become general standards, and thus be applicable to anyone in scope and not just to a sub-category. Additionally, having regard to the wider range of persons covered by the investment recommendation regime under MAR, the scope of the persons subject to the additional sets of standards has been expanded to include the so-called “experts”.

Annex IV: Draft regulatory technical standards for the conditions that buy-back programmes and stabilisation measures must meet, the appropriate arrangements, systems and procedures for disclosing market participants conducting market sounding and the criteria, procedures and requirements for establishing an accepted market practice and for maintaining, terminating and modifying the conditions for its acceptance



EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

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supplementing Regulation (EU) No (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) with regard to regulatory technical standards for the conditions that buy-back programmes and stabilisation measures must meet, the appropriate arrangements, systems and procedures for disclosing market participants conducting market sounding and the criteria, procedures and requirements for establishing an accepted market practice and for maintaining, terminating and modifying the conditions for its acceptance

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)[16], and in particular Articles 5(6), 11(9) and 13(7) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) The provisions of Article 5 of Regulation (EU) No 596/2014 only cover behaviour directly related to the purpose of the buy-back and stabilisation activities. Behaviour which would not benefit from such provisions under Regulation (EU) No 596/2014 should not in itself be deemed to constitute market abuse, although they are covered by Regulation (EU) No 596/2014 and may be subject to administrative and criminal penalties, if the competent authority establishes that the action in question constitutes market abuse.

[16] OJ L 173, 12.6.2014, p. 1

(2) Article 5 of Regulation (EU) No 596/2014 refers to associated instruments only in the context of stabilisation of securities. Accordingly, buy-back programmes involving

(3) associated instruments, such as financial derivatives, will not benefit from the exemption provided in Regulation (EU) No 596/2014.

(4) As transparency is a prerequisite for the prevention of market abuse, it is important to specify the mechanisms to be used for public disclosure of information, which is required to be publicly disclosed under this Regulation.

(5) Issuers having adopted buy-back programmes should inform their competent authority and the public.

(6) In order to prevent market abuse, the daily volume of trading in own shares in buy-back programmes should be limited.

(7) Particular attention has to be paid to the selling of own shares during the life of a buy-back programme, to the possible existence of closed periods within issuers during which transactions are prohibited and to the fact that an issuer may have legitimate reasons to delay public disclosure of inside information.

(8) Stabilisation transactions mainly have the effect of providing support for the price of an offering of relevant securities during a limited time period if they come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in the relevant securities. This is in the interest of those investors having subscribed or purchased those relevant securities in the context of a significant distribution, and of issuers. In this way, stabilisation can contribute to greater confidence of investors and issuers in the financial markets. Furthermore, this is achieved by the purchase, rather than the sales of the relevant securities.

(9) In relation to stabilisation, block trades that are strictly private transactions should not be considered as a significant distribution of relevant securities.

(10) In the context of an initial public offer, when Member States permit trading prior to the beginning of the official trading on a regulated market, the permission covers 'when issued trading'.

(11) Market integrity requires the adequate public disclosure of stabilisation activity. Methods used for adequate public disclosure of such information should be efficient and can take into account market practices accepted by competent authorities. Besides, an appropriate reporting of the stabilisation transactions is necessary to allow competent authorities to supervise stabilisation activities. Futhermore, it is preferable to clarify in advance the allocation of the responsibilities between the issuers, the offerors or the entities undertaking the stabilisation for fulfilling the applicable reporting and transparency requirements taking into account who has the relevant information.

(12) There should be adequate coordination in place between all investment firms and credit institutions undertaking stabilisation. During stabilisation, one investment firm or credit institution should act as a central point of inquiry for any regulatory intervention by the competent authority in each Member State concerned.

(13) In order to avoid confusion, stabilisation activity should be carried out by taking into account the market conditions and the offering price of the relevant security.Transactions to liquidate positions that were established as a result of stabilisation activity, should be undertaken to minimise market impact having due regard to prevailing market conditions.

(14) Overallotment facilities and 'greenshoe options' are closely related to stabilisation, by providing resources and hedging for stabilisation activity.

(15) Particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilisation when it results in a position uncovered by the 'greenshoe option'.

(16) The ability to conduct market soundings is important for the proper functioning of financial markets and therefore a market sounding regime is needed to provide a legal framework within which such activity is clearly defined and can be conducted legitimately. Information disclosed by a disclosing market participant should enable a market sounding recipient as a potential investor to make a sufficiently informed assessment and inside information should be properly flagged as required. Provided that all applicable market sounding standards and requirements are complied with, disclosing market participants should be afforded a measure of protection against allegations that they have committed market abuse through improper disclosure of inside information. In this respect, appropriate arrangements, procedures and record keeping requirements are necessary in order to ensure that market sounding activities are managed and controlled effectively and smoothly, being in the interest of the dislcosing market participant to ensure appropiate internal controls, guaranteeing the legitimacy of market sounding activities, are in place.

(17) A disclosing market participant, alone or as part of a syndicate, could be considered as acting on behalf of or for the account of the market sounding benificiary, when the disclosing market participant has concluded a written agreement with the market sounding beneficiary, has received, in oral or written form, instructions or a mandate from the market sounding beneficiary, or, has sufficient information from the market sounding beneficiary to conclude that the transaction subject to the market sounding is reasonably expected to come into existence or occur.

(18) When determining which information to disclose to a potential investor, a disclosing market participant should carefully consider whether the disclosure should include only the exact characteristics of the possible transaction, or also other information which may provide context and background to the possible transaction, but is not directly related to it.

(19) Communications related to and prior to a private placement or a block trade would normally fall under the scope of the market sounding regime when they are intended to provide information to potential investors in order to gauge their interest in a possible transaction and the conditions relating to it such as its potential size or pricing.

(20) Operational procedures and their regular review and update are key for the correct and effective application of the relevant requirements throughout the process of a market sounding. For this purpose, employees of a disclosing market participant should be appropriately trained in relation to the conduct of a market sounding, with a particular

focus on the legal implications of market sounding activities and the assessment of the nature of the information communicated through market soundings.

(21) Effective planning of a market sounding would imply that the disclosing market participant determines for each particular market sounding the type and number of investors it intends to sound, taking into account the specific circumstances surrounding the subject of the market sounding and the willingness of the investors to be sounded. When planning the market sounding process, a disclosing market participant should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the anticipated date for the launch or announcement of the potential transaction, but it should also recognise the anticipated launch or announcement is also dependent on external factors such as changing market conditions.

(22) In addition to obtaining and recording the consent of a potential investor to receive inside information in relation to every market sounding, a disclosing market participant should also keep a list of those potential investors that have informed it that they are not willing to be sounded in relation to potential transactions. Potential investors may express their wish not to be approached in relation to all potential transactions or particular types of transactions. It should be the responsibility of the potential investor to keep the disclosing market participant updated in relation to its preferences. Disclosing market participants are not expected to continually approach the potential investors on its list to ensure the list remains up-to-date, although it may be in their commercial interest to periodically reconfirm the position with potential investors.

(23) The definition of common criteria, procedure and requirements across the Union for the establishment of an accepted market practice by a national competent authority, as well as common requirements for maintaining, terminating or modifying an accepted market practice by a competent authority, contributes to the development of uniform arrangements used by competent authorities in the sphere of accepted market practice and improves the clarity of the legal regime under which these practices are legitimate.

(24) An accepted market practice should be performed in a way that ensures market integrity and investor protection without creating risks for other market participants and other related markets. It should also be subject to a sound surveillance and proper supervision from the competent authority that accepted it. Therefore, the status of the entity performing the accepted market practice, especially when acting on behalf or for the account of another person who is the direct beneficiary of the market practice, is of particular relevance. The competent authority will need to assess for the particular market practice under consideration whether such entity needs to be a supervised person.

(25) When assessing the impact of a practice on market liquidity and efficiency, competent authorities should positively consider market practices whose one or more of their objectives are, inter alia, to promote regular trading of illiquid financial instruments, minimize price fluctuations due to excessive spreads and limited supply or demand of a financial instrument without contradicting a market trend, avoid abusive squeezes, provide quotes when there is the risk of not having counterparties for a trade, provide transparency of prices, facilitate the evaluation of fair and actual prices in markets

where most trades are conducted outside a trading venue or facilitate orderly operations where a participant has a dominant position.

(26) The provisions in this Regulation are closely linked, since they deal with exemptions to provisions of Regulation (EU) No 596/2014 when certain circumstances or conditions are met. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including investors that are non-Union residents, it is desirable to include certain of the regulatory technical standards required by Regulation (EU) No 596/2014 in a single Regulation.

(27) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(28) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[17].

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down regulatory technical standards for:

(i) the conditions to be met by buyback programmes and the stabilisation of financial instruments in order to benefit from the exemption provided for in Article 5 of Regulation (EU) No 596/2014;

(ii) determining appropriate arrangements, procedures and record keeping requirements for disclosing market participants conducting market soundings, to comply with the requirements laid down in paragraphs 4, 5, 6 and 8 of Article 11 of Regulation (EU) No 596/2014, pursuant to Article 11(9) of Regulation (EU) No 596/2014; and

(iii) the criteria, the procedure and the requirements for establishing an accepted market practice, as well as the requirements for maintaining, terminating or

[17] OJ L 331, 15.12.2010, p. 84.

modifying the conditions for its acceptance pursuant to Article 13(7) of Regulation (EU) No 596/2014.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) No 596/2014:

a) ‘time-scheduled buy-back programme’ means a buy-back programme where the dates and quantities of securities to be traded during the time period of the programme are set out at the time of the public disclosure of the buy-back programme;

b) ‘adequate public disclosure’ means, for instruments admitted to trading on Regulated Markets, the use of the information dissemination and storage mechanism(s) set up in the member state as part of their implementation of the public disclosure made in accordance with the procedure laid down in Directive 2004/109/EC (Transparency Directive), and, for other financial instruments, the use of the technical means for public disclosure of inside information pursuant to Article 17(1) of Regulation (EU) No 596/2014;

c) ‘offeror’ means the prior holders of, or the entity issuing, the relevant securities;

d) ‘allotment’ means the process or processes by which the number of relevant securities to be received by investors who have previously subscribed or applied for them is determined;

e) ‘ancillary stabilisation’ means the exercise of an overallotment facility or of a “Greenshoe option” by investment firms or credit institutions, in the context of a significant distribution of relevant securities, exclusively for facilitating stabilisation activity;

f) ‘overallotment facility’ means a clause in the underwriting agreement or lead management agreement which permits acceptance of subscriptions or offers to purchase a greater number of relevant securities than originally offered;

g) ‘greenshoe option’ means an option granted by the offeror in favour of the investment firm(s) or credit institution(s) involved in the offer for the purpose of covering overallotments, under the terms of which such firm(s) or institution(s) may purchase up to a certain amount of relevant securities at the offer price for a certain period of time after the offer of the relevant securities;

h) “disclosing market participant” means a person referred to in Article 3(32) of Regulation (EU) No 596/2014;

i) “market soundings” means the activity defined in Article 11(1) and (2) of Regulation (EU) No 596/2014;

j) “market sounding beneficiary” means a person referred to in point (a) to (c) of Article 11(1) and Article 11(2) of Regulation (EU) No 596/2014;

k) “syndicate” means a group of disclosing market participants who act in coordination as a third party referred to in Article 11(1)(d) of Regulation (EU) No 596/2014;

l) “supervised persons” means persons who are subject to supervisory duties from regulators, authorised persons under MiFID, or persons subject to prudential supervision in a Member State;

m) “interested parties” means an issuer, an intermediary or any other party or group of parties that subscribe or promote the accepted market practice.

CHAPTER II

BUY-BACK PROGRAMMES

Article 3

Conditions for buy-back programmes and disclosure

1. Prior to the start of trading, full details of the programme approved in accordance with Article 21(1) of Directive 2012/30/EU shall be adequately disclosed to the public in Member States in which an issuer has requested admission of its shares to trading on a Regulated Market or a Multilateral Trading Facility.
Those details shall include the objective of the programme as referred to in Article 5(2) of Regulation (EU) No 596/2014, the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorisation for the programme has been given.

Subsequent changes to the programme shall be subject to adequate public disclosure in Member States.

2. The issuer must have in place the mechanisms ensuring that it fulfils trade reporting obligations to the competent authority of the trading venue on which the shares have been admitted to trading or are traded and where the transactions were carried out no later than the end of the seventh daily market session following the date of execution of such transactions. These mechanisms must record each transaction related to buy-back programmes, including the information referred to in Article 5(3) of Regulation (EU) No 596/2014.

3. The issuer shall publicly disclose buy-back transactions referred to in paragraph 2 in an aggregated form indicating the aggregated volume and the weighted average price per day and per trading venue no later than the end of the seventh daily market session following the date of execution of such transactions, using the mechanisms defined in Article 2(b) of this Regulation. The issuer shall also post on its website the transaction publicly disclosed and keep the information available to the public for at least a five year period.

Article 4

Trading conditions

1. In order to benefit from the exemption under Article 5(1) of Regulation (EU) No 596/2014, the issuer shall purchase shares on a trading venue where the shares are admitted to trading or traded. For shares traded continuously on a trading venue, the orders placed during any auction phase on that venue or orders placed before but modified during the

auction phase shall not benefit from the exemption. For shares traded solely on a trading venue through an auction process, the orders placed and modified by the issuer during the auction period can benefit from the exemption provided that the other market participants have sufficient time to react to them.

2. An issuer shall not, when executing trades under a buy-back programme, purchase shares at a price higher than the higher of the price of the last independent trade and the highest current independent purchase's bid on the trading venue where the purchase is carried out, including when the shares are traded on different trading venues.

3. An issuer shall not purchase in any one trading day more than 25% of the average daily volume of the shares over a period of reference on the trading venue on which the purchase is carried out.

The average daily volume figure shall be based on the average daily volume traded in:

- the month preceding the month of public disclosure of that programme and fixed on that basis in that programme for the authorised period of the programme; or
- the 20 trading days preceding the date of purchase, where the programme makes no reference to that volume.

Article 5

Restrictions

1. In order to benefit from the exemption provided by Article 5(1) of Regulation (EU) No 596/2014, the issuer shall not, during its participation in a buy-back programme, engage in the following trading:

a) selling of own shares during the life of the programme;

b) trading during a closed period as defined under Article 19(11) of Regulation (EU) No 596/2014;

c) trading where the issuer has decided to delay the public disclosure of inside information in accordance with Article 17(4) and (5) of Regulation (EU) No 596/2014.

2. Paragraph 1(a) shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintained adequate and effective internal arrangements and procedures to prevent unduly transmission of inside information, between those in possession of inside information related directly or indirectly to the issuer and those responsible for any decision relating to the trading of own shares (including the trading of own shares on behalf of clients), when trading in own shares on the basis of such any decision.

3. Paragraphs 1(b) and (c) shall not apply if the issuer is an investment firm or credit institution and has established implemented and maintained adequate and effective internal arrangements and procedures to prevent unduly transmission of inside information between those responsible for the handling of inside information related directly or indirectly to the issuer (including acquisition decisions under the buy-back programme) and those

responsible for the trading of own shares on behalf of clients, when trading in own shares on behalf of those clients.

4. Paragraph 1 shall not apply if:

a) the issuer has in place a time-scheduled buy-back programme; or

b) the buy-back programme is lead-managed by an investment firm or a credit institution which makes its trading decisions in relation to the issuer's shares independently of, and without influence by, the issuer with regard to the timing of the purchases.

CHAPTER III

STABILISATION OF SECURITIES

Article 6

Time-related conditions for stabilisation

1. Stabilisation shall be carried out only for a limited time period.

2. In respect of shares and other securities equivalent to shares, the time period referred to in paragraph 1 shall, in the case of a significant distribution in the form of an initial offer publicly announced, start on the date of commencement of trading of the relevant securities on the concerned trading venue and end no later than 30 calendar days thereafter.

3. Where the initial offer publicly announced takes place in a Member State that permits trading prior to the commencement of trading on a trading venue, the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the final price of the relevant securities and last no longer than 30 calendar days thereafter. Such trading shall be carried out in compliance with the rules, if any, of the trading venue on which the relevant securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.

4. In respect of shares and other securities equivalent to shares, the time period referred to in paragraph 1 shall, in the case of a significant distribution in the form of a secondary offer, start on the date of adequate public disclosure of the final price of the relevant securities and end no later than 30 calendar days after the date of allotment.

5. In respect of bonds and other forms of securitised debt (which are not convertible or exchangeable into shares or into other securities equivalent to shares), the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the terms of the offer of the relevant securities (i.e. including the spread to the benchmark, if any, once it has been fixed) and end, whatever is earlier, either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the relevant securities.

6. In respect of securitised debt convertible or exchangeable into shares or into other securities equivalent to shares, the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the final terms of the offer of the relevant securities and

end, whatever is earlier, either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the relevant securities.

Article 7

Disclosure and reporting conditions for stabilisation

1. The following information shall be adequately publicly disclosed before the opening of the offer period of the relevant securities:

a) the fact that stabilisation may be undertaken, that there is no assurance that it will be undertaken and that it may be stopped at any time;

b) the fact that stabilisation transactions are aimed to support the market price of the relevant securities during the stabilisation period;

c) the beginning and end of the period during which stabilisation may occur;

d) the identity of the stabilisation manager, unless this is not known at the time of publication, must be publicly disclosed before any stabilisation activity begins;

e) the existence and maximum size of any overallotment facility or greenshoe option, the exercise period of the greenshoe option and any conditions for the use of the overallotment facility or exercise of the greenshoe option.

The application of the provisions of this paragraph shall be suspended for offers under the scope of application of the measures implementing Directive 2003/71/EC.

2. Within one week of the end of the stabilisation period, the following information must be adequately disclosed to the public by the entity undertaking the stabilisation measure:

a) whether or not stabilisation was undertaken;

b) the date at which stabilisation started;

c) the date at which stabilisation last occurred;

d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out; and

e) the trading venue(s) on which the stabilisation transactions were carried out, where applicable.

For the purpose of the notification duty set out in Article 5(5) of Regulation (EU) No 596/2014, the entities undertaking the stabilisation must record each stabilisation order or transaction in securities and associated instruments with, as a minimum, the information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of Regulation (EU) No600/2014. Where the stabilisation transactions take place on several trading venues in different Member States, the competent authorities of the trading venues shall be notified of the stabilisation transactions carried on their venue.

3. The issuer, the offeror and the entities undertaking the stabilisation shall appoint one of them as responsible for the disclosure pursuant to paragraph 1.

4. Where several entities undertake the stabilisation acting, or not, on behalf of the issuer or offeror, one of those persons shall act as central point of inquiry for any request from the competent authority of the trading venue on which the relevant securities have been admitted to trading or are traded.

Article 8

Specific price conditions

1. In the case of an offer of shares or other securities equivalent to shares, stabilisation of the relevant securities shall not in any circumstances be executed above the offering price.

2. In the case of an offer of securitised debt convertible or exchangeable into instruments as referred to in paragraph 1, stabilisation of those instruments shall not in any circumstances be executed above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

Article 9

Conditions for ancillary stabilisation

In order to benefit from the exemption provided for in Article 5(4) of of Regulation (EU) No 596/2014, ancillary stabilisation must be undertaken in accordance with Article 8 of this Regulation and with the following:

a) relevant securities may be overallotted only during the subscription period and at the offer price;

b) a position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the greenshoe option may not exceed 5% of the original offer;

c) the greenshoe option may be exercised by the beneficiaries of such an option only where relevant securities have been overallotted;

d) the greenshoe option may not amount to more than 15% of the original offer;

e) the exercise period of the greenshoe option must be the same as the stabilisation period required under Article 7;

f) the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of relevant securities involved.

Article 10

Restrictions

Sell transactions of the securities subject to stabilisation measures carried out during the time period referred to in Article 7 of this Regulation by an entity undertaking the stabilisation and further acquisitions conducted after such sales shall not benefit from the exemption provided by Article 5(4) of Regulation (EU) No 596/2014.

CHAPTER IV

ARRANGEMENTS, PROCEDURES AND RECORD KEEPING REQUIREMENTS FOR THE ACTIVITY OF MARKET SOUNDING

Article 11

Internal arrangements and procedures

1. A disclosing market participant shall establish and maintain internal arrangements supported by operational procedures setting out how to carry out the market soundings to ensure its compliance with Article 11(3) to (8) of Regulation (EU) No 596/2014 prior, during and after the conducting of the market sounding. A disclosing market participant shall regularly review such arrangements and procedures and update them when necessary.

2. The procedures referred to in paragraph 1 shall include, inter alia, the template for standard scripts, including at least the information set out in Article 6 of this Regulation, and the arrangements regarding how market sounding records are made and maintained.

3. As part of the internal procedures referred to in paragraph 1, a disclosing market participant shall take the necessary steps to:

a. limit the number of employees responsible for conducting the market sounding, having regard to the nature and characteristics of the transaction;

b. ensure employees responsible for conducting market soundings are appropriately trained and understand the key risks and obligations arising from market soundings. This shall include training in relation to assessing whether information is inside information as well as conducting the market sounding process;

c. limit the number of employees who are not responsible for conducting the market sounding but having access to the information to those with a legitimate reason for such access, taking into account the characteristic of the transaction. A disclosing market participant shall ensure that clear internal arrangements are established to ensure that its employees who are not responsible for conducting the market sounding and who do not have a legitimate reason to have access to inside information are not in possession of that inside information.

d. reduce as much as possible the time between the moment when inside information is made available to the employees conducting the market sounding and the moment when market soundings with investors are conducted.

Article 12

Procedures prior to conducting a market sounding

1. A disclosing market participant shall determine in advance the content of the information it will disclose to a potential investor.

2. For the purposes of Article 11(3) of Regulation (EU) No 596/2014, when considering whether the market sounding will involve the disclosure of inside information, a disclosing market participant shall include in the written record an explanation of its conclusion. This shall include all the relevant information that contributed to the conclusion such as any opinion provided by the market sounding beneficiary as to whether or not the information is inside information, and the source of that information. As part of this conclusion a disclosing market participant shall also determine the time when the transaction is estimated to be announced.

3. In the case of a syndicate, the disclosing market participants shall have appropriate arrangements in place aimed at establishing an agreement between the syndicate's members on: (i) the information that will be disclosed to potential investors as part of the market sounding, and (ii) the conclusion referred to in paragraph 2.

4. If a disclosing market participant has concluded the information to be disclosed in any market sounding will involve the disclosure of inside information it shall, before starting the market sounding, inform a market sounding beneficiary of that conclusion and of the information it proposes to disclose in any market sounding if the disclosing market participant has concluded an agreement with, or received direct instructions or a mandate, from the market sounding beneficiary.

5. For the purpose of applying Article 11(3) of Regulation (EU) No 596/2014, a disclosing market participant shall keep a written record of its consideration, any discussion undertaken with the market sounding beneficiary, and an explanation justifying its conclusion regarding whether the market sounding will involve the disclosure of inside information.

Article 13

Information and modalities for communicating with potential investors

1. A disclosing market participant shall use a script for conducting any market sounding. Whilst a script could be tailored for specific transactions, it shall always contain at least the following information set out in Annex I of the ITS on market sounding:

i. clarification that the conversation is classified as a market sounding;

ii. confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation;

iii. in cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information:

   a. a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor, may cause them to be an insider, and

   b. a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that

apply to the possession of inside information, including keeping the information confidential;

c. consent of the market sounding recipient to receiving the information which is the subject of the proposed market sounding;

iv. in cases where a disclosing market participant has concluded that the information included in the market sounding is inside information:

a. a statement explaining that the disclosing market participant has considered the information and concluded it is inside information;

b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded it is inside information;

c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid;

d. a statement explaining that obligations and prohibitions apply to the possession of inside information, including point (b), (c) and (d) of Article 11(5) of Regulation (EU) No 596/2014, and that administrative and criminal penalties may be incurred in the event of a breach of Regulation (EU) No 596/2014;

e. consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014; and

v. information regarding the transaction in accordance with Article 12(1) of this Regulation.

2. A disclosing market participant may use a simplified standard script when sounding a market sounding recipient with whom it has an ongoing relationship and who has previously confirmed to the disclosing market participant that they are aware of the consequences of holding inside information. The simplified script includes all the items listed in paragraph 1, expect for item iv(d), as set out in [Annex I of the ITS on market sounding.

Article 14

Data regarding market sounding recipients

1. A disclosing market participant shall make and maintain accurate records in relation to each market sounding conducted, including:

a. the names of all firms and employees at those firms who were sounded by the disclosing market participant;

b. the date and time of each sounding, including any follow up communication

c. the contact details used (e.g.telephone numbers, emails) for the sounding.

2. A disclosing market participant shall draw up a list of the contact details of designated persons or contact points entrusted by a potential investor to receive market soundings, if this information has been provided by the potential investor.

If the contact details of a designated person or contact point are provided by a potential investor, a disclosing market participant shall use these details to approach the potential investor, unless the disclosing market participant reasonably believes that the contact information on the list is not up-to-date.

3. A disclosing market participant shall draw up a separate list of potential investors that have informed it that they do not wish to be sounded in relation either to any potential transaction or particular types of potential transactions, and refrain from sounding them in relation to those transactions.

Article 15

Record keeping requirements

1. For the purpose of Article 11(8) of Regulation (EU) 596/2014 in relation to each market sounding, a disclosing market participant shall ensure that the following records are kept in a durable medium and in an accessible form for a period of at least five years:

a. the relevant internal arrangements and procedures and any changes to them;

b. the record provided for in Article 12(5);

c. the records provided for in Article 14(1);

d. where applicable, the consent of the market sounding recipient to receiving inside information pursuant to point (a) of Article 11(5) of Regulation (EU) 596/2014;

e. all communications relating to the market sounding between the disclosing market participant and all market sounding recipients in the course of the sounding, including any document and material provided by the disclosing market participant to a potential investor; and

f. where applicable, the communication explaining that the information that has been disclosed in the course of a market sounding has ceased to be inside information.

2. Such records shall be made available to the competent authority upon request.

CHAPTER V

ESTABLISHING AN ACCEPTED MARKET PRACTICE

Article 16

General requirements

1. When considering accepting a market practice as an accepted market practice (hereinafter "AMP"), modifying an AMP already established or deciding for the continuation of an AMP pursuant to Article 13(11) of Regulation (EU) No 596/2014, the competent shall conduct the following assessment:

a. evaluation of the market practice against each of the criteria set in Article 13(2) of Regulation (EU) No 596/2014 and specified further in Chapter VI of this Regulation and assess whether they are fulfilled;

b. consultation with relevant bodies such as representatives of issuers, financial services providers, consumers, market operators and other authorities.

2. The notification referred to in Article 13(3) of Regulation (EU) No 596/2014 shall be made in accordance with the procedure described in Chapter VII of this Regulation and using the template set out in Annex 1 of this Regulation.

3. The competent authority shall publicly disclose the AMP on its website using the format set out in Annex 1 of this Regulation, and provide a link to the relevant national legal decision , before effectively establishing the AMP.

CHAPTER VI

SPECIFICATION OF THE CRITERIA TO CONSIDER WHEN CONSIDERING MARKET PRACTICES

Article 17

Transparency

1. The criterion of substantial level of transparency set out in Article 13(2)(a) of Regulation (EU) No 596/2014 encompasses the following principles:

a. Adequate transparency "before starting the execution of an AMP". Any established AMP should have a substantial level of ex ante transparency, namely public disclosure, before the start of the AMP, of the more relevant aspects of the objective(s) and details of the activity to be carried out. The following non-exhaustive factors shall be taken into account by competent authorities when assessing whether an AMP has a substantial level of transparency:

   i. identities of the all the interested parties in the AMP;

   ii. identification of the financial instrument(s) on which the AMP would apply;

   iii. time-length of the AMP and conditions leading to interruption, suspension or cancellation;

   iv. identification of markets (trading venues on which the participants will intervene);

   v. where relevant, number of financial instruments and cash available in the accounts used to execute an AMP;

   vi. when necessary, reference to the maximum limits for cash and number of financial instruments.

b. Adequate transparency "during the execution of an AMP". This would include, the following non exhaustive elements:

    i. details of trading activity such as number of trades executed, aggregation of the volume traded, average size of the orders/transactions and average spreads quoted, prices and volumes of executed trades if considered necessary (when there are numerous transactions in a single session a daily aggregate figure could be provided);

    ii. any other relevant information related to the concerned AMP that guarantees the transparency of the practice during the execution of the AMP such as the resources available –cash, financial instruments-, the identity of possible additional appointment or change of intermediaries executing the AMP, the transfer of cash or financial instruments between the issuer`s and the intermediary`s accounts;

    iii. details about orders and transactions executed and a report on how the contract has been implemented should be provided by interested parties to the competent authority according to a predefined timeframe.

c. Adequate transparency "after the execution of an AMP" means that in the event of termination or amendment of the AMP, the following elements shall be disclosed:

    i. proper disclosure of the transactions made,

    ii. reasons or causes of the termination of the AMP,

    iii. any subsequent change of the above mentioned factors.

2. When assessing a market practice that may be performed outside a trading venue, competent authorities shall consider carefully whether the necessary criterion of a substantial level of transparency to the market is met.

Article 18

Safeguards of the operations of the market forces and interplay of the forces of supply and demand

1. For the purpose of assessing the market practices against the criteria set out in Article 13(2)(b), the market practice shall not inhibit the interaction of the demand and supply of a financial instrument by limiting the opportunities for other market participants to respond to transactions.

2. Competent authorities shall consider the extent to which persons performing the market practice shall comply with the following non-exhaustive list of features:

a. being supervised persons, in particular when the interested party who benefits from the AMP delegates or instructs a supervised person to execute an AMP. Where a competent authority accepts an AMP where the person performing the AMP is not a supervised person, it shall be in a position to explain the reasons;

b. being members of a trading venue where the AMP is performed;

c. complying with the general rules and particular requirements imposed by the trading venue or market;

d. maintaining records of orders and transactions relating to the market practice performed allowing to easily distinguished it from other trading activities, including where appropriate, on special separate accounts, in particular to demonstrate that orders introduced are entered separately (individually) without aggregating orders from several clients;

e. having in place specific and effective internal procedures allowing the activities relating the market practice to be immediately identified, and the relevant records to be readily made available to the competent authority upon request;

f. possessing effective compliance and audit resources and a framework enabling the monitoring of the market practice and the demonstration, at any time, to the competent authority that the market practice meets the principles and criteria of the Regulation.

3. Competent authorities shall be in a position to get information on the impact of the established market practice against at least some main parameters, inter alia, the weighted average price of a single session, the daily closing price, the volume traded before and after establishing a market practice, and the volatility of the financial instrument.

4. Competent authorities shall be also be capable of evaluating, when necessary, the establishment of or compliance with acceptable trading condition rules such as i) introduction of bid/offer prices (not higher or lower than the prevailing market price or last trade), ii) price within price ranges, or iii) when applicable limits on positions

5. The principle of independency of action of the person performing the AMP with regard to interested parties shall generally apply. Interested parties shall not instruct, inform or influence this person on how to conduct trading. Where a competent authority accepts an AMP where such a principle is not complied with, it shall be in a position to explain the reasons. Conflict of interests between a person performing an AMP and interested parties or clients shall be avoided to the extent possible.

Article 19

Impact on market liquidity and efficiency

For the purpose of assessing the criteria set out in Article 13(2)(c) of Regulation (EU) No 596/2014, the competent authority shall assess the extent the market practice incorporates practices that generally have a positive impact on the following non-exhaustive variables: volume traded, number of orders in the order book (order depth), execution speed, spread, regularity of quotations or transactions and, where there is very limited supply or demand for a financial instrument, price fluctuations.

Article 20

Impact on market functioning

For the purpose of assessing the criteria set out in Article 13(2)(d) of Regulation (EU) No 596/2014, the competent authority shall consider the following aspects:

a. the extent to which AMPs do alter price formation processes in a trading venue;

b. the extent to which the market practice facilitates the evaluation of prices and orders entered into the order book. Trades or orders (when not executed outside a trading venue) related to AMP shall be executed or introduced in

accordance with the trading rules of the corresponding trading venue. AMP whose trades and orders are effectively monitored real time by the market operator is also an important factor to consider;

c. the extent to which the orders or transactions related to the AMP are performed during periods when stabilisations and buy-back operations are carried out. Where a competent authority considers that this can be allowed it shall be in a position to evidence why this coincidence in timeframe is advisable or necessary;

d. the extent to which information about an AMP is generally available and adequately disseminated. Interested parties that discloses information about the AMP through web pages of trading platforms should ensure this availability and dissemination and the AMP shall ensure that there is also simultaneous release of information through web pages of the interested parties;

e. the extent to which the AMP establishes an ex ante list of situations when the AMP is temporarily suspended or restricted. Examples of the particular trading periods or phases to be considered by the competent authority are the following: auction phases; takeovers, IPO`s, capital increases, secondary offerings. Competent authorities shall give special care to market practices that could be performed during any kind of auction.

Article 21

Risks for integrity of related markets

For the purpose of Article 13(2)(e) of Regulation (EU) No 596/2014, an AMP shall contain the following non-exhaustive and indicative list of features:

a. Notification obligation to the competent authority. Information to the competent authority must be compulsory. Transactions should be reported to the competent authority on a regular basis. Whenever an AMP is established by a written contract between interested parties, a copy of the written form shall be provided to the competent authority.

b. Proportionality. Resources (cash or financial instruments) granted to relevant persons performing the AMP shall be proportionate and commensurate with the objectives of the latter.

c. Fair compensation for the services provided. To the extent possible, competent authorities shall encourage fixed compensation for services provided within the AMP. Should variable compensation nonetheless be provided for, it shall be structured in a way so as to not lead to behaviour which may be prejudicial to market integrity or to the orderly functioning of the market.

d. Adequate separation of assets. Competent authorities shall consider that persons performing the AMP ensure, where appropriate, an adequate separation of assets.

e. Clear indication of duties taken on by the contracting parties in an AMP. Competent authorities shall promote that established AMP provides a clear definition of duties shared by the parties.

f. Adequate internal structure for firms performing an AMP. Any party in charge of trading according to the AMP shall ensure that there is an organisational

structure and adequate internal arrangements to ensure that the trading decisions relating to the AMP remain (i) confidential from other units within the firm, and (ii) independent from orders to trade that it receives from clients, portfolio management or orders placed on its own account.

g. An adequate reporting process between the interested party and the person performing the AMP is in place to allow the exchange of the necessary information to fulfil their respective legal or contractual obligations (if applicable).

h. Adequate exchange of information among regulators. With the aim of providing competent authorities with the possibility of verifying the effects that an AMP might have on other venues or jurisdictions, the acceptance process to establish a market practice should encourage an adequate exchange of views among regulators.

Article 22

Outcome of investigation

1. For the purpose of applying the criteria set out in Article 13(2)(f) of Regulation (EU) No 596/2014, the competent authorities shall:

a. verify and be in a position to justify that there has not been any adverse result of investigation or supervisory practice in the markets they supervise that might question the AMP to be accepted;

b. report to, or inform ESMA and other competent authorities about any significant breach of regulation resulting from any investigation involving an AMP.

2. Any sanction resulting from an investigation involving an AMP shall trigger an evaluation process by the competent authority that has accepted it, to investigate whether the AMP's appropriateness is still considered valid.

Article 23

Structural characteristics of the market

For the purpose of Article 13(2)(g) of Regulation (EU) No 596/2014, the competent authority shall in particular:

a. carefully assess the impact the AMP might have on retail investors´ interests when the AMP concerns financial instruments traded on markets where retail investors participation is relevant;

b. evaluate the extent to which the AMP increases the probability of retail investors to find counterparty with lawful objectives in low-liquidity financial instruments, without increasing the risks borne by them.

CHAPTER VII

PROCEDURES

Article 24

Notification when intending to establish an accepted market practice

1. For the purpose of Article 13(3) of Regulation (EU) No 596/2014, the notification of intent shall be sent by mail or email simultaneously to a contact point within ESMA and within the national competent authorities, through a pre-identified contact list to be set-up and regularly maintained by competent authorities and ESMA.

2. The notification of intent referred to in paragraph 1 shall include at least the following elements:

a. A statement of the intention to establish an AMP, including the expected date of establishment;

b. Identification of the notifying competent authority and the contact details of include contact person(s) within that authority (Name, telephone including Mobile if any), Email, title);

c. an in-depth description of the practice and identification of the types of financial instrument and trading venues on which the AMP will be performed;

d. the reason why the practice would constitute market manipulation;

e. details of the assessment made according to Article 13(2);

f. A reference to the last date for ESMA to issue the opinion pursuant to Article 13(4) of Regulation (EU)596/2014 in order for the CA to make a decision according to national legislation.

3. The notification of intent shall include the table for assessing an AMP using the template in Annex 1 of this Regulation and an accompanying explanatory note detailing the assessment conducted pursuant to Article 3(1) of this Regulation that contains the information required under paragraph 2 not included in the template thereof.

Article 25

ESMA opinion

1. For applying the provisions of Article 13(4) of Regulation (EU) No 596/2014, the procedures to be arranged by ESMA shall permit the following:

a. ESMA or any competent authority to request a conference call with or a period of written consultation to express to the notifying competent authority preliminary comments, concerns or disagreement or request clarifications, if any;

b. the notifying competent authority to provide any additional clarification. Any fundamental or significant modification or change that could affect the basis or substance of the notified practice (or the assessment done) in the course of this process shall be considered as a new AMP and thus follow the process for establishing an AMP;

c. in accordance with internal ESMA procedures, the preparation and submission of a draft opinion to the ESMA Board of Supervisors for approval;

d. final ESMA opinions to be published in its website according to Article 8(1)(k) of Regulation 1095/2010 and to the goals set out in Article 29 of the same regulation.

2. Without prejudice of the 2 month maximum period of Article 13(4) of Regulation (EU) No 596/2014, ESMA may publish its opinion earlier.

3. Once the notifying competent authority has formally established the accepted market practice, ESMA shall also publish on its website the content of the accepted market practice AMP in the format set out in the template in Annex 1 and provide a link to the national legal text.

CHAPTER VIII

REVIEW AND TERMINATION OF ACCEPTED MARKET PRACTICES

Article 26

Review

1. For applying the provision of Article 13(8) of Regulation (EU) No 596/2014, the competent authority shall assess whether the initial conditions are still satisfied, taking into account inter alia the compatibility of the concerned accepted market practice with the legislative framework, market practice, and market conditions.

2. On the basis of the assessment referred to in paragraph 1, the competent authority shall examine whether the situation warrants initiating a modification of the AMP or its termination in accordance with the provision of Article 13 of Regulation (EU) No 596/2014 and of this regulation. Where the competent authority concludes that the accepted market practice shall be maintained without modification, it shall inform ESMA accordingly.

Article 27

Termination

1. The following non-exhaustive reasons shall be taken into account by a competent authority to examine whether to permanently terminate an AMP:

a. the activities of persons performing the accepted market practice no longer meet the conditions determined by the accepted market practice or the criteria of Article 13 (2);

b. activities related to the accepted market practice have not been executed for a significant period of time or object has become unfeasible;

c. the competent authority understands that the continuation of an AMP might adversely affect the integrity or efficiency of the markets under its supervision;

d. the competent authority has good reasons to suspect that acts contrary to the provisions of Regulation (EU) No 596/2014 are being or have been carried out by the beneficiary of, or by the person performing, the AMP;

e. existence of a situation falling within any general termination provision included in the AMP itself.

2. The competent authority terminating an AMP shall publicly disclose and communicate its decision simultaneously to ESMA and all other competent authorities, including the date of effective termination. ESMA shall then remove publication of the terminated AMP from its website.

CHAPTER IX

FINAL PROVISIONS

Article 28

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
It shall apply from […].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX I

Template
Table for assessing AMP's

Description of the National AMP:

Explanation on why the practice would constitute manipulation

List of Criteria

List of criteria to be taken into account by Competent Authorities when assessing a particular AMP

- The level of transparency provided to the market.

Transparency of market practices by market participants is crucial for considering whether a particular market practice can be accepted by competent authorities. The less transparent a practice is, the more likely it is not to be accepted.

Conclusion of the regulator: [fill in the rationale for this factor]

- The need to ensure a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand;

Market practices inhibiting the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions can create higher risks for market integrity and are, therefore, less likely to be accepted by competent authorities.

Conclusion of the regulator: [fill in the rationale for this factor]

The fact that the market practice has a positive impact on market liquidity and efficiency.

Conclusion of the regulator: [fill in the rationale for this factor]

- The fact that the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice.

Conclusion of the regulator: [fill in the rationale for this factor]

- The fact that the market practice does not create risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the whole Community.

Particular market practices in a given market should not put at risk market integrity of other, directly or indirectly, related markets throughout the Community.

Conclusion of the regulator: [fill in the rationale for this factor]

- The outcome of any investigation of the relevant market practice by any competent authority or other authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse, or codes of conduct, irrespective of whether it concerns the relevant market or directly or indirectly related markets within the Union;

Conclusion of the regulator: [fill in the rationale for this factor]

- The structural characteristics of the relevant market, inter alia whether it is regulated or not, the types of financial instrument traded and the type of market participants, including the extent of retail investors' participation in the relevant market;

Conclusion of the regulator: [fill in the rationale for this factor]

Overriding Principles

Overriding principles to be observed by Competent Authorities to ensure that accepted market practices do not undermine market integrity, while fostering innovation and the continued dynamic development of financial markets:

- New or emerging accepted market practices should not be assumed to be unacceptable by the Competent Authority simply because they have not been previously accepted by it;

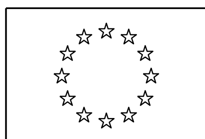
- Practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity.

- Competent Authorities should analyse the impact of the relevant market practice against the main market parameters such as weighted average price of a single session, daily closing price, specific market conditions, before carrying out the relevant market practice.

Conditional elements

In this final section, you should comment on any conditions relating to legitimate reasons and proper execution

Annex V: Draft implementing technical standards on systems and notification templates to be used by disclosing market participants conducting market sounding



EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

of XXX

[…]

Draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/... laying down implementing technical standards with regard to the systems and notification templates to be used by disclosing market participants according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)

of XXX

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse)[18] and in particular Article 11(10) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) The ability to conduct market soundings is important for the proper functioning of financial markets and therefore a market sounding regime is needed to provide a clear framework within which such activity is clearly defined and can be conducted legitimately. In this context, in order to ensure uniform condition of application of Article 11 Regulation (EU) No 596/2014 across the Union, disclosing market participants shall use pre-determined notification templates, a precise format of record and defined technical means for appropriate communication with market sounding recipients.

(2) Records are key for demonstrating that market soundings have been appropriately carried out. They serve as a means to allow a disclosing market participant to demonstrate the legitimacy of its conduct, and as an important audit trail for competent authorities when conducting investigations. The use of common notification templates, record formats and technical means guarantees the harmonised application of the market sounding regime across the Union.

(3) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(4) The ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[19].

[18] OJ L 173, 12.6.2014, p. 1.
[19] OJ L 331, 15.12.2010, p. 84.

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down implementing technical standards, pursuant to Article 11(10) of Regulation (EU) No 596/2014, specifying the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 4, 5, 6 and 8 of Article 11 of the same regulation, particularly the precise format of the records referred to in paragraphs 4 to 8 and the technical means for appropriate communication of the information referred to in paragraph 6 of that regulation to the person receiving the market sounding.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) No 596/2014:

a) “disclosing market participant” means a person referred to Article 3(2) of Regulation (EU) No 596/2014;

b) “market soundings” means the activity defined in Article 11(1) and (2) of Regulation (EU) No 596/2014;

c) “syndicate” means a group of disclosing market participants who act in coordination as a third party referred to in Article 11(1)(d) of Regulation (EU) No 596/2014.

CHAPTER II

TEMPLATES, FORMAT OF THE RECORDS AND TECHNICAL MEANS TO BE USED FOR THE ACTIVITY OF CONDUCTING A MARKET SOUNDING

Article 3

Format of records

1. Pursuant to Article 11(8) and (9) of Regulation 596/2014 the records shall be kept and stored by the disclosing market participant in format that ensures their durability, accessibility and readability over the period of retention and their electronic transmission to the competent authority upon request.

2. Unless otherwise provided in paragraph 3, the record of the information shall be maintained in a written, durable and electronic form.

3. Where market soundings are conducted over the telephone, they shall take place on a recorded line of the disclosing market participant. Where market soundings are conducted in other ways, such as via conference meetings, a written record of the market sounding in a durable form shall be maintained and include:

a. the date and time of the event and its attendees;

b. confirmation of and agreement on the actual content disclosed during the market sounding; and

c. any document and material provided by the disclosing market participant to a market sounding recipient during the market sounding.

4. In the case of market soundings conducted through conference meetings, a video or audio recording shall also be considered as an appropriate record for the purpose of point (b) of paragraph 3.

Article 4

Template for scripts

For the purpose of Article 13 of RTS on market sounding, the templates set out in Annex I to this Regulation shall be used. These templates shall be maintained in electronic form clearly listing all the items to be included in the script in accordance with Article 13 of the Regulatory Technical Standards, as referred to in Article 11(9) of Regulation 596/2014.

Article 5

Technical means for communication with the market sounding recipient

For the purposes of applying Article 11(6) of Regulation 596/2014, a disclosing market participant, where applicable, shall communicate to the market sounding recipient that the information that has been disclosed in the course of the market sounding has ceased to be inside information. Such communication shall be in written and durable form, using an electronic means of transmission that is acceptable to the market sounding recipient.

Article 6

Entry into force

This Regulation shall enter into force on the the twentieth day following that of its publication in the *Official Journal of the European Union*.
It shall apply from [...].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

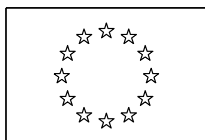
[Position]

ANNEX I

Template for the scripts of market sounding
Description of the items:
i. Clarification that the conversation is classified as a market sounding.
ii. Confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation.
iii. In cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information: a. a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor,would become inside information; b. a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential; c. confirmation of the market sounding recipient's consent to be sounded.
iv. In cases where a disclosing market participant has concluded that the information included in the market sounding is inside information: a. a statement explaining that the disclosing market participant has considered the information and concluded it is inside information; b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded it is inside information, and the potential investor is obliged to keep such information confidential; c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid; d. a statment explaining that obligations and prohibitions apply to the possession of inside information, including point (b), (c) and (d) of Article 11(5) of Regulation (EU) No 596/2014, and that administrative and criminal penalties may be incurred in the event of a breach of Regulation (EU) 596/2014; e. consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014.
v. Information regarding the transaction in accordance with Article 12(1) of the RTS on market sounding.

Simplified template for the scripts of market sounding (to be used in accordance to Article 13(2) of the RTS)	
Description of the items:	
i.	Clarification that the conversation is classified as a market sounding.
ii.	Confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation.
iii.	In cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information: a. a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor,would become inside information; b. a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential; c. confirmation of the market sounding recipient's consent to be sounded.
iv.	In cases where a disclosing market participant has concluded that the information included in the market sounding is inside information: a. a statement explaining that the disclosing market participant has considered the information and concluded it is inside information; b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded it is inside information, and the potential investor is obliged to keep such information confidential; c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid;consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014; d. consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014.
v.	Information regarding the transaction in accordance with Article 12(1) of the RTS on market sounding.

Annex VI: Draft regulatory technical standards on the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions



EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

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Draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)[20], and in particular Article 16(5) thereof,

After consulting the European Data Protection Supervisor

Whereas:

(1) It is necessary to specify appropriate requirements for the arrangements, procedures and systems that the persons subject to the reporting obligation under Article 16 of Regulation (EU) 596/2014 should have in place in order to assist these persons in the fulfillment of their prevention, detection and reporting duties and in the submission of meaningful, comprehensive and useful notifications of suspicious behaviours, such as suspicious transactions and orders. This requires a minimum level of granularity in the surveillance approaches which involve, to be effective, both automated monitoring systems and human inputs from appropriately trained staff. This will also promote consistent approach and practices across the EU on detection and reporting of suspicious transactions and orders, notably with respect to content and timelines of the reporting. Where appropriate to the scale of their business, trading venues should have facilities to replay the order book in order to analyse the activity of a trading session also in a context of high frequency trading. Prevention of market abuses can also be achieved by trading venues through appropriate trading rules.

(2) The determination of a single harmonised template for reporting suspicious transactions and orders electronically will assist compliance in markets where transactions are becoming increasingly cross-border in nature, and will also facilitate the efficient sharing of information on suspicious transactions and orders between

[20] OJ L 173, 12.6.2014, p. 1.

competent authorities in cross-border investigations. The information fields if completed clearly, comprehensively, objectively and accurately will assist the receiving competent authority to promptly assess the matter and initiate relevant actions.

(3) Suspicious transaction and order reports should be submitted to the relevant competent authority as soon as possible once a reasonable suspicion is formed in relation to a trading behaviour. “Batching”, the practice consisting in waiting for a particular number of suspicious orders and/or transactions to justify a submission although suspicion by this time has already risen, is not consistent with the requirement to notify without delay. Generally and indicatively, suspicious transaction and order reports should be submitted within two weeks of the actual suspected breach.

(4) Exceptionally, there may be circumstance whena reasonable suspicion of market abuse or attempted market abuse is formed some time after the suspected breach effectively occurred, due to susbsequent events or information coming to light. This should not be considered a reason for not reporting to the competent authority. In these specific circumstances, the person making the notification should be in a position to justify the time discrepancy between the occurrence of the suspected breach and the formation of the reasonable suspicion of market abuse or attempted market abuse, in order to demonstrate compliance with the reporting requirement.

(5) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(6) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[21].

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation lays down the appropriate arrangements, systems and procedures to be established and maintained under Article 16(1) and 16(2) of Regulation (EU) 596/2014 in order to prevent and detect market abuse and attempted market abuse and specifies in Annex 1 the template to be used for notification of suspicious transactions and orders pursuant to Article 16(5) of Regulation (EU) 596/2014.

[21] OJ L 331, 15.12.2010, P. 84

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) 596/2014:

a) "person professionally arranging or executing transactions" shall have the meaning defined in Article 3(28) of Regulation (EU) 596/2014;

b) "suspicious transactions and orders" shall have the meaning defined in Article 16(1) and (2) of Regulation (EU) 596/2014;

c) "suspicious transaction and order report" (hereinafter referred to as STOR) means the report to be made by persons referred to in Article 16(1) and (2) of Regulation (EU) 596/2014 to the competent authority as defined by Article 16(3) of Regulation (EU) 596/2014.

CHAPTER II
ARRANGEMENTS, SYSTEMS AND PROCEDURES

Article 3

Purpose of the arrangements, systems and procedures to be established and maintained for the prevention and detection of market abuse or attempted market abuse

The arrangements, systems and procedures to be established and maintained pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 shall allow for:

a) the detection and identification of suspicious behaviours, including suspicious transactions and orders, through effective and ongoing monitoring;

b) the transmission of STORs without delay in accordance with the requirements and the format set out in this Regulation;

c) in the case of trading venues, the aim of prevention of insider dealing, market manipulation and attempted insider dealing and market manipulation; and

d) the appropriate record-keeping of the detection, reporting and, for market operators and investment firms that operate a trading venue, the prevention suspicious behaviours, including orders and transactions.

Article 4

Requirements regarding the arrangements, systems and procedures to be established and maintained for the prevention and detection of market abuse or attempted market abuse

The effective arrangements, systems and procedures to be established and maintained pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 shall be:

a) appropriate for and proportionate to the scale, size and nature of the business activity of the persons referred to in Article 16(1) and (2) of Regulation (EU) 596/2014;

b) subject to regular internal review and audits and updated when necessary;

c) documented, maintained and updated in written form; and

d) readily and easily accessible by the competent authority upon request.

Article 5

Monitoring and Detection

1. Persons referred to in Article 16(1) and (2) of Regulation (EU) 596/2014 shall establish and maintain appropriate automated surveillance systems to conduct effective monitoring of orders and transactions, including through the generation of alerts. Those persons shall explain to their competent authority, if requested, the extent to which the level of automation of their system is appropriate for and proportionate to the scale, size and nature of their business activity. The automated system shall cover the full range of trading activities undertaken by the concerned person.

2. The systems of market operators and investment firms that operate a trading venue shall include an IT system to read, replay and analyse order book data on an ex-post basis with sufficient capacity to operate also in an automated low-latency trading environment.

3. The arrangements, systems and procedures to be put in place and maintained under this Regulation shall allow for human analysis to play an important role in the monitoring, detection and identification of suspicious trading activity, including transactions and orders that could constitute market abuse or attempts of market abuse. Effective, comprehensive and robust training, which is tailored to the business, shall be provided to ensure, among the relevant staff, a culture of monitoring and detection of suspicious trading activity, including suspicious transactions and orders.

Article 6

Reporting obligations

1. The effective arrangements, systems and procedures to be established and maintained pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 shall enable any person referred to in this Article to decide to submit a STOR, taking into account the elements constituting the actual or attempted insider dealing or market manipulation, referred to in Articles 7, 8, 10 and 12 of Regulation (EU) 596/2014 and the non-exhaustive list of indicators of market manipulation defined in Annex I of the same regulation and further specified in the [Delegated Act on Indicators of Market Manipulation].

2. Where multiple persons are involved in the processing of an order or a transaction, each person subject to the reporting obligation under Article 16(1) and (2) of Regulation (EU) 596/2014 shall be individually responsible for considering whether to submit a STOR.

3. The effective arrangements, systems and procedures referred in paragraph 1 shall ensure that the obligation to submit STORs pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 applies to orders placed or executed on or outside a trading venue and is irrespective of the trading capacity in which the order is placed or executed and the types of clients concerned.

4. The information included in the STOR shall be based on facts and analysis, taking into account all information available to the person subject to the reporting obligation under Article 16(1) and (2) of Regulation (EU) 596/2014, and avoiding speculation or presumptions about other activity.

Article 7

Timing of STORs

1. The effective arrangements, systems and procedures to be established and maintained pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 shall ensure that the STORs

are submitted without delay once reasonable suspicion of actual or attempted market abuse is formed.

2. The effective arrangements, systems and procedures referred to in paragraph 1 shall enable reporting of STORs on trading behaviours, including transactions and orders, detected sometime after their occurrence which become suspicious in the light of subsequent events or information. In such cases, the person subject to the reporting obligation under Article 16(1) and (2) of Regulation (EU) 596/2014 shall be able to justify the delay between the suspected breach and the submission of the STOR according to the specific circumstances of the case.

3. A person subject to the reporting obligation under Article 16(1) and (2) of Regulation (EU) 596/2014 shall submit to the competent authority any relevant, additional information which he becomes aware of after the initial STOR is submitted and shall respond to questions posed by the competent authority.

Article 8

Content of STORs

1. A STOR submitted pursuant to Article 16(1) and (2) of Regulation (EU) 596/2014 shall be submitted using a form that takes the format set out in Annex 1 of this Regulation.

2. The person submitting the STOR shall complete as many information fields as possible, in a clear and accurate manner. At the least the following information shall be included:

a. description of the orders, transactions or other behaviour, including the type of order and the type of trading (such as block trade) and where the activity occurred;

b. reasons for the suspicion that the orders or transactions or other behaviour might constitute market abuse or an attempt of market abuse;

c. means for identification of the person submitting the STOR;

d. means for identification of the person or entity whose behaviour is suspicious, including the person who placed the concerned orders (which encompass cancellation and modification orders) or executed the orders, the person or entity on whose behalf the orders have been placed or executed, and any other person involved in the suspicious behaviour, including the relevant orders or transactions;

e. capacity in which the person submitting the STOR operates (such as for own account or on behalf of third parties);

f. any other information and supporting documents which may be relevant for the competent authority.

Article 9

Means for transmission

1. STORs shall be submitted to the competent authority electronically and in a secure manner.

2. Initial information about a STOR can be reported by other means than the one referred to in paragraph 1, subject to a written confirmation made in accordance with Article 8 of this Regulation and transmitted pursuant to paragraph 1.

Article 10

Record keeping

1. The records kept pursuant to point (d) of Article 3 of this Regulation shall be retained by the persons referred to in Article 16(1) and 16((2) of Regulation (EU) 596/2014 for at least 5 years. They shall be made available to the relevant competent authority upon request.

2. The records referred to in paragraph 1 shall include in particular:

a. every STOR submitted, including the relevant elements on the basis of which the STOR was prepared and reported to the competent authority, and

b. details of transactions and orders which were identified as potentially suspicious but following examination were subsequently not submitted, including a summary of the reasons for not submitting a STOR;

c. the effective arrangements, systems and procedures put in place and any changes implemented to them.

3. Without prejudice to the competent authorities' rights and powers under Regulation (EU) 596/2014 and this Regulation to access these records, the arrangements, systems and procedures to be established and maintained under this Regulation shall ensure that these records are kept confidential.

CHAPTER III

FINAL PROVISIONS

Article 11

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
It shall apply from [...].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX I

STOR template

SECTION 1 - TRANSACTION / ORDER

Date and time of suspicious activity (specify time zone)

Market – trading venue where activity occurred

Location – country (if available)

If outside trading venue – specify

Transaction reference number/Order reference number (if applicable)

Settlement date

Name and type of security – ISIN

Additional elements in relation to OTC derivatives:

Description of the type of OTC derivative (e.g. CFD, swap, CDS, OTC option) and its particulars including, but not limited to: nominal amount (face value), currency of the price denomination, maturity, premium (price), interest rate, etc.

Margin, up-front payment and nominal size/value of underlying security

Transaction terms - Strike price/contract terms e.g. spread bet gain/loss per tick move

Name and ISIN of underlying security

Purchase price/sale price

Order submission – type of order e.g. buy with limit €x/how placed e.g. electronic order book/time placed /who placed the order/who received the order

Order cancellation or alteration –time/by whom/how effected

Type of breach suspected – market manipulation/insider dealing

SECTION 2 - IDENTITY OF ENTITY/PERSON MAKING DISCLOSURE

Person professionally arranging or executing transaction/ Market operators and

investment firms that operate a trading venue – specify in each case:

Name of individual

Name of Firm/Trading Venue

Position within entity

Address of reporting entity

Acting capacity of entity with respect to suspicious activity e.g. agency broker, trading platform

Type of activity of trading desk involved (if available)

Relationship with subject of suspicion

Contact/Compliance Officer

SECTION 3 - IDENTITY OF ENTITY/PERSON SUSPECTED OF BREACH

Details:

Name

Date of birth (if available)

Address

Place of employment

Position

Account Number(s)

[MiFIR/Client ID code] (e.g. national ID number, if applicable)

Relationship with the concerned issuer (if applicable and if known)

Names and capacity of other entities/persons known to be involved in the suspicious activity

SECTION 4 - DESCRIPTION OF SUSPECTED BREACH OR ATTEMPTED

BREACH

Narrative: Describe activity, how matter came to reporter's attention and specify reasons for suspicion.

For OTC derivatives, details concerning transactions or orders placed in the underlying asset and information on any possible link between dealings in the cash market of the underlying asset and the reported dealings in the OTC derivative.

For instruments admitted to trading on/traded on a trading venue, describe the nature of suspicious order book interaction/transactions

Please note that these are non-exhaustive guiding criteria

SECTION 5 - ADDITIONAL INFORMATION

Background or other information which could be relevant to the report e.g.:

Trading patterns of the suspected entity/person. For guidance, the following are examples of information that may be useful;

- The nature of the suspected entity/person (e.g. retail client, institutions);
- The nature of the suspected entity's/person's intervention (on own account, on behalf of a client, other);
- The size of the suspected entity's/person's portfolio;
- Its trading habits in terms of use of leverage and short selling, and frequency of use;
- Comparability of the size of its order/transaction with the average size of its orders submitted /transactions carried out for the past 12 months;
- Its habits in terms of the issuers whose securities it has traded for the past 12 months (does the order/transaction relate to an issuer whose securities have been traded by the suspected entity/person for the past year?)

Date on which the business relationship with the client started;

Contact details of client

KYC or AML documentation

Details of any Powers of Attorney on the account or any joint accounts the suspected

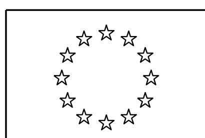
entity/person holds.

Please note that these are non-exhaustive guiding criteria

SECTION 6 - DOCUMENTATION ATTACHED

List of attachments e.g. e-mails, recordings of conversations, order/transaction records, confirmations, broker reports, and media comment if relevant.

Annex VII: Draft implementing technical standards on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information, the precise format of insider lists and for updating insider lists, and the format and template for notification and public disclosure of manager's transactions



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Brussels, XXX
[…](2012) XXX draft

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of XXX

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Draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/… laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information, the precise format of insider lists and for updating insider lists, and, the format and template for notification and public disclosure of manager's transactions according to Regulation (EU) No 596/2014] of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)

of XXX

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of 16 April 2014 of the European Parliament and of the Council on market abuse (market abuse regulation)[22] and in particular Articles 17(10), 18(9) and 19(15) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) Not only does the protection of investors require timely public disclosure of inside information by issuers or emission allowance market participants, it also requires such disclosure to be as fast and as synchronised as possible between all categories of investors in all Member States in which the issuer has requested or approved admission of its financial instruments to trading on a regulated market, on a multilateral trading facility or an organised trading facility.

(2) In order to protect the legitimate interests of issuers or of emission allowance market participants, it should be permissible, in the circumstances specified under Article 17(4) of Regulation (EU) No 596/2014, to delay public disclosure of inside information. However, to avoid delaying the public in such cases, the information is kept confidential in order to avoid improper dislcosure and insider dealing, and to prevent leaks from within the issuer or emission allowance market participant. The notification of delay should be provided to the competent authority specified under Article 17(3) of Regulation (EU) No 596/2014 in writing, and both such notification and, where required, the written explanation of how the condition set out in Article 17(4) of Regulation (EU) No 596/2014 were met should be provided to the relevant competent authority using electronic means of transmission accepted by the same. Without prejudice to the need to identify the persons within the issuer who made the decision to delay, it is not required to nominate in the notification all the persons within the issuer or emission allowance market participant who had access to the delayed inside information.

(3) In order to preserve the stability of the financial system, it should be permissible for an issuer that is a credit institution or a financial institution, in the circumstances specified under Article 17(5) of Regulation (EU) No 596/2014, to delay public

[22] OJ L 173, 12.6.2014, p. 1.

disclosure of inside information. The issuer should provide the notification regarding the intention of delay to the relevant competent authority specified under Article 17(3) of Regulation (EU) No 596/2014 in writing via a secure channel of communication, for example, as encrypted emails. If the competent authority does not consent to the delay, the issuer should disclose the inside information immediately. The decision taken by the competent authority may also be communicated orally to the issuer, as long as a written communication, provided by a secure channel, confirms as soon as possible the content of the oral communication.

(4) It is important that issuers and emission allowance market participants have in place appropriate procedures and arrangements ensuring that the process for delaying inside information is managed effectively, with appropriate procedures dedicated to the confidentiality of the delayed inside information. Throughout the period of delay, issuers and emission allowance market participants should ensure that the conditions for the delay are continually fulfilled through a regular review of the conditions. Should confidentiality be no longer ensured, including due to the circulation of rumours that are sufficiently accurate to indicate that a leak of information has occurred, and irrespective of where the breach of confidentiality originates from, an issuer or emission allowance market participant must publicly disclose this inside information.

(5) A precise format for insider lists, as well as harmonisation of standards on the detail of data to be included in the insider lists, will provide sufficient information to the competent authorities to fulfil the task of protecting the integrity of the financial markets while, at the same time, facilitate compliance with the Regulation.

(6) A harmonised approach in the format for drawing up, maintenance and transmission of the insider lists will also decrease the administrative burden for competent authorities, issuers, emission allowance market participants, auction platforms, auctioneers or the auction monitor and those acting on their behalf or on their account.

(7) An insider lists should be updated without delay when a change is made so that it is made readily available to competent authority upon its request. An update conducted only when the competent authority has made such a request is not an appropriate behaviour.

(8) The following indicative and non-exhaustive lists of categories of persons should be included in the insider list to be drawn up and updated pursuant to Article 18(1) of Regulation (EU) No 596/2014 when they have access to inside information within the issuer, the emission allowance market participant, the auction platform, the auctioneer or the auction monitor: members of the management and/or supervisory board, executive officers, persons discharging management responsibility, related staff members (including secretaries and personal assistants), internal auditors, persons having access to databases on budgetary control or balance sheet analyses, persons who work in units that have regular access to inside information. With respect to persons acting on behalf or on the account of the issuer, the emission allowance market participant, the auction platform, the auctioneer or the auction monitor, the following non-exhaustive list of categories of professionals with access to inside information should be included in the insider list: auditors, attorneys, accountants and tax advisors, managers of issuers such as corporate and investment banks, communication and IT agencies, rating agencies, investor relation agencies, investment analysts, journalists.

(9) Issuers, emission allowance market participants, auction platforms, auctioneers or the auction monitor and persons acting on their behalf or on their account have the flexibility to provide to the competent authotity either a single consolidated insider list or separate insider lists, provided that the list or lists are in the format set out in

this Regulation and are submitted electronically and securely. This will allow competent authorities to identify all the insiders in relation to a particular piece of inside information.

(10) Issuers on an SME Growth Market are exempted from drawing up and maintaining a contemporaneous insider list but should always be in position to submit an inside list in the proper format, upon request of the competent authority and for the date requested.

(11) In relation to the notification by persons discharging managerial responsibilities and persons closely associated with them, uniform rules regarding the information to be notified through a common template, including common data standards, should be specified to ensure consistency in the application of the notification requirement across the Union. This will foster efficiency in the reporting process and provide comparable information to the public.

(12) Competent authorities, issuers and emission allowance market participants (or auction platforms, auctioneers and auction monitors, as applicable) should be notified of information detailing every transaction conducted by persons discharging managerial responsibilities and persons closely associated with them, in a single notification for a particular day. In order to provide investors with readable, understandable and meaningful information regarding the transactions notified by persons discharging managerial responsibilities and persons closely associated with them, the information should be made public in an aggregated form.

(13) Where an amendment needs to be made in relation to an incorrect notification already transmitted to the competent authority and issuer or emission allowance market participant (or auction platform, auctioneer and auction monitor, as applicable), it is necessary that a replacement notification including the correct information and an explanation for the inaccuracy in the previous notification in the relevant field of the notification form is submitted as soon as possible to the competent authority and the issuer or emission allowance market participant or, where applicable, the auction platform, auctioneer or auction monitor.

(14) The provisions in this Regulation are closely linked, since they deal with notification and disclosure requirements applying to issuers and emission allowances market participants as well as to auction platforms, auctioneers and the auction monitor. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including investors that are non-Union residents, it is desirable to include certain implementing technical standards required by Regulation (EU) No 596/2014 in a single Regulation.

(15) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(16) The ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)23.

HAS ADOPTED THIS REGULATION:

CHAPTER I

[23] OJ L 331, 15.12.2010, p. 84.

GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down implementing technical standards specifying the following:

a. the technical means for appropriate public disclosure of inside information by an issuer or an emission allowances market participant pursuant` to Article 17(10)(a) of Regulation (EU) No 596/2014;

b. the technical means for delaying the public disclosure of inside information an issuer or an emission allowances market participant pursuant to Article 17(10)(b) of Regulation (EU) No 596/2014;

c. the precise format of insider lists and the format for updating insider lists pursuant to Article 18(9) of Regulation (EU) No 596/2014;

d. the format and template in which the information relating to transactions by persons discharging managerial responsibilities and persons closely associated with them is to be notified and made public pursuant to Article 19(15) of Regulation (EU) No 596/2014

CHAPTER II

TECHNICAL MEANS FOR APPROPRIATE PUBLIC DISCLOSURE OF INSIDE INFORMATION

Article 2

Means for public disclosure of inside information

Pursuant to Article 17(1) and Article 17(2) of Regulation (EU) No 596/2014 inside information shall be disseminated using the mechanisms and channels established in Member States to comply with the standards set out in Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council and Article 12 of Commission Directive 2007/14/EC.

Article 3

Language of disclosure of inside information

1. Purusant to Article 17(1) of Regulation (EU) No 596/2014, the language to be used for the public disclosure of inside information by an issuer whose financial instruments are admitted to trading on a regulated market shall be the language identified in accordance with Article 20 of Directive 2004/109/EC of the European Parliament and of the Council.

2. For issuers of financial instruments traded or admitted to trade only on a multilateral trading facility or on an organised trading facility, the same procedure as the one set out in Article 20 of Directive 2004/109/EC of the European Parliament and of the Council shall apply to determine the language of the issuer.

3. Pursuant to Article 17(2) of Regulation (EU) No 596/2014 an emission allowance market participant shall make a public disclosure of inside information both in a language accepted by the relevant competent authority for notification purposes and a language

customary in the sphere of international finance, or alternatively only in a language customary in the sphere of international finance, at the choice of the emission allowance market participant.

Article 4

Posting on the issuer's website

1. Pursuant to Article 17(1) of Regulation (EU) No 596/2014, the information shall be posted by the the issuer on its website through means which:

a. allows users to access the website on a non-discriminatory manner and free of charge;
b. allows users to locate the inside information in an easily identifiable section of the website that includes only the inside information disclosed by the issuer and not information pertaining to the marketing of its activities; and
c. ensures the disclosed inside information is clearly dated and organised in chronological order.

2. In order for issuers whose financial instruments are admitted to trading on an SME growth market to benefit from the provision under Article 17(9) of (EU) No 596/2014, the information shall be posted on the website of the trading venue through the means referred to in paragraph 1 and shall be maintained on the website for a period of at least five years.

CHAPTER III

TECHNICAL MEANS FOR DELAYING THE PUBLIC DISCLOSURE OF INSIDE INFORMATION

Article 5

Notification of delayed inside information and written explanation

1. Pursuant to Article 17(4) of Regulation (EU) No 596/2014, an issuer or an emission allowance market participant shall inform the relevant competent authority, as defined under Article 17(3) of Regulation (EU) No 596/2014, in written form, using electronic means of transmission accepted by the relevant competent authority, through a dedicated contact point within, or designated by, the relevant competent authority. The written explanation, to be provided simultaneously or upon request of the competent authority, shall be provided using electronic means of transmission accepted by the relevant competent authority, to a dedicated contact point within, or designated by, the relevant competent authority. The act of notifying shall not be delayed.

2. The notification informing the relevant competent authority about the delay of a public disclosure of inside information shall include the following information:

a. the identity of the issuer or emissions allowance market participant: full official name;
b. the identity of the person within the issuer or emissions allowance market participant making the notification: name, surname, positions(s);
c. the contact details of the person making the notification: professional emails address and phone number;
d. identification of the publicly disclosed inside information that was subject to delayed disclosure: title of the disclosure statement, reference number assigned by the dissemination system (if available), and date and time of the public disclosure of the relevant inside information;
e. date and time of the decision to delay the disclosure of inside information; and

f. the identity of any person having taken part in the decision making process for delaying.

3. Without prejudice to sub-paragraph 3 of paragraph 4 of Article 17 of of Regulation (EU) No 596/2014, the written explanation of the delay of the disclosure of an inside information by an issuer or emission allowance market participant shall always include the following information:

a. description of the legitimate interest likely to be prejudiced;
b. assessment on how the omission of the inside information would not be likely to mislead the public; and
c. description of how the confidentiality of the delayed inside information is ensured, including which information barriers have been put in place internally to prevent access to inside information by persons other than those who require it for the normal exercise of their employment, profession or duties within the issuer or emissions allowance market participant, and with regard to third parties.

4. Where the written explanation is provided to the relevant competent authority separately from the notification of the delay, it shall also provide all the information included in the original notification, as referred to in paragraph 2.

5. The notification and the written explanation shall be drafted in the same language as that in which the inside information is disclosed.

Article 6

Notification of intention to delay

1. Pursuant to Article 17(6) of Regulation (EU) No 596/2014, the notification that an issuer shall provide to the relevant competent authority, shall be submitted in writing, electronically and securely, ensuring the confidentiality of that information.

2. The relevant competent authority shall confirm in writing to the issuer its decision to consent or not the delay on the basis of the information provided pursuant to paragraph 1.

3. The issuer shall inform the relevant competent authority in writing, and using the same channel as used in the original notification, of any new information that may affect the competent authority's decision.

Article 7

Record keeping

1. Pursuant to Article 17(4) and 17(5) of Regulation (EU) No 596/2014, issuers and emission allowance market participants shall keep records of the following information:

a. The dates when (i) the inside information came into existence; (ii) the decision to delay inside information was made; (iii) and the issuer or emissions allowance market participant is likely to publish the inside information;
b. evidence of the fulfillment of the conditions for the delay, both initially and on an on-going basis during the delay period; a new record is needed when there has been a change in the original conditions;
c. the identity of the persons responsible within the issuer or emission allowance market participant, notably for (i) deciding about the start of the delay and its likely ending, (ii) ensuring the on-going monitoring through a regular review of the conditions of the delays (in particular confidentiality), (iii) deciding about the disclosure of the delayed inside information and (iv) providing the

requested information about the delay and the explanations to the competent authority;

d. the procedures put in place, and any changes in these procedures, regarding the confidentiality of the delayed inside information for:
    i. denying access to the delayed inside information to persons other than those who require it for the normal exercise of their employment, profession or duties within the issuer;
    ii. ensuring awareness of the persons accessing delayed inside information about the legal and regulatory duties as well as of the sanctions attached; and
    iii. arranging immediate disclosure in cases where confidentiality is no longer ensured.

2. Issuers and emission allowance market participants shall provide the records referred to in paragraph 1 to the competent authority upon request.

CHAPTER IV

FORMAT FOR INSIDER LISTS AND FORMAT FOR UPDATING INSIDER LISTS

Article 8

Format of insider lists

1. Pursuant to Article 18(1) of Regulation (EU) No 596/2014, the issuer or a person referred to in Article 18(8) of Regulation (EU) No 596/2014, or any person acting on its behalf or for its account, shall create and update the insider list in the form of either:

a. a general list including all persons having access to any inside information as set out in Template 1 of Annex I of this Regulation; or
b. a deal-specific or event-based list that includes all the persons having access to relevant deal-specific or event-based inside information as set out in Template 2 of Annex I of this Regulation.

2. Pursuant to Article 18(3)(a) of Regulation (EU) No 596/2014, the insider list shall contain the following information to specify the identity and the contact information of persons having access to inside information:

a. name: first name, surname, birth surname;
b. home address: address, postal code and city, country;
c. work address;
d. 'National Identification Number' when applicable, in accordance with national law or otherwise, the date and place of birth;
e. home, work and mobile telephone numbers; and
f. work and personal e-mail addresses.

3. The list shall contain the following information relating to the reason for inclusion of the person having access to inside information on the insider list pursuant to Article 18(3)(b) of Regulation (EU) No 596/2014:

a. role or function;
b. name of the organisation/employers, particularly in case of professional acting on behalf or on the account of the issuer or a person referred to in Article 18(8) of Regulation (EU) No 596/2014; and
c. name of the project to identify the particular inside information requiring inclusion on the insider list.

4. Pursuant to Article 18(3) and Article 18(4) of Regulation (EU) No 596/2014, the date and time at which the following occur shall be included in the insider list:

a. a new person has access to inside information;
b. a person already on the insider list ceases to have access to inside information; and
c. there is a change in the reason for including a person already on the insider list that does not fall within either (a) or (b) above.

In all cases the relevant time zone shall be specified.

Article 9

Procedure for updating insider lists

1. Pursuant to Article 18(4) of Regulation (EU) No 596/2014, the insider list shall be updated without undue delay after that underlying set of circumstances exists or event has occurred.
2. Pursuant to Article 18(5) of Regulation (EU) No 596/2014, the lists shall be maintained in an electronic format that ensures:

a. it can be updated in accordance with Article 18(4) of Regulation (EU) No 596/2014; and
b. access to and retrieval of previous versions of insider lists.

Article 10

Format for notification to the competent authority

1. The insider list submitted to the competent authority pursuant to Article 18(1)(c) and Article 18(6)(b) of Regulation (EU) No 596/2014 shall be submitted electronically and securely in order to ensure confidentiality, in a format that allows reading and processing by computers.

2. The insider list mentioned in paragraph 1 shall be submitted in any of the format templates set out in Annex I. Where persons acting on behalf or for the account of the issuer or a person referred to in Article 18(8) of Regulation (EU) No 596/2014 maintain their own insider list separately from the insider list of the issuer or that person, the latter shall provide the competent authority with the requested insider list either in the form of a consolidated list or in the form of separate lists, namely the insider list of the issuer or the person referred to in Article 18(8) of Regulation (EU) No 596/2014 itself and the insider list of any third party working on its behalf or for its account.

3. The insider list shall be submitted in the official language of the relevant competent authority or in a language which is customary in the sphere of international finance, at the choice of the issuer, the person referred to in Article 18(8) of Regulation (EU) No 596/2014 or persons acting on behalf of or on its account.

Article 11

SME Growth market issuers

Pursuant to Article 18(6)(b) of Regulation (EU) No 596/2014, SME Growth Market issuers shall be able to provide an insider list containing the information specified in in Table 2 of Annex 1 for the date as requested by the competent authority and shall submit it in accordance with the format for notification specified in Article 10(1) and (3).

CHAPTER V

FORMAT AND TEMPLATES FOR NOTIFICATION AND DISCLOSURE OF MANAGERS' TRANSACTIONS

Article 12

Notification to the competent authority and the issuer, the emission allowance market participant, the auction platform, auctioneer or the auction monitor

1. Pursuant to Article 19(1) and 19(10) of Regulation (EU) No 596/2014, a notification made by persons discharging managerial responsibilities or by persons closely associated with them shall contain the information specified in Annex II to this Regulation.

2. The notification shall be made using the template set out in Annex III to this Regulation.

3. The notification template set out in in Annex III shall contain:

a. in Section 1, a list detailing all the transactions carried out by a person discharging managerial responsibilities or a closely associated person with such a person in the relevant financial instruments for a particular day;

b. in Section 2, aggregated figures about the transactions carried out in each relevant financial instrument for a particular day and per execution venue by a person discharging managerial responsibilities or a closely associated person with such a person.

Article 13

Means of transmission of notifications

The notifications referred to in Article 2 of this Regulation shall be submitted electronically to the persons referred to in Article 19(1) and 19(10) of Regulation (EU) No 596/2014 through technical means that are accepted by the recipients of the notifications and that ensure the completeness, integrity and confidentiality of the information are maintained during the transmission.

Article 14

Public disclosure of notifications received

1. An issuer, an emission allowance market participant, an auction platform, an auctioneer or an auction monitor receiving a notification pursuant to Article 12 of this Regulation shall make such notification public by using the technical means for public disclosure set out in Article 2 to 4 of this Regulation.

2. The information to be publicly disclosed shall contain the information specified in Section 2 of Annex II to this Regulation and shall be made public using the Section 2 of the template set out in Annex III.

3. Pursuant to Article 19(3) of Regulation (EU) No 596/2014, where information to be notified is made public by the competent authority itself, the concerned competent authority shall make public the information referred to in paragraph 2 in a way that ensures that the requirements for proper dissemination and appropriate public disclosure of Article 17 of Regulation (EU) No 596/2014 are met.

CHAPTER VI

FINAL PROVISIONS

Article 15

Entry into force

This Regulation shall enter into force on the the twentieth day [following that of its publication in the *Official Journal of the European Union*.
[It shall apply from [...].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

ANNEX I

Template 1

General Insider List

Date (creation/update): [yyyy-mm-dd]

Time (creation/update): [hh:mm GMT+[?]]

First name(s)	**Surname (s)**	**Name of Birth (if different)**	**National Identification Number** **Or otherwise, the date and place of birth**	**Address**	**Zip**	**City**	**Country**	**Email Address**	**Telephone Numbers**	**Company Name**	**Company address**	**Start date**	**End date**	**Function**	**[Name of Event/Project No 1]**		**[Name of Event/Project No 2]***	
															Obtained	**Ceased**	**Obtained**	**Ceased**
First name(s) of the insider	Surname(s) of the insider	Surname of birth of the insider	National Identification Number (where applicable, in accordance with national law) Or otherwise, the date and place of birth	Private address of the insider	Zip code of the private address of the insider	City of the private address of the insider	Country of the private address of the insider	E-mail Address (Professional and personal)	Fixed and Mobile (Professional and personal)	Company/ employer of the insider/third party contacts	Company address of the insider	Start date of employment of the insider	End date of employment of the insider	Comprehensive description of present role and function of the insider	The date and time at which a person obtained access to inside information	The date and time at which a person ceased to have access to inside information	The date and time at which a person obtained access to inside information	The date and time at which a person ceased to have access to inside information
Text	Text	Text	Number (and text)	Text	Numbers/ Text (no space)	Text	Text	Text	Numbers (no space)	Text	Text	yyyy-mm-dd	yyyy-mm-dd	Text	yyyy-mm-dd	yyyy-mm-dd	yyyy-mm-dd	yyyy-mm-dd

(Add a new column with an event or project name for each new specific inside information)

Template 2

Deal specific/ Event Based Insider List: [Name of the Project 1[24]]

Date (creation/update): [yyyy-mm-dd]

Time (creation/update): [hh:mm GMT+[?]]

First name(s)	**Surname (s)**	**Name of Birth (if different)**	**National Identification Number** Or otherwise, the date and place of birth	**Address**	**Zip**	**City**	**Country**	**Email Address**	**Telephone Numbers**	**Company Name**	**Company address**	**Start date**	**End date**	**Function**	**Obtained**	**Ceased**
First name(s) of the insider	Surname(s) of the insider	Surname of birth of the insider	National Identification Number (where applicable, in accordance with national law) Or otherwise, the date and place of birth	Private address of the insider	Zip code of the private address of the insider	City of the private address of the insider	Country of the private address of the insider	E-mail Address (Professional and personal)	Fixed and Mobile (Professional and personal)	Company/ employer of the insider/third party contacts	Company address of the insider	Start date of employment of the insider	End date of employment of the insider	Comprehensive description of present role and function of the insider	The date and time at which a person obtained access to inside information	The date and time at which a person ceased to have access to inside information
Text	Text	Text	Number	Text	Numbers/ Text (no space)	Text	Text	Text	Numbers (no space)	Text	Text	yyyy-mm-dd	yyyy-mm-dd	Text	yyyy-mm-dd: hh:mm	yyyy-mm-dd : hh:mm

[24] To facilitate delivery of an Insider List for a specific project. This will mean that the issuer, the EAMP or the auction entity, or, a person acting on its behalf or on its account might have a specific Insider List for each of the price sensitive project.

ANNEX II

SECTION 1: List of information for notification to the competent authority and the employer	
Field identifier	Description
1. Notifying party name	For natural persons: the first name and the last name For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable, and, Legal Entity Identifier (LEI) if available
2. Notifying party position/status	For persons discharging managerial responsibilities: the position occupied within the issuer, Emission allowances market participant/ Auction platform/auctioneer/auction monitor should be indicated e.g. CEO, CFO. Where the notifying party is a closely associated person, - the association with the relevant persons discharging managerial responsibilities using the categories identified in the definition of a closely associated persons under Article 3(26) of Regulation (EU) No 596/2014 [MAR](e.g. spouse, children…) - Name and position of the relevant person discharging managerial responsibilities
3. Address of the notifying party	Full address (e.g. street, street number, postal code, city, state/province) and country For natural persons, the personal address is required.
4. Contact details of the notifying party	Telephone number and email address For natural persons, the personal contact details are required.
5. National identification number	Where applicable, the national identification number in use in the particular Member State of the notifying party.
6. Identification of the issuer, emission allowances market participants, auction platform, auctioneer or auction monitor	Full name of the entity Legal Entity Identifier (LEI)
7. Description of the financial instrument(s) or emission allowance(s)	Indication as to the nature of the instrument: a share, a debt instruments or a derivative or a financial instrument related to a share or a debt instrument, or an allowance, an auction based product relating to an emission allowance or a derivatives on either of the previous. Identification code as defined under MiFIR implementing texts
8. Nature of the transaction	Description of the transaction type using where applicable the type of transaction identified in the Delegated Act adopted by the Commission (ref XXX) (pursuant to Art. 19(14) of MAR) or a specific examples set out in Article 19(7) of Regulation (EU) No 596/2014 [MAR]. Pursuant to Article 19(6)(e) of Regulation (EU) No 596/2014 [MAR], it shall be indicated whether the transaction is linked to the exercise of a share option programme.
9. Financial instrument, price and volume of the transaction(s)	Using the data standard defined under MiFIR implementing texts

10. Date of the transaction	Date of the particular day when the notified transaction(s) were executed Using the data standard defined under MiFIR implementing texts
11. Place of the transaction	The trading venue identification code as defined under MiFIR implementing texts or, if the transaction was not executed on a trading venue, then mention "OTC"
12. Comments	Free text - Mandatory to identify and justify an amendment to an incorrect notification already transmitted. - Optional in other cases: to allow the notifying party to provide a comment or explanation to the competent authority about the particular transaction(s) listed in the notification
SECTION 2: List of information the purpose of disclosure to the public	
Field identifier	Description
1. Notifying party name	For natural persons: the first name and the last name For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable, and, Legal Entity Identifier (LEI) if available
2. Notifying party position/status	For persons discharging managerial responsibilities: the position occupied within the issuer, Emission allowances market participant/ Auction platform/auctioneer/auction monitor should be indicated e.g. CEO, CFO. Where the notifying party is a closely associated person, - An indicator that the notifying person is a closely associated person to a person discharging managerial responsibilities - Name and position of the relevant person discharging managerial responsibilities
3. Identification of the issuer, emission allowances market participants, auction platform, auctioneer or auction monitor	Full name of the entity Legal Entity Identifier (LEI)
4. Description of the financial instrument or emission allowance	Indication as to the nature of the instrument: a share, a debt instruments or a derivative or a financial instrument related to a share or a debt instrument, or an allowance, an auction based product relating to an emission allowance or a derivatives on either of the previous. Identification code as defined under MiFIR implementing texts
5. Nature of the transaction	Description of the transaction type using where applicable the type of transaction identified in the Delegated Act adopted by the Commission (ref XXX) (pursuant to Art. 19(14) of MAR) or a specific examples set out in Article 19(7) of Regulation (EU) No 596/2014 [MAR]. Pursuant to Article 19(6)(e) of Regulation (EU) No 596/2014 [MAR], it shall be indicated whether the transaction is linked to the exercise of a share option programme.
6. Price information	- Weighted average price - Lowest price of the day - Highest price of the day

	Using the data standard defined under MiFIR implementing texts
7. Aggregated volume	Using the data standard defined under MiFIR implementing texts
8. Date of the transaction	Date of the particular day when the notified transaction(s) were executed Using the data standard defined under MiFIR implementing texts
9. Place of the transaction	The trading venue identification code as defined under MiFIR implementing texts or, if the transaction was not executed on a trading venue, then mention "OTC"
10. Amendment of previous notification	Only to explain that the present notification is amending a notification previously disclosed to be specified Free text

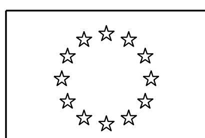
ANNEX III

SECTION 1: Notification template to the competent authority and the employer		
1	**Details of the notifying party**	
a)	Notifying party name	
b)	Position/status of the notifying party	
c)	Full address	
d)	Contact details: - Phone number - E-mail address	
f)	National identification number	
2	**Details of the Issuer/Emission allowances market participant/ Auction platform/auctioneer/auction monitor**	
a)	Name	
b)	LEI	
3	**Details of the transaction(s) ***	
a)	Description of the financial instrument / Emission allowance - Type of instrument - Identification code	
b)	Nature of the transaction	
c)	Price and volume	
e)	Date of the transaction	
f)	Place of the transaction	
4	**Other information**	
a)	Comments	
SECTION 2: Notification template for the purpose of disclosure to the public		
1	**Details of the notifying party**	
a)	Notifying party name	
b)	Position/status of the notifying party	

2	**Details of the Issuer/Emission allowances market participant/ Auction platform/auctioneer/auction monitor**	
a)	Name	
b)	LEI	
3	**Details of the transaction**	
a)	Description of the financial instrument / Emission allowance - Type of instrument - Identification code	
b)	Nature of the transaction	
c)	Price information (highest/lowest price and weighted average price)	
d)	Aggregated Volume	
e)	Date of the transaction	
f)	Place of the transaction	
4	**Amendment of previous notification**	

(*) Section to be repeated for each type of instrument

Annex VIII: Draft regulatory technical standards on the technical arrangements for objective presentation of investment recommendation or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest



EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

EN

Draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendation or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)[25], and in particular Article 20(3) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) Harmonised standards are necessary for the objective, clear and accurate presentation of information and disclosure of interests and conflicts of interest, to be complied with by persons producing or disseminating information recommending or suggesting an investment strategy, intended for distribution channels or for the public. In particular, market integrity requires high standards of fairness, probity and transparency by requiring information that recommends or suggests an investment strategy to be presented objectively and in a way that does not mislead market participants or the public.

(2) All persons who produce or disseminate information recommending or suggesting an investment strategy should therefore have in place arrangements to ensure information and disclosure of interests or conflicts of interest are objectively presented. However, it is considered appropriate and proportionate to specify additional arrangements for those

[25] OJ L 173, 12.6.2014, p. 1

persons who by their nature and their activities generally pose greater risks to market integrity and investor protection. This group would include persons who are not persons referred to Article 3(1)(34)(i) of Regulation (EU) No 596/2014, hereinafter referred to as "professionals" but who present themselves as having financial experience or expertise, or are perceived as such by market participants. Non-exhaustive indicators to be considered in relation to such experts include: the frequency with which they produce iinformation recommending or suggesting an investment; the number of followers they have when they propose an investment recommendation; and whether their previous investment recommendations are or have been relayed by third parties such as the media.

(3) Recommending or suggesting an investment strategy is either done explicitly (such as "buy", "hold" or "sell" recommendations) or implicitly (such as by reference to a price target, through technical analysis or otherwise).

(4) Non-written recommendations are recommendations made using modalities such as meetings, road shows or audio or video conference as well as radio, TV or website interviews. In the interest of proportionality, producers of non-written recommendation should be allowed to adapt their arrangements to their particular situation.

(5) An investment recommendation is considered to be intended for distribution channels or for the public when it is expected to be distributed to clients or potential clients, or to a specific segment of clients or potential clients, whatever their number and irrespective of the type of channel used (e.g. regulatory information systems, media specialised in disseminating information, website of the producer, emails, social networks). However, an investment advice, through the provision of a personal recommendation to a client in respect of one or more transactions relating to financial instruments, should not be considered in itself as an investment recommendation within the meaning of this Regulation.

(6) Investment recommendations can take various forms, such as a short note to clients commenting and updating previous investment recommendations in the light of external events often labelled as morning notes or sales notes, and the qualification will depend at least on the substance of the information as well as how that information is disseminated. Consequently, the investment recommendations which are subject of this Regulation are not necessarily limited to those recommendations that are held out as being objective or independent.

(7) The identity of the producer of investment recommendations and, where applicable, his competent authority should be disclosed, since they may be valuable information for investors to consider in relation to their investment decisions.

(8) "Professionals" and experts should, as best practice, seek consistency in the methodologies adopted in their own investment recommendations to the extent possible, explaining any divergence in the methodologies used. For instance, investment recommendations produced by the same person and related to companies that belong to the same industry or to the same country should aim at consistently exhibiting consistent common factors.

(9) The interests of persons recommending or suggesting an investment strategy and the conflicts that those interests could produce, may influence the opinion that those persons express in investment recommendations. In order to ensure that the objectivity and reliability of the information can be evaluated, appropriate disclosure should be made of significant financial interests in any financial instrument which is the subject of the information recommending investment strategies, or of any conflicts of interest or control relationship with respect to the issuer to whom the information relates, directly or

indirectly. However, this Regulation should not require any person producing investment recommendations to breach effective information barriers put in place in order to prevent and avoid conflicts of interest.

(10) Investment recommendations may be disseminated in unaltered, altered or summarised form by a person other than the producer. The way in which disseminators handle such recommendations may have an important impact on the evaluation of those recommendations by investors. In particular, the knowledge of the identity of the disseminator of the investment recommendation or the extent of alteration of the original recommendation can be a valuable piece of information for investors when considering their investment decisions. The extrapolation of some elements of an original investment recommendation could amount to a substantial alteration of the content of the source investment recommendation.

(11) Posting of investment recommendations on internet sites should be done in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(13) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[26].

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This regulation lays down regulatory technical standards specifying the technical arrangements for the categories of person referred to in paragraph 1 of Article 20(1) of Regulation (EU) No 596/2014, for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest pursuant to Article 20(3) of Regulation (EU) No 596/2014.

[26] OJ L 331, 15.12.2010, P. 84

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) No 596/2014:

a) "expert" means a person referred to Article 3(1)(34)(ii) of Regulation (EU) No 596/2014 who repeatedly proposes particular investment decisions in respect of financial instruments and who:

   i. holds himself out as having financial expertise or experience; or

   ii. puts forward his recommendation in such a way that other persons would believe he has financial expertise or experience;

b) "related person" means:

   i. a spouse, or a partner considered to be equivalent to a spouse in accordance with national law;

   ii. a dependent child, in accordance with national law;

   iii. a relative who has shared the same household for at least one year on the date of the dissemination of the investment recommendation concerned; or

   iv. a "related legal person" as defined in point (c) of this paragraph;

c) "related legal person" means any legal person:

   i. which is a controlled undertaking or a controlling undertaking in the meaning of Article 2(1)(f) of Directive 2004/109/EC of the European Parliament and of the Council; or

   ii. the managerial responsibilities of which are discharged by a natural person, or which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.

CHAPTER II

PRODUCTION OF RECOMMENDATION

Article 3

Identity of producers of investment recommendations

1. The persons referred to in Article 3(34)(i) and (ii) of Regulation (EU) No 596/2014 shall have in place arrangements to ensure that any investment recommendation discloses clearly and prominently the identity of the person responsible for its production by indicating:

   a. the name of the individual(s) who prepared the recommendation;

   b. the job title of the individual(s) who prepared the recommendation; and

   c. when the individual(s) who prepared the recommendation is acting under contract of employment of otherwise for a legal person, the name of the legal person.

2. Where the person referred to in paragraph 1 is an investment firm, a credit institution or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU, the identity of the relevant competent authority shall be disclosed.

3. Where the person referred to in paragraph 1 is not an investment firm, a credit institution or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU, but is subject to self-regulatory standards or codes of conduct, a reference to those standards or codes shall be disclosed.

Article 4

Objective presentation of investment recommendations

1. The persons referred to in Article 3(34)(i) and (ii) of Regulation (EU) No 596/2014 who produce an investment recommendation, whether in a written or non-written form, shall have in place the necessary arrangement to ensure that facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information, and that the following information is included and shown clearly and prominently:

a. all sources are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated;

b. all projections, forecasts and price targets are labelled as such and the material assumptions made in producing or using them are indicated;

c. all substantially material sources are indicated as appropriate; and

d. an indication of the date and time at which the investment recommendation was first released for distribution.

2. Subject to paragraph 3, the persons referred to Article 3(34)(i) of Regulation (EU) No 596/2014 and experts as defined in point (a) of Article 2 of this Regulation shall have in place additional arrangements to ensure that the following information is included and shown clearly and prominently in written or non-written investment recommendations:

a. The indication of substantially material sources as referred to in point c of paragraph 1 shall include, where applicable, the issuer to which the investment recommendation directly or indirectly relates, together with information on whether the recommendation has been disclosed to that issuer and amended, following this disclosure, before its dissemination;

b. a summary of any basis of valuation or methodology and the underlying assumptions used to either evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument. Any changes in the valuation, methodology or underlying assumptions shall be indicated and summarised;

c. an indication of the location where detailed information about the valuation or methodology and the underlying assumptions is directly and easily accessible;

d. when the producer has used proprietary models, a summary of the key factors of such models and their impact on the results shall be indicated, as well as an indication of where more detailed information is directly and easily accessible.

e. the meaning of any recommendation made, such as buy, sell or hold, which shall include the length of time of the investment to which the recommendation relates, is adequately explained and any appropriate risk warning, including a sensitivity analysis of the relevant assumptions, indicated;

f. a reference to the planned frequency, if any, of updates to the recommendation and to any major change in the coverage policy previously announced;

g. an indication of the relevant date and time of any price of financial instrument mentioned;

h. where a recommendation differs from a recommendation concerning the same financial instrument or issuer that has been issued during the 12-month period immediately preceding its release, the change and the date of the earlier recommendation are indicated; and

i. a list of all investment recommendations produced on any issuer and disseminated during the preceding 12-month period that contains, at least, for each recommendation, the date of release, the identity of the producer, the price target and the relevant market price at the time of dissemination, the direction of the recommendation and the validity time period of the price target and of the recommendation.

3. Where the disclosure of the information required in points (c) and (d) of paragraph 1, and points (d), (e) or (i) of paragraph 2 is disproportionate in relation to the length of the written or non-written investment recommendation, it shall suffice for the relevant person to make clear and prominent reference in the recommendation itself to the place where the required information can be directly and easily accessed at no additional charge by the public, such as a direct internet link to that information on an appropriate internet site.

4. All persons referred to in paragraphs 1 and 2 shall have arrangements that enable them to substantiate any investment recommendation they have produced to the competent authority upon request.

Article 5

Disclosure of interests or indication of conflicts of interest

1. The persons referred to Article 3(34)(i) and (ii) of Regulation (EU) No 596/2014 shall have in place arrangements to ensure the disclosure of all relationships and circumstances that may reasonably be expected to impair the objectivity of the investment recommendation, in particular where these persons have a significant financial interest in one or more of the financial instruments which are the subject of the recommendation, or a significant conflict of interest with respect to an issuer to which the recommendation directly or indirectly relates.

Where a person referred to in the previous sub-paragraph is a legal person, the arrangements shall also cover any legal or natural person working for it, under a contract of employment or otherwise, who was involved in preparing the recommendation.

2. For the purpose of applying paragraph 1, where the person is a legal person, the relevant arrangements shall allow the disclosure of at least:

a. any interests or conflicts of interest of this person or of related legal persons that are accessible or reasonably expected to be accessible to the persons involved in the preparation of the investment recommendation;
b. any interests or conflicts of interest of this person or of related legal persons known to persons who, although not involved in the preparation of the investment recommendation, had or could reasonably be expected to have access to the recommendation prior to its dissemination to customers or the public.

3. The persons referred to Article 3(34)(i) of Regulation (EU) No 596/2014 and experts as defined in point (a) of Article 2 of this Regulation shall have in place additional arrangement to ensure that the following information on their interests and conflicts of interest is included in a clear and prominent manner in the investment recommendation they produce:

a. where applicable, the actual holding in the financial instruments to which the recommendation relates;
b. other significant financial interests they hold or that is held by or any related person in relation to the issuer;
c. any major holdings that exist between the person producing the investment recommendation, or any related person, and the issuer. These shall include at least the following instances:
    i. shareholdings exceeding 0,5% of the total issued share capital of the issuer, held by the person producing the investment recommendation, or any related person; or
    ii. short positions, as defined in Article 3(1) and (3) of the Regulation (EU) No 236/2012, exceeding the threshold of 0,5% of the issued share capital of the issuer held by the person producing the investment recommendation, or any related person; and
    iii. shareholdings exceeding 5% of the total issued share capital of the person producing the investment recommendation, or of any related person, held by the issuer.
d. where applicable, a statement that the person producing the investment recommendation or any related legal person:
    i. is a market maker or liquidity provider in the financial instruments of the issuer;
    ii. has been lead manager or co-lead manager over the previous 12 months of any publicly disclosed offer of financial instruments of the issuer;
    iii. is party to any other agreement with the issuer relating to the provision of investment banking services, provided that this would not entail the disclosure of any confidential commercial information and that the agreement has been in effect over the previous 12 months or has given rise during the same period to the payment of a compensation or to the promise to get compensation paid;
    iv. is party to an agreement with the issuer relating to the production of the recommendation.

4. Where the person referred to in paragraph 3 is an investment firm, a credit institution or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU, the arrangements shall also allow the disclosure of:

a. a description, in general terms, of the effective internal organisational and administrative arrangements it has set up for the prevention and avoidance of conflicts of interest with respect to the investment recommendations, including information barriers;
b. whether the remuneration of natural or legal persons working for them under a contract of employment or otherwise, and who were involved in preparing the investment recommendation, is tied to investment banking or other type of transactions performed by the investment firm, credit institution or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU or any related legal person;
c. whether the remuneration of natural or legal persons working for them under a contract of employment or otherwise, and who were involved in preparing the investment recommendation, is tied to trading fees received by the investment firm, credit institution, or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU or any related legal person;
d. the price and date of acquisition of shares when natural persons working for them under a contract of employment or otherwise, and who were involved in preparing the investment recommendation, receive or purchase the shares of the issuer to which the recommendation directly or indirectly relates, prior to a public offering of such shares.

5. The persons referred to in Article 3(34)(i) of Regulation (EU) 596/2014 and experts as defined in point (a) of Article 2 shall on a quarterly basis arrange for the disclosure of:

a. the proportion of all investment recommendations that are 'buy', 'hold', 'sell' or equivalent terms over the previous 12 months, and
b. where the person is an investment firm, a credit institution or a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU, the proportion of issuers corresponding to each of the categories referred to in point a) to which it has supplied material investment banking services over the previous 12 months.

6. Where the disclosure of the information referred to in this Article is disproportionate in relation to the length of the investment recommendation distributed it shall suffice to make clear and prominent reference in the recommendation itself to the place where the required information can be directly and easily accessed by the public, such as a direct internet link to that information on an appropriate internet site.

7. A person producing a non-written investment recommendation shall only decide to not include the information referred to in this Article directly into the non-written recommendation when:

a. the non-written recommendation is based on an existing written recommendation which properly outlines the interests or conflicts of interests of the producer;
b. the recipients of the non-written recommendation are informed about the existence of conflicts of interest; and

c. the non-written recommendation includes the indication of where the written recommendation mentioned in point (a) is available free of charge to the public.

CHAPTER III

DISSEMINATION OF RECOMMENDATIONS PRODUCED BY THIRD PARTIES

Article 6

Identity of disseminators of investment recommendations and disclosure of interests or indication of conflict of interests

The persons referred to in Article 3(34)(i) and (ii) of Regulation (EU) No 596/2014 shall have arrangements in place to ensure that, whenever under their own responsibility they disseminate an investment recommendation produced by a third party:

a. the recommendation indicates clearly and prominently their identity; and
b. all relationships and circumstances that may reasonably be expected to impair the objectivity of the investment recommendation are disclosed, in particular where these persons have a significant financial interest in one or more of the financial instruments which are the subject of the recommendation, or a significant conflict of interest with respect to an issuer to which the recommendation directly or indirectly relates.

Article 7

Arrangements for dissemination of investment recommendations

1. Whenever the person who disseminates an investment recommendation produced by a third party is an investment firm, a credit institution, a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU or a natural persons working for them under contract of employment or otherwise, the arrangements to put in place shall ensure the disclosure of:

a. the identity of the relevant competent authority in a clear and prominent manner;
b. his own interests or indication of conflicts of interest as set out in Article 5, unless that disseminating person is acting as the disseminating channel of the recommendations produced within the group he belongs to without any discretion as to the recommendation to disseminate.

2. A person referred to in Article 3(34)(i) of Regulation (EU) No 596/2014 and experts as defined in point (a) of Article 2 who disseminates a summary of an investment recommendation produced by a third party shall have arrangement in place to ensure that the summary is clear and not misleading, mentioning the source document and where the disclosures related to the source document can be directly and easily accessed by the public, provided that they are publicly available. The disseminating person shall also ensure that the information about interests or indications of conflicts of interest of the producer as set out in Article 5 of this

Regulation is made available either directly in the summary itself or through the source document.

Article 8

Arrangements for dissemination of substantially altered investment recommendations

1. Any person, including news disseminators such as news reporting agencies, who disseminates an investment recommendation produced by a third party that is substantially altered shall have the necessary arrangements to ensure that the information disseminated clearly indicates the substantial alteration in detail.

2. Where the person who disseminates a substantially altered an investment recommendation produced by a third party is an investment firm, credit institution, a person benefitting from the optional exemption under Article 3 of Directive 2014/65/EU or a natural person working for them under contract of employment or otherwise, the type of information referred to in Articles 3 to 5 of this Regulation is relevant to that person who shall have in place the arrangements to ensure this information is disclosed.

3. Where the disseminating person is a person referred to in Article 3(34)(i) of Regulation (EU) No 596/2014 or an expert as defined in point (a) of Article 2 and whenever the substantial alteration consists of a change of the direction of the investment recommendation or of the target price, the type of information referred to in Articles 3 to 5 of this Regulation, is relevant to the disseminating person who shall have in place the arrangements to ensure this information is disclosed, to the extent of the substantial alteration.

4. A person referred to in paragraph 2 who is a legal person and who itself, or through natural persons, disseminates a substantially altered investment recommendation shall have a formal written policy to direct the persons receiving the information to where they can access the identity of the producer of the recommendation, the original recommendation and the disclosure of the producer's interests or conflicts of interest.

CHAPTER V

FINAL PROVISIONS

Article 9

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
[It shall apply from […].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

EN