



European Securities and
Markets Authority

Discussion Paper

ESMA's policy orientations on possible implementing measures
under the Market Abuse Regulation



Responding to this paper

The European Securities and Markets Authority (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 Monday 27 January 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 investors 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 and operators of trading venues.

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Acronyms used

AMP	Accepted Market Practices
DP	Discussion paper
DA	Delegated act to be adopted by the European Commission
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
RM	Regulated market
RTS	Regulatory technical standards
STR	Suspicious transactions report
TD	Transparency Directive – Directive 2004/109/EC

Executive Summary

Reasons for publication

On 20 October 2011, the Commission issued its proposal for a regulation on insider dealing and market manipulation (i.e. market abuse). The Market Abuse Regulation (MAR) aims at enhancing market integrity and investor protection. To this end MAR updates and strengthens the existing framework¹ by extending its scope to new markets and trading strategies and by introducing new requirements.

On 24 June 2013, the European Parliament, the Council and the European Commission reached a political agreement on the MAR level 1 text. This Discussion Paper (DP) is based on the version of the text following such agreement². However, it should be noted that the text is still undergoing legal review and, for this reason, it has not yet been published in the Official Journal of the European Union (OJ).

This DPP seeks the views of interested parties on ESMA's policy orientations and initial proposals for MAR implementing measures. These will take the form of delegated acts of the Commission, ESMA technical standards and Guidelines.

Contents

In preparing this paper, ESMA has, to the extent possible, taken into consideration the existing level 2 texts and the sets of CESR Guidance on the operation of the Market Abuse Directive; in such instances, the rules have been reviewed in light of the broadening of the scope of MAR. In addition, ESMA has dealt more extensively with the sections relating to new requirements introduced with MAR. These concern the market soundings (Section II), the public disclosure of inside information (Section VI) and the reporting of violations (Section x).

This DP is structured in accordance to the ten areas of MAR to which input from ESMA is required. It follows the order of the sections in the level 1 compromise text. Section I relates to the conditions to be met by buyback programmes and stabilization measures to benefit from the exemption from market abuse prohibitions. Section II deals with the arrangement and procedures required for Market soundings, from the perspective of both the sounding and the sounded market participants. Section III concerns the indicators and signals of market manipulation. Section IV deals with the criteria to establish Accepted Market Practices. Section V relates to the arrangement, systems and procedures to put in place for the purpose of suspicious transactions and order reporting as well as its content and format. Section VI covers issues relating to public disclosure of inside information and the conditions for delaying it. Section VII relates to the format for Insider lists. Section VIII contemplates issues concerning the reporting and public disclosure of managers' transactions. Section IX deals with the arrangements for fair presentation and disclosure of conflict of interests by producers and disseminators of investment recommendations. Finally, section X addresses the reporting of violations and related procedures.

¹ Market Abuse Directive 2003/6/EC (OJ L 96, 12.4.2003, p.16).

² The text of the political agreement was made public on the Council website on 18 September 2013 and can be found at: <http://register.consilium.europa.eu/pdf/en/13/st12/st12906.en13.pdf>.

Each section summarises the relevant provisions and their objectives, it provides an explanation of the related policy issues and discusses various policy options. For each issue, the paper describes the orientations ESMA is envisaging and/or poses questions on aspects where views of stakeholders are considered to be helpful for the final decision making.

Next steps

ESMA will consider the feedback it received to this consultation in Q1 2014. On the basis of the relevant input, ESMA will prepare consultation papers on both its draft technical standards and technical advice to the Commission. On 21 October 2013, the Commission mandated ESMA to provide its technical advice on the elements of MAR, which will have to be specified in the delegated acts. ESMA's advice must be delivered within eight months from the entry into force of the MAR text. In addition, MAR mandates ESMA to draft technical standards to be endorsed by the Commission. However, the exact deadline for submission of the standards to the Commission only be known upon publication of MAR in the OJ.

ESMA expects to further publicly consult on the draft technical advice on Delegated Acts in spring 2014 before submitting it to the Commission within the requested deadline. In addition, ESMA will conduct an open public consultation before submitting its technical standards to the Commission. The date of publication of such consultation and commenting period will depend on the date of publication of the level 1 text on the OJ.

I. Buyback programmes and stabilisation (Article 3 of MAR)

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 shall 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 3(1) of MAR states that the prohibition of insider dealing (Article 9) and market manipulation (Article 10) do not apply to trading in own shares in buy-back programmes when the programme fulfils the requirements defined in the Article 3(1) of MAR. According to Article 5(12) of MAR "buy-back programme" means trading in own shares in accordance with Article 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 3(1a) 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 3(2) 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 when the stabilisation is carried out for a limited time period, when relevant information about the stabilisation is disclosed, notified to the competent authority, and adequate limits with regard to price are respected and provided that such trading complies with the conditions for stabilisations

laid down in regulatory technical standards (RTS). According to Article 5(4b) of MAR, “stabilisation” means any purchase or offer to purchase the relevant securities, or any transaction in associated instruments equivalent thereto, by investment firms or credit institutions, which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities. The term “significant distribution” is further defined in Article 5(5a) 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 3(2c) MAR, ESMA shall 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.*”

I.1 Buy-back programmes

I.1.1 General conditions that buy-backs must meet

9. Article 3(1) and (1b) and Article 5(12) MAR use the term “shares”. “Associated instruments” are only mentioned in the context of stabilisations (Article 3(2) and Article 5 (4b) 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 3(2c) MAR does not foresee further work on this issue.

I.1.2 Disclosure and reporting obligations

I.1.2.1 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 case of shares only traded on trading venues different from a RM, a comparable mechanism should be used.

Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

I.1.2.2 Content of public disclosure

11. 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.
12. However, it is important that the information to the public is readable and understandable. Thus, there may be a need for striking a balance in case of a large buy-back programme including a high number of transactions: it might be 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 might be more comprehensible for an investor to access aggregated figures (e.g. on a daily basis). In

this context, it should be noted that the competent authority will still be provided with details on every single transaction, so that there is no loss of information. It might also be envisaged that the details of every single transaction are published on the website of the issuer.

Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

I.1.2.3 Deadline for public disclosure

13. 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 sessions following the date of execution of such transactions.
14. One might argue that the investors might be interested in a more timely provision of these transaction reports. On the other hand, the current system seems to work without any major complaints from market participants regarding the time frame for the publications.

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

I.1.2.4 Disclosure towards competent authorities

15. 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).
16. 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).
17. 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 and OTFs, it is highly likely that buy-back transactions would have to be reported to more than one competent authority across Europe. ESMA is thus considering whether a single competent authority could be determined for this reporting and several options are under examination:
 - The competent authority of the most relevant market liquid market in terms of liquidity as defined under up-coming MiFIR;
 - The home competent authority of the issuer according to the Prospectus directive (Directive 2003/71/EC), although that would be valid only for shares admitted to trading on RMs;
 - The competent authority of the trading venue where the share was first admitted to trading or traded.

Q4: Do you agree to use the same deadline as the one chosen for public disclosure

for disclosure towards competent authorities?

Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

I.1.3 Conditions for trading

I.1.3.1 Price and time limitations

18. 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.

I.1.3.1.1 Multi-listings

19. When shares are multi-listed on different trading venues, one could argue that the price should not be higher than the last traded price or last current bid on the most liquid market.

Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?

I.1.3.1.2 Auctions

20. The price formation process during the end of auctions is especially sensitive (“marking-the close” manipulations), so it could be argued that no orders should be entered by the issuer during that time. However, the length of auctions differs among trading venues and financial instruments and there are also auctions that consist of a regular (fixed) amount of time plus an additional period with random length. So as it seems difficult to set a specific number of minutes, it could be envisaged that during the last third of the regular (fixed) time of an auction the issuer should not be covered by the safe harbour.

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

I.1.3.2 Volume limitations

21. 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 informs 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).

22. However, experiences in the past have shown that it seems to be difficult to define the term “extreme low” liquidity and that there is therefore uncertainty among market participants as to whether they are allowed to buy back up to 50% of the average daily volume. One solution might be to refer to other existing legal provisions:

23. According to Article 22(1) of Regulation No 1287/2006 (EC) implementing MiFID, a share shall be considered to have a liquid market if the share is traded daily, with a free float not less than EUR 500 million, and one of the following conditions is satisfied: (a) the average daily number of transactions in the share is not less than 500; (b) the average daily turnover for the share is not less than EUR 2 million. Besides, according to Article 22(5) of the same regulation, a share shall not be

considered to have a liquid market if the estimate of the total market capitalisation for that share is less than EUR 500 million.

24. Therefore, one could argue that a case of extreme low liquidity requires that all the following criteria are met:

- The total market capitalisation/free float is less than EUR 50 million;
- The share is on average traded less than every 10th trading session (aggregation of all trading venues);
- The average daily number of transactions in the share is less than 50 (aggregation of all trading venues);
- The average daily turnover for the share is less than EUR 200,000 (aggregation of all trading venues).

Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

25. Another issue in this context is that even a limit of 25% of the daily average volume might be too high for liquid shares. Therefore, it might be worth considering different thresholds for liquid shares (15%), illiquid shares 25% and shares with extreme low liquidity (50%).

Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

26. 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. Currently, the limit is calculated in relation to RMs only. Under MAR, volumes on other venues should also be taken into account. In this case, a reporting requirement ensuring that issuers identify and justify their calculations is needed; otherwise the competent authority would have to check the volume on each of the trading platforms in order to calculate the relevant volume limit. However, there are trading venues where shares can be listed by third parties without notification to the issuer. Therefore, it might be too burdensome to oblige the issuer to check each and every trading venue with rather insignificant volumes in order to perform an accurate calculation. Nevertheless, it should be noted that the omission of (insignificant) volumes during the calculation is ultimately at the disadvantage of the issuer, as this reduces the amount of shares that issuer can buy. So, it seems all in all appropriate to oblige the issuer to base the calculation of the volume limit on significant volumes on all trading venues.

Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

I.1.4 Restrictions to trading

27. 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.

28. 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.
29. 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.

Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

I.2 Stabilisation measures

I.2.1 Restrictions regarding the time of stabilization measures (stabilization period)

30. Stabilisation activities may give false or misleading signals regarding the supply of the relevant securities or may secure an artificial price level. Therefore, stabilisations shall 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:

I.2.1.1 Shares and securities equivalent to shares

31. As far as shares and other securities equivalent to shares are concerned, the stabilisation period shall be announced publicly.
32. In the case of an initial offer, 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 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. 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.
33. 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.

I.2.1.2 Bonds and other forms of securitised debts (not convertible or exchangeable into shares or into other securities equivalent to shares)

34. 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 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 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.

I.2.1.3 Securitised debt convertible or exchangeable into shares or into other securities equivalent to

shares

35. In respect of such securities the stabilisation period 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 not later than 60 calendar days after the date of allotment of the relevant securities.

Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

I.2.2 Disclosure and reporting obligations

36. 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.

I.2.2.1 Transparency conditions for offers under the scope of the Prospectus Directive

37. 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.

Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?

I.2.2.2 Transparency conditions for offers not under the scope of the Prospectus Directive

I.2.2.2.1 *Details which have to be disclosed*

38. 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.
39. The identity of the "stabilization 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.
40. 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.
41. 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.

Q14: Do you agree with these above mentioned details which have to be disclosed?

1.2.2.2.2 Responsible person for disclosure

42. 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. An exclusive responsibility with respect to transparency obligations could be entrusted to the "stabilisation manager", who should be the entity undertaking the stabilisation.

Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?

1.2.2.3 Issues with respect to recording and reporting conditions

43. 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 shall 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.
44. 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.
45. 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.

Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?

46. Another issue arises where the relevant securities are listed in different countries and stabilisation measures are being undertaken simultaneously in different countries. From ESMA's point of view, the reporting should be centralised to one competent authority in order to facilitate surveillance. There are several options under consideration:

- The competent authority of the most relevant market liquid market in terms of liquidity as defined under up-coming MiFIR;
- The home competent authority of the issuer according to the Prospectus directive (Directive 2003/71/EC), although that would be valid only for shares admitted to trading on RMs;
- The competent authority of the trading venue where the share was first admitted to trading or traded.

Q17 Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?

I.2.3 Price conditions

47. In order to avoid that stabilization 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 shall not under any circumstances be executed above the offering price.
48. In the case of an offer of securitised debt convertible or exchangeable in shares or other securities equivalent to shares, stabilisation of those instruments shall 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.

Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?

Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?

I.2.4 “Ancillary stabilisation”

49. “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”.
50. 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. 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.

Q20: Do you agree with these conditions for ancillary stabilisation?

I.2.5 Sell side trading during stabilisation periods and “refreshing the green shoe”.

51. ESMA is of the opinion that sell transactions cannot be subject to the exemption provided by Article 3(3) 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 5(4b) MAR. For this reason, such sales of securities are not covered by Article 3(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 3(1) MAR.
52. 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.

Q21: Do you share ESMA’s point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore “refreshing the green shoe” does not fall under the safe harbour?

I.2.6 “Block-trades”

53. 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 3(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.

Q22: Do you agree that “block-trades” cannot be subject to the exemption provided by Article 3(1) of MAR?

II. Market soundings (Article 7c of MAR)

Introduction

54. Article 7c(1) of MAR defines a “market sounding” as a communication of information, prior to the announcement of a transaction, to one or more potential investors”. Article 7c(5) states that, when a disclosing market participant has assessed that the market sounding will involve the disclosure of inside information, such disclosure in the course of a market sounding shall 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, if certain conditions are met by the disclosing market participant. Those conditions are set out in paragraphs (4) to (8) of Article 7c.
55. Article 7c(9) of MAR requires ESMA to develop draft RTS to determine arrangements and procedures for persons to comply with the requirements of Article 7c. Paragraph 10 of the same article requires ESMA to develop draft ITS to specify the systems and notification templates to be used by persons to comply.
56. The following section of the DP puts forward ESMA’s views on the areas that should be covered by the draft technical standards and guidelines that shall be developed pursuant to Article 7c of MAR. The technical standards will apply to disclosing market participants (generally sell side firms) when conducting market soundings. The proposals for ESMA guidelines should apply to buy side firms that are sounded. Although, for the purposes of this paper, the notion of ‘buy side’ is intended in broad terms, this refers to the person being sounded out and so can be either a buyer or seller (for example in a M&A context).
57. For the purposes of this paper the term “disclosing market participant” shall encompass any person listed in Article 7c(1) and (2). For the sake of simplicity, the paper refers to the term “issuer” but this should be understood as encompassing any of the persons listed in points a) to c) and 2 (issuers, secondary offerors, emissions allowance market participants, and persons intending to make a takeover bid for the securities of a company or a merger with a company) of paragraph 1, unless specified otherwise.

II.1 General remarks

II.1.1 Link to issuer³

58. 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.
59. 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 issuer and the issuer. Therefore, 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 7c(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 an issuer, sounds out potential investors with a view to determining the

³ Here, the term « issuer » is used in the common sense

characteristics of that transaction. The third party is deemed to be acting at the request of the issuer if it is taking part in the transaction under the issuer's instructions, 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 issuer or in connection with a request for proposals by the issuer.

II.1.2 'Block trades'

60. Market soundings conducted prior to undertaking block trades⁴ where the disclosing market participant is acting on behalf of a secondary market offeror will be captured within the scope of Article 7c. Such soundings - i.e. "communication of information, prior to the announcement of a transaction, to one or more potential investors 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" - 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. This will always be the case where the disclosing market participant has been engaged by the seller to sound out investors. As such, they 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, particularly when conducted on a "no names" basis, it may be necessary to sound out potential investors with inside information. Inside information (i.e. the volume and price of the trade, and, if the communication is conducted on a "names" basis, the identity of the seller) is passed on to potential investors.
61. However, it is important to note that the soundings provisions in Article 7c do not aim to create any overlap with MiFID requirements regarding the provision of investment advice (e.g. record keeping, taping of telephone conversations). 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 Article 7(1) of MAR, but actually trying to conclude the transaction, then Article 7c will not apply.

II.1.3 Other remarks

62. It is important to note that the market soundings regime under MAR is not intended to inhibit relations between the issuer and its investors. The regime only applies to communications intending to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, and not to investor relations communications more generally.
63. Market soundings should apply equally to the private side operations of sell side firms, such as investment banking and corporate finance. Investment banking is subject to the same requirements (such as improper disclosure) as other sectors.

II.2 Proposed standards prior to conducting a market sounding (Article 7c(4) and (5)(b) of MAR)

64. Article 7c(4) requires the disclosing market participant 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 disclosing market participant shall take into account when making any sounding.

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

II.2.1 Determining what information to disclose

65. The disclosing market participant 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 to enable a potential investor to make a sufficiently informed assessment, for example general information about the issuer such as its financial standing. 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.
66. In the case of a Syndicate, the disclosing market participant should ensure that the Members agree on the information that will be disclosed to investors.

II.2.2 Characterising the information to be disclosed

67. Prior to conducting a market sounding, the disclosing market participant is required under Article 7c(4) to assess whether the information to be provided to the person it intends to sound is or is not inside information under Article 6.
68. Where the disclosing market participant is acting on behalf of an issuer, it shall inform the issuer of the outcome of its assessment as to whether the information to be disclosed to the market is inside information.
69. In the case of a Syndicate, the disclosing market participant shall take all reasonable steps to ensure that the members agree on whether the information to be disclosed to investors is inside information.
70. If the members of the Syndicate disagree among themselves, the disclosing market participant shall characterise the information as inside information.

II.2.3 Information and issuer's agreement in case of market soundings conducted on its behalf

71. Before conducting a market sounding on behalf of an issuer involving disclosure of an issuer's name or of information that would enable an investor to deduce that name, the disclosing market participant, or the disclosing market participant appointed by the Syndicate, where such is the case, should obtain the issuer's agreement to go ahead with the sounding.
72. Before seeking the agreement of the issuer, the disclosing market participant should inform of the following:
 - the content of the information that will be disclosed to investors; and
 - whether it has determined if the information is inside information or not.
73. In the event that the issuer takes a different view as to whether the information is inside information or not, the disclosing market participant shall characterise it as inside information.

II.2.4 Determining which investors to question

74. Before conducting a market sounding involving disclosure of inside information (referred here as a

“wall crossing”), the disclosing market participants should determine the type and number of investors he/she intends to question. This is relevant to determining whether or not the disclosure is improper and therefore in breach of Article [7b].

75. In the case of a syndicate, the disclosing market participant shall consult the other members of the syndicate so as to ensure that the same investor is not questioned by several syndicate members in relation to the same transaction.
76. In case of market soundings conducted on behalf of an issuer, the disclosing market participant appointed by the syndicate, where such is the case, should inform the issuer of the type of investors to be questioned.

Q23: Do you agree with ESMA’s proposals for the standards that should apply prior to conducting a market sounding?

II.3 Timing of market soundings

77. When planning the market sounding process, the disclosing market participants should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the envisaged 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 disclosing market participant’s control, due to other market factors such as issues on the issuer side.
78. In some jurisdictions, it is recommended, where possible, not to conduct market soundings within trading hours, in order to limit the possibility of inappropriate use of the information.
79. On the other hand, it should be pointed out that trading in a specific security may occur in different time zones, access to fund managers is usually best achieved during the normal trading hours and recordings of market soundings on the official systems of the buy and sell side entities might best be achieved during trading hours. For these reasons, it might be better not to restrict the hours in which market soundings can take place.

Q24: Do you have any view on the above?

II.4 Obtaining buy side’s agreement (Article 7c(6)(a)(i) of MAR)

80. Article 7c(6)(a)(i) requires the disclosing market participants to obtain the consent of the buy side with whom they intend to conduct a market sounding before providing the information to them.

II.4.1 The buy side’s wish (not) to be wall-crossed

81. In order to prevent unwanted or inadvertent wall-crossings, the buy side should be encouraged to formally inform the sell side of their unwillingness to be wall-crossed in any circumstances (see buy side ESMA guidelines).
82. Within this context, there are **three possible options** for requirements related to the issues of obtaining the buy side agreement (that should apply to the sell-side. These are listed below in ascending order in terms of effectiveness at avoiding inadvertent improper disclosure on one hand, but also in terms of regulatory burden on the other hand:

- **Option 1:** Prior to wall-crossing in relation to an individual transaction, the disclosing market participant seeks the consent of the buy-side to be wall-crossed.

This would be the minimum to comply with Article 7c(6)(a)(i) with no further requirement set out in technical standards as regards buy side consent. There is a corresponding requirement for the disclosing market participant to record its client's consent (or refusal to consent) in accordance with Article 7c(6)(b).

This option has the distinct advantage of being simple, up-to-date (the action is based on the client's wishes at the time of the potential wall-crossing) and imposing a relatively low burden on the sell-side firm. The downside is that it is probably the least effective option for preventing inadvertent wall-crossing as, by definition, more buy-side firms will be approached and it is likely that buy-side firms will ask for some detail or information before making the decision as to whether or not to consent to being wall-crossed, thereby increasing the risk of inadvertent disclosure.

- **Option 2:** As well as seeking and recording the consent of the buy-side to be wall-crossed in relation to an individual transaction, the disclosing market participant also keeps a list of those clients that have informed it that they would never want to be wall-crossed and does not contact those clients in relation to potential transactions.

This option is clearly going to be more effective in avoiding inadvertent disclosure, although it would be moderately more burdensome. However the disclosing market participant would not be aware of the wishes of many of his/her clients, in which case, the risk of inadvertent disclosure described in option 1 remains. Additionally, as the time passes, the sell side firm's list of clients who have expressed a wish not to be wall-crossed will grow out of date (i.e. the buy-side firm's attitude toward sounding might change), although this risk would be mitigated if buy-side firms adopted the practice of informing the sell side of their permanent unwillingness to be wall-crossed.

- **Option 3:** As well as seeking the consent of the buy-side to be wall-crossed in relation to an individual transaction, the disclosing market participant should be required to maintain an up-to-date record of the buy side's general wishes in relation to wall-crossings.

Feedback from industry suggests that this requirement could be very burdensome. In order to be able to demonstrate that its records are up-to-date, the disclosing market participant might have to question systematically all its clients and record their answers.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

II.5 Record keeping requirements imposed on the disclosing market participant (Article 7c(4), (6)(b), (7) and (8) of MAR)

II.5.1 General

83. The record keeping requirements stem from Article 7c(4), (6)(b) and (7). As a general rule the disclosing market participant will need to keep a record of its compliance with all the processes and procedures provided for in the technical standards developed under Article 7c.

II.5.2 Scripts

84. In order to have a more consistent approach to soundings across the industry, the disclosing market

participant should be required to create and use a script for each sounding:

- a. **Non-wall-crossed sounding scripts:** A standardised script should be used for non-wall-crossed soundings. This will support a more unified approach to market soundings.

The standard script must contain at least the following:

- i. A statement noting that the conversation is classified as a market sounding because it concerns a potential transaction. Information specific to the Transaction may also be given, provided it is general enough so that the person questioned is not inadvertently wall-crossed;
 - ii. A statement to warn the buy side that even though the sounding will take place on a non-wall-crossed basis, there is the risk that inside information may be inadvertently disclosed and therefore result in a wall-crossing;
 - iii. Information about subsequent disclosures relating to the market sounding
- b. **Wall-crossed sounding scripts:** ESMA proposes a similar approach to the above. However, in addition to the requirements for non-wall-crossed sounding scripts, the wall-crossed sounding script should also contain:
 - i. A statement explaining the reasons why the disclosing market participant considers the information to be inside information;
 - ii. A reference to the fact that, by giving its agreement, the person will receive information which the disclosing market participant has characterised as inside information;
 - iii. An explanation of what the cleansing strategy is, noting that the cleansing strategy may change in light of market conditions but, should it do so, the disclosing market participant will notify the buy side of the amended plan.
 - iv. 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;

85. The disclosing market participant may use a simplified standard script when questioning investors that have previously said they were aware of the consequences of holding inside information. In this case, the disclosing market participant may disregard point iv above.

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

II.5.3 Sounding lists

86. The disclosing market participant shall be required to maintain accurate sounding lists in relation to each potential transaction, providing:
 - the names of all firms (and employees at those firms) who were sounded

- the date and time of the approach
- a summary of the information provided
- the contact details used (i.e. telephone numbers) for the approach

87. The record keeping requirements should apply in relation to both wall-crossed and non-wall-crossed soundings. The highest risks of market abuse happening are during the conversations taking place before a formal wall-crossing has occurred. Therefore, ESMA believes that precautions should apply to both non-wall-crossed and wall-crossed soundings.
88. Providing regulators with the ability to access and review such information 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).

Q27: Do you agree with these proposals regarding sounding lists?

II.5.4 Point of contact at the buy side firm, if any

89. The disclosing market participant should keep a list of the relevant contact name and contact details of the designated person responsible for receiving sounding approaches within the buy side firm, if such a person exists.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

II.5.5 Recorded lines (Article 7c(6)(b) and (8))

90. Disclosing market participant must conduct all market soundings and cleansing conversations on company recorded mobile and land lines, regardless of whether the intention is to pass inside information. Article 7c(8) clarifies that these must be retained for a period of at least 5 years.
91. This is a sensible and practical step, both for firms (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), particularly as MiFID provides for such an obligation for investment services providers (Article 18(7) 2004/39/EC).
92. 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 disclosing market participant. In such cases, ESMA is of the opinion that the same recordkeeping and assessment requirements as for the initial transmission should apply.

Q29: Do you agree with these proposals regarding recorded lines?

II.5.6 Written confirmations (Article 7c(6)(b) and (8))

93. ESMA is interested in the public's views on whether there should be an obligation on the disclosing market participant to obtain written confirmation of the fact that an investor has agreed to be wall-crossed, after the sounding has taken place and, if so, what should be the content of such

confirmation.

94. ESMA suggests that disclosing market participants be required to provide the buy side with a written confirmation of their agreement to be wall-crossed as well as its implications, using a durable medium, in the shortest possible time after the market sounding is conducted.
95. The standard confirmation by the disclosing market participant to the buy side following any wall-crossed soundings shall contain at least the following:
- Indication of the confidential nature of the confirmation;
 - Reference to the transaction concerned by the market sounding;
 - Reference to the fact that the investor's agreement involves the disclosure of information that the disclosing market participant has characterised as inside information;
 - 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.

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

96. ESMA considers that there should be no requirement for the disclosing market participant to ensure that a written confirmation is issued to the buy side before inside information is passed. Such a requirement would be unworkable particularly in fast moving and volatile markets and where there is more than one disclosing market participant managing a transaction. However, requiring the disclosing market participant to receive confirmation (written or verbal) from investors that they agree to be wall-crossed prior to wall-crossing them, and maintaining a record of all non-wall-crossed-soundings would be prudent and serve as good record keeping practice.

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

II.6 The disclosing market participant's internal processes and controls

II.6.1 Preparing and reviewing the procedure governing market soundings

97. The disclosing market participant shall draw up and maintain operational procedures setting out how to carry out the market soundings to ensure their compliance with Article 7c(4) to (8). The procedure shall 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.

II.6.2 Employees of the disclosing market participant responsible for conducting the market sounding

98. The disclosing market participant shall ensure that clear Chinese Walls are established in order to ensure that inside information is not divulged to its employees who are not responsible for conducting the sounding.

99. The sell side should consider steps in order to:

- limit the number of employees tasked with conducting the market sounding, having regard to the characteristics of the Transaction;
- reduce as much as possible the time between the moment when inside information is disclosed to the employees conducting the market sounding and the moment when it becomes necessary to conduct market soundings with investors.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

II.7 ESMA guidelines for the buy side (Article 7c(9))

100. Article 7c(11) of MAR provides that “ESMA shall issue guidelines addressed to potential investors in accordance with Article 16 of Regulation 1095/2010 regarding:

- the factors that a potential investor should take into account when information is disclosed to him within the context of a market sounding in order for him to consider whether the information may amount to inside information;
- the steps that a potential investor ought to take if inside information has been disclosed to him in order to comply with the provisions of Articles [7] and [7b] of this Regulation; and
- the records a potential investor should maintain in order to demonstrate that he has complied with the provision of Articles [7] and [7b] of this Regulation.”

101. Accordingly, ESMA’s proposals for standards that could apply to the buy-side take the form of proposals for guidelines and not technical standards.

II.7.1 Communicating the desire not to be wall-crossed

102. The buy side should formally notify the sell side if it never wishes to be wall-crossed and keep record of this notification. This would be beneficial for market sounding practices, particularly as it would establish a process which should help to minimise inadvertent and unintentional wall-crossings.

II.7.2 Practical organisation of market soundings

103. Some buy side firms may wish to designate a person who receives sounding approaches and determines whether the buy side should agree to be wall-crossed. If they do so, they should ensure this is appropriately publicised to the sell side (e.g. through sell side relationship management, on Bloomberg contacts, on their website).

II.7.3 Recording its own assessment

104. When the buy side conducts its own assessment under Article 7c(7) of whether the information it has received is inside information or ceases to be inside information, they should record its own assessment regardless of whether they have been formally wall-crossed by the sell side.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

II.7.4 Discrepancies of opinion

105. Should the buy side disagree that they have been provided with inside information even though they have been formally wall-crossed, or that they have not been cleansed of inside information after they have already been wall-crossed, they should inform the sell side of this discrepancy of opinion.
106. The buy side should also forward any supporting information that is in the public domain to the sell side. Where information provided to the buy-side is not considered by them to be inside information, even though the disclosing market participant considers that they have wall-crossed the buy-side, the buy side may avoid unnecessary restrictions on themselves and other buy side firms when providing supporting information.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

107. An additional issue in this area is whether the buy side should also inform the disclosing market participant when they believe they have been passed inside information by the sell-side but the sell-side has not indicated that they think it is inside information. The sell side may have made a mistake in its analysis (and may have good faith reasons for their analysis). Alternatively, the difference of opinion (as to the status of the information) could result from a divergence in compliance risk policy. It could be argued that the sell-side should have an opportunity to review its analysis before, for example, the information is brought to the attention of the competent authority.
108. An alternative view is that the buy side should only inform the sell side of any disagreement they have with the sell side in circumstances where the sell side considers information to be inside information but the buy side does not. It should not inform the sell side of any disagreement in circumstances where the sell side considers information not to be inside information but the buy side does. Such disagreement could be damaging for their relationship, as they would have to inform the sell side of their (inadvertent) improper disclosure and would also be required to report this to the competent authority (see below).

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

II.7.5 Possible consequences for the buy-side of discrepancies of opinion

109. In the event that the buy-side's assessment leads him to believe that he has not been wall-crossed contrary to the opinion of the disclosing market participant, he may legitimately believe that this relieves him from the obligation not to use the information received. Nonetheless, the buy-side should recall that he may still be pursued by the competent authority for a breach of article 7 of MAR should the latter be of the opinion that the information is inside information.

II.7.6 Reporting

110. In instances where the buy side suspects improper disclosure of inside information, i.e. that the disclosing market participant has not complied with Article 7c(5), they should be encouraged to notify the relevant Competent Authority of this potential violation.
111. This would not be an onerous process and would mirror the suspicious transaction reporting (STR) obligations on the sell side which does not apply to the buy side.
112. By receiving notifications of suspected improper wall-crossings, regulators could be alerted to

potential market abuse through improper disclosure which might not otherwise be identified from trading surveillance alone.

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

II.7.7 The buy side's assessment of related securities

113. The buy side should demonstrate its own determination on whether securities are related securities, by maintaining a full audit trail of its analysis.

II.7.8 Cleansing

114. The buy side should document its own analysis and determination of the point of cleansing.

II.7.9 Recording follow-up calls

115. The buy side should ensure that any follow-up calls to the sell side following a sounding approach which didn't result in a wall-crossing should be conducted on company recorded mobile and land lines.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

II.8 Planning for cleansing

116. One of the concerns expressed by some buy side firms is the uncertainty around when any inside information which is the subject of a wall crossing ceases to be inside information or, in other words, when the information is cleansed, particularly when such information is not published. This is one of the key reasons why buy side may be reluctant to engage in market soundings.

117. Although there is a clear obligation in Article 7c(7) of MAR for the disclosing market participant to disclose to the buy side when information ceases to be inside information after they have been wall-crossed, there is no explicit obligation on the disclosing market participant to agree a cleansing strategy with the buy side prior to any wall-crossing.

118. The buy-side will be particularly interested in knowing when the information is likely to be cleansed, which would enable them to commence trading in financial instruments. For this reason, they may require the disclosing market participant to agree a cleansing strategy with the buy side prior to being wall-crossed as part of the conditions of its consent to be sounded. This might involve providing clarification on the point in time when inside information is expected to be cleansed, and updating this information on an on-going basis as circumstances change and evolve.

119. Whether the parties involved in a market sounding are willing to agree to a cleansing strategy and what such a strategy looks like depends on individual circumstances and on commercial reasons. For example, although the buy-side might generally prefer clarity as regards the point in time in the future when any inside information is likely to be cleansed, the disclosing market participant may not be comfortable with the risk of committing itself to any potential dates, particularly if there are many possible outcomes resulting from the market sounding making meaningful projections

difficult.

120. ESMA is considering, for the purposes of ensuring effective management of inside information in the context of a market sounding, the options for tackling this issue, keeping in mind that disclosure of inside information, according to Article 12 of MAR is typically an obligation for the issuer.

Option 1: need for discussion on a possible cleansing strategy

121. One option would be to recommend/require that the buy-side to systematically engage with the disclosing market participant to determine whether an agreement should be reached on a cleansing strategy prior to a market sounding taking place. This has the benefit of encouraging the buy side to routinely lead on any discussion as regards the cleansing of inside information in way in which is appropriate for the particular circumstances. Such an approach would encourage the routine and better handling and management of inside information than leaving the issue to the complete discretion of the parties in a market sounding situation.
122. If buy side firms are encouraged to require the disclosing market participants to agree to a cleansing strategy, this may lead to enhanced transparency between the parties, improving investors' engagement overall, which may be particularly beneficial in a period of market volatility. Such enhanced transparency might also assist towards greater market stability and cleanliness in a period of turbulence.
123. In addition, over the course of time, developments could mean that any agreed cleansing strategy or related analysis may be subject to change. Therefore, another benefit of this approach could be to encourage the buy-side to prompt the disclosing market participant to update any cleansing strategy or analysis as appropriate, should they consent to being wall-crossed.

Option 2: Requirement for agreement on a cleansing strategy

124. Another option would be to oblige the disclosing market participant to assess when inside information which is the subject of a market sounding is likely to be cleansed. There could be a requirement, as part of the disclosing market participant's assessment of whether information is inside information (under Article 7c(4)), to assess when any inside information is likely to be cleansed and/or to agree a cleansing strategy with the buy-side prior to disclosing any inside information.
125. If the disclosing market participant has made an assessment that information is inside information, it may also be necessary to require discussions with the issuer on whose behalf it is acting to also plan for an appropriate cleansing strategy; for example, an approximate point in time for disclosure when a decision has been made by the issuer to legitimately delay disclosure and if information does not otherwise cease to be inside information.
126. The benefit of this option is that, after the issuer, the disclosing market participants, when acting on their behalf, are in the strongest position to assess the likelihood of a potential transaction proceeding as they act between the issuer and potential investors.

Q39: What are your views on these options?

127. It should be noted that, as recognised in Article 7c(7) which requires the buy side to assess whether information ceases to be inside information, despite any agreement reached on a cleansing strategy,



the buy side cannot automatically rely on the analysis of the disclosing market participant. For example, they may disagree with the analysis or the buy side may also be in possession of other information which the disclosing market participant is unaware of, which taken together with the information obtained through a market sounding, may amount to inside information.

III. Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

Introduction

128. MAR foresees the activities that will constitute market manipulation and behaviours that shall be considered as market manipulation, and draws up a non-exhaustive list of indicators related to false or misleading signals and to price securing and indicators related to the employment of fictitious devices or any other form of deception or contrivance (Article 8 (1) to Article 8(3) and Annex I of MAR). A financial instrument may be manipulated not only by executing transactions on a trading venue. Manipulation or attempted manipulation of financial instruments may also consist in placing orders which may not be executed. Further, a financial instrument may be manipulated through behaviour which occurs outside a trading venue (Article 2(4) of MAR).
129. Due to technical developments on financial markets, the use of electronic means of trading, such as algorithms including high frequency trading strategies has become very present in the markets. Despite the benefits that can arise from an automated trading environment, abusive behaviours can arise. Article 8(3)(c) of MAR expressly provides for situations of market manipulation related to the use of electronic means of trading, such as algorithmic strategies and high frequency strategies, which has one of the effects referred to in Article 8(1)(a) or Article 8(1)(b) of MAR.
130. Following the publication of MAD, CESR published three sets of guidance and information on the common operation of MAD. The First Set of Guidance (CESR/04/505b) sets out a number of examples of type of practice that it considered would constitute market manipulation including amongst others those related to false/misleading transactions, price positioning and dissemination of false and misleading information.
131. In addition, ESMA published in April 2012 “Guidelines on Systems and controls in an automated trading environment for trading platforms (ESMA/2012/122), investment firms and competent authorities” which address specific issues raised by the development of automated trading.
132. ESMA has reviewed these lists and updated them in light of the more extensive scope of MAR and in light of additional developments in the market related in particular to automated trading.
133. The purpose of this section is to put forward preliminary views on the manner in which to clarify the indicators of manipulative behaviour found in Annex I of MAR and to identify new issues, notably by taking into account technical development on financial markets, which may require further elucidation so that ESMA could provide a technical advice to the Commission in accordance with Article 8(5) of MAR.

III.1 Types of practices of market manipulation

134. Annex III of this document contains a list of examples of types of practices that would constitute market manipulation under MAR. The list was drawn taking into account the list provided by CESR’s First Set of Guidance, trying to update it in light of the more extensive scope of MAR. Respondents are invited to review it.
135. MAR has a more extensive scope than MAD. It applies to any financial instrument traded, admitted to trading, or for which a request for admission to trading on a RM or MTF has been made, any financial instrument traded on an OTF, OTC derivatives such as CDS and contracts for difference,

spot commodity contracts (the price of which is based on that of a derivative, as well as spot commodity contracts to which financial instruments are referenced) and auctioned products based on emission allowances (Article 2(1) and (3) of MAR).

136. Furthermore, following the information which became public in 2012 relating to the calculation of indices and in particular LIBOR, the initial MAR proposal was amended. Activities that will constitute market manipulation comprise the manipulation of benchmarks (Articles 2(3a) and 8(1)(d) of MAR) considering the serious impact on market confidence, the risk of significant losses for investors or the distortion of real economy (Recital 20a).
137. Also, it is noteworthy that recent market practices have shown that in some cases, firms offering trading/platform facilities (e.g. trading software) may be held directly liable for market abuse in relation to the trades of their clients, irrespective of the nature of the relationship between the trading facilities provider and its clients. These market practices / behaviours are covered in MAR. Indeed, recital 18a of MAR states that the prohibitions on insider dealing and market manipulation should also cover those persons who act in collaboration to commit market abuse. This includes cases such as persons who encourage persons with inside information to disclose it improperly or persons who develop software in collaboration with a trader for the purpose of facilitating market abuse.

Q40: Which practices do you think are more related to manipulation of benchmarks?

Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

III.2 Indicators/signals of market manipulation

138. Annex IV of this document contains a list of indicators of manipulative behaviour which, as stated previously, is very similar to that found in CESR's First Set of Guidance, but which respondents are invited to review. Nonetheless, ESMA considers that a number of issues merit consideration at this time and have set them out below with a number of questions to which ESMA would like replies.

III.2.1 High ratio of cancelled orders (e.g. order to trade ratio) which may be combined with a ratio on volume (e.g. number of financial instruments per order)

139. It could be a signal of unusual activity and it could also be a strategy consisting of inputting many orders on one or both sides of the market in order to create the impression either of high demand for the financial instrument thereby pushing up the price or, on the contrary, the impression of desire to sell thereby pushing down the price; in particular when seen in combination with a ratio indicating either an unusual price or volume variation.
140. Complementing a ratio of cancelled orders with one on volume can help to pinpoint certain trading patterns. A high ratio of cancelled orders alone may be offset by executed small volume orders designed for example to avoid triggering a limit set by the trading venue. However, this type of behaviour may become clearer if the order to trade ratio is complemented by one taking into account the volume of orders.

141. Order cancellations may be measured in different manners including:

- order to trade ratio (which can be calculated in various ways depending on the definition of order taking into account orders entered and/or modified and/or cancelled and/or that resulted in at least one trade etc.);
- cancellation rate (number of orders cancelled compared to orders entered).

Q42: In your view, what other ways exist to measure order cancellations?

III.2.2 Cross-venue and cross-product market manipulation

142. Financial instruments which are traded, admitted to trading or for which a request for admission to trading has been made on more than one trading venue, for example on a RM and on a MTF, may be targets for cross-venue market manipulation in which orders or transactions on one venue are used to influence the price in another.
143. This may occur in several different ways. Transactions or orders to trade may be undertaken in one trading venue with a view to also improperly influencing the price of the same financial instrument in another trading venue; similarly transactions may be undertaken in an underlying financial instrument in order to influence the price of the derivative.
144. Also, financial instruments which are traded on the same trading venue may be targets for cross-product market manipulation in which orders or transactions in one financial instrument are used to influence the price of another financial instrument (e.g., financial instruments relating to the same underlying such as an equity share and a subscription right or a structured bond).
145. Moreover, orders to trade may be inserted with price-limits which serve to increase the bid or decrease the offer for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, and which therefore have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument
146. The list of indicators of manipulative behaviour found in Annex I of MAR refers to “orders to trade”. ESMA believes that this is meant to encompass all types of orders as well as modifications and cancellations of orders irrespective of whether there is an intention to trade or not and irrespective of the means used to access the trading venue (membership versus DMA/SA).

Q43: What indicators are the most pertinent to detect cross-venue or cross-product market manipulation and which would cover the greatest number of situations?

Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

III.2.3 Topics relating to specificities arising in an automated trading environment

147. Technological developments in financial markets, although present for many years, have accelerated in recent years and have had many different impacts. As indicated by IOSCO, these developments

have brought important advantages such as electronic audit trails and the amelioration of order and trade transparency⁵, but technological innovation has also created new opportunities for committing market abuse notably market manipulation.

148. The trading patterns typically arising in an automated environment⁶ represent a challenge in terms of detection and of measurement of manipulative behaviour despite the indicators which have been identified. These include amongst others the entering of orders to trade in order to ascertain the level of hidden orders and particularly used to assess what is resting on a dark platform (ping orders) and the entering of a large number of orders to trade and/or cancellations/updates to orders to trade so as to create uncertainty for other participants, slowing down their process and to camouflage their own strategy (quote stuffing).

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.

Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?

Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

⁵ « Regulatory Issues raised by the Impact of Technological Changes on Market Integrity and Efficiency » IOSCO FR09/11 October 2011

⁶ Please refer to the list found in Annex IV paragraphs r), s), t) and u).

IV. Accepted Market Practices (Article 8a(5) of MAR)

IV.1 General Comments

149. Article 8a(7) of MAR requires ESMA 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 as well as for maintaining or not or modifying the conditions for its acceptance.
150. 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.
151. *“Accepted market practices means specific market practices that are accepted by the competent authority of a given Member State in accordance with Article 8a of this Regulation”*. The word “specific” relates to conditions characterising an AMP that shall typically find justifications on a national basis and thus should be better addressed by local competent authorities.
152. The word “specific” in conjunction with “market practices” 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.
153. Specific practices in conformity with the rules of a trading venue (RM, MTF or OTF) have already been reviewed by the relevant competent authorities and have been deemed not manipulative by themselves. Therefore, they should not be given an AMP status. For instance, if the trading venue allows entering “iceberg orders”, these orders should not be considered by themselves as manipulative. ESMA considers important to emphasize that Article 8a(1) of MAR requires that any behaviour (entering into a transaction or placing an order to trade) 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 entered to for legitimate reasons and comply with a certain number of criteria, in the end, they are not deemed to constitute “market manipulation”.
154. AMPs are not treated in MAR like buy-back programmes and stabilisation (Article 3), which are different concepts. In particular, the decision as to whether a particular behaviour constitutes an AMP or not, is a matter of national discretion while this is not the case for buy-back programmes and stabilisation. Therefore, AMPs are 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 accepted market practice 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.
155. 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;

- financial instruments traded on an OTF.

156. It is worth mentioning that Article 2(4) of MAR includes transactions that take place outside a trading venue (OTC transactions) within its scope. It would be thus too restrictive to dismiss practices that may be performed outside a trading venue especially when this way of trading is put on equal footing in Article 2(4) of MAR as trading on trading venues. Additionally, it would not be coherent with the purpose of Article 8a to exclude transactions that take place outside a trading venue (OTC trading), particularly in financial instruments which most of the trading is conducted outside a trading venue (OTC). However, Article 8a(2)(a) requires the specific market practice to have a substantial level of transparency to the market, which may in some cases raise doubts about the suitability of OTC markets to meet this requirement, since these are by definition less transparent in terms of trailing positions, prices, transactions and scale of exposures. Consequently, ESMA considers that when conducting its assessment of a particular market practice, the competent authority will have to consider whether the necessary criteria are met for OTC trading.
157. In relation to the scope of firms that might perform an AMP, ESMA considers that only the firms who are in any case subject to supervisory duties from regulators (MiFID firms, credit institutions), should be entitled to perform AMPs. This way fairness, efficiency and market integrity is fostered and the risks mentioned in Article 8a (2)(e) of MAR are less likely to arise. In this respect, ESMA is 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 MiFID-regulated firm or credit institution. This requirement would allow a sound surveillance and supervision activity by the competent authority of practices that might be deemed manipulative.
158. Article 8a(2) specifies the criteria that a competent authority should take into account when deciding to establish an AMP and Article 8a(3) and (4) describe the role of ESMA in the assessment of the intended AMP that the competent authority has to notify prior to taking effect.

Q48: Do you agree with the approach suggested in relation to OTC trading

Q49: Do you agree with ESMA's approach in relation to entities which can perform or execute an AMP?

IV.2 Criteria to establish an AMP

159. Article 8a(2) of MAR sets out the list of criteria that competent authorities should take into account while assessing whether a practice might be established (accepted) as an AMP.
160. For the purpose of this document interested party typically means an issuer, an intermediary or any other party or group of parties that might subscribe or promote an AMP.

IV.2.1 The specific market practice has a substantial level of transparency to the market

161. The non-exhaustive and indicative list of principles that ESMA thinks necessary to apply so that the AMP is deemed to have a substantial level of transparency relates to the principle of adequate transparency: any established (accepted) AMP shall have a substantial level of transparency, including ex ante, ex post transparency.
162. Regarding the principle of adequate transparency “before starting the execution of an AMP”, any

established (accepted) AMP should have a substantial level of ex ante transparency. ESMA thinks that the following non exhaustive factors shall be taken into account by competent authorities when assessing whether an AMP has a substantial level of transparency: public disclosure, before the start of the AMP of the more relevant aspects of the objective(s) and activity to be carried out. These would include, as a way of illustration, the following elements; a) identities of all the interested parties in the AMP (liquidity provider, financial intermediary, issuer, major shareholder, and any other relevant information related to the concerned AMP that guarantees the transparency of the practice before the start of the AMP (for instance maximum position limits, conditions for trading, reasons for suspension, etc.), b) identification of the financial instrument (s) on which the AMP would apply, c) duration of the AMP and conditions leading to interruption, suspension or cancellation, d) identification of markets (trading venues on which the participants will intervene), e) if relevant, number of financial instruments and cash available in the accounts used to execute an AMP and f) when necessary, reference to the maximum limits for cash and number of financial instruments.

163. Regarding the principle of adequate transparency during the execution of an AMP, this would include the more appropriate elements such as a) 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 could be provided) and b) 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...). 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 within a predefined timeframe.
164. Regarding the principle of adequate transparency after the execution of an AMP, in the event of termination or amendment of the AMP, the following elements should be disclosed: a) proper disclosure of the transactions made, b) reasons or causes of the termination of the AMP and c) any subsequent change of the above mentioned factors.

Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?

Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?

IV.2.2 The specific market practice ensures a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand

165. 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, 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.
166. Competent authorities would consider the extent to which and, where deemed necessary, require that, persons performing an AMP 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 to be readily available to the competent authority upon request and 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.

167. ESMA considers that, generally and notably in the case of equity liquidity contracts, the principle of independency of action of the firm executing the AMP should be recommended/required 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 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.
168. Again, a principle of fairness and efficiency of the AMP should allow competent authorities to be in the position to get information on the impact of the relevant market practice against at least some main parameters. For illustrative purposes these could be the following ones: a) weighted average price of a single session, b) daily closing price, c) volume traded before and after establishing a market practice and d) volatility of the financial instrument. Competent authorities should also be able to evaluate the establishment of acceptable trading condition rules like a) introduction of bid/offer prices (not higher or lower than the prevailing market price or last trade) or b) price within price ranges, as well, when applicable of limits on positions (relative to several parameters, total issuance, average daily volume etc.) that can be taken.

Q52: Do you agree that the factors listed seek to ensure a high degree of safeguards and proper interplay of forces of supply and demand?

Q53: Do you agree with the fact that AMPs may in some instances protect specific market participants (retail clients)?

Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should this principle be adapted?

Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?

IV.2.3 The specific market practice has a positive impact on market liquidity and efficiency

169. ESMA thinks that liquidity should not be narrowly defined and that recognized 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.
170. ESMA is of the opinion that the more the concept of market efficiency is present, the more the market price is unbiased and the fairer is the estimate of the true value of the financial instrument as the probability of finding inefficiencies in a financial instrument decreases as the ease of trading

on it increases. Besides, since to be efficient a market (financial instrument) needs to be liquid/traded, AMPs 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.

171. Competent authorities might therefore accept AMPs that include some of the following objectives (non-exhaustive list): a) promote regular trading of illiquid financial instruments, b) 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, c) avoid abusive squeezes, d) provide quotes when there is the risk of not having counterparties for a trade, e) provide transparency of prices, facilitate the evaluation of fair and actual prices in markets where most trades are conducted outside a trading venue and f) facilitate orderly operations where a participant has a dominant position.

IV.2.4 The specific market 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;

172. 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 enables market participants to react properly and in a timely manner to the new market situation created by that practice.
173. Competent authorities should consider the extent to which AMPs do not alter price formation processes in a trading venue.
174. 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. The effective real time monitoring by market operators of trades and orders within the context of an AMP is an important factor that competent authorities should consider when assessing the AMP.
175. ESMA is of the view that AMP's orders or transactions related to liquidity provisions should not be performed during periods when stabilisation's 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 a position to evidence why this coincidence in timeframe is advisable or necessary.
176. 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-related information through trading platforms' web pages should ensure this availability and dissemination. In such cases, ESMA would recommend that AMPs foresee that there is also a simultaneous release of information through the interested parties' web pages.
177. Competent authorities should also 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, IPOs, 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).

Q56: Should an ex ante list of situations when the AMP should be temporarily suspended or restricted be established (e.g. takeover bids)?

IV.2.5 The specific 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 Union

178. 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:

- Notification obligation to the competent authority: information to the competent authority must be compulsory and 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- Interested party in charge of trading according to the AMP should ensure that there is an organisational structure and adequate Chinese walls 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 (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) where the request of adequate Chinese Walls might not be strictly necessary. In these cases competent authorities should be then in a position to accept and explain why the absence of appropriate Chinese Walls between activities is permissible.

- Adequate reporting between the interested party and the issuer. 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 fulfil their respective legal or contractual obligations (if applicable).

Q57: Do you agree with the above mentioned principles that seek to ensure that AMPs do not create risks for the integrity of related markets and would you consider adding others?

IV.2.6 The outcome of any investigation of the relevant market practice by any competent authority or other authority, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Union

179. 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.
180. Competent authorities should report to, or inform ESMA and other competent authorities about any breaches of regulation resulting from any investigation involving an AMP. This communication would help competent authorities that have established similar AMPs to monitor them.
181. Any sanction resulting from an investigation involving an AMP should trigger an evaluation process to check its appropriateness from the Competent Authority that has accepted it.
182. Principle of appropriate transaction and order recording. ESMA thinks that transactions coming from an AMP should be recorded, when appropriate, on special a separate accounts and orders introduced should be entered separately (individually) without aggregating orders from several clients.

Q58: What kind of records of orders, transactions etc. should a person that performs an AMP have?

IV.2.7 The structural characteristics of the relevant market including 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

183. 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.
184. 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.



Q59: Do you agree with the above mentioned principles that take into account the retail investors' participation in the relevant market? Would you consider adding others?

V. Suspicious Transaction and Order Reports (Article 11 of MAR)

Introduction

185. Article 11 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.
186. Article 11(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.
187. Article 11(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 11(1) and 11 (2).
188. ESMA (CESR) has previously addressed the subject of 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 has drawn on this previous work when developing this section of the DP.
189. STR content and format is re-examined to see whether any additional content might be included, in light of the scope of MAR being widened. Particular attention is paid to the content of STRs relating to OTC derivatives whose underlying security is admitted to trading on a RM, MTF or OTF.
190. Standards relating to unexecuted orders are considered in light of the extended scope of MAR and, in particular, the fact that Articles 9(a) and 10 of MAR explicitly state that attempts to engage in insider dealing and market manipulation, respectively, are also offences.

V.1 *The reporting obligations*

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

191. The extension of the scope of MAR to attempted market abuse and also to behaviour which may occur outside a trading venue (see Recital 22) requires detailed analysis, particularly in terms of the practical implications of the application of MAR to such activities.
192. By definition (see Article 11(1)), 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. Entities may find the task of judging whether someone was attempting to do something quite difficult and there may be a risk of over-reporting (initially, at least). However, it could be said that, to an extent, this risk is inherent to the exercise of requiring the reporting of suspicions.
193. The RTS need to clearly state that the obligation to submit STRs extends 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).

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

V.1.2 Reporting by trading venues

194. Article 11(1) of MAR requires operators of trading venues to report orders and transactions market abuses or attempted market abuses.
195. To whom this obligation applies will depend on the eventual outcomes for Articles 31 and 56 in the proposed MiFID. 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 STRs 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 11(1).

V.2 Level of suspicion required

V.2.1 Timing of STRs

196. Article 11 (1) and (2) state that reports shall be made “without delay”. ESMA’s view is that this means that STRs should be submitted as soon as practicable. Experience of competent authorities shows that there is great divergence in how entities interpret this, with some taking the view that two weeks is a reasonable period and others taking longer, sometimes waiting until they had a sufficient number of suspicious orders and/or transactions to justify a submission (‘batching’). ESMA’s view is that batching is not appropriate and that it is reasonable to expect submission of reports straight away and within two weeks of the suspected breach, at the very latest. Any greater delay must be justified by the specific circumstances of the case, such as when the evidence of suspicion only emerges sometime after the suspected breach has occurred.
197. Naturally, a balance needs to be struck between speedy submission of STRs and submission of adequately detailed STRs, which may take longer to compile. But, as a general principle, entities must send in STRs at the earliest possible opportunity. This principle is articulated in paragraph 5.11 of the First Set of CESR Guidance.
198. Competent authorities should indicate that they are happy to receive supplementary information as internal enquiries are pursued. If there is a doubt on this question, as stated in the Third Set of Guidance at paragraph 32, it is open to competent authorities “to discuss with institutions whether a particular order or transaction should be reported”.
199. In order to facilitate timely submission of STRs, as reflected in paragraph 28 of the Third Set of Guidance, STRs can be reported by telephone as long as this is followed up by written confirmation in the appropriate form upon request by the competent authority.
200. Additionally, as stated in paragraph 5.6 of the First Set of Guidance, institutions 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).

Q61: Do you agree that the above approach to timing of STR reporting strikes the

right balance in practice?

V.2.2 Partial view

201. A connected issue is the fact that entities do report that they may not be in a position to determine whether or not trading 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 may not see the full trading picture. In all cases, entities should base their decision generally on what they do see and/or know, and should avoid unreasonable presumption about other activity. However, they 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.
202. An important principle underlying this point, as stated in paragraph 31 of the Third Set of Guidance, is that the responsibility for determining whether to make STRs rests solely with the entity under the reporting obligation.

Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?

Q63: Do you have any views on what those reasons could be?

V.3 Detection

V.3.1 Proactive surveillance

203. Article 11 (2) of MAR requires a minimum level of organisation, through arrangements, systems and procedures, in order to be able to detect suspicious orders and transactions.
204. RTS must explicitly state that there is an obligation to establish and maintain appropriate arrangements, systems and procedures to monitor for and identify 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

205. An obvious question that flows from the duty to conduct surveillance is whether firms should establish automated surveillance systems. However, as it was also recognised in paragraph 36 of the Third Set of Guidance, the correct approach will most likely depend on the size and nature of the entity concerned as well as the particular activity it performs. Provided that the level of monitoring is appropriate for the scale and nature of the business, then the obligation in Article 11(2) to establish and maintain effective arrangements, systems and procedures to detect will be complied with.
206. However, in reality, once an institution starts to undertake a certain level of activity, particularly if that business is 'low touch' such that there is little or no contact with the front office who might otherwise detect a potentially suspicious trade, it will be very difficult to meet this requirement without an automated system. This, at its most basic, could mean utilisation of a spread-sheet and, at its most sophisticated, a bespoke system. 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.

207. As part of the systems trading venues should have in place for the purpose of market abuse detection under Article 11(1), ESMA is considering including an IT system to read and analyse order books information on ex post basis. This would be of particular relevance in an automated trading environment.

Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.

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

208. Another point to note is that effective monitoring involves much more than just a surveillance system and must include comprehensive training and a culture within an institution that is genuinely dedicated to monitoring for and reporting suspicions of market abuse. As such, paragraph 36 of the Third Set of Guidance remains valid:

“Additionally, CESR considers the training of personnel in the recognition and reporting of suspicious transactions absolutely vital, as it plays an important role in increasing the number and quality of STRs.”

209. However, whilst training is essential and plays an important role in increasing the number of qualitative STRs, it must be underpinned by appropriate monitoring and detection systems. Without this, it is much more difficult for training to produce desired results. Experience of some competent authorities is that some of the very best STRs come from the front office staff. Accordingly, where entities do have automated surveillance systems and a dedicated surveillance team (who may well be middle or back office), responsibility for reporting lies at the level of the individual who has a suspicion, wherever in the structure of an entity he/she may sit.
210. Given the new offence of attempted manipulation, training programmes will need to reflect the need to ensure that all staff, 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.

Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

V.4 Content of STRs

211. An STR 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 STRs 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.

212. Where STRs 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 form (Section 4 below) is paramount.
213. Paragraph 30 of the Third Set of Guidance provides, in indicative and non-exhaustive terms, recommendations as to what would be expected to be included in STRs. This guidance remains largely applicable. However, the extended scope of MAR and the requirement for ESMA to 'determine' systems and notification templates, require that more detailed content be specified.
214. To reflect the diversity among the types of entity that may now submit a STR and the increased scope of MAR, the harmonised reporting form needs to be more comprehensive, while remaining, as far as possible, straightforward to complete.
215. Building on existing formats, content and guidelines, ESMA believes that new harmonised STRs should be organised into six sections, with suggested content as follows:

SECTION 1 - TRANSACTION / ORDERS

Date and time of suspicious activity

Market – Trading Venue where activity occurred

Location – country (if available)

If outside trading venue – specify

Transaction Reference number (if applicable) / 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, strike price, maturity, premium (price), interest rate, order type, etc.

Name and ISIN of underlying security

Size /Value of transaction

For OTC derivatives – Margin, up-front payment and nominal size/value of underlying security

Purchase Price

For OTC derivatives - Transaction terms - Strike price/contract terms e.g. spread bet gain/loss per tic move

Sale Price



For OTC derivatives, as above

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 transaction

Regulated Market

MTF

OTF

In each case:

Name of individual

Name of Firm/Trading Venue

Position within entity

Address

Acting capacity of entity with respect to suspicious activity e.g. agency broker, trading platform

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)

Client ID code (if applicable)

Relationship with the concerned issuer (if applicable and if known)

Names and capacity of other entities known to be involved in the transactions/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.

Additional elements in relation to 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 MTFs OTFs, describe nature of suspicious order book interaction, transactions

Please note that these are non-exhaustive guiding criteria.

SECTION 5 - DOCUMENTATION ATTACHED

List of attachments e.g. e-mails, recordings of conversations, transaction records, confirmations, broker reports, media comment if relevant.

SECTION 6 - ADDITIONAL INFORMATION

Provide background or other information which could be relevant to the report (e.g. trading patterns of the client, when 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 client holds.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

V.5 STR template

216. According to Article 11(3) of MAR, ESMA is asked to develop RTS on notification templates to be used by persons subject to the reporting obligation.
217. It is noted that competent authorities use a range of different STR templates and that not many actually use the template contained in the First Set of Guidance.
218. As encouraged in the First Set of Guidance, it is ESMA's view that a single harmonised reporting form should be used across the EU. Not only will this ease compliance in markets that are becoming increasingly cross-border in nature, but it will also facilitate the sharing of STRs between competent authorities in cross-border investigations.
219. The template in the First Set of Guidance serves as a good starting point for this. However, the extension of the scope of MAR to cover reporting by venues, new instruments (e.g. OTC (including commodity derivatives, emissions allowances)), orders and attempts generally means that it may no longer be fit for purpose.
220. An additional point to consider is whether an electronic STR form should be developed. Whilst there may be internal IT issues for competent authorities around how an electronic form could be submitted, stored and analysed, institutions might welcome them as they could include the facility to attach electronic files, such as audio files or details of trades (e.g. excel sheets).
221. ESMA believes that electronic STR forms are appropriate provided that adequate levels of security can be guaranteed.

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

V.6 Record-keeping

222. All institutions should keep a record of STRs actually submitted for not less than five years. In addition, paragraph 33 of the Third Set of Guidance encourages institutions to keep records of "potentially suspicious transactions which have been examined but which have not been reported to the competent authorities" - i.e. 'near-misses'.
223. Access to records of near-misses is a very effective way for competent authorities to assess compliance with the STR obligations from a supervisory perspective. Improving the consistency and completeness of these records can only help this supervision.
224. In a world where the reporting obligation will encompass a wider range of instruments and behaviours, subjective judgements made by institutions as to whether a suspicion exists will play an even greater role. It can be argued that competent authorities' access to records of these judgements has also become more important.
225. ESMA's recommendation is that the RTS should also require a record to be kept of decisions regarding near misses. In any event, this is arguably part of the activity audit trail required under the proactive surveillance duty upon institutions (please see section on "Automated surveillance"). If so, there is merit in specifying that it is.

226. Institutions submitting STRs and competent authorities to whom they are submitted should ensure that records of reports are kept confidential.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

VI. Public disclosure of inside information and delays (Article 12 of MAR)

Introduction

227. Article 12 of MAR⁷ requires issuers of financial instruments to publicly disclose inside information as soon as possible. This requirement applies only to issuers who requested/approved admission to trading or trading of their financial instrument on a trading venue. The inside information to disclose should directly relate to the concerned issuer. When 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 simultaneously disclose the inside information to the public in the case of intentional disclosure or otherwise, promptly. Furthermore, 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:

- Immediate disclosure would likely prejudice the issuer's legitimate interest
- The omission would not be likely to mislead the public, and
- Confidentiality is ensured by the issuer.

228. These public disclosure requirements and the possibility of delaying disclosure were already included in Article 6(1) to (3) of MAD. However, Article 12 of MAR is amending and complementing the current MAD in a number of areas:

- 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 that trading on a MTF or an OTF.
- Expansion of the scope to emission allowances market participants unless they are exempted on the basis of thresholds to be determined in an EU Commission delegated act (Article 12(2)).
- Incorporation in MAR of the manner in which the issuer shall disclose inside information and of the requirement to post for 5 years that information on its website (Article 12 (1)). The possibility for SME growth markets issuers to post inside information on the trading venue website instead of their own website (Article 12(7)) has been introduced.
- Introduction of an additional possibility of delaying public disclosure, under certain conditions, in order to preserve the stability of the financial system (Article 12(4)).
- Introduction of the requirement to notify ex-post the competent authority when disclosure of inside information was delayed (Article 12(3)) or to obtain prior approval in case of delays for preserving financial stability (Article 12(4)).

⁷ All references to MAR are based on the consolidated version dating 8 of July 2013 and adopted in 1st reading by the European Parliament on 10 September 2013.

- Specification that immediate disclosure is required when the confidentiality condition for delaying disclosure is no longer fulfilled, including in the case of rumours (Article 12(4a)).

229. Besides, MAR mandates the European Commission to produce a delegated act (DA) and ESMA to prepare implementing technical standards (ITS) and issue guidelines in the following areas:

- definition of measures establishing minimum thresholds of carbon dioxide equivalent and of rated thermal input for the purpose of the exemption for certain emission allowances market participants (DA);
- specification of the technical means for appropriate disclosure of inside information by issuers, including SMEs growth markets issuers (ITS);
- specification of the technical means for delaying the public disclosure of inside information (ITS);
- specification of the competent authority for the notifications of inside information delays under Article 12(3) and 12(4) (DA);
- in relation to delaying disclosure under Article 12(3), setting up through ESMA Guidelines a non-exhaustive indicative list of:
 - i. the legitimate interests of the issuer, and
 - ii. situations where the omitted disclosure is likely to mislead the public.

230. ESMA is not consulting at this stage on the issue of minimum thresholds of CO₂ equivalent and rated thermal input to be determined for the purpose of the exemption of certain emission allowances market participants from the disclosure requirements. It should be noted that the European Commission (Directorate-General Climate Action) has commissioned a contractor to prepare a report on the « Interplay between the EU ETS registry and the post-trade infrastructure in the financial markets, and transparency in the carbon market ». One of the expected outputs is the identification of possible options for the above mentioned minimum thresholds and an assessment of their impacts. The results of this analysis to be delivered by the contractor will contribute to ESMA work on technical advice to the Commission and to the preparation of the proposal of delegated act by the Commission.

VI.1 Means for appropriate disclosure of inside information

231. ESMA is mandated to draft ITS on the technical means for appropriate disclosure of inside information under paragraphs 1, 6 and 7 of Article 12 MAR.

232. Article 12(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 under the Transparency Directive. The disclosed inside information should also be posted on the issuer's website and maintained there for a

minimum of 5 years.

233. Article 12(7) 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 art 12(1) that should enable fast access, complete, correct and timely assessment by the public.
234. ESMA understands that the MAR requirement to also “where applicable”, provide the information to the Officially Appointed Mechanism (OAM), which is the national mechanism for centrally storing Regulated Information under the TD, applies only to the issuers who have requested or approved admission of their financial instruments to trading on a RM, which is the actual scope of the TD. It 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.
235. However, it should be noted that the mandate given to ESMA does not cover Article 12(2) concerning the public, effective and timely disclosure of inside information by an emission allowance market participant.
236. In addition, Article 12(6) requires issuers or emission allowances market participants to make an effective and complete public disclosure of the inside information disclosed to a third party not owing duties of confidentiality. Such a public disclosure should be made simultaneously to the transmission to the third party or promptly thereafter depending on whether the disclosure that third party was intentional or not.
237. In that respect, ESMA considers that the way and manner in which the inside information is transmitted to a third party should be made public, should not be different from any other disclosure of inside information pursuant to Article 12(1). It would be inefficient and confusing for issuers and emission allowances market participants to adopt a different approach to and a particular mechanism for public disclosure of information transmitted a third party.

Q70: Do you agree with this general approach? If not, please provide an explanation.

VI.1.1 Channels for appropriate public disclosure

238. Article 2 of the Commission Directive 2003/124/EC implementing MAD already specifies the means and time limit for public disclosure of inside information.
239. 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) which amended Directive 2001/34.
240. 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 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...).

241. Art 20 of TD specifies the language in which the regulated information should be disclosed.
242. However, the TD only covers financial instruments admitted to trading on a RM whereas MAR has expanded the scope to instruments only traded on MTFs and OTFs. So, 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 to be allocated for developing a new and particular mechanisms for disclosure by MTF/OTF issuers.
243. 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.
244. Consequently, 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 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.
245. Article 19 TD requires an issuer to simultaneously file to the Home competent authority of the issuer the regulated information they disclose, information that 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.
246. Considering that the filing of inside information to the competent authority and its publication by the competent authority are not mandatory requirements under the TD, ESMA is of the opinion that it should not be considered as a mean to ensure appropriate disclosure of inside information.

Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

VI.1.2 Inside information already disclosed

247. Article 2(3) of the Commission Directive 2003/124/EC implementing MAD also 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 using the same disclosure channels. ESMA considers that such a requirement should be maintained in the MAR level 2 measures.

Q72: Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.

VI.1.3 Posting on the issuer’s website

248. Under Article 12(1) of MAR, an issuer should post on its website inside information it is required to disclose and should maintain it there at least for 5 years.

249. With respect to SME Growth markets issuers, under Article 12(7) 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 operators 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 such a facility for posting inside information.

250. Although Article 12(7) does not explicitly refer to a minimum 5 years maintenance of the inside information posted, it is assumed that inside information shall remain published on the SMG Growth Market operator’s website for at least five years.

251. As mentioned previously, only posting inside information on a website is not a sufficient means for ensuring appropriate disclosure. Therefore, the posting of inside information on the website of the issuer or of the SME Growth market operator, where relevant, should intervene without delay after 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 may consider setting some criteria for the website where inside information is posted by the issuer in fulfilment of Article 12(1) and 12(7), such as:

- The access to the website should be non-discriminatory
- 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 as to its content will include the inside information disclosed by the issuer without mixing up with marketing communications of that issuer.

- Considering the 5 year record keeping, previously disclosed inside information should be easy to find and search; disclosed inside information should notably be clearly dated.

Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?

VI.2 *Delaying disclosure of inside information*

253. As noted in introduction, MAR allows for delaying the disclosure of inside information, under certain conditions, and introduced 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 12(3)), by both issuers of financial instruments and emission allowances market participants (so called “general” delays).
- A notification for prior consent by the competent authority for delays by issuers of financial instruments which are credit institutions or financial institutions to preserve the stability of the financial system (Article 12(4)).

254. ESMA is mandated to draft an ITS on the technical means for such delays and the Commission should specify through a delegated act who are the competent authorities to notify. In addition, ESMA will have to issue guidelines on the legitimate interests for delays and on situations where omission is likely to mislead the public in the context of Art 12(3) i.e. the “general” delays.

VI.2.1 *Determination of the relevant competent authority for notification of delays by issuers of financial instruments*

255. Under MAR, the competent authority is generally defined as the one of the MS of the trading venue where the financial instruments have been admitted to trading or are traded (Article 16).

256. However, for the purpose of delaying disclosure of inside information under Article 12(3) and 12(4), there are some elements to consider for the determination of the competent authority. First, only issuers who have requested/approved admission to trading or trading of their financial instruments on a trading venue are subject to the disclosure requirement and thus the possibility of delaying such disclosure. Second, such issuers may have their financial instruments traded on trading venues in different MSs, be they the same type of instruments (e.g. shares) traded in different places or different types of financial instruments issued by the issuer traded in different places. Consequently, under the general MAR definition, more than one authority would be competent.

257. However, Article 12(3) and Article 12(4) require the notification to be provided to only one CA. Different approaches can be suggested to determine the competent authority for the purpose of notifying delays:

- Transaction Reporting MiFID based approach: the competent authority of the most

relevant market in terms of liquidity as it would be defined under up-coming MiFIR;

- Prospectus Directive based approach: the competent authority of the Home MS of the issuer i.e. where the issuer is registered for Community issuers and for third country issuers, the MS of first offer or first admission to trading on a RM;
- Transparency Directive based approach: For shares or debt instruments below €1,000, the competent authority of the MS where a Community issuer is registered and for third country issuers the competent authority of the MS where the securities are intended to be offered to the public for the first time or where the first application for admission to trading is made and otherwise the competent authority of the MS chosen by the issuer from among the MS in which the issuer has its registered office and those MSs which have admitted its securities to trading on a RM on their territory.

258. Using the MiFID approach would put the focus on the market monitoring aspect. The relevant authority would have the exhaustive picture of the transactions conducted on the instruments of an issuer and would be able to exercise some judgment as to the delay. However, it may happen that the issuer has not approved the admission/trading on a venue in the MS of the competent authority of the most relevant market in terms of liquidity, and that authority would not have any competence under other directives/regulations about other information that the issuer has to publish.
259. Alternatively, the approach to determine the competent authority could be based on where the issuer is liable in terms of information, either be in terms of information relating the offer of financial instrument (Prospectus Directive) or in terms of regulated information (Transparency Directive). However, this approach would only be valid for financial instruments admitted to trading on RMs. For other financial instruments traded only on MTF or OTF, it could be suggested to determine the competent authority as the one of the MTF/OTF where the financial instrument was first traded with the consent of the issuer.

Q74: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?

VI.2.2 Determination of the relevant competent authority for notification of delays by emission allowances market participants

260. The duty to notify delays in disclosure of inside information to the competent authority set out in Article 12(3) also applies to emission allowances market participants, provided that they are not exempted.
261. In terms of scope, it should be remembered that MAR applies both to the bid in the auction process and transactions on secondary markets of emission allowances (Article 2(1) of MAR).
262. It should be noted that Article 43 of the Auctioning Regulation, which notably regulates the bidding in auction process, requires that the authorities competent for supervising and enforcing the market abuse related provisions of that regulation are the one designated under Article 11 of MAD i.e. the single administrative authority within a MS in charge of market abuse for financial markets.
263. In addition, one of the objectives of including emission allowances in the scope of MAR was to

“make possible to attribute the market oversight competences for both spot and derivatives trading to just one category of public authorities – financial supervisors”⁸.

264. Consequently, a straightforward approach would be to determine the competent authority receiving the notification of delay as the competent authority designated by Article 16 of MAR in the MS where the emission allowances market participant has its registered office. However, this may lead to situations where a competent authority in one MS would receive notification of delays on emission allowances from a market participant registered in that MS whereas the concerned emission allowances are actually traded on a trading venue in another MS.
265. There might be alternative approaches based on the trading venue where the emission allowances are traded. In the case of auction bid, this would also allow a financial supervisor to be the competent authority designated. Indeed, Article 35 of the Auctioning Regulation requires an auction platform to be a RM under MiFID and therefore the competent authority of that auction platform is the one defined under MiFID for that RM. However, even though the market operator of an auction platform under the Auctioning Regulation is very likely to also operate a secondary market of emission allowances and related products, there can be situations where only a secondary market is operated in a particular MS. Furthermore, an emission allowances market participant can well be member of different auction platforms and/or secondary markets. Therefore, this market participant would be trading emission allowances and/or related product from different venues across Europe and would potentially have to notify several CAs. However, from a market perspective there will be only one competent authority for a particular emission allowances certificate i.e. the authority of the trading venue where that particular emission allowances certificate is traded.

Q75: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by emission allowances market participants?

VI.2.3 Technical means for delaying disclosure of inside information

266. Under Article 12(9), the text of ESMA empowerment for ITS on the technical means for delaying disclosure explicitly cross-references to paragraph 4 and paragraph 5 of Article 12. Whereas paragraph 4 refers to delays by credit/financial institutions to preserve financial stability, there is no paragraph 5 in the final MAR text agreed in the Trilogue. Nevertheless, ESMA is working on the matter under the assumption that the scope of the mandate also includes the general case for delays set out in Article 12(3).

VI.2.3.1 “General” delays (Article 12(3))

267. For the delays foreseen under Article 12(3), an “ex-post” notification to the competent authority is required to inform about the existence of the delay and to provide the written explanation on how the conditions for delaying were met. MAR allows the possibility for the explanations to be provided only upon request of the competent authority if provided for it under national law.
268. The notification to the competent authority of the information about the delay, and, where relevant, of the explanations, should take place immediately after the delayed inside information has been

⁸ Quote from EU Com FAQ on Emission allowances within the frame of MiFID and MAD review (http://europa.eu/rapid/press-release_MEMO-11-719_en.htm?locale=FR)

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 this notification should not be delayed intentionally or negligently, and should be integrated in the issuer's general process for disclosing inside information.

269. 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 that competent authority, therefore, written notification is considered as the "normal way". Would national law allow for the explanations about the delay to be provided upon request of the competent authority, the issuer should provide them 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, for example by phone, 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 neither the competent authority nor the issuer.
270. Consequently, ESMA suggests that both the information about the delay and the explanations are provided in written form, using electronic means of transmission, in a form accepted by EU regulation, to dedicated contact point(s) within the CA. In any event, the competent authority should make clear how the notification process operates (e.g. on its website).

Q76: Do you agree with the approach to the ex post notification of general delays and the ways to transmit the required information? If not, please explain.

Procedures and arrangements within the issuer

271. 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 should therefore 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. Thus, there should be responsible persons 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) considering the major importance of such a decision. However, ESMA does not consider appropriate to specify which positions such persons should have within the issuer considering the variety of organisational structures issuers may have. In addition, before taking a decision concerning the delay of publication of inside information, these persons should conduct an assessment on whether the three conditions set forth in Article 12(3) for delaying are fulfilled⁹. Besides, considering the requirement for the issuer to be able to provide written explanations concerning the delay, the above mentioned decision should be recorded, evidenced and motivated.
272. 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

⁹ the three conditions are:

- the immediate disclosure would likely prejudice his legitimate interests;
- the omission would not be likely to mislead the public;
- the issuer of a financial instrument or emission allowance market participant is able to ensure the confidentiality of that information.

and, where relevant, to provide the explanations in writing.

273. 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 12(4a)). 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 explanations in writing. Therefore, an on-going monitoring of the conditions of the delays is required.
274. Against this background, ESMA considers that there should be procedures and arrangements in place within the issuer whereby:
- a) the process for assessing and deciding on the starting and ending point of delaying the inside information is designed;
 - b) the records evidencing the fulfilment of the conditions for the delay, both initially and on an on-going basis during the delay period, are set up and maintained each time the disclosure of inside information is delayed;
 - c) responsibilities within the issuer are clearly allocated notably for deciding about the delay and its subsequent publication, ensuring the on-going monitoring of the conditions of the delays and particularly the confidentiality and providing the Information about the delay and the explanations to the CA;
 - 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.
275. With respect to point d) above, Article 3(2) of Directive 2003/124/EC implementing the current MAD already specifies certain requirements for ensuring confidentiality of the inside information and that the access to such information is controlled by the issuer. It includes arrangements to deny access to non-relevant persons, measures to ensure awareness of the legal and regulatory duties and sanctions by persons accessing delayed inside information, and, measures allowing immediate disclosure in case of breach of confidentiality.
276. ESMA considers that the above requirements should be kept and thus included in the technical standards to be drafted.
277. For the sake of clarity, ESMA considers that the procedures and arrangements that must 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 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.

Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please

explain.

Format and content of the notification

278. 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, it could be suggested to specify the content of the information to be provided and to design one or more common templates.
279. In terms of content, a distinction should be drawn between the notification of the information about the delay and the related explanations, as they are not necessarily transmitted simultaneously to the CAs. 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/activity.
280. 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 may suggest 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.
281. When recording time, it is proposed that the relevant time zone should be specified (for example CET or GMT).
282. 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.
283. In addition, the issuer is requested to provide explanations as to how the three conditions of Article 12(3) were met. Therefore, beyond the identification information above presented to introduce the notification, that notification should be structured around the three conditions and filled in with free text by the issuer:
- To describe the legitimate interest at stake.
 - To specify its assessment on how the omission of the inside information would not be

likely to mislead the public.

- To describe how the confidentiality of the delayed inside information is ensured, notably what information barriers have been put in place internally for non-relevant 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.

284. The explanations should reflect the initial assessment conducted by the issuer of the conditions to fulfil. They 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 mentioned in Article 12(10) of MAR. Any evolution of this initial assessment should also be included in the explanations as well as its timing. Thus the explanations should contain an item on date and time of any evaluations of the decision to delay (decisions to prolong the delay), if applicable.
285. 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 language, including for financial instruments that are only admitted to trading or traded on MTFs or OTFs.
286. ESMA is examining whether common templates for these notifications should be designed and included in the ITS. Beyond the general harmonisation purpose, templates would also facilitate the speedy preparation of the notification by the issuer.

Q78: Do you agree with the proposed content of the notification that will be sent to the competent authority to inform and explain a delay in disclosure of inside information? If not, please explain.

Q79: Would you consider additional content for these notifications? Please explain.

Q80: Do you consider necessary that common template for notifications of delays be designed?

Emission allowances market participants

287. Article 12(3) does not only apply to issuer of financial instruments but also to emission allowances market participants. ESMA is of the view that for specifying the technical means for delaying disclosure of information, no argument would support following a different approach than for issuer of financial instruments. Thus the same requirements and standards should apply with the exception of the language.
288. It is a rather integrated market with a number of global players, financial and non-financial usually internationally active. Consequently, 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, including a language customary in the sphere of international finance.

VI.2.3.2 Specific delays to preserve the financial stability (Article 12(4))

289. Unlike the “general” delay under Article 12(3), Article 12(4) of MAR specifies a particular type of delays, applying to a limited category of issuers of financial instruments, namely credit institutions and financial institutions, and that can be resorted to in exceptional circumstances in order to preserve the stability of the financial system and to protect the public interest.
290. For these specific cases of delays, the concerned issuers should seek prior consent from their competent authority, which should consult with other relevant authorities as indicated in Article 12(4) of MAR before deciding on the delays. Consequently, the issuer has to notify the competent authority of its intention to delay disclosure.
291. ESMA considers that the requirements in terms of arrangements and procedures the issuer must have in place for delaying disclosure of inside information should similarly apply in those circumstances.
292. 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 the evidence of the fulfilment of the conditions for delaying¹⁰ should be provided by the issuer 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 themselves. Consequently, ESMA considers that secured channels for communicating the notification of intent and/or its content should be used and therefore proposes that information is exchanged via encrypted emails or any other channel the competent authority offers provided that it has the same level of security.
293. 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 if consented). 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 whether the public and the market should be immediately informed. ESMA considers that the decision taken should also be communicated orally by the competent authority to the issuer. 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 communication to proceed immediately with the public disclosure of the relevant inside information.
294. When consenting on delaying the disclosure of inside information, MAR requires the competent

¹⁰ These conditions to fulfil are:

- (a) the disclosure of the information entails a risk of undermining the financial stability of the issuer and of the financial system;
- (b) it is in the public interest to delay the disclosure;
- (c) the confidentiality of that information can be ensured.

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, 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 would changes affecting the conditions occur.

295. 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 elements, development or information that may affect the fulfilment 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 12(4a).

Q81: Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?

VI.3 Guidelines on legitimate interests and omission likely to mislead the public

296. MAR requires ESMA to issue Guidelines to establish a non-exhaustive indicative list of:

- the legitimate interests of the issuer for delaying disclosure of inside information; and
- the situations where the omitted disclosure is likely to mislead the public.

297. It should be noted that the text of the empowerment refers only to issuer; emission allowances market participants are not mentioned.

298. ESMA also considers that, when preparing the explanations for the delayed disclosure of inside information they will have to provide to the competent authority in accordance with Article 12(3), the issuer may consider, if appropriate, the indicative list of examples listed in the above mentioned ESMA guidelines and the terminology thereof.

VI.3.1 Legitimate interests

299. Recital 24a of MAR already provides two examples of circumstances to which the legitimate interests of the issuer may be related, taken out word by word from the current Article 3 (1) of Directive 2003/124/EC:

- a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer;
- b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public..

300. CESR in its second set of Guidance (CESR/06-562b) already elaborated a non-exhaustive indicative list of examples to illustrate further the two sets of circumstances mentioned above. At the time, CESR was of the view that it was not “*appropriate to give a long list of (other) circumstances in which the issuer has the right to delay*” and thus confined accordingly its guidance.
301. In relation to the first set of circumstances (‘negotiations in course’), the CESR examples were as followed:
- Confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations.
 - Product development, patents, inventions etc where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible.
 - When an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure.
 - Impending developments that could be jeopardised by premature disclosure.
302. The cases within the scope of the second set of circumstances (‘decisions taken which need the approval of another body’) include those where there are complex decision-making processes involving multiple hierarchical layers in the issuer’s organization.
303. ESMA considers that this existing list of illustrative examples should be included in the Guidelines to be issued.
304. However, in line with the CESR guidance, ESMA believes that it should not give a long list of other circumstances, and related illustrative examples, in which an issuer could legitimately consider delaying disclosure as this right to delay is a derogation from the general rule of immediate disclosure.

Q82: Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information? Do you consider that CESR examples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

VI.3.2 Situations where omitted disclosure is likely to mislead the public

305. Unlike for legitimate interests, no Recital in MAR is providing any hint on what could be such situations. CESR in its second set of guidance provided neither guidance nor examples of situations where delay in disclosing inside information would not be likely to mislead the public.
306. The approach for ESMA guidelines is to identify main categories of situations where the delay

cannot be applied because omitted disclosure is likely to mislead the public; in other words, situations where immediate and appropriate disclosure is absolutely necessary and mandatory. However, in doing so, ESMA does not intend to provide a long list of detailed and specific examples.

307. Thus, ESMA considers that disclosure will always be required where the undisclosed inside information contradicts the market's current expectations. This may be the case when, for instance, a company embarking on an acquisition strategy where there is clear sense that the market does not expect it to.
308. ESMA also considers that disclosure will always be required where the undisclosed inside information contradicts previous public announcement of the issuer. For instance, when preparing its annual financial statement, it becomes clear the actual results, even though not fully finalised, substantially differ from the anticipated results as previously publicly announced by the issuer, the issuer would be expected to issue a profit warning without delay until the finalisation of the concerned financial statement.

Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

VII. Insider list (Article 13 of MAR)

Introduction

309. Article 13 of 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 shall 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 attain access to inside information*”.
310. Recitals 27 and 27A provide the context for the provisions on the creation, maintenance and “*renewing and revision*” [updating] of insider lists envisaged by MAR and, as such, provide a useful illustration of the overarching objective of Article 13.
311. Article 13 gives the issuer the option to delegate the creation, maintenance and update of insider lists to persons acting on their behalf or on their account. For example, in the case of a consultant or accountant working for the issuer, the list of insiders within the consultant or accountant can be created, maintained and updated by the consultant or accountant, but under the ultimate responsibility of the issuer. So this means that where the issuer has delegated the creation, maintenance and update of the insider list the issuer remains fully responsible for the accuracy and accessibility of the insider list.
312. MAR extends the scope of the insider list provision to MTFs, OTFs and the emission allowance market from the previous application to issuers of instruments admitted to trading on a RM of a MS (or for which such admission to trading has been requested) alone. Specifically, Article 13(3) requires issuers whose instruments are traded on a MTF or OTF only but who have approved such trading on a MTF or an OTF or who have requested admission to trading on a MTF, to draw up and maintain insider lists. Article 13(6) extends the requirement to create and maintain an insider list to emission allowance market participants and to emission allowance auction platforms, auctioneers and monitors, this creates a need for ESMA to specify particular standards with regard to insider lists for these entities.
313. ESMA shall develop ITS on the precise format of insider lists and the format for updating insider lists referred to in this Article.
314. ESMA’s mandate 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 MAR by issuers listed in more than one MS. A precise format will further assist the examination of these lists by competent authorities.

VII.1 Standards for Format

315. 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. Data fields required for insider lists should therefore be uniform in order to minimise the associated costs.
316. According to Article 13(3), an insider list shall document at least:

- the identity of any person having access to insider information;
- the reason for being included in the list;
- the date at which list of insiders was created and updated;
- 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.

317. As part of its mandate, ESMA shall determine the precise format of the insider list and therefore to appropriately address the mandate has to specify the information needed to properly satisfy the minimal requirements set out in Article 13(3).

318. Regarding **(a) the identity of any person having access to inside information**, ESMA proposes to include the following information about the relevant person in the insider list:

- Name: First name, Surname, birth surname , date and place of birth
- Home Address: Address, postal code City and Country
- Work address (specify if branch or head office)
- ‘National Identification Number’ (if applicable, in accordance with national law).
- Home, Work and mobile telephone numbers
- Personal and work e-mail addresses

Q84: Do you agree with the information about the relevant person in the insider list?

319. Regarding **(b), the reason for being included on the list**, ESMA considers appropriate to include the function and employer’s/company name (if an outside agent) of the insider in the insider list. The company name is relevant to make a distinction between the issuer, subsidiaries or professional acting on behalf of the issuer or on their account.

320. The recent ESMA Review Panel Peer Review of the Supervisory Practices under Directive 2003/6/EC found that twenty-one competent authorities require the inclusion, indicatively, of all the following categories of persons in the insider lists, as long as they have access to inside information:

Members of the Board of Directors, CEOs, relevant persons discharging management responsibility, related staff members (such as secretaries and personal assistants), internal auditors, people having access to databases on budgetary control, or balance sheet analyses, people, who work in units that have regular access to inside information.

321. Further it is valuable to note that this Peer Review report found that twenty-four competent authorities require in their legislation the inclusion in insider lists, indicatively, of individuals who

fall into the non-exhaustive list of categories of professionals mentioned below, where these categories of professionals have access to inside information:

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.

322. Regarding **(c), the date on which the list of insiders** was created and updated, the proposed format allows for the creation of one single consolidated list, which would be electronically created and stored. This would be constantly updated to reflect additions and removals. It is important that both the date of update and the specific change made be easily identifiable by the competent authority. ESMA believes that the contemporaneous updating of the insiders list will be of benefit to the issuer, in that it will assist with the requirement to keep inside information confidential as well as providing competent authorities with a reliable picture as to the disbursement of information within, and indeed without the issuer. Thus crucially, providing a clear indication of the chronology of possession of inside information.
323. Regarding **(d), the date and time at which such person obtained inside information and (e) 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 time, it is proposed that the relevant time zone should be specified (for example CET or GMT).
324. In Annex V an example of the proposed format of the insider list for delivery of relevant information to the competent authority is included. It is anticipated that this harmonised approach would decrease the administrative burden for competent authorities, issuers and their agents.
325. The proposed format would facilitate the option of maintaining integrated insider lists, where issuers could use dedicated fields to distinguish, on a single document, insiders who are privy to information on specific projects, along with individuals who are permanent insiders. However, this is without prejudice to the issuer adopting a different methodology in relation to the maintenance of separate insider lists for specific projects, as long as the proposed format as set out in this implementing technical standard is used.

Q85: Do you agree on the proposed harmonised format in Annex V?

326. ESMA proposes 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 and persons acting or on their account.

Q86: Do you agree on the proposal on the language of the insider list?

VII.2 Standards for submission to competent authorities

327. CESR stated in the Third set of Guidance that writing either by letter, fax and/or e-mail is considered sufficient. This creates difficulties in uploading the insider list in an electronic system for market surveillance and is in the context of the current electronic environment, no longer the usual or most effective means of communication. ESMA therefore proposes that the insider list will be sent to a competent authority in an electronic, machine readable format (e.g. MS Excel, comma-separated or plain text format). Further, a standardised electronic format and storage would

facilitate the requirement to maintain and submit historic records of the list as required under Article 13 (4). Insider list should be held in a way that ensures 1) the certainty of the date in which each piece of information has been inserted and 2) the impossibility of modifying the content.

328. In order to ensure convenient and safe way of conveying such information ESMA proposes that the insider list will 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.

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields...)?

VII.3 Procedure for updating insider lists

329. The insider list should be kept by the issuer or, if applicable, the person acting on his behalf or on his 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 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.

Q89: Do you agree on the procedure for updating insider lists?

VII.4 SME Growth Markets

330. In Article 13(2) of MAR, issuers whose instruments are traded on an SME Growth Market shall be exempt from drawing up an insider list provided that certain conditions are fulfilled.
331. It should be noted that an issuer can benefit from this exemption if its financial instruments are traded on an SME Growth Market but that the exemption does not apply to the issuers of other financial instruments that are traded outside SME Growth Markets. In other words, the exemption is pertinent to the instruments traded on the SME Growth Market and not to the issuer per se.
332. Article 13 (2) exempts these issuers of the obligation to draw up an insider list, on the basis that the issuer is in the position to provide the competent authority, upon request with the insider list pursuant to Article 13. The issuer must also take all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions applicable to the misuse or improper circulation of such information.
333. Given that Article 13 specifies that the availability of the exemption is based on the aforementioned requirements, ESMA believes that an issuer seeking to avail of the exemption under Article 13(2) should have sufficient record keeping practices and systems in place to be in a realistic position to create an accurate insider list on request. As such, it will be necessary for them to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement.

Q90: Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to



fulfil the obligation?

VIII. Managers' transactions (Article 14 of MAR)

Introduction

334. Article 14 of MAR¹¹ sets out a transactions notification requirement for persons discharging managerial responsibilities within an issuer of a financial instrument as well as persons closely associated with them ("PDMRs")¹². 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.
335. Under Article 14, PDMRs should notify the issuer and the competent authority of every transaction conducted on their account relating to the shares or debt instruments of that issuer, and, that issuer is responsible for ensuring that the information is made public, unless the competent authority does it directly under national law.
336. Once cumulated transactions executed by a PDMR amount to €5,000 (€20,000 if a competent authority has decided to increase this threshold in accordance with Art 5(3a)), every subsequent transactions should be notified. The €5,000 (€20,000) threshold should be calculated by summing all transactions effected with no netting.
337. MAR mandates the European Commission to produce a delegated act (DA) and ESMA to prepare ITS in three following areas:
- specification of the circumstances under which trading during a closed period may be allowed by the issuer (DA),
 - specification of the characteristics of a transaction which trigger the duty to notify (DA), and
 - the format of the template which should be used to notify transactions and to disclose them to the public (ITS).

VIII.1 General remarks

338. MAR has expanded the scope of the obligation to notify PDMRs' transaction from that in MAD 2003/6 in two areas.
339. Firstly, 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' 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.
340. Secondly, the scope of instruments falling under the obligation explicitly covers both shares and debt instruments of the said issuer, derivatives or other financial instruments linked to them, and,

¹¹ All references to MAR are based on the consolidated version dating 8 of July 2013.

¹² See Article 5 of MAR for the definitions of persons discharging managerial responsibilities within an issuer of a financial instrument and closely associated persons

emission allowances or related derivatives. [However, there is a discrepancy between the instruments covered in Article 14(1) and Article 14(1a) whereas both articles refer to the same requirement to notify the competent authority. In Article 14(1a), the scope is limited to shares admitted to trading on a RM, whereas Article 14(1) defines the scope as applying to shares, in general (i.e. irrespective of where they admitted to trading or traded), or debt instruments].

341. Article 14(4) also clearly states that the notification obligation applies to PDMRs within an emission allowances market participants and PDMRs within an auction platform, an auctioneer or an auction monitor. However, the situation is less clear as to the public disclosure requirements as nowhere in the current text of Article 14 there are provisions similar to those applying to issuers of financial instruments in relation to their duty to disclose the managers' transactions they have received and in relation to the determination of the competent authority to whom the managers should notify their transaction.

VIII.2 Characteristics of the transactions triggering the duty to notify

342. ESMA is mandated to provide a technical advice to the Commission for specifying the characteristics of the transactions referred to in Article 14(2), which trigger the duty to notify.
343. PDMRs must notify the issuer and the relevant competent authority about every transaction conducted on their behalf. In turn, the issuer (or the relevant CA) should disclose the notified information.
344. Article 14(2) provides a non-exhaustive list of transactions to be notified referring specifically to:
- pledging or lending of financial instruments;
 - transactions undertaken by any person professionally arranging or executing transactions, including where discretion is exercised;
 - transactions made under a life insurance policy.
345. ESMA considers that the scope of the transactions to be covered under the empowerment of Article 14(6) is broad and should not be limited to only the three types of transactions explicitly listed in Article 14(2).
346. Therefore, although these three types of transactions referred to in Article 14(2) will need to be considered individually, ESMA considers it useful to begin by establishing some basic characteristics of any transaction, which must be present in order for the transaction to require reporting.
347. Besides, ESMA understands that transactions referred to in Article 14(2)(b) include transactions executed for the account of the PDMRs within the framework of a fully discretionary asset management contract (meaning that there is no instruction whatsoever from the PDMR) as regards the investment policy of the contract.

VIII.2.1 Basic characteristics

348. Article 14(1) states that PDMRs *“shall notify the issuer and the competent authority about the existence of every transaction conducted on their own account relating to the shares or debt instruments of that issuer, or to derivatives or other financial instruments linked to them, or in*

emission allowances or related derivatives”.

349. 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) shall be notified.
350. In addition, Article 14(1) refers to individual transaction. Therefore, the notifications to be received by the competent authorities and the issuers should take place on a transaction by transaction basis. A PDMR is not expected to aggregate transactions conducted during the same day in a single notification for that day.
351. ESMA considers that transactions to be notified should include any acquisition including gift, inheritance and donation, disposal, subscription or exchange of financial instruments of an issuer or related financial instruments.
352. An additional basic characteristic of transaction is that it is conducted on the own account of the PDMR.

Q91: Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?

VIII.2.2 Additional types of transactions

353. To supplement those particular transactions listed in Article 14(2)(a), (b) and (c), ESMA proposes the inclusion of a slightly more extensive list of examples of transactions triggering notification and publication requirements provided that it is clear that these are only some examples amongst other types of transactions and this constitutes an open-ended list:
 - a. The acceptance and the exercise of a stock-option in case of stock options granted to managers and employees as part of their remuneration package.
 - b. The sale of shares stemming from the exercise of a stock option (even in case of stock options granted to managers and employees as part of their remuneration package).
 - c. Equity swaps. The constitutive elements of equity swaps that have to be notified are: name of PDMR, description of securities, nature of transaction, value of transaction, date of transaction, share's price, maturity/term of the contract.
 - d. Transactions related to derivatives products settled in cash (such as for instance equity swaps with a cash settlement).
 - e. Acquisition, sale or exercise of rights, put and call options traded on a RM and/or a MTF and/or over the counter. If rights, as well as put and call options are exercised, the date of the exercise of rights has to be taken into account when considering whether there is a notification requirement.
 - f. The subscription to a capital increase (primary market).
 - g. Conditional trades i.e. trades which occur on the basis of a previous contract that stipulates a condition that is now met or on the basis of a contract which establishes

that the trade will occur in the future if a condition is met, by PDMRS.

- h. The conversion of a financial instrument into another financial instrument e.g. exchange of convertible bonds to shares.

- 354. It should also be noted that the definition of issuer also covers the case of depositary receipt. Therefore, acquisition or disposal of depositary receipts on a particular issuer are amongst the transactions to be notified.
- 355. ESMA is of the opinion that transactions executed in derivative on indices or baskets are within the scope of transactions to be notified. However, ESMA is examining whether to be notifiable such transactions should be conditioned to the financial instrument of the concerned issuer carrying a certain weight within the index or basket.

Q92: What are your views on the minimal weight that the issuer's financial instrument should have for the notification requirement to be applicable? What could be such a minimal weight?

Q93: For the avoidance of doubt, do you see additional types of transactions that should be mentioned to the non-exhaustive of examples of transactions that should be notified?

VIII.3 Timeframe and means for notification and disclosure

- 356. Article 14(1) sets out a reduced timeframe for notification - three business days after the transaction – compared to the five days established in Directive 2004/72.
- 357. Article 14 does not prescribe particular means for notification of transactions by the PDMRs to the issuer and the competent authority. However, the means by which the issuer should ensure that transactions are made public is specified in Article 14(1b) as being in accordance with the standards to be established by ESMA for the disclosure of inside information in Article 12.
- 358. ESMA is however of the opinion 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.
- 359. ESMA is mandated to draft technical standards concerning the format to be used for the notification and publication of the transactions. Article 14(3) provides the list of information to be provided:
 - a) Name of the person;
 - b) Reason for notification;
 - c) Name of the relevant issuer;
 - d) Description and identity 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 paragraph 4;

- 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.
360. Annex VI contains two templates which ESMA believes contain the information required for on the one hand the notification and on the other hand the disclosure to the public.
361. With regard to the disclosure to the public by issuers under Article 14(1b), 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 of the PDMR 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. It might be more comprehensible for an investor to be provided with aggregated figures.
362. There are several alternatives for aggregation.
- Aggregation could be limited to transactions in the same financial instrument executed on the same day and at exactly the same price may be aggregated by purchases and by sales but not netted.
 - 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 report would be the average weighted price.
 - 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.

Q94: What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?

VIII.4 Trading Window

363. The trading window as referred to in article 14(4a) during which a PDMR shall not conduct any trading in financial instruments relating to the issuer is a closed window period, which lasts for 30 days before an annual or interim report is to be disclosed by the issuer.
364. ESMA is mandated to specify in a technical advice the circumstances under which trading during a closed period may be permitted by the issuer “*either on a case by case basis, in case of exceptional circumstances, which require the immediate sale of shares, such as severe financial difficulty, or due to the characteristics of the dealing involved for dealings made under or related to an employee’s share scheme, saving schemes, qualification or entitlements of shares or dealings where the beneficial interest in the relevant security does not change*”. In particular, the goal is to define the circumstances that would be considered as exceptional and the type of transaction that could be permitted.
365. In any case, it should be recalled that the obligation for the PDMRs to refrain from insider dealing,

e.g. trading in possession of inside information, prevails over any authorization to trade granted by the issuer.

366. Another aspect to consider relates to the need for the PDMR to demonstrate that the execution of a trade cannot wait until after the end of the closed window.
367. ESMA is also considering whether criteria, to be used by the issuer, can be set to:
- a) determine if the circumstances are indeed exceptional, as defined above, or not, what could a severe financial difficulty, and the type of dealings that could justify the issuer's permission;
 - b) specify types of transactions that would fall under the second limb of the potentially allowed dealings (made under or related to the employee's share scheme, saving scheme, qualification or entitlements or where the beneficial interest does not change)

VIII.4.1 In relation to transactions under exceptional circumstances

368. ESMA considers that some criteria need to be defined to specify the exceptional circumstances under which an issuer may allow a PDMR to trade during a trading window. It should be recalled that the level 1 text only refers to immediate sales of shares in such exceptional circumstances.
369. As the MAR text specifies that the issuer's permission should be given on a case by case basis, the first criteria would be that the PDMR has requested (and obtained), prior to any trading, the permission to trade. To allow the issuer to assess the individual circumstances of each single case, such permission should be motivated: explanation of the transaction envisaged and description of the exceptional character of the circumstances.
370. Any situation in which trading might be permitted should only be envisaged if the reason for wanting to transact is exceptional. By that, it should be understood to be not only extremely urgent but also unforeseen, compelling and the cause is external to the PDMR.
371. Where the PDMR presents situations which are unforeseen, compelling and beyond his control, he should only be allowed to sell shares, debt instruments, related derivatives or other financial instrument linked to them. In addition, these situations could stem from a financial commitment that the PDMR has to fulfil, such as a legally enforceable demand (e.g. a court order), and provided that the PDMR cannot meet this commitment without selling the concerned financial instruments. It could also stem from a situation entered into by the PDRM before the trading window has started (e.g. a tax liability) and requiring the payment of a sum to a third party that could not be fully or partly funded by the PDMR in ways other than selling issuer's financial instruments.
372. However, when the PDMR be in possession in the inside information, the general prohibition of insider dealing must apply even in exceptional circumstances and thus the issuer cannot allow the PDMR's transaction.

Q95: What are your views on the suggested approach in relation to exceptional circumstances under which an issuer may allow a PDMR to trade during a trading window?

VIII.4.2 In relation to the other types of dealing

373. The level 1 text is clearly listing the types of dealings that could be permitted by the issuer but without requiring a case-by-case assessment, namely dealing in relation to employee's share scheme, saving scheme, qualification or entitlements of shares or dealings where the beneficial interest in the relevant security does not change.
374. As regards dealing made under or related to employee's share scheme, saving scheme, qualification or entitlements and whether they can be permitted by the issuer, ESMA is examining whether certain conditions should be fulfilled. Such conditions could relate to the nature of the dealing (e.g. a purchase or sale, exercise of option or other entitlements), the timing of the dealing or of the entering of the PDMR into a particular scheme, whether the dealing and its characteristics (e.g. execution date; amount) was agreed, planned and organised before the trading window starts.
375. For instance, dealings of the issuer's financial instrument under a saving scheme during a trading window may be permitted by the issuer if the PDMR has not entered into the scheme or not altered the conditions of his participation during the trading window and could only conduct purchases provided that the purchase operations are clearly organised without possibility for the PDMR to alter them during the trading window (e.g. regular standing order) or are planned under the scheme to intervene at a fixed date which falls under a trading window. Another condition can be that the PDMR cannot cancel his/her participation into the scheme during the trading window.
376. Another example could occur in the case the expiration date of assigned options, warrants or convertible bonds under an employee's scheme is in the closed period, the exercising of the options, warrants or the conversion of the convertible bond and the selling of the shares acquired by exercising these rights in the closing window is allowed under the following conditions:
- the PDMR notifies the issuer of its choice to exercise at least 4 month before the expiration date;
 - the decision of the PDMR is irrevocable and authorised by the issuer.
377. Another example could occur in case of the award of the issuer's financial instruments (e.g. shares, options, warrants) under an employee's scheme to a PDMR has taken place in the closed period. This is possible under the condition of a "consistent course of action" regarding: the conditions, the periodicity, the time of the award, the group of entitled persons to whom the financial instruments are granted and the amount of financial instruments to be awarded. The purpose to follow a consistent course of action is to create a tight framework for the award, which is free from specific circumstances to such an extent, that any inside information that may exist cannot play a part at the time of the award.
378. As regards dealings where the beneficial interest does not change, they could be undertaken at the initiative of the PDMR, provided that he has requested (and obtained) the permission from the issuer prior to the envisaged transaction. As above, the request should be motivated and should only relate to a transfer of the concerned instruments between accounts of the PDMR (e.g. between schemes). Such transfer should not entail a change in the price of the instruments transferred.

Q96: What are your views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

IX. Investment recommendations (Article 15 of MAR)

Introduction

379. Article 15(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 shall 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.
380. Since the mandate defined by Article 15(3) of MAR - developing draft RTS to determine the technical arrangements for objective presentation and for the disclosure of particular interests or indication of conflicts of interest, distinguishing between the various categories of persons involved, journalists included¹³ - 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.
381. Nevertheless, several relevant issues arise with respect to the scope and the opportunity to update the regulatory framework.
382. 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, Article 15(1) of MAR provides the definitions of “investment recommendation” and “recommending or suggesting an investment strategy” at Level 1 and is understood to include research and technical analysis.
383. Since there is no longer in MAR a definition of ‘relevant person’ as currently provided in the MAD implementing text¹⁴, ESMA understands that this applies to anyone who produces or disseminates investment recommendation or other information recommending or suggesting an investment strategy.
384. The current 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).
385. Both sets of rules include “general standards” applicable to all “relevant person” and additional obligations for qualified persons, namely independent analysts, investment firms, credit institutions, any other persons whose main business is to produce recommendations or any natural person working for them, that, directly or indirectly, expresses a particular investment

¹³ Following the approach outlined by the implementing Directive 2003/125/EC, the last paragraph of Article 15(3) states that “*The technical arrangements laid down in the regulatory technical standards referred (...) shall not apply to journalists subject to equivalent appropriate regulation in the Member States, including equivalent appropriate self-regulation, provided that such regulation achieves similar effects as those technical arrangements. The text of that equivalent national regulation shall be notified to the Commission*”.

¹⁴ Article 1(5) of the implementing Directive 2003/125/EC is defining a “*relevant person*” as “*a natural or legal person producing or disseminating recommendations in the exercise of his profession or the conduct of his business*”.

recommendation. For the sake of simplicity we define these qualified persons as “financial analysts”.

IX.1 Publication of recommendations “intended for distribution channels or for the public”

386. Like Article 1(3) of implementing Directive 2003/125/EC, Article 15(1) of MAR establishes that investment recommendations that fall under its 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*”.
387. ESMA believes it might be helpful to make clear that an investment recommendation will become publicly available when it is distributed through a Regulatory Information System or media specialised in disseminating information (news agency, news provider, a newspaper, etc.) or when it is put on the website of the producer.
388. 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 clients¹⁵, 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.
389. In other words, ESMA believes that a “large number of persons” shall 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)¹⁶.
390. Finally, ESMA considers that the date when the investment recommendation is made available through any of the above mentioned channels or distributed for the first time to any of the groups of persons mentioned above, is the date that must be indicated within the investment recommendation as the date when it was first released for distribution as provided for in Article 4(1)(e) of implementing Directive 2003/125/EC.

Q97: Do you have suggestions on how to determine when an investment recommendation is “intended for distribution channels or for the public”?

Q98: Do you think that there should be a threshold for what constitute “large

¹⁵ “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.

¹⁶ 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.

number of persons” for the purpose of determining that an investment recommendation is intended for the public?

IX.2 Production of recommendations

IX.2.1 Identity of the producers

391. 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 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.
392. ESMA is considering to confirm the above requirements in the draft technical standards.

Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?

IX.2.2 Objective presentation of investment recommendations

393. Article 15(3) MAR requires ESMA to develop draft RTS to determine the technical arrangements, for the various categories of person referred to in Article 15(1), for objective presentation of investment recommendations or other information recommending an investment strategy.

IX.2.2.1 General standard

394. ESMA considers that the general standard on objective presentation of investment recommendations can be based on the current general standard for fair presentation of recommendations.
395. 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.

IX.2.2.2 Additional obligations for “financial analysts”

396. Article 4 of implementing Directive 2003/125/EC prescribes additional obligations for “financial analysts”, as referred to above. It establishes that financial analysts have to ensure that: a) all substantially material sources are indicated, clearly stating whether the recommendation has been disclosed to the issuer and if it has been amended following this disclosure; b) any basis of valuation or methodology used to evaluate or to set a price target are adequately summarised; c) 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; d) the planned frequency, if any, of update of the recommendation and major changes in the coverage policy previously announced are disclosed; e) the date at which the recommendation was first released for distribution is indicated clearly and prominently; f) 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.

Q100: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?

IX.2.2.3 Transparency of the methodology

397. Typically, research on a specific financial instrument or issuer ranges from a few lines or pages, where it updates customers on the latest news, to as many as 30-40 pages, depending among other things on the relevance of the type of information disclosed by the issuer. 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” give more indications on the underlying methodology used only in latter case since they assume that in the former case customers can retrieve details from previous research or may contact the “financial analysts” for further direct clarifications.
398. 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.
399. Therefore ESMA is 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.
400. 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.

Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

IX.2.3 **Disclosure of interests and conflicts of interests**

401. Article 15(3) MAR requires ESMA to develop draft RTS to determine the technical arrangements, for disclosure of particular interests or indications of conflicts of interest.

IX.2.3.1 General standard

402. 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 also applies 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.

IX.2.3.2 Additional obligations for “financial analysts”

403. 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 shall 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, in 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.

Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

IX.2.3.3 Thresholds for conflicts of interest

404. In order to ensure the objectivity and reliability of the investment recommendations produced by “financial analysts”, significant financial interests held in relation to the issuer in the concerned financial instrument or conflicts of interest between the “financial analysts” and the concerned issuer shall be disclosed.
405. Currently, the disclosure requirement set out in Article 6(1)(a) of the implementing Directive 2003/125/EC 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.
406. In addition, ESMA is examining whether to introduce a further disclosure requirement, with a different threshold, for net short positions opened for reasons different from market making activities.
407. Furthermore, ESMA is considering whether to introduce further disclosure requirement, with a different threshold, 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).
408. ESMA wishes to clarify that disclosures of any financial interests below the minimum disclosure thresholds to be set in the regulatory requirements are possible.

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-

3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?

Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?

Q106: Do you think that additional specific thresholds should be specified with respect to other ‘non-equities’ financial instruments?

IX.2.3.4 Details on the distribution of previous recommendations

409. As mentioned above, Article 6(4) of implementing Directive 2003/125/EC outlines additional obligations in relation to disclosure of conflicts of interest for “financial analysts” and, in particular, 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*”. ESMA is considering whether to establish additional requirements for each issuer covered by previous recommendations, requiring a list of all recommendations produced and disseminated over the previous 12 months, containing at least the date of release, price target, direction of recommendation, timeframe for price target and recommendation, identity of who produced the recommendation

Q107: Do you think that further disclosure on previous recommendations should be given?

Q108: If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?

IX.2.3.5 Requirement to properly disclose conflicts of interest

410. 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. Examples of such ineffective disclaimers in analysts’ reports are 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”.

411. 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 potentially

impacted by the recommendation expressed by the analyst.

Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

IX.2.4 Non-written recommendations

412. Implementing Directive 2003/125/EC prescribes that MSs shall 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 inclined not to indicate in the RTS the adaptation necessary for non-written recommendations, but leave assessments on a case-by-case basis.
413. Moreover, it has been considered whether it might be appropriate to clarify the meaning of non-written recommendations. In such a case, the risk of not being complete, thus allowing for circumvention and arbitrage opportunities should be taken into account.

Q110: Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?

IX.2.5 Dissemination of recommendations produced by third parties

414. ESMA holds the view that current Level 2 rules for dissemination of recommendation produced by third parties should apply. 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 shall 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 shall provide further indications. ESMA is considering whether the latter additional requirement should also be triggered by changes of the target price.
415. Article 9(1)(b) of implementing Directive 2003/125/EC requires that intermediaries or "financial analysts" that disseminate recommendations produced by a third party shall 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.

Q111: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

X. Reporting of violations (Article 29 of MAR)

Introduction

416. Article 29(1) of MAR requires MSs to ensure that competent authorities establish effective mechanisms to enable reporting of any actual or potential breach of the provisions of the Regulation, regardless of whether the reporting of the violation is related to market abuse or to any violation of the Regulation (e.g. insider lists).
417. According to Recital 36 of MAR reporting is necessary to facilitate detection and sanctioning of market abuse; therefore adequate arrangements/mechanisms should be “in place to enable persons to alert competent authorities to actual or potential breaches of the Regulation. Reporting is also necessary to ensure the protection and the respect of the rights of the whistle-blower (i.e. the person who is reporting the breach) and the reported person (i.e. the person who is allegedly responsible for a breach) who may be subject to retaliation, discrimination or other types of unfair treatment.
418. This reporting regime is without prejudice of any report made on anonymous basis to the competent authorities, which can still be evaluated by competent authorities to determine whether it offers enough circumstantial evidence of the violation but which would not benefit of the protections under this regime.
419. Article 29(1a) establishes that the mechanisms to enable such reporting include, at least:
- specific procedures for the receipt of reports and their follow-up, including the establishment of secure communication channels for such reports;
 - within their employment, appropriate protection for employees, who report breaches or are accused of breaches against retaliation, discrimination or other types of unfair treatment at a minimum;
 - protection of personal data both of the person who reports the breaches and the natural person who is allegedly responsible for a breach, including protection in relation to preserving the confidentiality of the identity of the relevant persons, at all stages of the procedure without prejudice to such disclosure being required by national law in the context of investigation or subsequent judicial proceedings.
420. MSs have to require that employers, engaged in activities that are regulated for financial services purposes, have in place appropriate procedures for their employees to report breaches internally (Article 29(1b)). Moreover, MSs may provide for financial incentives to persons who offer salient information about potential breaches of the Regulation (Article 29(2)), under certain conditions.
421. Since there are no indications in MAR about definitions of whistle-blower or whistle-blowing activity (i.e. reporting of breach), no restrictions seem to exist on the access to the mechanisms of protection under Article 29 of MAR, even for persons that have taken part ,or are going to take part, in an abuse or an attempted abuse. Due to their particular position, those persons should not take advantage of any financial incentives possibly outlined by the MS according to Article 29(2), but, where appropriate, they can probably access the benefits outlined in Article 27(1)(e) of MAR for persons who cooperate with competent authorities.

422. It is the first time that the issue of whistle-blowing is addressed within the European framework of Market Abuse. Nevertheless competent authorities have already gained experience concerning reporting of violations and in particular with regard to the regulation of Suspicious Transactions Reporting by intermediaries.
423. ESMA is requested to submit to the Commission a technical advice on measures to specify the procedures referred to in Article 29(1), including the modalities of reporting and the modalities for reports follow-up, measures for the protection of employees and measures for the protection of personal data.
- X.1 Procedures for the receipt of reports of breaches and their follow-up**
424. Procedures that competent authorities should have in place for the receipt of reports of violations should allow for any person to report. A balanced approach should be adopted between the need not to deter reporting and the necessity to have a procedure in place ensuring that the report received is sufficient for the analysis and follow-up by the competent authority.
425. In this respect, competent authorities should establish an independent and autonomous channel for reporting of violations: the competent authorities should provide contacts with “dedicated resources or lines” entitled to receive reports and to maintain contacts with the whistle-blower; the competent authority’s website should indicate how to contact the team, whether through a dedicated phone line or website or secure and confidential email address or by post. In any case, communication channels should ensure a high level of security.
426. As to the way of reporting violations to the competent authorities, different issues should be taken into consideration.
427. ESMA is of the opinion that any means of notification should be allowed provided that they ensure durability to allow further investigations, and, confidentiality so as to reassure the whistle-blower.
428. Therefore, the ordinary way of reporting to the competent authority should be the written notification, including through electronic channels (e-mails).
429. In case of notification through telephone calls, the competent authority should ensure the content of this oral notification is properly recorded in a manner that ensures protection of personal data and is retrievable. Taking into account national law, this can take the form of audio recording of the conversation or by requesting the whistle-blower to follow up with a written notification.
430. Interviews or physical meetings with the specialised / dedicated line or team might be allowed and, in order to ensure durability, they should be recorded or the related minutes should be signed by the whistle-blower. In such cases, competent authorities should have measures in place to ensure that the identity of the whistle-blower is protected.
431. Competent authorities should encourage whistle-blower to provide hard intelligence/information of the violation. However, lack of supporting documentation does not prevent anyone from raising their concerns with the competent authority but the notification should be based on a “reasonable suspicion”.
432. ESMA proposes that an indicative list of elements that could be included in such reports is drawn.

Q112: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?

X.2 Protection for the reporting and for the reported persons

433. The competent authority owes a duty to every whistle-blower and reported persons and should treat information from and regarding such persons sensitively and with confidentiality. In particular, competent authorities shall not disclose to any person the identity of the whistle-blower and of the reported person unless the circumstances described in paragraph 436 arise. Failure to do so risks whistle-blowers' and reported persons' reputation, including their future employment prospects.
434. Recording of their name, email and contact details should be maintained in a system within the competent authority and should be subject to restricted access.
435. In order to protect the confidentiality of the identity of the whistle-blower, competent authorities should treat his/her personal data, as a minimum, in accordance with the EU Data Protection Directive.
436. The reporting person should be aware that confidentiality may not be ensured in the following circumstances:
- circumstances may mean that disclosure of identity is required by the law, for instance when the public prosecutor requests this piece of information;
 - the nature of subsequent enquiries may make it possible for the employer to accurately assume the whistle-blower's and/or reported person's identity; or
 - the competent authority has no other option than to disclose the whistle-blower's and/or reported person's identities to the employer being investigated to proceed further with its investigation, although the competent authority should try and seek the whistle-blower's and/or reported person's prior consent before doing so.
437. Where information provided by a whistle-blower needs to be passed on from the competent unit to another unit of the competent authority for internal investigation or enforcement proceedings, the whistle-blower's identity should be transmitted to the minimum possible number of persons within the competent authority.
438. The identity of reported persons should be protected in the same manner, unless there is a need to disclose it for the purpose of enforcement proceedings.
439. If the competent authority opens a formal investigation after having received information about potential breaches, persons/units responsible for the investigation or subsequent enforcement activities should not mention the whistle-blower's identity in reports or published acts and might be expected to contact the dedicated intelligence team for specific guidance on handling the information received.
440. Competent authority should also clarify that: it will be unable to supply any more than very limited feedback to the whistle-blower about the outcome of the provision and investigation of information, due to statutory restrictions; the whistle-blower is not encouraged to proactively obtain any further

information from any source, whatever the circumstances. However whistle-blowers may be asked by the competent authority to clarify the information they have already provided to the competent authority.

441. According to the national law, the employer engaging in activities that are regulated for financial services purposes shall have in place appropriate procedures for their employees to report breaches internally through a specific, independent and autonomous channel that ensures protection and confidentiality.

Q113: Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?

Annex I

Summary of questions

Buyback programmes and stabilisation (Article 3 of MAR)

Buyback programmes

- Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?
- Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?
- Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?
- Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?
- Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?
- Q6: Do you agree that with multi-listed shares the price should not be higher than the last traded price or last current bid on the most liquid market?
- Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?
- Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.
- Q9: Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?
- Q10: Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?
- Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

Stabilisation measures

- Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

- Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?
- Q14: Do you agree with these above mentioned details which have to be disclosed?
- Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?
- Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?
- Q17: Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?
- Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?
- Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?
- Q20: Do you agree with these conditions for ancillary stabilisation?
- Q21: Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?
- Q22: Do you agree that "block-trades" cannot be subject to the exemption provided by Article 3(1) of MAR?

Market soundings (Article 7c of MAR)

- Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?
- Q24: Do you have any view on the above?
- Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?
- Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

- Q27: Do you agree with these proposals regarding sounding lists?
- Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?
- Q29: Do you agree with these proposals regarding recorded lines?
- Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?
- Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?
- Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?
- Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?
- Q34: Do you agree with this proposal regarding discrepancies of opinion?
- Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?
- Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?
- Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?
- Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?
- Q39: What are your views on these options?

Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

- Q40: Which practices do you think are more related to manipulation of benchmarks?
- Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

- Q42: In your view, what other ways exist to measure order cancellations?
- Q43: What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?
- Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?
- Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.
- Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?
- Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

Accepted Market Practices (Article 8a(5) of MAR)

- Q48: Do you agree with the approach suggested in relation to OTC trading
- Q49: Do you agree with ESMA's approach in relation to entity which can perform or execute an AMP?
- Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?
- Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?
- Q52: Do you agree that the factors listed seek to ensure a high degree of safeguards and proper interplay of forces of supply and demand?
- Q53: Do you agree with the fact that AMPs may in some instances protect specific market participants (retail clients)?
- Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should this principle be adapted?
- Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?
- Q56: Should an ex ante list of situations when the AMP should be temporarily suspended or restricted be established (e.g. takeover bids)?
- Q57: Do you agree with the above mentioned principles that seek to ensure that AMPs do not create risks for the integrity of related markets and would you consider adding others?

- Q58: What kind of records of orders, transactions etc. should a person that performs an AMP have?
- Q59: Do you agree with the above mentioned principles that take into account the retail investors' participation in the relevant market? Would you consider adding others?

Suspicious Transaction and Order Reports (Article 11 of MAR)

- Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?
- Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?
- Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?
- Q63: Do you have any views on what those reasons could be?
- Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?
- Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.
- Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?
- Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?
- Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?
- Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

Public disclosure of inside information and delays (Article 12 of MAR)

- Q70: Do you agree with this general approach? If not, please provide an explanation.
- Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of

the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

- Q72: Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.
- Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?
- Q74: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?
- Q75: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by emission allowances market participants?
- Q76: Do you agree with the approach to the ex post notification of general delays and the ways to transmit the required information? If not, please explain.
- Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.
- Q78: Do you agree with the proposed content of the notification that will be sent to the competent authority to inform and explain a delay in disclosure of inside information? If not, please explain.
- Q79: Would you consider additional content for these notifications? Please explain.
- Q80: Do you consider necessary that common template for notifications of delays be designed?
- Q81: Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?
- Q82: Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information? Do you consider that CESR examples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.
- Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

Insider list (Article 13 of MAR)

- Q84: Do you agree with the information about the relevant person in the insider list?
- Q85: Do you agree on the proposed harmonised format in Annex V?
- Q86: Do you agree on the proposal on the language of the insider list?
- Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?
- Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields...)?
- Q89: Do you agree on the procedure for updating insider lists?
- Q90: Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

Managers' transactions (Article 14 of MAR)

- Q91: Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?
- Q92: What are your views on the minimal weight that the issuer's financial instrument should have for the notification requirement to be applicable? What could be such a minimal weight?
- Q93: For the avoidance of doubt, do you see additional types of transactions that should be mentioned to the non-exhaustive of examples of transactions that should be notified?
- Q94: What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?
- Q95: What are your views on the suggested approach in relation to exceptional circumstances under which an issuer may allow a PDMM to trade during a trading window?
- Q96: What are your views on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

Investment recommendations (Article 15 of MAR)

- Q97: Do you have suggestions on how to determine when an investment recommendation is "intended for distribution channels or for the public"?

- Q98: Do you think that there should be a threshold for what constitute “large number of persons” for the purpose of determining that an investment recommendation is intended for the public?
- Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?
- Q100: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?
- Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?
- Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?
- Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?
- Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?
- Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?
- Q106: Do you think that additional specific thresholds should be specified with respect to other ‘non-equities’ financial instruments?
- Q107: Do you think that further disclosure on previous recommendations should be given?
- Q108: If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?
- Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?
- Q110: Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?
- Q111: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

Reporting of violations (Article 29 of MAR)

- Q112: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?
- Q113: Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?



Annex II

Commission's mandate to provide technical advice

http://www.esma.europa.eu/system/files/ec_mandate_to_esma_mar-l2_211021_doc.pdf

Annex III – Examples of practices of market manipulation

In the view of ESMA, the following types of practices would constitute market manipulation under MAR. The examples are categorised according to which element of market manipulation as defined by the Regulation they relate to. However, it should be noted that a specific practice may involve more than one type of market manipulation according to how it is used, and so there can be some overlap.

The list is non-exhaustive, thus not excluding the possibility that other situations may be classified as market manipulation. Where an example seems to require that a conduct is characterized by a manipulative intent, this does not imply that, in the absence of the intent, that conduct might not fall within the scope of the definition of market manipulation. Since examples must be described briefly, they show cases that are clearly included in the notion of market manipulation or that, in some respects, provide signals of manipulative conduct. On the other hand, there are examples of practices that actually might be deemed licit if, for instance, they are determined by legitimate reasons or are in compliance with laws and regulations (for example, because in conformity with the rules of the relevant trading venue; buy-back programmes and stabilization; legitimate arbitrage). As acknowledged by recital (19a) of MAR, a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned. However, as highlighted by recital (18a) of MAR, the persons who act in collaboration with others to commit market abuse should also be liable for such practice or behaviour.

I. “False or misleading signals” – first indent of article 8(1)(a) of MAR

- a. Entering into arrangements for the sale or purchase of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion – wash trades.
- b. Engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – painting the tape.
- c. Transactions carried out as a result of the entering of buy and sell orders to trade at or nearly at the same time, with the same quantity and the same price by different but colluding parties – improper matched orders.
- d. Entering of orders which are withdrawn before execution, thus having the effect, or which are likely to have the effect, of giving a misleading impression that there is demand for or supply of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances at that price – placing orders with no intention of executing them.

II. “Price securing” – second indent of article 8(1)(a) of MAR

- e. Buying or selling of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, deliberately, at the reference time of the trading session (e.g. opening, closing, settlement) in an effort to increase, to decrease or to maintain the reference price (e.g. opening price, closing price, settlement price) at a specific level – marking the close.
- f. Buying of positions, by colluding parties, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, in secondary market, after the allocation in the primary market in order to post the price to an artificial level and generate interest from other investors – colluding in the after market of an Initial Public Offer.
- g. Taking advantage of the significant influence of a dominant position over the supply of, or demand for, or delivery mechanisms for a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, in order to materially distort, or likely to distort, the prices at which other parties have to deliver, take delivery or defer delivery in order to satisfy their obligations – abusive squeeze.
- h. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – creation of a floor in the price pattern.
- i. Moving the bid-ask spread to and/or maintaining it at artificial levels, by abusing of market power – excessive bid-ask spreads.
- j. increasing the bid for a security or derivative to increase its price Entering orders to trade increase the bid (or decrease the offer) for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances to increase or decrease its price – advancing the bid.
- k. Undertaking trading or entering orders to trade in one trading venue with a view to improperly influencing the price of the same financial instrument in another trading venue, related spot commodity contract, or an auctioned product based on emission allowances– inter-trading venues manipulation (trading on one trading venue to improperly position the price of a financial instrument in another trading venue).
- l. Undertaking trading or entering orders to trade in one trading venue with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – cross-product manipulation (trading on financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue).

III. “Fictitious devices” – article 8(1)(b) of MAR

- m. Transaction or series of transactions designed to conceal the ownership of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances via the breach of disclosure requirements through the holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances in the name of a colluding party (or parties). The disclosures are misleading in respect of the true underlying holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances – concealing ownership.
- n. Dissemination of false or misleading market information through the media, including the internet, or by any other means, which results or is likely to result in the moving of the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.
- o. Taking of a long position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out – pump and dump.
- p. Taking of a short position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further selling activity and /or disseminating misleading negative information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to decreasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others sellers. When the price has fallen, the position held is closed– trash and cash.
- q. Opening a position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and closing it immediately after having publicly disclosed it putting emphasis on the long holding period of the investment – opening a position and closing it immediately after its public disclosure.

Annex IV – Indicators/Signals of market manipulation

The following are a set of indicators/signals of market manipulation. It is acknowledged that the list is neither exhaustive nor determinative of market manipulation. In specific circumstances, transactions and/or orders to trade meeting signals may be legitimate and hence not give reasonable grounds for suspicion. It is highlighted that any reference to “order to trade” is meant to encompass all sorts of orders, modifications and cancellations of orders, irrespective of whether there is an intention to trade or not and irrespective of the means used to access the trading venue.

- a. Unusual concentration of transactions and/or orders to trade in a particular financial instrument, related spot commodity contract, or an auctioned product based on emission allowances;
- b. Unusual repetition of a transaction among a small number of parties over a certain period of time;
- c. Unusual concentration of transactions and/or orders to trade with only one person, or with different accounts of one person or with a limited number of persons.
- d. Transactions or orders to trade with no other apparent justification than to increase/decrease the price of or to increase the volume of trading in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, namely near to a reference point during the trading day - e.g. at the opening or near the close.
- e. High ratio of cancelled orders (e.g. order to trade ratio) which may be combined with a ratio on volume (e.g. number of financial instruments per order).
- f. Transactions carried out or submission of orders to trade, namely near to a reference point during the trading day, which, because of their size in relation to the market of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, will clearly have a significant impact on the supply of or demand for or the price or value of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances.
- g. Transactions or orders to trade which have the effect, or are likely to have the effect, of increasing/decreasing/maintaining the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances during the days preceding the issue of a related derivative or convertible;
- h. Orders to trade inserted with such a price that they increase the bid or decrease the offer for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, and have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument.
- i. Transactions or orders to trade which modify, or are likely to modify, the valuation of a position while not decreasing/increasing the size of the position;
- j. Transactions or orders to trade which have the effect of, or are likely to have the effect of

increasing/decreasing the weighted average price of the day or of a period during the trading session;

- k. Transactions or orders to trade which have the effect of, or are likely to have the effect of setting a market price when the liquidity of the financial instrument or the depth of the order book, related spot commodity contract, or an auctioned product based on emission allowances is not sufficient to fix a price within the session;
- l. Transactions or orders to trade which have the effect of, or are likely to have the effect of bypassing the trading safeguards of the market (e.g. price limits, volume limits, bid/offer spread parameters, etc);
- m. Execution of a transaction, changing the bid-offer prices, when such spread is a factor in the determination of the price of any other transaction whether or not on the same trading venue;
- n. Entering orders representing significant volumes in the central order book of the trading system a few minutes before the price determination phase of the auction and cancelling these orders a few seconds before the order book is frozen for computing the auction price so that the theoretical opening price might look higher/lower than it otherwise would do;
- o. Transactions or orders to trade which have the effect of, or are likely to have the effect of, maintaining the price of an underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, below/above a strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date;
- p. Transactions on any trading venue which have the effect of, or are likely to have the effect of, modifying the price of the underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, so that it surpasses/not reaches the strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date;
- q. Transactions which have the effect of, or are likely to have the effect of, modifying the settlement price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, when this price is used as a reference/determinant namely in the calculation of margin requirements.

Signals of market manipulation in an automated environment

Signals of market manipulation in an automated environment include in particular:

- r. entering small orders to trade in order to ascertain the level of hidden orders and particularly used to assess what is resting on a dark platform – ping orders;
- s. entering large number of orders to trade and/or cancellations/updates to orders to trade so as to create uncertainty for other participants, slowing down their process and to camouflage their own strategy – quote stuffing;

- t. entering orders to trade or a series of orders to trade intended to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to unwind/open a position at a favourable price – momentum ignition;
- u. submitting multiple orders to trade often away from the touch on one side of the order book with the intention of executing a trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed will be removed - layering and spoofing;
- v. posting of “alluring” limit orders to trade, to attract “slow traders”, i.e. employing traditional trading techniques, that are then rapidly revised onto less generous terms, hoping to execute profitably against the incoming flow of “slow traders” orders to trade - smoking.

The above non-exhaustive list of signals is not intended to suggest that the same strategies carried out by non-automated means would not also be abusive.



European Securities and
Markets Authority

Annex V – Example of proposed format of the insider list

First name(s)	Surname(s)	Name of Birth (if different)	Date of birth	Place of birth	National Identification Number	Address	Postal code	City	Country	Email Address	Telephone Numbers	Company Name	Company address	Start date	End date	Function	Obtained	Ceased	Permanent Insider	Name of Project 1	Name of Project 2
First name(s) of the insider	Surname(s) of the insider	Surname of birth of the insider	Date of birth of the insider	Place of birth of the insider	National Identification Number (if applicable, in accordance with national law)	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 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	yyyy-mm-dd	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	yyyy-mm-dd		* Mark with asterisk if insider on specified project	* Mark with asterisk if insider on specified project
Aiden	Connor	n.a.	1968-11-03	Dublin	564546546	Kingsroad 55	5874AB	Cork	Ireland	a.connor@cor.k.ie	+35312345678	Cork & Co Ltd.	Princeroad 155	2012-11-03	2012-12-03	Consultant	2000-01-01	2002-01-01		*	*
Henk-Willem	Janssen	n.a.	1974-04-28	Amsterdam	58321231	Dorpstraat 1	2131AC	Rotterdam	Nederland	hwjanssen@nl.pwc.com	+31205486244 +31624587901	PWC	Stationsstraat 15	2012-04-28	NA	Manager	2010-09-08				*

Annex VI – Draft templates for notification and disclosure of managers’ dealings

Draft template for notification

1	Details of the notifying party	
a)	First name Last name	
b)	Position in the issuer (e.g. CEO, CFO) or, for closely related persons, the association with a manager e.g. spouse, partner child, legal person, and his or her position in the issuer.	
c)	Address Post code and City Country	
d)	Phone number E-mail address	
2	Details of the Issuer	
a)	Issuer name and LEI	
3	Details of the transaction	
a)	Description of the financial instrument	
b)	Nature of the transaction	
c)	Price	
d)	Volume	
e)	Date and Place of the transaction, (i.e. the trading venue ID or a flag for OTC trades).	
4	Other information	
a)	National identification number (where applicable)	

Draft template for disclosure

1	Details of the notifying party	
a)	First name Last name	
b)	Position in the issuer (e.g. CEO, CFO) or, An indicator that the person is a closely related person	
2	Details of the Issuer	
a)	Issuer name/LEI	
3	Details of the transaction	
a)	Description of the financial instrument	
b)	Nature of the transaction ¹⁷	
c)	Price	
d)	Volume	
e)	Date and Place of the transaction (i.e. the trading venue ID or a flag for OTC trades)	

¹⁷ Transactions in the same financial instrument executed on the same day and at exactly the same price may be aggregated by type of acquisition (e.g purchases) or by type of disposal (e.g. sales) but not netted.