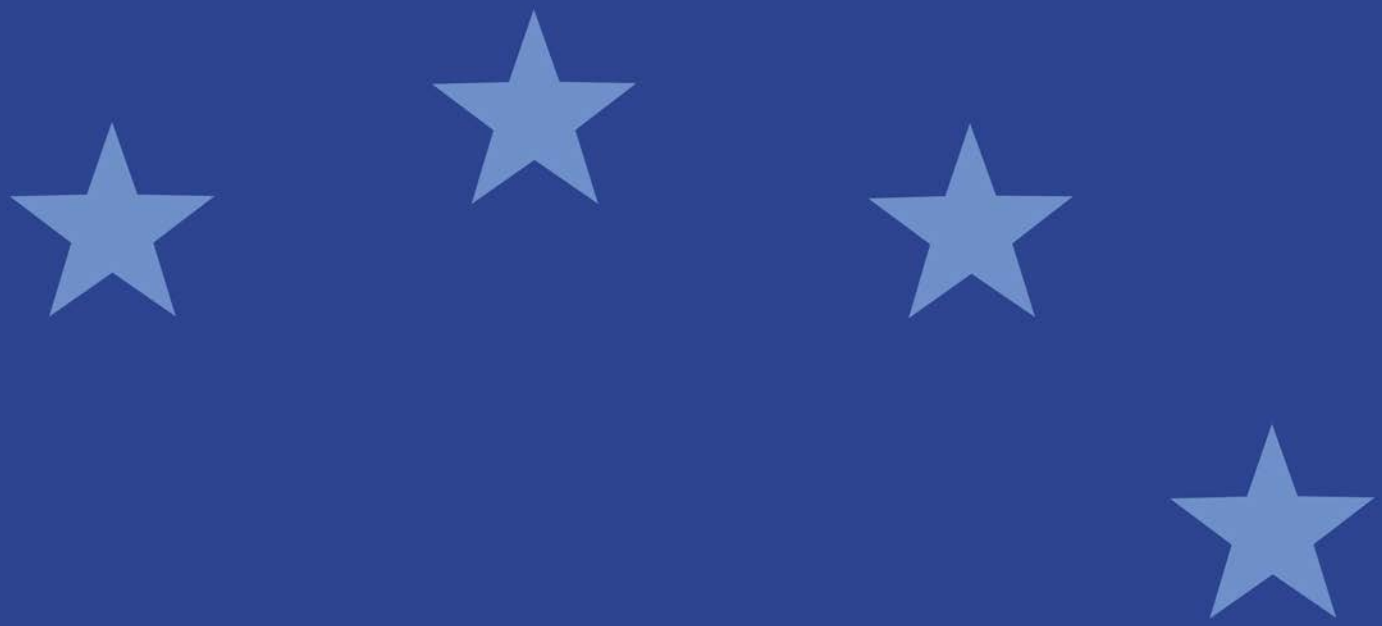
esma European Securities and Markets Authority

Final Report

Draft technical standards on the Market Abuse Regulation



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Acronyms used

ACER	Agency for the Cooperation of Energy Regulators
AMP	Accepted Market Practices
CDS	Credit default swap
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CFD	Contract for difference
CFO	Chief Financial Officer
CP	Consultation Paper on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2014/808) published on 15 July 2014
DP	Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649), published on 14 November 2013
EAMP	Emission allowances market participant
EEA	European Economic Area
ESMA	European Securities and Markets Authority
EU	European Union
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; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of

	15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012
MTF	Multilateral trading facility
MSB	Market sounding beneficiary
MSR	Person receiving the market sounding (market sounding recipient)
OAM	Officially Appointed Mechanism
OJ	The Official Journal of the European Union
OTC	Over-the-counter
OTF	Organised trading facility
PD	Prospectus Directive - Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
PDMR	Person discharging managerial responsibilities within an issuer of a financial instrument, an emission allowance market participant, auction platform, an auctioneer or an auction monitor.
REMIT	Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency
RM	Regulated market
RTS	Regulatory technical standards
SME	Small and medium sized enterprise
STR	Suspicious transactions report
STOR	Suspicious transactions and orders report
TD	Transparency Directive – Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information

	about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC
UCITS	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

1 Executive Summary

Reasons for publication

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

MAR requires ESMA to develop draft regulatory technical standards (RTS) and draft implementing technical standards (ITS) on a number of prospectus related matters.

While developing the draft TS, ESMA consulted stakeholders by way of a Discussion Paper[3] (DP) followed by a Consultation Paper[4] (CP).

Contents

To a large extent the structure of the final report follows that of the CP, with the addition of the topic relating to the notification and the list of financial instruments. It is divided into nine main sections dealing with each of the topics on which mandates were given to ESMA to develop draft technical standards and presenting the changes to the draft technical standards which ESMA proposes based on the feedback received from the consultation. It follows the order established in MAR:

- The content of the notifications of financial instruments and the manner and conditions of the compilation, publication and maintenance of the list of financial instruments (RTS) and the timing, format and template of submission of the notifications of financial instruments (ITS)
- the conditions, restrictions, disclosure and reporting obligations for buyback programmes and stabilisation measures (RTS);
- the arrangements, procedures and record keeping requirements for persons conducting market soundings (RTS), and systems and notification templates to be used in market soundings and the technical means for appropriate communication (ITS);
- the establishment, maintenance and termination of accepted market practices

[1] Market Abuse Regulation No 596/2014 (OJ L 173, 12.6.2014, p. 1): http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0001.01.ENG.
[2] Market Abuse Directive 2003/6/EC (OJ L 96, 12.4.2003, p.16).
[3] Discussion Paper: ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf
[4] Consultation Paper on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2014/808) published on 15 July 2014 https://www.esma.europa.eu/system/files/esma_2014-808_consultation_paper__on_mar_draft_technical_advice_0.pdf

(RTS).

- the arrangements, systems, procedures and notification templates to report suspicious orders and transactions (RTS);
- the technical means for the public disclosure of inside information and its delay (ITS);
- the precise format of insider lists and the format to update them (ITS);
- the format and template for the notification of managers' transactions (ITS),and
- the technical arrangements for the objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflict of interest (RTS).

The annexes of the final report consist of the legislative mandates for ESMA to develop draft technical standards (Annex I), a revised cost-benefit analysis (Annex II), the opinion submitted by the Securities and Markets Stakeholder Group (Annex III), a summary of the feed-back to questions asked in the CP and related ESMA's responses (Annex IV), and, in annexes V to XIII, the proposed text of the draft technical standards is presented. The draft technical standards have been organised as follows:

- Annex V contains the draft regulatory technical standards related to the notifications and the list of financial instruments.
- Annex VI the draft implementing technical standards related to the submission of the notification of financial instruments.
- Annex VII contains the draft regulatory technical standards related to buy-back programmes and stabilisation measures.
- Annex VIII contains the draft regulatory technical standards related market soundings.
- Annex IX contains the draft implementing technical standards related market soundings.
- Annex XI contains the draft regulatory technical standards related accepted market practices.
- Annex XI contains the draft regulatory technical standards related to prevention and detection of market abuse.
- Annex XII contains the draft implementing technical standards related to disclosure of inside information and delay of disclosure of inside information.
- Annex XIII contains the draft implementing technical standards related to insider lists.
- Annex XIV contains the draft implementing technical standards related to managers' transactions.
- Annex XVI contains the draft regulatory technical standards related to investment recommendation or other information recommending or suggesting an investment strategy.

Next Steps

This final report will be submitted to the European Commission for it to decide whether to endorse ESMA's draft regulatory and implementing technical standards.

2 Notification and list of financial instruments

2.1 Introduction

1. Article 4 of MAR requires ESMA to develop technical standards in relation to the obligation to provide information on the financial instruments.
2. It should be noted that both Article 4 of MAR and Article 27 of the Regulation (EU) No 600/2014 (MiFIR) establish a requirement on the provision of instrument reference data to the competent authorities. The competent authorities should in turn provide this data to ESMA who will make it available on its website. Such provisions are aimed at providing transparency to market participants and ensuring competent authorities possess the necessary tools to fulfil their supervisory duties under MAR as well as under MiFIR.
3. Considering the common purpose of the two provisions and the common reference data elements to be provided, ESMA deemed it appropriate to ensure that the two requirements are aligned and that a single set of reference data is published on ESMA website.
4. ESMA consulted on this approach in the Discussion Paper[5] on MiFIR. It was further clarified in the Consultation Paper[6], where additionally ESMA sought feedback on further issues related to the instrument reference data, including the proposed list of details of financial instruments to be provided in the reports.

2.2 Feedback from stakeholders

5. A strong support was expressed for the alignment of requirements related to provision of instruments reference data under MAR and MiFIR.
6. ESMA considered this feedback and decided to align to the extent possible the relevant provisions. In particular, the same details of financial instruments will have to be included in the instrument reference data reported under both regulations. Furthermore, the data will have to be reported using the same standards and formats and by means of the same technical format. Timelines for submissions of reference data to the competent authorities, as well as for their subsequent transmission from the competent authorities to ESMA were also aligned.
7. This approach was not followed only where the empowerments given to ESMA under MAR and MiFIR did not allow for the full alignment of the technical standards. In particular, under MiFIR the trading venues are expected to send information on a given instrument on a daily basis as long as the instrument is traded. This provision was not included in the MAR technical standards, given that MAR explicitly states that only two submissions should be sent for a given instrument– when the instrument is traded for the first time (or when the instrument is admitted to trading or when a request for admission to trading is submitted) and when it ceased to be traded.

[5] https://www.esma.europa.eu/system/files/2014-548_discussion_paper_mifid-mifir.pdf
[6] https://www.esma.europa.eu/system/files/2014-1570_cp_mifid_ii.pdf

3 The conditions for buy-back programmes and stabilisation measures

3.1 Introduction

8. 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 securities. This is in the interest of those investors having subscribed or purchased those 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.

9. 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. Article 8 of Directive 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 stabilisation 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 (EU) No 2273/2003.

10. Similarly, Article 5(1) of Regulation (EU) No 596/2014 (MAR) states that the prohibition of insider dealing (Article 14) and market manipulation (Article 15) do not apply to trading in own shares in buy-back programmes when the programme fulfils the requirements defined in the Article 5(1) of MAR. According to Article 3(1)(17) of MAR "buy-back programme" means trading in own shares in accordance with Articles 21 to 27 of Directive 2012/30/EU.

11. 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 competent authorities and subsequently have to be disclosed to the public. Moreover, certain limits with regard to price and volume have to be met.

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

13. According to Article 5(4) of MAR, the prohibitions of insider dealing and market manipulation do not apply either to trading in securities or associated instruments for the stabilisation of securities where the stabilisation is carried out for a limited period, where relevant information about the stabilisation is disclosed and notified to the competent authority of the trading venue, where adequate limits with regard to price are complied with and provided that such trading complies with the conditions for stabilisation laid

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

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

3.2 Buy-back programmes

3.2.1 General conditions that buy-backs must meet

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

16. ESMA also believes derivatives are not suitable for granting a safe harbour as it would be very difficult to monitor price and volume limits. ESMA also thinks that by using derivatives it could be relatively easy to circumvent the prohibition of market manipulation. Although derivatives can be used for buying back shares, ESMA is of the opinion that their complexity and particular features make them not appropriate for the purposes of buy-back programmes in accordance with Article 5 of MAR, considering the dependence on too many factors like strike, time, and other elements that cannot be calculated in advance with certainty. Furthermore these special features of derivatives run against the transparency requirements set out in this regulation, whatever conditions on price or volume should be established, the use of derivatives could easily lead to circumvention of the prohibition. Level 1 MAR provides for price and level conditions to be met that clearly refer and are intended to apply to situations where buy-backs are implemented by buying shares and not by using derivatives.

3.2.2 Disclosure and reporting obligations

3.2.2.1 Channels of public disclosure

17. According to the regime of Directive 2003/6/EC, 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 Directive 2004/109/EC (Transparency Directive, TD).

18. ESMA aims at ensuring continuity with the MAD regime in this respect but also consistency in the mechanism to be used considering the extended scope of MAR to shares only traded on trading venues different from a RM. Therefore, for sake of clarity,

ESMA considers that the information and storage mechanism to be used should be the one defined under Article 17(1) of MAR and specified through the ITS developed under Article 17(10) of MAR, with the posting for five years on the issuers' websites serving as storage for the disclosed information as well as in the case of financial instruments admitted to trading on RMs, the storage mechanism applicable under the TD.

3.2.2.2 Content of public disclosure

19. According to the current regime (Article 4(4) in combination with Article 4(3) of Regulation (EU) No 2273/2003) the issuer must publicly disclose each transaction related to buy-back programmes, including the information specified in Article 25(4) of MiFID, i.e. details of the names and numbers of the shares bought, the dates and times of the transactions, the transaction prices, the trading venue and the means of identifying the investment firms concerned.
20. However, it is important that the information to the public is readable and understandable. The information on the transactions carried out should be disclosed not only on a transaction per transaction basis, but also on an aggregated basis, which might make the information for investors more comprehensible. Both, the competent authority and the public will be provided with the same type of information regarding the transactions carried out during the buy-back. This will enhance transparency and will provide investors with a more complete information on the transactions carried out.
21. ESMA maintains its proposal that the aggregated volume per day and per venue is published on the website of the issuer as well as the volume-weighted average price per day and per venue, and additionally requires the posting on detailed information for every single transaction carried out in the buy-back programme.

3.2.2.3 Deadline for public disclosure

22. According to the current regime (Article 4(4) of Regulation (EU) No 2273/2003), the issuer must publicly disclose transactions related to a buy-back programme no later than the end of the seventh daily market session following the date of execution of such transactions. As the current system seems to work mostly efficiently, it should be maintained.
23. ESMA believes that the existing deadline of seven days seems to be a good balance between transparency and administrative burden and that, if market participants are willing to disclose earlier, they can, of course, voluntarily do so.

3.2.2.4 Disclosure towards competent authorities

24. According to the current regime (Article 4(3) of Regulation (EU) 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 i.e. the firm conducting the buy-backs for the issuer and not the counterparties of buy-back transactions).
25. 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 (seven market sessions).
26. The above-mentioned Article 4(3) of Regulation (EU) No 2273/2003 also specifies that this disclosure should be made to the competent authority of the RM on which the shares

have been admitted to trading. However, considering the extension of the scope of MAR to include also instruments traded on MTFs, it is highly likely that buy-back transactions have to be reported to more than one competent authority across Europe in cases of multiple listings. The new MAR regime aims to establish more transparency across the Union, and Article 5(3) of MAR clearly specifies that in order to benefit from the exemption the issuer should report to the competent authority of the trading venue on which the shares have been admitted to trading or are traded, the details of each transaction relating to the buy-back programme. ESMA has further considered the approach with respect to the competent authority or authorities to which to report the buy-back transactions, as compared to the CP, and now it is proposing in the final draft RTS that all the transactions relating to the buy-back programme are notified to all the competent authorities of all the trading venues on which the shares are admitted to trading or are traded. This approach is fully in line with MAR Level 1. It also fosters investor protection across the EU: any competent authority could thus conduct its supervisory activities with the view to protect the investors on their market, irrespective of where the buy-back transactions were conducted. Besides, ESMA considers that not determining a single competent authority avoids the need of setting up complex (and probably lengthy) mechanisms for exchanging information between competent authorities although it results in potential multiple reporting.

3.2.3 Conditions for trading

3.2.3.1 Price and time limitations

General Approach

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

28. Furthermore, ESMA wishes to clarify that in order for the price conditions set out in the draft technical standard to apply and to avoid any risk of circumvention of the prohibitions set out in MAR through OTC trading, only the buy-back transactions carried out on a trading venue where the shares are admitted to trading or are traded should benefit from the "safe harbour". This is in line with the approaches currently in place in many Member States and ensures that the shareholders are treated equally in case of buy-back as required under Directive 2012/30/EU (Second Company Law Directive). In ESMA's view also the calculation of the volume limit for OTC trading is not feasible because there is no clear reference market from which the percentage could be calculated. The price limit is not controllable as parties can claim prices used without a sufficient possibility to verify the actual price paid. Generally OTC transactions might lack the same level of transparency that trading on other venues can offer so that, in order to prevent abusive behaviour, there is no room for granting a safe harbour for OTC trading.

Multi-listings

29. When shares are multi-listed on different trading venues, ESMA proposes that the price limitations should be applied to the trading venue on which the shares are purchased. ESMA proposes to make the price restriction dependent on the last price/bid of the relevant trading venue where the purchase is planned. This rule is clear, simple and easier to follow. Otherwise abuse of the exemption would be possible and the supervision for competent authorities very difficult.

Auctions

30. The price formation process during the end of auctions is especially sensitive for potential market manipulations, for example in the form of “marking-the-close”. So where a share is traded through a continuous trading process during the market session, the safe harbour should not cover orders which are placed or modified during an auction (for example, opening-, mid-day-, closing auction or auction after volatility break) that may take place on the concerned market. However, where a share is solely traded on a trading venue through auctions (no continuous quotation), orders placed under a buy-back programme may participate in the auction with the benefit of the safe harbour, provided that market participants have sufficient time to react to the transactions orders relating to the buy-back programme.

3.2.3.2 Volume limitations

31. Under the current regime (Article 5(2) of Regulation (EU) 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 it provides information and explanations to the competent authority in advance, discloses this adequately to the public and does not exceed 50% of the average daily volume (Article 5(3) of Regulation (EU) No 2273/2003). As the 50% extension has been used only very rarely in the past, it does not seem to be required by the market. Considering that only one competent authority has reported cases of extreme low liquidity situations justifying the application of the extended volume, ESMA considers it neither useful nor necessary to maintain such a possibility. Furthermore, this would avoid having to provide a strict definition of “extreme low liquidity” as this depends much on a case-by-case assessment considering the characteristics of the specific instrument and venue. Finally, would the possibility to exceed the 25% limit on a trading venue basis be maintained, this may potentially result in different volume limits on the different trading venues where the shares are traded, and, ESMA believes that, to mitigate the risk of abusive use of such an exception, buy-back transactions should always take place on the venues where the 25% volume limit applies.

32. A closely related issue concerns the way in which the daily average volume should be calculated when the relevant shares are traded on different venues. There are trading venues where shares can be listed by third parties without notification to the issuer. It seems too burdensome to oblige the issuer to check each and every trading venue with rather insignificant volumes in order to perform an accurate calculation across venues. ESMA proposes to make the calculation per relevant venue where a purchase is planned. This rule is clear, simple and easy to follow. ESMA believes the proposed method of calculating the volume limitation for multi-listed shares per venue is the most effective way to prevent abuse and also the most unambiguous way to calculate the volume limits.

33. ESMA considers that the approach applied under the current regime to define the period of reference for calculating the daily average volume for the purpose of the volume limitations remains valid.

3.2.4 Restrictions to trading

34. Under the current regime (Article 6 of Regulation (EU) 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.

35. 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 or a credit institution. In addition, the selling restriction does not apply to an issuer that is an investment firm or a credit institution and that has appropriate information barriers in place.
36. ESMA considers adequate to continue to impose the same restrictions to trading and selling during a buy-back programme and to maintain the same exemptions to these restrictions. The rules on information barriers should be more harmonised with the new MiFIR/MiFID II regime.

3.3 Stabilisation measures

3.3.1 Restrictions regarding the time of stabilisation measures

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

3.3.1.1 Shares and securities equivalent to shares

38. In the case of an initial offer of shares or securities equivalent to shares, the time period should start on the date of commencement of trading of the securities on the trading venue and last no longer than 30 calendar days thereafter. Should the initial offer publicly announced take place in a Member State that permits trading prior to the commencement of trading on a trading venue, the time period should start on the date of adequate public disclosure of the final price of the 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 securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.
39. In case of a secondary offer, the time period should start on the date of adequate public disclosure of the final price of the securities and last no longer than 30 calendar days after the date of allotment.

3.3.1.2 Bonds and other forms of securitised debts (convertible or exchangeable into shares or into other securities equivalent to shares as well as non-convertible or exchangeable into shares or into other securities equivalent to shares)

40. In respect of bonds and other forms of securitized debts (convertible or exchangeable into shares or into other securities equivalent to shares as well as non-convertible or exchangeable into shares or into other securities equivalent to shares), the time period referred should start on the date of adequate public disclosure of the terms of the offer of the 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 securities.

3.3.2 Disclosure and reporting obligations

41. 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.

42. For offers under the scope of application of Directive 2003/71/EC (Prospectus Directive, PD), the relevant transparency conditions have been, according to the legal framework of Regulation (EU) No 2273/2003, the transparency conditions of that directive. ESMA considers these transparency conditions non-sufficient for the purpose of prevention and detection of market abuse and proposes to additionally comply with the requirements set out in this final draft RTS.

43. For offers which do not fall under the scope of the PD it is necessary to adequately publicly disclose, before the opening of the offer period of the securities, the fact that stabilisation measures may be undertaken, 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 also need to be adequately publicly disclosed as well as the fact that stabilisation transactions are aimed to support the market price of the security during the stabilisation period. Additionally ESMA is of the opinion that it is necessary to adequately disclose where the stabilisation measures may occur whether be on or outside trading venue(s).

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

45. If an overallotment facility or "Greenshoe option" 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.

46. 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 stabilisation transactions started, the date at which stabilisation transactions last occurred, the price range within which stabilisations transactions were carried out, for each of the dates during which stabilisation transactions were carried out and the trading venue(s) on which the stabilisation transactions were carried out, where applicable.

47. According to Article 9 of Regulation (EU) No 2273/2003, the transparency conditions could be fulfilled either by the issuer, the offeror or by any of the entities which was undertaking the stabilisation or any person acting on their behalf. However, in ESMA's point of view a clear allocation of responsibilities seems preferable. To this purpose, the issuer, offeror and entities undertaking the stabilisation should appoint one among them to act as a central point for disclosing the information required and to handle any request made by competent authorities.

48. 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 25(1) and Article 26(1) to (3) of Regulation (EU) No 600/2014 extended to financial instruments other than those admitted or going to be admitted to the RM.

49. Furthermore, the details of all stabilisation transactions must be notified to competent authorities. As under the existing legal framework, the transactions have to be reported

no later than by the end of the seventh daily market session following the date of execution of the relevant transaction.

50. Another issue arises where the securities under stabilisation are admitted to trading or traded on trading venues in different Member States or where stabilisation measures on the securities themselves or on associated instruments are being undertaken simultaneously in different Member States. In the public consultations, ESMA was considering whether the reporting could be centralised to one competent authority in order to, in practical terms, facilitate surveillance. It should be noted that MAR clearly states that all stabilisation transactions should be notified to the competent authority of the trading venue (Art 5(5)). Taking into account that stabilisation transactions can be carried out on a trading venue or OTC (outside a trading venue) and considering that MAR aims to establish more transparency and to enhance investor protection across the EU, ESMA now considers that all stabilisation transactions, whether be in the securities themselves or in associated instruments and irrespective on where they have been carried out, have to be reported to all competent authorities responsible for a trading venue (i) on which the securities under stabilisation are admitted to trading or traded and (ii) where stabilisation transactions in associated instruments have taken place, if any. Not determining a single competent authority, and thus requiring multiple reporting in case of stabilisation measures taken simultaneously in different Member States or when the securities are listed in different countries: (i) enables the authorities to be in position to ensure the protection of the investors on their markets (ii) brings the required immediate transparency to those authorities having a supervisory interest in terms of market monitoring (i.e. the ones supervising the trading venues), in particular in relation to the transactions in associated instruments; (iii) avoids the need of setting up complex (and probably lengthy) mechanisms for exchanging information between competent authorities and (iv) will not cause disproportional burden for the entity which is responsible for fulfilling the reporting requirements.

3.3.3 Price conditions

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

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

3.3.4 “Ancillary stabilisation”

53. “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 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 stabilisation when it results in a position not covered by the “Greenshoe option”.

54. 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 securities may be over-allotted only during the subscription period and

at the offer price. A position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the "Greenshoe option" may not exceed 5% of the original offer. Although some market participants stressed that the limit of 5% is too prohibitive and that over-allotting beyond 5% should also be within the "safe harbour", ESMA believes that the existing rules have worked well in practice and therefore should not be changed.

55. Aside from that, the "Greenshoe option" may be exercised by the beneficiaries of such an option only where 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 securities involved.

3.3.5 Sell side trading during stabilisation periods and "refreshing the Greenshoe"

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

57. 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.

3.3.6 "Block-trades"

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

59. A number of respondents highlighted that a distinction should be drawn between "private" block trades that are not protected by the stabilisation safe harbour and publicly announced placements that can constitute "significant distributions" under Regulation (EU) No 2273/2003 for which the stabilisation safe harbour is available.

60. Ultimately, ESMA considers that only the operations that meet the criteria of the significant distributions as defined in Article 3(2)(c) of MAR should be considered for the purpose of the stabilisation under MAR. For instance, those block trades that constitute strictly private transactions cannot be considered as "significant distributions".

4 Market soundings

4.1 Introduction

61. Article 11(1) of MAR describes a “market sounding” as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. Further descriptions are provided in Recitals 32 and 33 or MAR. Article 11(4) states that, when a “disclosing market participant” (“DMP”) discloses inside information to a person receiving the market sounding (“MSR”) in the course of a market sounding in accordance with the conditions in Article 11(3) and (5), this should be deemed to have been made in the normal course of the exercise of a person’s employment, profession or duty, and therefore not to constitute market abuse.
62. Article 11(9) of MAR requires ESMA to develop draft RTS to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in Article 11 paragraphs 4, 5, 6 and 8 of MAR. Article 11(10) of MAR requires ESMA to develop draft ITS to specify the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 4, 5, 6 and 8 of MAR. The technical standards will apply to DMPs when conducting market soundings.
63. It should be noted that Article 11(11) of MAR requires ESMA to issue guidelines addressed to persons receiving market soundings. ESMA will consult on these guidelines, which will supplement the draft technical standards for DMPs, in due course.
64. For the purposes of this paper the term DMP should encompass any person listed in Article 11(1) and 11(2) of MAR, while the term “market sounding beneficiary” (“MSB”) should identify the entity on behalf or on the account of which the market sounding activity is conducted, noting that the MSB and the DMP may coincide.

4.2 General remarks

4.2.1 Link to the market sounding beneficiary (MSB)

65. 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 (all examples of MSBs).
66. Competent authorities have observed that market soundings in many cases take place at a stage at which no written agreement has been concluded between the third party DMP acting on behalf of the MSB and the MSB. Therefore, it is important to clarify what is meant by “acting on behalf of or on the account of” for the purposes of Article 11(1)(d) of MAR. ESMA’s view is that this should include situations where a third party, in order to prepare a transaction in which it is acting at the request of a MSB, sounds out potential investors with a view to determining the characteristics of the transaction. The third party is acting at the request of the MSB if it is taking part in the transaction under the MSB’s mandate, including where the instructions are oral or written and where they are issued as part of discussions which the third party has initiated with the MSB or in connection with a request for proposal by the MSB. In all cases, although ESMA recommends that the disclosing market participant keep records of the instructions or the mandate received

in order to evidence that they are acting on behalf of the MSB, the final draft TS do not include such requirement taking into account the scope of the mandate.

67. Situations where a DMP questions investors on its own initiative, without being mandated by the MSB, should not be considered as market soundings under Article 11 of MAR. These forms of questioning/enquiry are often used to assess whether the time is right to pitch an idea to an issuer. The aim is then to gauge potential investors' appetite for a potential corporate finance transaction, with the aim of promoting it to the MSB if appropriate. However, since it is not made at the request of a MSB the DMP should not be considered to be acting on behalf of the MSB.

4.2.2 Clarification on 'Block trades'[7]

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

69. Market soundings related to and conducted prior to undertaking a block trade where the DMP is acting on behalf of a secondary market offeror will be captured within the scope of Article 11 of MAR. Such soundings - i.e. "*communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors*" - will usually take place in cases where blocks are so significant that their size, in relation to the average trading volume or market capitalisation, would impede their execution within the average trading day or where the information about the block trade would be likely to have a significant effect on the price of the financial instrument.

70. It is important to note that the sounding provisions in Article 11 of MAR do not aim to create any overlap with MiFID II requirements (e.g. record keeping, recording of telephone conversations regarding the provision of investment advice or other investment services). In other words, when, in relation to possible counterparties, the professional is not trying to gauge the conditions relating to the potential size or pricing of a transaction, i.e. it is not conducting a sounding as described in Article 11(1) and Recitals 32 and 33 of MAR, but actually trying to conclude the transaction, then Article 11 of MAR will not apply.

4.2.3 Other scope issues

71. In line with what is above considered about block trades, it should be noted that market soundings prior to and in relation to a private placement are within the scope of Article 11 of MAR provided that it fulfils the criteria set out in Article 11(1) of MAR.

72. More generally, in response to comments and requests for clarification on when the market soundings regime under MAR applies, ESMA would refer to Article 2 of MAR determining scope and Article 7 of MAR which defines inside information.

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

4.2.4 Joint market soundings

73. There are circumstances in which more than one DMPs may conduct market soundings jointly. For example, an issuer and its financial advisor may both act in their capacity as DMPs for the purposes of Article 11 of MAR. However, irrespective of how in practice more than one DMPs may decide to arrange for a market sounding to be jointly conducted, every DMP will have to comply with the requirements set forth in Level 1 and present draft technical standards, as the issue of joint market soundings has not been considered within the mandate.

4.2.5 Other remarks

74. It is important to note that the market soundings regime under MAR is not intended to inhibit relations between the issuer and its investors. Indeed, Recital 32 states that soundings "are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile". On the contrary, the market soundings regime is intended to provide a clear framework within which such disclosures can legitimately be made and, provided that some requirements are complied with, DMPs can benefit from protection against unlawful disclosure of inside information. Clearly, where the requirements set out in MAR and further specified in the draft technical standards are not complied with, DMPs cannot benefit from such protection.

4.3 Arrangements prior to conducting a market sounding

75. Article 11(3) of MAR requires DMPs to make an assessment as to whether the market sounding will involve the disclosure of inside information. It also requires a written record of its conclusion to be maintained and updated and the reasons therefor. This section of the paper sets out related requirements that that DMP should meet when conducting a market sounding.

4.3.1 Determining what information to disclose

76. DMPs should determine what information intend to disclose to potential investors in the course of a sounding taking into account what is necessary and appropriate to disclose in order to gauge potential investors' interest in a possible transaction and its pricing, size and structuring. Generally, this is information related to the characteristics of the possible transaction in relation to which they intend to sound out potential investors. However, it may also include some other information not necessarily directly related to the possible transaction but providing important context to the transaction. For example general information about the issuer such as its financial standing could be useful. It should be noted though that any inside information about the financial standing of the issuer should have been made public by the issuer, unless delayed disclosure is justified. At the same time, DMPs should avoid disclosing any unnecessary additional inside information to the MSR.

77. DMPs should pre-determine the standard set of information to provide to and request from potential investors according to the provision set forth in Article 3 of the RTS, in a view of ensuring that the same level of information is communicated to each potential investor in relation to the same market sounding.

4.3.2 Characterising the information to be disclosed

78. Prior to conducting a market sounding, DMPs are required under Article 11(3) of MAR to assess whether or not the information to be provided to the MSRs is inside information under Article 7 of MAR. As part of the standard set of information to provide to and request from potential investors, the DMP should also determine, to the extent possible, the estimated time when the information will cease to be inside information.

79. It should be noted that for the purpose of market soundings it is DMP's responsibility under Article 11(3) of MAR to determine whether or not the information to be disclosed includes inside information, taking into account all the information in its possess. For this purpose, a DMP should keep a written record of the conclusion and the reasons for such conclusion.

80. Unlike the version of the technical standards proposed in the CP, the final version of the draft TS does not set forth any additional provision with reference to arrangements prior to conducting market soundings, as that is considered beyond the empowerment. For the same reason, the final version of the draft TS does not provide any provisions with reference to syndicate of DMPs. Any more elaboration on these issues may be dealt with in future guidelines.

81. As noted in the introduction, guidelines for persons receiving market soundings will follow in due course notably in relation to the factors they should take into account for their own assessment of the inside nature of the received information.

4.3.3 Determining which investors to sound

82. As any provision additional to what set forth in the Level 1 text is considered beyond the scope of the mandate, unlike the version proposed in the CP, the final version of the draft technical standards does not elaborate on the obligation for DMPs to determine, before conducting a market sounding, the type and number of investors they intend to sound out. Since ESMA considers that could be done as a good practice depending on the characteristics of the sounding, the issue may be dealt with in future guidelines.

4.4 Timing of market soundings

83. As the issues of the timing of market soundings and their planning process by the DMPS fall within the arrangements prior to conducting market soundings, unlike the version of the draft TS proposed in the CP, the final version of the draft TS does not set forth any additional provision in this respect. Any more elaboration on this may be addressed in future guidelines.

4.5 Obtaining potential investor's agreement

84. DMPs should obtain the potential investor's consent before proceeding with the market sounding.

85. As well as asking for and recording the potential investor's consent to receive a market sounding in relation to a possible transaction, DMPs should also keep a list of those potential investors that have informed them that they do not wish to be sounded in relation to either all potential transactions or particular types of potential transactions. It should be up to the potential investor to keep the DMP up to date if its wishes change.

4.6 Record keeping requirements imposed on the DMP

4.6.1 General requirements

86. The record keeping requirements stem from Article 11(3), second paragraph of Article 11(5), Article 11(6) and Article 11(8) of MAR. It should be noted however that the record keeping of the assessment to be done by the DMP on whether inside information will be disclosed does not fall with the ESMA mandate to develop technical standards.

87. As a general rule DMPs will need to keep an accessible record, in a durable medium, of their compliance with all the requirements and procedures provided for in the draft technical standards developed under Article 11 of MAR. These records are key for demonstrating that market soundings have been appropriately carried out, allowing DMPs to demonstrate the lawfulness and legitimacy of their activities, in addition to serving as an important audit trail for competent authorities in conducting investigations.

88. ESMA is of the view that there is a risk that inside information is passed in the course of a market sounding even if the DMP has categorised it as not containing inside information. Therefore, ESMA considers that DMPs keep records all market soundings, including the ones where the DMPs have concluded under Article 11(3) of MAR that no inside information will be disclosed. Indeed, ESMA is of the view that keeping such records is also in the DMP's interests, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information.

89. In order to provide certainty as to the content of the information communicated in the course of market soundings, where they are conducted by telephone and the DMP has access to recorded telephone lines, the DMP should use such lines, provided that the MSRs have given their consent to the recording. Where market soundings are conducted through channels other than by recorded telephone lines, records of the market sounding communications should be kept in written form, or in the form of audio or video recordings. The persons working for a DMP should send and receive telephone calls and electronic communications for the purposes of market soundings using only equipment provided by the DMP.

90. This proposal does not preclude market soundings from taking place via other channels. Indeed, draft Article 2(1) of the RTS states that DMPs "may communicate information to potential investors for the purposes of market soundings orally, in physical meetings, audio or video telephone calls, or in writing, by mail, fax, or electronic communications including email." The intention is not to introduce an absolute requirement that all market soundings conducted via telephone must be done on recorded lines but to maximize the accuracy of the records, through reasonable and proportionate tools, by requiring that where recorded telephone lines already exist within a DMP, they are used.

91. Taking into account data protection concerns, the use of recorded telephone lines is subject to the MSR's consent to the recording. Where the MSR does not give their consent to the recording or where the communication of information takes place during unrecorded meetings or telephone conversations (for instance because the DMP does not have access to recoded lines), the DMP should draw up written minutes or notes of such meetings or telephone conversations. The written minutes or notes should be agreed and signed by both parties. In case the parties do not find an agreement within five working days after the market sounding, the DMPs should keep two versions of the written minutes or notes, both signed by one party. Where the MSR does not provide the DMP with any signed written minutes or notes within five working days after the market sounding, the disclosing market participant should keep a copy of the version of the

minutes or notes signed by the DMP. Templates for written minutes or notes have been developed in the ITS to facilitate the keeping of records and ensure the consistency of such records.

92. Where the communication of information within the sounding takes place in writing, the DMPs should keep a copy of the correspondence. In such case it will be a two-step process, where the DMPs first request and obtain the MSR's consent prior to transmitting any information, then they communicate the information for the purposes of the market sounding.

93. ESMA is of the view that all records should be kept in an electronic format, as it is accessible and easily transmitted to the competent authority upon request.

4.6.2 Standard set of information to be provided to potential investors

94. In order to have a more consistent approach to market soundings across the industry, DMPs should establish procedures describing the manner in which market soundings are conducted. As the concept of "script" that was previously included in the draft RTS proposed in the CP was not sufficiently clear, in the final draft TS it was replaced by the obligation to adopt appropriate procedures. Such procedures should provide for a standard set of information to be provided to and requested from potential investors during each market sounding, ensuring that no unnecessary potentially sensitive information is disseminated and that all the persons contacted for the purpose of the same market sounding receive the same level of information.

95. Where DMPs consider that the market sounding will involve the disclosure of inside information, the standard set of information to be provided to and requested from potential investors should include, in the following order:

    a. a statement clarifying that the communication takes place for the purposes of a market sounding;

    b. where the market sounding is conducted by recorded telephone lines, or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

    c. a request to and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding;

    d. a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

    e. where possible, an estimation of when the information will cease to be inside information, the factors that may alter that estimation and, in any case, information about the manner in which the person receiving the market sounding will be informed of any change in such an estimation;

    f. a statement informing the person receiving the market sounding about the obligations laid down in Article 11(5), letters (b), (c) and (d) of Regulation (EU) No 596/2014;

    g. a request for consent and the consent of the person receiving the market sounding to receive inside information, as referred to in Article 11(5)(a) of Regulation (EU) No 596/2014;

h. where the consent required under point (g) is given, the information being disclosed for the purposes of the market sounding, identifying the information considered by the disclosing market participant to be inside information.

96. Where DMPs consider that the market sounding will not involve the disclosure of inside information, the standard set of information to be provided to and requested from potential investors should include, in the following order:

    a. a statement clarifying that the communication takes place for the purposes of a market sounding;

    b. where the market sounding is conducted by recorded telephone lines or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

    c. a request to and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding;

    d. a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers not to be inside information and information about the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

    e. a request for consent and the consent of the person receiving the market sounding to proceed with the market sounding;

    f. where the consent required under point (e) is given, the information being disclosed for the purposes of the market sounding.

97. Finally, ESMA is no longer proposing to allow the use of the simplified scripts mentioned in the CP whereby DMPs would not have to remind the person receiving the market sounding of its obligations and the prohibitions applying to the possession of inside information. This will make the market sounding regime clearer while ensuring legal certainty with regards to the requirements to comply with for availing themselves of the protection set out in Article 11(4).

4.6.3 Sounding lists

98. In relation to each market sounding conducted, DMPs should draw up a list containing the following information:

    - the names of all natural and legal persons to whom information has been disclosed in the course of the market sounding;

    - the date and time of each communication of information which has taken place in the course of or following the market sounding;

    - the contact details of the potential investors used for the purposes of the market sounding.

99. DMPs should also draw up a list of any potential investors that have informed them that they do not wish to receive market soundings, in relation to either all potential transactions or particular types of potential transactions. DMPs should refrain from communicating information for the purposes of market soundings to such potential investors.

4.6.4 Point of contact at the potential investors

100. Unlike the version of the TS proposed in the CP, the final version of the TS do not set forth any provision with reference to designated person or designated contact point responsible for receiving sounding approaches on behalf of the potential investor, as it is deemed to be beyond the empowerment.

4.6.5 Recorded communications

101. DMPs should keep record in an electronic format of all communications of information taking place for the purposes of the market sounding between the DMP and all MSRs, including any documents provided by the DMP to the MSRs.

4.7 The DMP's internal processes and controls

4.7.1 Setting up and reviewing the procedure governing market soundings

102. The DMP should establish and maintain arrangements, procedures and record keeping requirements on how to carry out the market soundings to ensure compliance with paragraphs 4, 5, 6 and 8 of Article 11 of MAR. The procedure should be reviewed periodically and updated if necessary. As part of the procedures DMPs should determine the standard set of information to provide to and request from potential investors during market soundings.

4.7.2 Employees of the DMP responsible for conducting the market sounding

103. Unlike the version of the draft TS proposed in CP, the final version of the TS does not set forth any provision with reference to persons working with the DMPs, as the issue is not considered to be within the scope of the empowerment. The issue may be dealt with in future guidelines.

4.8 Cleansing

104. According to Article 11(6) of MAR, when DMPs assesses that the information that was disclosed in the course of a market sounding has ceased to be inside information, the DMPs should inform the recipient accordingly, as soon as possible.

105. In order to foster clarity for potential investors as to the estimated date at which the information disclosed will cease to be inside information (e.g. because the transaction has become public), DMPs should include in the standard set of information, where possible, an estimation of when the information will cease to be inside information, the factors that may alter such estimation and the manner in which the person receiving the market sounding will be informed of any change in such an estimation.

106. ESMA is of the view that it is not appropriate to set forth an obligation to determine a fixed deadline for the cleansing. In any case, persons receiving the market sounding will always have the option to decline a market sounding if the estimated date at which the information disclosed will cease to be inside information is deemed to have negative consequences on their activity.

107. ESMA does not consider it appropriate to presume that the DMP has complied with its obligation under Article 11(6) of MAR only because the transaction the receivers were

sounded about has been made public. Depending on the characteristic of the transaction and the information disclosed, the information disclosed during the market sounding may still be, at least partially, inside information.

108. In any case, ESMA reminds that according to Article 11(7) MAR, the person receiving a market sounding remains responsible for assessing when the information received ceases to be inside information.

5 Accepted Market Practices

5.1 Background/Mandate (extract)

109. Pursuant to Article 13(7) third subparagraph of MAR, power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

110. According to Article 13(7) first subparagraph "in order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards specifying the criteria, the procedure and the requirements for establishing an accepted market practice under paragraphs 2, 3 and 4, and the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance".

111. Article 13(7) second subparagraph stipulates that "ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015".

5.2 Analysis

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

113. ESMA has been making a distinction between practices and activities carried out in financial markets. As pointed out in the First set of CESR guidance and information on the common operation of MAD (CESR/04-505b), "market practice" means the way an activity is handled and executed in the market. "Activities" would cover different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling. In the view of ESMA, activities were and are still considered to be too broad to qualify for the status of AMPs.

114. ESMA understands that 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 national competent authorities. ESMA is of the view that, when in conjunction with "market practices", the word "specific" refers to practices in a particular market that are notably fitted for the purpose of, or intended to apply to, enhancing liquidity and efficiency that relate to a financial instrument.

115. Specific trading behaviour in conformity with the rules of a trading venue (regulated market, MTF or OTF) would be sufficient in itself to promote market integrity and therefore the question of giving to such behaviour an AMP status would not arise. For instance, if the trading venue allows entering "iceberg orders", these orders should not be considered by themselves as manipulative. On the other hand, not any specific trading activity in conformity with the rules of a trading venue should be considered by themselves as licit. For instance, in particular circumstances "iceberg orders" might be deemed manipulative.

116. Article 13(1) of MAR requires that any behaviour related to an AMP must be first of all carried out for legitimate reasons. The relevant market practices may correspond to activities referred to in Article 12(1)(a) of MAR under the definition of "market

manipulation", to which the prohibition of Article 15 of MAR does not apply because this activity fulfils two conditions: a) it is performed for legitimate reasons and b) conforms to an established AMP. ESMA understands that the inapplicability of the prohibition of Article 15 of MAR benefits both the beneficiary and the person performing the AMP if the behaviour is carried out for legitimate reasons and that conforms to an AMP. ESMA also recognises that both the beneficiary and the person performing the AMP must fulfil the two conditions of Article 13(1) of MAR. The concepts of "beneficiary" and "person performing the AMP" have been clarified in the final draft RTS.

117. Article 13 (2) of MAR lists several criteria that competent authorities have to take into account when establishing an AMP. In the final draft RTS, compared to the CP, ESMA is essentially further clarifying the elements to assess and the conditions to fulfil for a market practice to be established as an AMP by ensuring an adequate level of transparency, distinguishing between general transparency requirements upon the establishment of the AMP and requirements for allowing transparency at the various stages of the performance of the AMP (prior to the beginning of its performance, during its performance and when it ceases to be performed).

118. In view of both Recital 42 and Article 13 of MAR, ESMA recognizes that only national competent authorities may establish an AMP and that 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. In addition, 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.

5.3 Approach regarding the extended scope of MAR

119. Compared to the current Directive 2003/6/EC (MAD), MAR has extended the scope of market abuse. Consequently, and in accordance with Article 2(1) of MAR, AMPs may cover any financial instrument covered by MAR, including financial instruments admitted to trading on a RM, or for which a request for admission to trading on a RM has been made, financial instruments traded, admitted to trading or for which a request for admission to trading on a MTF has been made, and, financial instruments traded on an OTF.

120. Furthermore, the fact that Article 2(3) of MAR includes within its scope transactions that take place outside a trading venue (OTC transactions) sets forth the question of its compatibility with some of the AMPs criteria of Article 13(2) and in particular with the criterion of Article 13(2)(a) of whether the market practice provides for a substantial level of transparency.

121. ESMA is of the view that it would be too restrictive to dismiss practices whose transactions may be performed outside a trading venue especially when this way of trading is put on equal footing as trading on trading venues in Articles 2(3) and 2(4) of MAR. Rather, it would not be coherent with the purpose of Article 13 of MAR to exclude transactions that take place outside a trading venue (OTC transactions); particularly in financial instruments which most of the trading is conducted OTC.

122. However, ESMA is of the opinion that since Article 13(2)(a) requires the market practice to provide for a substantial level of transparency to the market, competent authorities when conducting its assessment of a particular market practice, will have to consider carefully whether this necessary criterion is met for transactions that take place outside a trading venue (OTC trading). This assessment of the OTC trading applicability

is necessary so that the established AMP will not raise any doubt in terms of contravening some of the criteria set out in Article 13(2).

123. The feedback received from respondents and the SMSG in relation to ESMA DP on policy orientations on possible implementing measures under the Market Abuse Regulation, published on 14 November 2013 (DP) and in relation to ESMA CP on draft technical advice on possible delegated acts concerning the Market Abuse Regulation, published on 11 July 2014, agreed with ESMA's view taken in relation to OTC transactions.

124. Notably respondents to the CP generally thought that OTC transactions should not be "per se" excluded from the scope of AMP but that they require a further assessment from competent authorities to determine if they meet the criterion of a substantial transparency level. ESMA is thus making this explicit in a recital of the final TS.

5.4 Status of firms performing an AMP

125. In relation to the status of firms that might perform an AMP, ESMA considers that although MAR does not impose the status of supervised person as a general requirement to perform an AMP, it is advisable that competent authorities have the discretion to evaluate under particular criteria whether the execution of a particular AMP warrants such a condition. ESMA reiterates that this approach strikes a balance between the need to avoid creating risks for the integrity of the markets, by providing adequate safeguards for the market operation, and setting a general requirement that would limit the scope of application of Article 13 of MAR.

126. So, as a result of the consultation and in view of the mixed views expressed in the responses, ESMA maintains its position not to establish a general requirement to be a supervised person for performing any type of AMPs to be established, and instead is allowing national competent authorities to assess, on case by case basis, in the process of acceptance of a particular market practice as an AMP whether the person who will perform that AMP should be a supervised person.

127. ESMA is therefore proposing that the status of supervised person is a particular condition to perform an AMP to be considered and assessed by competent authorities so that the criterion set up in Article 13(2)(b) of MAR to ensure a high degree of safeguards to the operation of market forces and proper interplay of the forces of supply and demand is met. ESMA has also clarified, further to the requests expressed in response to the CP, the definition of "supervised person".

128. ESMA would like to clarify that where a competent authority decides that a specific AMP should be only performed by supervised persons, this condition would only be applicable to those who can perform the AMP and that there is no general restriction in relation to who can be the beneficiary of an AMP.

5.5 Process and requirements conceived to establish, maintain and terminate a market practice

129. Article 13(2) of MAR specifies the criteria that a competent authority should take into account to assess a market practice and decide to establish it as an AMP, and, Articles 13(3) and (4) of MAR describe the role of ESMA in the assessment of the intended AMP that the competent authority has to notify prior to taking effect.

130. ESMA understands that, for the purpose of the mandate and to ensure consistent harmonisation, it should offer high level principles for the procedure and requirements for

establishing an AMP so that these do not constrain unnecessarily the process. A too detailed set of provisions may result in undesirable inflexibility.

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

132. On the issue of the automatic extension of an AMP already established under the current MAD regime to financial instruments admitted to trading on a MTF or for which a request of admission to trading has been made, or traded on a MTF or an OTF(MTF or OTF financial instruments), ESMA would like to reiterate that MAR is neither providing for permanent grandfathering of existing AMPs under MAD considering the provisions of Article 13(11) of MAR nor allowing for their automatic extension to the new financial instruments covered by the extended scope of MAR. These latter instruments can without contest be the subject of an AMP. In this respect, ESMA would like to call attention again to the fact that competent authorities shall notify the AMPs that they have established before 2 July 2014 to ESMA within three months of the entry into force of the regulatory technical standards indicating the financial instruments covered by the specific AMP that may include MTF or OTF financial instruments.

6 Suspicious transaction and order reporting

6.1 Introduction

134. Article 16 of MAR relates to the prevention and detection of market abuse. Paragraph 1 of this Article requires market operators and investment firms that operate a trading venue 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 market operators and investment firms that operate a trading venue to report suspicious transactions and orders to the competent authority without delay. It should be noted that these obligations do not make any differentiation between RMs, MTFs or OTFs.

135. Article 16(2) of MAR 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.

136. Article 16(5) of MAR requires ESMA to develop draft regulatory technical standards (RTS) to determine appropriate arrangements, systems and procedures as well as notification templates to be used by persons to comply with the requirements of Article 16(1) and (2) of MAR.

137. ESMA (CESR) has previously addressed the subject of suspicious transactions reports (STRs) in the first and third sets of CESR guidance and information on the common operation of MAD, respectively CESR/04-505b and CESR/09-219. This includes advice on the method of reporting suspicious transactions and the content and reporting format for STRs. ESMA drew upon this previous work when developing the proposals in relation to suspicious transactions and orders reports (STORs). Such proposals were presented in the DP and CP. ESMA has taken on board the feedback received to such proposals in order to reach the final policy which is set out below.

6.2 The reporting obligations

6.2.1 Attempted market abuse (including reporting of orders)

138. By definition (see Article 16(1) and (2) of MAR), it will be necessary to report suspicious orders whether or not they have been executed (e.g. where an entity has refused to place an order for a client), as well as transactions that might constitute market abuse or attempted market abuse. Recital 41 of MAR, which provides an explanation for attempted abuse, refers to the situation where activity is started but not completed, for example as a result of failed technology or an instruction to trade which is not acted upon.

139. ESMA clarified in the CP that the obligation to submit STORs extends to OTC derivatives trading where the underlying instrument is traded on a RM, a MTF or an OTF. The obligation 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).

6.2.2 Clarification of trading venues in MiFID II

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

6.3 Level of suspicion required

6.3.1 Timing of STORs

141. Article 16(1) and (2) state that reports should be made “without delay”. In the draft RTS proposed in the CP, Recital 3 stated that generally and indicatively reports should be submitted within two weeks of the suspected breach (the transaction or order). This inclusion in the draft Recital was intended only to act as a guideline (note “generally and indicatively”) and not to the introduction of a formal time-frame within which reports must be submitted. However, in light of the feedback received, ESMA is amending its approach and removing this language from the draft RTS recital.

142. A STOR should be submitted to the relevant competent authority without delay once reasonable suspicion has formed in relation to a trading behaviour. However, this does not mean that reporting persons have an unlimited period of time to reach the point of reasonable suspicion; where preliminary analysis is required, this should be conducted as quickly as practicable. Sometimes a suspicious transaction or order may only be detected sometime after it has actually occurred. In such cases, ESMA would expect the reporting person to be able to justify, if requested, the delay according to the specific circumstances of the case.

143. Entities should not only notify transactions and orders which they consider suspicious at the time of the transaction, but also transactions and orders which become suspicious retrospectively in the light of subsequent events or information (such as new orders and/or transactions by the same person). The practice which consists of waiting for a sufficient number of suspicious orders and transactions to accumulate before reporting them should not be regarded as consistent with the requirement to notify without delay.

144. Where a suspicion is alerted to the competent authority via telephone, ESMA does not consider that the requirement to report under paragraph 1 or 2 of Article 16 MAR is fulfilled; the reporting persons would still be under the obligation to submit a STOR using the template in the draft RTS.

145. An entity who has already submitted a STOR can subsequently become aware, for instance through internal enquiries it has pursued, of additional information that could be relevant to supplement the already submitted STOR. Such relevant additional information should be provided to the competent authority.

6.3.2 Partial view

146. Persons captured by paragraphs 1 and 2 of Article 16 of MAR may not always be in a position to determine whether or not transactions or orders are suspicious; for instance if they know that they are just one of a number of brokers a client uses and, as a result, they are unable to see the full trading picture. Entities should generally base their decision on what they see and/or know and should avoid presumptions about other activities. However, entities have to take into consideration all information available to them, such as public disclosure of other trades. Also, there might be instances where there are good reasons or certain indications for suspecting something which the entity does not know for sure. It should be clearly stated in the STOR if this is the case.

147. In the situation where a chain of market participants are involved in a transaction, each person subject to the requirement to submit a STOR has its own obligation to report suspicions. Reporting by one entity in the chain does not absolve another entity of its duty to report its own suspicions in relation to the same or connected transactions or orders.

6.4 Detection

6.4.1 Proactive surveillance

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

6.4.2 Surveillance systems

149. In order to detect market abuse and attempted market abuse, entities will need to have in place a system which is capable of the analysis of every transaction and order, individually and comparatively, and which produces alerts for further analysis. ESMA is of the view that in the large majority of cases this will necessitate an automated surveillance system. Indeed, once an entity starts to undertake a certain level of activity, particularly if in that business there is little or no contact with the front office who might otherwise detect a potentially suspicious order or transaction, it will be very difficult to detect suspicious orders and transactions without an automated system. However, ESMA recognises the broad range of persons to whom Article 16 applies and that an automated surveillance system may not be appropriate or proportionate in every scenario. ESMA emphasises that what is important is that the surveillance system in place is an effective form of monitoring for that reporting person. An entity will be compliant with the obligation in paragraphs 1 and 2 of Article 16 if the level of monitoring is effective and appropriate for the size and nature of the business the entity conducts.

150. In considering whether an automated system is necessary and if so its level of automation, entities should take into account the number of transactions and orders that need to be monitored; the type of financial instruments traded; the frequency and volume of orders and transactions; and the size, complexity and/or nature of their business. For a business with a limited dimension, it could be appropriate to establish an automated system relatively simple, whereas, for more complex and sophisticated entities, a more elaborate and bespoke system would be necessary to monitor effectively. In any event, the surveillance system, whether automated or not, should cover the full range of trading

activities undertaken by the entity. The entity must be able to explain to their competent authority upon request how they manage the alerts generated by the adopted system and why such a level of automation is appropriate for their business. Additionally persons professionally arranging or executing transactions that are subject to Directive 2014/65/EU and engage in algorithmic trading will have to comply with the organisational requirements of such Directive and the relevant implementing regulations.

151. There should always be an element of human analysis in the detection of orders and transactions that could be market abusive. This plays an important role as the most effective form of surveillance will likely be a mix of both automated and human forms.

152. The systems that trading venues should have in place for the purpose of market abuse detection under Article 16(1) should include software capable of deferred automated reading, replaying and analysis of order book data on an ex post basis. This would be of particular relevance in an automated trading environment to analyse the activity and dynamics of a trading session, for instance by using a slow motion replaying tool.

153. This Regulation is providing the possibility for entities belonging to a group to delegate the functions of monitoring, detection and identification of suspicious orders or transactions to another entity within the group. In any case, the delegating entities will remain fully responsible for the obligations stated in Article 16 and should be the ones submitting any STOR to the competent authority. Furthermore, they should be still able to conduct an analysis that complements any alert generated by the systems of the delegated entity.

154. In addition to the possibility of delegating to entities of the same group, this Regulation allows for persons professionally arranging or executing transactions to outsource the performance of data analysis, including order and transaction data, and the generation of alerts necessary to conduct monitoring, detection and identification of suspicious orders and transactions. The outsourcing entities will remain fully responsible for discharging all of their obligations under Article 16 of Regulation (EU) No 596/2014 and should:

- retain the expertise and resources necessary for evaluating the quality of the services provided, the organisational adequacy of the providers, for supervising the outsourced services effectively and for managing the risks associated with the outsourcing on an ongoing basis;
- have direct access to the relevant information of the outsourced data analysis and generation of alerts;
- define in a written agreement their rights and obligations and those of the providers. The outsourcing agreement should allow the persons professionally arranging or executing transactions to terminate it.

6.4.3 Internal procedures to facilitate detection and reporting

155. Entities should adopt systems and procedures to document, recall and review the analysis performed on STORs which have been submitted, as well as those suspicious orders and transactions which were analysed, but in relation to which it was concluded that the grounds for suspicion were not reasonable. This will assist persons professionally executing or arranging transactions and market operators or investment firms operating a trading venue in exercising their judgement when considering subsequent suspicious orders or transactions. Access to the analysis performed on suspicious orders and transactions which did not ultimately lead to a STOR being submitted should also assist those persons in refining their surveillance systems and in

detecting patterns of repeated behaviour, the aggregate of which could result in a reasonable suspicion of insider dealing, market manipulation or attempted insider dealing or market manipulation. The retention of STORs which have been submitted and of the analysis performed on suspicious orders and transactions which did not result in the submission of a STOR therefore forms an important part of the procedures to detect market abuse. Further, such records would assist in evidencing compliance with the requirements laid down in MAR and the RTS. Entities are not required to have procedures to document every alert – only those that were analysed and examined as being potentially suspicious of being sufficiently abusive to warrant a notification, even if later they were discarded as such.

156. Under MAR the reporting obligation will encompass a wider range of instruments and behaviours compared the previous regime and the judgments to be exercised by entities as to whether a reasonable suspicion exists will play an even greater role. The possibility for competent authorities' to access to records of such judgments has therefore become more important too and should facilitate the performance of their supervisory, investigatory and enforcement functions under MAR.

6.4.4 Training

157. Effective monitoring involves much more than just a surveillance system and must include comprehensive training genuinely dedicated to monitoring, detecting and reporting suspicions of market abuse or attempted market abuse. Training plays a key role in staff's ability to detect suspicious behaviour.

158. Training is essential and plays an important role in increasing the quality of STORs, but it must be underpinned by appropriate monitoring and detection systems. Without this, it is much more difficult for training to produce the desired outcome. The experience of some competent authorities is that some of the very best STORs come from the front office staff.

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

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

161. Due to the variety of persons subject to the obligation to submit a STOR and the wide range of activities and business structures, it is not deemed to be appropriate to provide granular details of training programme's content. Effective training will need to be tailored to the entity's business. It should have regard to, but not be limited to, the firm's size, structure, systems and activities.

6.5 Tipping off

162. Reporting persons should not tip-off the person in respect of which the STOR was or will be submitted and anyone who is not required to know about the submission of a STOR. This is crucial for not endangering the investigation the competent may initiate on the basis of the STOR received.

6.6 Content of STORs and Template

163. According to Article 16(5)(b) of MAR, ESMA is asked to develop draft RTS on notification templates to be used by persons subject to the reporting obligation.

164. A STOR should provide clearly-presented and accurate information, sufficient to enable a competent authority to promptly assess the validity of the suspicion and to initiate a follow-up investigation where appropriate. As all or most well-founded STORs will result in such follow-up investigations, the priority is to highlight and report the key points of a suspicion without delay.

165. Clarity in the narrative section of the STOR form describing the suspected breach or attempted breach is paramount, in particular, where the STORs relate to the extended scope of MAR - e.g. reports of attempted market abuse or transactions and orders where complex derivatives are involved. The STOR form will allow for the insertion of free-text, so that entities can provide as much relevant information as possible.

166. Entities should complete as many fields in the report as possible, insofar as they have, or can obtain at reasonable effort, that information. Clearly, not every field will be relevant for every submission but each field that is relevant should be completed. Personal data are required in order for competent authorities to be able to make follow-up enquiries or investigations. Where an investigation commences, time is of the essence.

167. Some of the information required in filling in the STOR is personal data. The necessity and the proportionality for such personal data to be included in the STOR lies in the fact that they will allow the competent authority to precisely identify the person in respect of which the STOR was submitted and to conduct preliminary investigations without the need for addressing specific request for information to the person submitting the STOR, which could be time consuming and potentially endanger the investigation.

168. STORs should be structured in accordance with the template presented in the Annex to the draft RTS, and should be transmitted in electronic format, and subject to adequate levels of security.

6.7 Record-keeping

169. All entities should document any changes or updates to the arrangements and procedures aimed at identifying and preventing market abuse, and ensure that the information is maintained for a period of five years.

170. As part of the arrangements and procedures aimed at identifying and preventing market abuse all entities should keep record of every STOR submitted to the competent authority, including the information documenting the elements that have been considered in the preparation and notification of the STOR. All entities should also keep for five years the records of details of, and the analysis carried out with regard to, suspicious orders and transactions which have been examined but not reported to the competent authority due to the conclusion that the suspicion was not reasonable, together with a summary of

the reasons for not submitting a STOR. Five years is the time period specified in MAR for keeping different records so the obligation referred to STORs should be aligned.

171. Entities submitting STORs as well as competent authorities receiving them should ensure that records of reports are kept confidential.

7 Technical means for public disclosure of inside information and delays

7.1 Introduction

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

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

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

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

- An ex-post notification to the competent authority in the “general” cases of delay (Article 17(4)), covering both issuers of financial instruments and EAMPs, so called “general delays”.
- A notification for prior consent by the competent authority for delays to preserve the stability of the financial system (Article 17(5)). This ex-ante notification could

be used only by issuers of financial instruments which are credit institutions or financial institutions.

175. Article 17(10) of MAR mandates ESMA to develop implementing technical standards specifying:

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

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

176. ESMA would like to recall that Article 17 covers issuers of financial instruments as defined under Article 3(21) of MAR, and mentioned in the 3rd subparagraph of paragraph in Article 17(1) of MAR. Some respondents to the CP argued that "commodity derivatives", although they are financial instruments under MiFID II, do not have issuers and therefore should not be in scope of MAR Article 17. The meaning of "issuer of financial instruments" in relation to derivative contracts may be further explained in the future, but at this stage this specific issue is outside of ESMA's mandate for the ITS related to Article 17 of MAR. Also to note the concept of inside information in relation to commodity derivatives is defined in point (b) of Article 7(1) of MAR, and Article 7(5) required ESMA to issue Guidelines to establish a non-exhaustive indicative list of information, which is reasonably expected or is required to be disclosed in relation to commodity derivatives.

7.2 Means for appropriate disclosure of inside information

177. Article 17(1) requires issuers of a financial instrument to publicly disclose as soon as possible inside information in a manner which enables fast access and complete, correct and timely assessment of the information by the public. It should be noted that these criteria are the ones currently set out in Directive 2003/124/EC implementing MAD. Where applicable, information should be made available in the officially appointed mechanism (OAM) under the Transparency directive 2004/109/EC (TD). The disclosed inside information should also be posted on the issuer's website and maintained there for a minimum of five years.

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

179. ESMA understands that the reference in Article 17(1) to the OAM (the national mechanism for centrally storing Regulated Information under the TD) only applies to issuers who have requested or approved admission of their financial instruments to trading on a Regulated Market (RM), the only type of trading venue in scope for the TD. Consequently, issuers of financial instruments only traded on MTFs or OTFs are not required by MAR to use the OAM, although this does not prevent such issuers to also use the OAM as a central storage mechanism if obliged to do so by national laws or on a voluntary basis.

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

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

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

7.2.1 Channels for appropriate public disclosure

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

184. 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 2004/109/EC (TD).

185. 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 2007/14/EC. In short, information should be disclosed by the issuer in a non-discriminatory manner, through the use of a media allowing dissemination throughout the EU and whose operators should not necessarily be located in the territory of the home Member State (MS) of the issuer. The implementing directive further specified minimum standards for the dissemination of regulated information that relate to:

- Dissemination to as wide as possible public and almost simultaneously across Member States (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…).

186. It should be noted that the TD itself only covers securities admitted to trading on a RM, whereas MAR's scope covers a larger set of financial instruments (as defined in Article 3(1)), including those only traded on MTFs and OTFs. In order to specify the means for appropriate disclosure by issuers of MTF/OTF instruments and to reach a level playing field across different types of trading venue, ESMA considers that for the purpose of MAR Article 17 compatible requirements and standards to those set out in the TD should apply to all types of markets in scope, i.e. RM/MTF/OTF. This would allow capitalising on existing and reliable channels, already known by the market and the various actors in the dissemination of the information, and would avoid important resources being allocated to developing new and particular mechanisms for disclosure by MTF/OTF issuers.

187. In addition, this 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 already knows the channels through which inside information has to be disclosed.

188. In this context, and as already explained in the CP, ESMA considers that, in relation to the obligation set up in the first sentence of the second subparagraph of Article 17(1), a disclosure of the information made directly by the issuer via other ways of publication only, such as issuer's website, and mobile or web based social media (e.g. blogs, social network site), with no communication to the media would not meet the requirements of proper dissemination of inside information, and thus of appropriate public disclosure. The mere availability of information is not sufficient, notably for ensuring fast access to the inside information. Accordingly, dissemination should involve the active communication of information from the issuers to the media, with a view to reaching investors.

189. It should be noted that the MAR TS require a communication of the information to the media, and prescribe specific criteria for this transmission, in line with the TD approach of "effective" dissemination included in Article 21 of the TD, and further specified in Article 12 of its implementing directive. In this context, the dissemination of the information only through a subscription system (such as the one used for web feed), where the public has to actively subscribe to a website to receive the information, should not be considered sufficient for the purpose of Article 17(1).

190. ESMA is of the opinion that the publication of inside information on the competent authority's internet site could be considered as a means to ensure appropriate disclosure of inside information under Article 17 of MAR only where the publication ensures that the requirements of proper dissemination and of appropriate public disclosure described in these TS are met, i.e. where it is combined with dissemination, including communication to the media.

191. There was vast support by the respondents to the CP on this approach for the dissemination of inside information by issuers in scope. Nevertheless, some respondents to both the DP and CP asked for lighter requirements to be applicable for issuers of financial instruments that are traded only on a MTF/OTF, and the same respondents also criticised an alleged "transposition" or "extension" of the TD requirements to MTF and OTF.

192. ESMA would like to respond to these comments with the following clarifications. First, lighter requirements for issuers of financial instrument traded only on MTF/OTF are not included in MAR Level 1, and thus cannot be introduced in the TS. Second, ESMA is not proposing to apply the full TD regime of access to regulated information to MTF/OTF, but just to offer the possibility to use a disclosure mechanism of inside information that is not different from the one already used in the context of RM. As already said, the use of the OAM as a storage mechanism would not be required by MAR for issuers whose financial instruments are traded only on a MTF/OTF, although this does not prevent such issuers to use the OAM as a central storage mechanism if obliged to do so by national laws or on a voluntary basis. Also inside information relating only to an emission allowance product is not required by MAR to be maintained in the OAM.

193. In light of all the comments received and with the goal of increasing clarity and avoiding misunderstanding, the TS have been changed in a way to no longer directly refer to the articles of the TD, but rather to explicitly list the required characteristics of the means of disclosure of inside information, characteristics which are in line with the ones foreseen under the TD regime. These amendments do not modify the substance of the requirements, which is the same of the one presented in the CP. The only difference with the CP is the deletion of the Article on the language to be used, because considered out of the empowerment ESMA has received under Article 17(10) of MAR.

7.2.2 Channels for appropriate public disclosure for EAMPs

194. In the context of appropriate means of inside information disclosure to be used by EAMP (Article 17(2)), ESMA proposed in the CP that the same approach as the one defined for issuers of financial instruments (Article 17(1)) should be followed. According to the approach of the CP, requirements and standards equivalent to the ones applicable under Article 17(1) should apply also under 17(2).

195. In relation to the proposal of having equivalent requirements for appropriate disclosure for the purpose of both Article 17(1) and (2), it should also be noted that emission allowances under MiFID II are included in the definition of financial instruments[8]. Having considered the feedback received, ESMA is broadly maintaining the same approach as the one presented in the CP (excluding the Article on the language to be used, that has been deleted because considered out of the empowerment), but more details are now provided on how the MAR and REMIT interact in this field, and a Recital is added in the TS to clarify how "duplication" of disclosure of inside information is avoidable.

196. In this respect, the main issue raised by a number of respondents to the CP (and previously, to the DP), is the clarification on the interaction between the REMIT regime (Regulation No. 1227/2011) and the MAR regime. Some of them suggested that disclosure according to the REMIT regime by an EAMP should discharge the same of any obligation under MAR, when this EAMP is subject to disclosure requirements for the same information under both regimes.

197. Regarding this point, it is important to clarify that the characteristics of inside information included in MAR are not exactly the same as the ones included in REMIT. According to Article 7(1)(c) of MAR, information can only be considered inside information, in particular (among other conditions), "*if it were made public, would be likely to have a significant effect on the prices*" of 'emission allowances or auctioned products based thereon' while REMIT defines that the relevant effect has to be assessed on "the prices of wholesale energy products".

198. It is therefore clear from the definitions included in MAR and REMIT that not all REMIT inside information fulfils the criteria to be classified as MAR inside information, and also that not all MAR inside information related to the emission allowances or auctioned products based thereon is inside information according to REMIT.

199. Inside information published under REMIT usually is, among other, supply-demand information required by internal energy market rules, or information on capacity and use of energy infrastructures, typically expected and non-expected outages (such as non-availability of a power plant). Most of the time it is an availability-type of information, normally updated frequently, related to networks, generation and consumption facilities. It should also be considered that the volume of inside information published under REMIT is relatively large, also because the information is updated frequently. In its Guidance on the application of REMIT[9], ACER has defined the content of the information to be published according to Article 4(1) of REMIT ("*Obligation to publish inside information*").

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[8] See Annex I, Section C, point (11) of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II): http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN

[9] See section 7.2.2 of the ACER Guidance on REMIT: http://www.acer.europa.eu/remit/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf

200. Another difference between the two Regulations results from the fact that there are market participants in the wholesale energy markets (covered by REMIT) that are not market participants in the emission allowance markets and vice versa (e.g. industrial combustion activities, such as steel making, are covered by MAR but not by REMIT).

201. Therefore, Recital 51 of MAR, which states: "Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011, the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content", should be interpreted in this context.

202. The wording of this Recital clearly implies that it is in only applicable to situations where market participants already comply with equivalent inside information disclosure requirements under REMIT. In practice, the scope of this Recital is limited to the situations where the information if it were made public would simultaneously be likely to have a significant effect on the prices of emission allowances (or auctioned products based thereon), on the prices of wholesale energy products, and whenever the entity simultaneously fulfils the criteria to be considered as an EAMP under MAR and a market participant under REMIT.

203. Nevertheless, this requirement to avoid duplication does not necessarily mean the need to create a differentiated regime under MAR for emission allowances (or auctioned products based thereon) that would undermine the level playing field between EAMPs subject to REMIT and MAR, and EAMPs subject to MAR but not to REMIT. This is exactly one of the limits of the proposal of the respondents which consisted in considering that MAR obligations on public disclosure are discharged if the same information is disclosed under REMIT obligations.

204. The Recital rather highlights a need to create a solution where: (i) the content prepared by the market participants for the inside information publication does not need to be different (no differences in the content of the information provided to the market) to be compliant with both regimes (the Recital states "…*not lead to the duplication of mandatory disclosures with substantially the same content*"), and (ii) there is an alignment towards the higher standard in the way information is published (no duplication of the publication channels, i.e. a single disclosure).

205. In order to better understand the similarities and differences between MAR and REMIT in this field, the following is a summary of the requirements under REMIT for the channels of public disclosure of inside information. This comparative analysis does not affect in any way the obligations under REMIT, and has the only aim of identifying in which circumstances the requirements under the two regimes can coincide.

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

a. if platforms for the disclosure of inside information exist, for instance operated by Transmission System Operators (e.g. RTE-UFE transparency initiative) or energy exchanges (e.g. Nord Pool Spot, EEX Transparency platform, etc.), or if transparency platforms exist in accordance with Regulations (EC) No 714/2009[10],

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

(EC) No 715/2009[11], including guidelines and network codes adopted pursuant to those Regulations, including Commission Regulation (EC) No 543/2013[12], market participants should use such platforms, if not otherwise specified in relevant rules and regulations, or by the competent National Regulatory Authority (NRA), i.e. an electricity and/or natural gas national authority.

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

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

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

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

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

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

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

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

208. In respect to the first approach, Article 4(4) of REMIT Level 1 considers that disclosure through such platforms constitutes a "*simultaneous, complete and effective public disclosure*". Those platforms meeting the requirements foreseen under MAR, and further specified in the technical standards on the technical means for appropriate public disclosure, would be considered as appropriate dissemination channels for the information relevant under MAR. In these cases a single disclosure of inside information would satisfy both regimes, REMIT and MAR, at the same time.

209. A crucial characteristic that a channel of disclosure under MAR must have is the ability to actively distribute the information with the goal to reach the public at large. As already said, the mere availability of information on a website with no dissemination is not sufficient for ensuring effective disclosure of the inside information. Those platforms used under REMIT that are able to disseminate information and communicate it to the media according to MAR criteria, would be considered appropriate also under the MAR regime. It should be noted that the concept of dissemination to "*as wide a public as possible,*

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

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

including the media" is already mentioned in the ACER Guidance, but only under the second approach.

210. Regarding the second approach, it should be clarified that the use of market participants' own website only cannot be considered proper public disclosure under MAR. When this approach is used by an EAMP for inside information in scope both under REMIT and MAR, it would have to be complemented with the use of a channel of appropriate disclosure of inside information which meets the characteristics required under MAR. On the other hand, if an EAMP disseminates the information in the way requested by the MAR technical standards, fulfilling the obligation of communication of the information to the media (as well as the other requirements), it would satisfy the two regimes simultaneously.

211. The rationale behind this assessment takes into account two factors: firstly, MAR requirements on the disclosure of relevant inside information for the MAR purpose need to be fulfilled by all EAMPs, even when they are subject to REMIT; secondly, in order to avoid duplication, EAMPs should be allowed to use a single channel for disclosure of inside information that is considered as appropriate under both regimes. That is why, where possible, for inside information that is in scope under both MAR and REMIT, EAMPs are encouraged to use a channel of disclosure satisfying both frameworks at the same time. It should be noted that MAR technical standards (in line with the TD), as already said, require a communication of the information to the media, and prescribe specific criteria for this transmission.

212. ACER publishes and maintains on its website a list of "inside information platforms" for the purpose of REMIT Article 4(1), containing both platforms for the wholesale electricity markets and the wholesale gas markets13, all providing information free of charge. At the same time, the European Network of Transmission System Operators for Electricity (ENTSO-E) has inaugurated on 5 January 2015 the ENTSO-E Transparency Platform, a new Central Information Transparency Platform providing a variety of information free of charge.

213. For the purpose of publicly disclosing inside information in the scope of MAR, as long as these platforms would encompass, by the time MAR is applicable, a dissemination mechanism consistent with the obligations defined in these MAR TS (including communication to the media), as well as comply with the other requirements, a single public disclosure for information covered by both regimes through one of these platforms would suffice.

214. In terms of channels of disclosure the two regimes, although currently not fully equivalent, are compatible, meaning that they follow the same logic and most of the criteria are already the same. Indeed, public disclosure requirements under MAR and REMIT have the same transparency goal. Against this background, duplication of public disclosure is avoidable as no conflicting requirements are in place, and therefore there could be a single channel of disclosure satisfying both REMIT and MAR for those information covered by the two regulations. As the transmission of the inside information to the media is not required under the Level 1 of REMIT (although there is reference to media in the second approach within ACER non-binding Guidance), this dissemination would be required only for the information in scope of MAR. Accordingly, in the TS a Recital has been included to explain how duplication is avoidable.

[13] https://www.acer-remit.eu/portal/list-inside-platforms

7.2.3 Posting on the issuer's website

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

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

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

217. Article 17(9) does not explicitly refer to a minimum of five years maintenance of the inside information posted (as Article 17(1) imposes for the websites of the issuers), and the draft ITS proposed in the CP were originally requiring the maintenance of inside information on the SME growth market operator's website for at least five years. This obligation has been deleted in the new version of the ITS because considered out of ESMA's empowerment.

218. Article 17(9) refers to the SME growth market operator's website only, thus websites which are not the ones of the trading venues (e.g. industry association's website) cannot be used to satisfy this requirement.

219. As previously mentioned, the posting of an inside information on a website only, with no communication of the information to the media, is not a sufficient means for ensuring appropriate public disclosure. Therefore, the posting of inside information on the website of the issuer or the SME growth market operator, where relevant, should occur without delay, once the inside information has been appropriately disclosed. This would limit the risk of unintentional early disclosure through the website before the appropriate public disclosure through the media has taken place, as it could be the case with an approach aiming to simultaneously posting on the website and proceeding with the appropriate disclosure.

220. The CP was presenting three main characteristics that the website should have in order to consider this obligation met by the issuer. There were no objections made by respondents of the CP on this section of the TS, apart from the following one. A respondent considered that the current standard practice of an "investor relations" section including all regulatory announcements is sufficient to ensure that inside information is easily located and distinct from marketing materials, and that the requirement to have inside information disclosed separately on an issuer's website dedicated section (ex-Article 4(1)(b) of the TS of the CP) will result in unnecessary duplication and impose an administrative burden on issuers, without improving access for investors.

221. ESMA appreciates this consideration and is slightly amending the three characteristics originally proposed, in a way that there is no requirement for the section of the website, to include "only" inside information, although this has to be clearly and easily identifiable.

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

a. the access to the inside information posted on the website is non-discriminatory and free of charge;

b. inside information should be easy to find: it should be located in an easily identifiable section of the website;

c. disclosed inside information should clearly indicates date and time of the disclosure.

223. ESMA would like to remind that when there is a change in a published inside information, and the change itself constitutes a new inside information, this new information is covered by the inside information's provisions within MAR, and the full process of public disclosure would have to take place (again).

7.3 Technical means for delaying disclosure of inside information

7.3.1 Article 17(4): "General" delay

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

225. The notification to the competent authority of the information about the delay and, where relevant, of the explanation, should take place immediately after the delayed inside information has been publicly disclosed. In order for the authority to be quickly informed to conduct any monitoring activity it may wish to do, the notification should be provided by the issuer by the most expeditious means. ESMA also considers that the act of notifying should not be delayed intentionally or negligently, and should be integrated in the issuer's general process for disclosing inside information.

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

227. This general proposal was widely supported by the majority of the respondents to the CP and to the DP.

228. Consequently, ESMA suggests that both the information about the delay and the explanation are provided in written form, using electronic means of transmission accepted by the relevant competent authority, to dedicated contact point(s) within the competent authority. In particular, competent authorities should make clear how the notification process operates on their website and should specify on the same the electronic means to be used by the issuers/EAMPs (see new Article 4(2) of the TS).

Technical means for the notification

229. For the sake of promoting a harmonised approach to the notification to the competent authorities and to ensure consistency in the information notified by the issuers across Europe, ESMA proposes to specify which information the technical means for notification should be able to include in the notification (see new Article 4(3) of the TS).

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

231. With respect to the information about the delay, i.e. the issuer informing that the disclosure of inside information that has just been publicly disclosed was delayed, the CP included a list of items to be included in the notification, which received some suggestions for improvements by the respondents. ESMA is therefore slightly amending one item of the proposal in order to accommodate for some of the comments received while, at the same time, maintaining the effectiveness of the TS. In particular, the CP included in the list of information requested "*the identity of the persons having taken part in the decision making process for delaying*". Considering the responses received by market participants, and also the function of the insider list in this context, the TS now specify that, under this item, the identity of "*all persons with responsibility for the decision of delaying the public disclosure of inside information*" should be included (see new Article 4(3)(f) of the TS).

232. Although ESMA received some comments asking to modify the item "*date and time of the decision to delay the disclosure of inside information*", this item remains the same as the one presented in the CP, and it is now included in new Article 4(3)(e). The date and time of the decision of delaying the disclosure of inside information is a critical information to be used in potential investigations regarding the concerned inside information. ESMA therefore does not agree with the proposal of having a flexible approach to this item, as proposed by some respondents, considering that even when the decision is taken during a meeting or during multiple discussions, there is always a moment in time in which the decision is officially taken by the person(s) with the power and responsibilities to do so.

233. Consequently, the list of information ESMA proposes to include in the notification of delay is the following, and remains broadly unchanged from the one of the CP:

a. the identity of the issuer or emission allowance market participant: full legal name;

b. the identity of the person within the issuer making the notification name, surname(s), position within the issuer or emission allowance market participant;

c. the contact details of the person making the notification: professional email address and phone number;

d. identification of the disclosed inside information that was subject to delayed disclosure: title of the disclosure statement; the reference number, when the dissemination system used assigns one; date and time of the public disclosure of the inside information;

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

f. the identity of all persons with responsibilities for the decision of delaying the public disclosure.

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

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

236. 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 explanatory notification to avoid any confusion.

237. In addition, the issuer is requested to provide explanation as to how the three conditions of Article 17(5) were met. The CP specified how the three conditions - namely (i) legitimate interest at stake; (ii) omission likely not to mislead the public; and (iii) confidentiality process within the issuer - should be considered in the explanation of the delay (see ex-Article 5(3) of the TS in the CP). In the new version of the TS this paragraph on the “content” of the written notification has been deleted because it was considered a repetition of the obligation already stated in MAR Article 17(4). Nevertheless, the new ITS foresee that the technical means for delaying the disclosure of inside information should ensure the maintenance of a number of key information, including the initial fulfilment of the conditions for delaying the disclosure and any change of this fulfilment during the delay period (see new Article 4(1) of the new TS, described in the next section of this Report).

238. Finally, as already said in the CP, it should be noted that ESMA has decided not to impose common templates for notification of delays.

Maintenance of information regarding the delay of disclosure

239. 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 issuers are therefore expected to have in place a minimum level of organisation and a process to conduct a prior assessment whether an information is an inside information, whether its disclosure needs to be delayed and for how long. There should be person(s) appointed within the issuer responsible for taking such decision. This person(s) should be clearly identified within the issuer and should have the necessary decision-making power (e.g. a managing board member or a senior executive director), considering the major importance of the decision. ESMA does not consider appropriate to specify which positions such person(s) should have within the issuer, considering the variety of organisational structures issuers may have, but the issuer should ensure that a person responsible for the delay is always clearly identified. In addition, before taking a decision allowing the delay of publication of inside information, this person(s) should conduct an assessment on whether the three conditions set forth in Article 17(4) for delaying are fulfilled[14].

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

240. Considering the requirement for the issuer to be able to provide a written explanation concerning the delay, the above mentioned decisions and information should be maintained in a durable medium together with, where needed, the relevant reasons supporting such decisions. Because of the reorganisation of the structure of the TS, it has been included a new provisions related to the maintenance of the key information of the process of delaying in new Article 4(1), while the ex-Article 7 dedicated only to "Record keeping" has been deleted.

241. 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 then publicly disclosed in an appropriate manner. The decision to publish will also trigger the duty to notify the competent authority about the delay and, where relevant, to provide the explanation in writing.

242. 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, the issuer must publicly disclose this inside information (Article 17(7)). Again, the decision to disclose taken in this context would trigger the duties to notify the competent authority about the delay and where relevant to provide the explanation in writing. Therefore, maintaining evidence of the outcome of the on-going monitoring of the conditions of the delays is needed, as requested by new Article 4(1)(c).

243. Article 17(7) does not mention that the leak of the rumour has to come from the sphere of the issuer in order to trigger the duty to disclose the inside information as soon as possible. If this would be the case, in order to decide whether the disclosure is required or not, an investigation (potentially time-consuming) has to take place to detect the source of leak, whereas Article 17(7) requires disclosure to the public "as soon as possible".

244. Some respondents to the CP asked ESMA to provide more details on rumour, and in particular on when a rumour should be considered "*sufficiently accurate*". ESMA cannot provide more details and explanation on what is meant by the MAR Level 1 in relation to rumour. It should also be reminded that ESMA will issue in the future some Guidelines to establish "*a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in Article 17(4)(a), and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in Article 17(4)(b)*", and in the context of these Guidelines ESMA may be able to provide additional information on what should be considered a rumour under Article 17(7) of MAR.

245. In relation to the "*on-going monitoring and records of changes in condition for delays*" (ex-Article 7(1)(b) in the CP), ESMA would like to clarify that, as expressed by some respondents, the requirement is to modify the records of how the required conditions for delay are met only after a change in these conditions, meaning that the record will include only relevant updates. This was explained in the CP and in the draft TS, with both stating that "*a new record is needed when there has been a change in the original conditions*". The drafting of this section has been amended in the new TS, which do not include anymore a dedicated article to "Record keeping", as explained in the next paragraphs.

246. Article 7(1)(a)(i) of the draft TS of the CP required the record keeping of "*the date when the inside information came into existence*", and ESMA received some suggestions to redraft this obligation by the respondents. It is important to highlight that the "*starting date*" of an inside information is a crucial piece of information, and it is necessary in the context of delay of publication of inside information, but also (indirectly) in the context of

the production of insider list. ESMA is aware that there are some circumstances where the inside information is not generated within the issuer because, for example, the source of it is a public body, such us a prudential supervisor or a patent office. The TS is amended to accommodate for this type of situations (see new Article 4(1)(a), point (i)).

247. Against this background, and taking into account the support received from the majority of the respondents to the CP and the suggestions provided by the same, ESMA has decided to delete the Article dedicated only to record-keeping (ex-Article 7), and to include in new Article 4 on "*Notification of delayed disclosure of inside information and written explanation*" the information that the technical means for delaying the public disclosure of inside information should be able to maintain in a durable medium. This information is:

a. the dates and times when (i) the inside information first existed within the issuer or emission allowance market participant; (ii) the decision to delay inside information was made; and (iii) the issuer or the EAMP is likely to publish the inside information;

b. the identity of the persons within the issuer or emission allowance market participant responsible for: (i) deciding about the start of the delay and its likely end; (ii) ensuring the on-going monitoring of the conditions for the delay; (iii) deciding about the public disclosure of the inside information; (iv) providing the requested information about the delay and the written explanation to the competent authority;

c. evidence of the initial fulfilment of the conditions referred to in Article 17(4) of Regulation (EU) No 596/2014, and of any change of this fulfilment during the delay period, including: (i) the information barriers which have been put in place internally to prevent access to inside information by persons other than those who require it for the normal exercise of their employment, profession or duties within the issuer or emission allowance market participant, and with regard to third parties; (ii) the arrangements put in place in cases where the confidentiality is no longer ensured.

248. In relation to the ability of the issuer or the EAMP to maintain the confidentiality of the inside information during the delay, ESMA considers that the information barriers in place within the issuer or the EAMP should be effective, though appropriate to the circumstances of the concerned issuer/EAMP as well as to 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 information barriers used should be.

249. Similarly to the comments received to the "*format and content of the notification*", some respondents asked to change the records related to how confidentiality is ensured, foreseen in Article 7(1)(d) of the TS in the CP, in a way that a general description of the process is considered enough. ESMA is clarifying the TS along the same lines explained in the previous section, meaning that for the maintenance of the information regarding the ability to maintain the confidentiality of the information, a general description of the standard procedure that the issuer has in place to ensure the confidentiality of the inside information is enough, unless a specific procedure (meaning different from the standard one) has been used for the concerned inside information. In this latter case, the maintenance of the information relating to the actual procedure used by the issuer is required (see new Article 4(1)(c)).

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

7.3.2 Article 17(5): Delay to preserve the stability of the financial system

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

252. For these specific cases of delay, the concerned issuers should seek prior consent from their competent authority, which should consult with other relevant authorities as indicated in Article 17(5) of MAR before deciding on the delay. Consequently, the issuer has to notify the competent authority of its intention to delay disclosure. In the relatively short period during which the competent authority decision is pending, the issuer is clearly not required to publicly disclose the inside information until the competent authority responds with its decision.

253. Article 17(6), which includes the obligation for the issuer to notify the competent authority of the intention to delay the disclosure of the inside information as of 17(5), clarifies that where the competent authority does not consent to the delay of public disclosure, the issuer should disclose the inside information immediately.

254. Unlike the ex-post notification of "general delays", in the case of delays to preserve the stability of the financial system, the relevant inside information has not yet been disclosed to the public as the notification of delays aims at seeking the prior consent of the competent. So, particular care should be given to the handling of that inside information in the communication process between the issuer and the competent authority. The information contained in the notification is particularly sensitive as not only will the notification include the evidence of the fulfilment of the conditions for delaying, but the inside information itself will be included. In addition, the consultation between relevant authorities will require the content of the notification of intent to be exchanged (fully or partially) among them. Consequently, ESMA considers that secured channels for communicating the notification of intent and its content should be used, such as encrypted emails or similar channels of communication. However, it should be noted that it is possible that a credit/financial institution decides to transmit the notification not through the use of an electronic means. As long as the notification is in writing and transmitted securely, the use of "secure electronic means" is not required (although it is clearly allowed). The TS have been amended to reflect this possibility (see new Article 5(1)).

255. ESMA considers that the issuer's notification of intent should be made in writing to ensure the audit trail of the evidence (notably with the view for the competent authority to proceed with the (at least) weekly assessment of the conditions for the delay, as required by Article 17(6)). For similar reasons, once the written notification of intent has been received, the competent authority's decision of consent or no consent should be provided in writing to the concerned issuer. However, this is without precluding oral discussions between the issuer and the competent authority, and the possibility of oral pre-warnings. Time is of essence both for the issuer and the competent authority in order to quickly initiate the process of assessment and of consultation between relevant authorities, to reach a decision on whether the delay can be consented and to decide whether the public and the market should be immediately informed. ESMA considers that the decision

taken may also be communicated orally by the competent authority to the issuer, as long as a written communication, provided by a secure channel, confirms as soon as possible the content of the oral communication, i.e. the decision of the competent authority. This is particularly relevant in case the competent authority does not consent to the delay; the issuer should be in position to rely on the oral pre-warning to proceed immediately with the public disclosure of the relevant inside information.

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

257. For the sake of preserving financial stability or ultimately ensuring proper information of the market, the issuer and the competent authority should inform each other of any new element, development or information that may affect the 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 17(7). This approach was widely supported by the majority of the respondents to the CP and the DP, and it is maintained in new Article 5(3).

258. Under MAR Article 17(6), competent authorities have an obligation to evaluate at least on a weekly basis if the conditions for delay under 17(5) are met. The reference to a week period is included in MAR Level 1 (Article 17(6)) and thus cannot be amended in MAR Level 2, as suggested by some respondents. However, it should be noted that competent authorities are free to adopt more frequent evaluations if considered necessary, considering they have to evaluate the conditions "at least" on a weekly basis.

8 Format of the insider list and format for updating

8.1 Background/Mandate

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

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

261. Article 18(3) and (4) of the MAR specifies a minimum level of content for the insider list:

a. the identity of any person having access to insider information;

b. the reason for being included in the list;

c. the date and time at which such person obtained access to inside information;

d. the date and time at which such person ceased to have access to inside information.

e. The date at which the insider list was created and updated.

262. Article 18(4) of the MAR also states the circumstances in which the insider list should be updated (change in the reasons for an insider to be included in the insider list; a new person has access to inside information and an insider ceases to have access to inside information).

263. Recital 56 of the MAR notes that data fields required for insider lists should be uniform in order to reduce unnecessary administrative burdens on issuers.

8.2 General approach

264. Insider lists are an important tool for competent authorities when investigating possible market abuse. Insider lists may also serve issuers, EAMPs and auction entities to control the flow of inside information and thereby help manage their confidentiality duties.

265. National differences have existed with regard to the data included in insider lists, which have imposed unnecessary administrative burdens on issuers active in multiple jurisdictions. Data fields required for insider lists should therefore be uniform in order to minimise the associated costs.

8.3 Format and template for the insider list

8.3.1 Competing issues

266. There was strong push back to the proposed templates in the DP and the CP. These concerns can be organised into the following categories:

Data protection/privacy

267. A large number of respondents stated that the requirement to have "National Identification Number", home address, personal e-mail address and personal telephone numbers included in an insider list was too personally invasive for the employees on the insider list. Concerns were expressed about the possibility of data theft if such personal information is visible on an insider list. There were also concerns that storing this level of personal data on an insider list could put firms at risk of non-compliance with regulations on data protection and privacy.

Administrative burden

268. In addition to the cost of systems to ensure personal data is protected, there was extremely strong pushback on the amount of fields in the list, generally due to how burdensome it would be to maintain this level of information for all insiders on an ongoing basis.

Ability of competent authorities to effectively investigate

269. From the competent authorities' perspective, the core function of an insider list is to enable issuers to maintain control of inside information emanating from and relating to the issuer as well as to serve as a tool for competent authorities to detect and investigate market abuse; and to protect the integrity of the financial markets. Insider lists are an extremely valuable tool, used in different ways by different competent authorities (for example as a means to assess whether an investigation should be opened vs. used when a formal investigation has already been opened). The usability of the insider lists is an essential factor to consider when addressing the above concerns.

8.3.2 Structure of the insider list

270. Considering the feedback received and the fact that there is a clear trade-off between (i) Data protection/privacy and (ii) Administrative burden concerns on one side, and (iii) Ability of competent authorities to effectively investigate on the other side, ESMA has slightly revised the content of the template for insider list, which now includes the following items:

a. Name: First name, surname, birth surname (if different from surname);
b. Company name and address;
c. Work direct line and work mobile telephone numbers;
d. Function and reason for being insider;
e. Date and time at which the person obtained inside information;
f. Date and time at which the person ceased to have access to inside information;
g. Date of birth;

h. ‘National Identification Number’ (where applicable in the concerned Member State);

i. Personal home and personal mobile telephone numbers;

j. Personal full address: street name; street number; city; post/zip code; country.

271. It should be noted that compared to the fields proposed in the CP, the revised list is shorter as some items are no longer required, having considered the comments on data protection and administrative burden (professional and personal emails; employment/contract start and end dates). At the same time, the new set of information requested still ensures that competent authorities can use insider lists as an effecting tool for detecting and investigating market abuse.

272. The final draft ITS also address the issue of “tipping-off” in a recital. The act of gathering information from insiders as a result of a request for an insider list carries a significant risk of tipping-off and should be avoided.

8.3.3 Justification for proposed fields on insider lists

273. Pursuant to Article 18(9) of MAR ESMA is charged with drafting implementing technical standards to determine the precise format of insider lists and the format for updating insider lists. In order to give effect to this mandate ESMA believes that the categories of information contained in insider lists should be delineated in the ITS. ESMA believes that providing for a homogenous structure for insider list across the EU is consistent with the maximum harmonisation regime set out in MAR and will achieve considerable cost savings for issuers across Europe.

274. Noting that many of the information required are personal data, below are presented justifications of their necessity and usefulness.

Name (First name/Surname):

275. This information constitutes the compulsory first step in order to ascertain the identity of the insiders, pursuant to Article 18 of MAR.

Telephone numbers (personal/professional):

276. This information is required to access communications traffic data. This data is pivotal in establishing whether there was contact between persons identified on an insider list and persons dealing in the securities. It helps to build a picture of connections between people and patterns of behaviour demonstrated by the interplay of contacts and actions following those contacts. Market abuse cases are often inferential so this kind of information is essential. Where these records show telephone numbers for regulated firms, some competent authorities may also be able to access the content of the calls. Where content of calls is available, considering that persons on an insider list in MAR are subject to a reverse burden of proof, this information could be very useful for their elimination from an investigation or indeed for their defence if necessary.

Company name and address:

277. These are key information to establish the identity of an individual and to understand in what capacity he may have worked on the deal. Having the address will enable competent authorities to identify the precise location of the employee. This may assist in understanding in which branch or office the employee works.

Function and reason for being an insider:

278. This is a Level 1 requirement. The information is important in order to know the capacity in which the individual has access to inside information. This will help competent authorities to know which role the person performed on the deal and may enable them to understand the level of information that may be held by that person. For example, a senior advisor would be likely to know far more information regarding a deal than an individual working in the control room.

Date obtained/ceased access to inside information:

279. This is a Level 1 requirement and core information to determine the timeframe during which an insider had access to a piece of inside information.

Date of birth:

280. This is important to certainly identify a person, especially where persons within the same company have the same name and where at the same time a "National Identification Number" is not available. This information assists with understanding the possible relationship between individuals with common surnames. It also helps identifying likely associates that may know each other because they have similar ages (e.g. they attended the same high-school).

National identification number:

281. This is important to uniquely identify a person. It should be noted that not all Member States have a "National Identification Number". Insofar as this is aligned to future MiFIR transaction reporting identifiers, this information will make it easier to connect suspicious trading behaviour by the same individual with the fact that he had access to inside information: this can be instructive in the investigation of, in particular insider rings or market manipulation schemes.

Personal address:

282. This information can assist in identifying an individual. It can be used to identify further telephone numbers (for example, home telephone number which has not been provided but which is registered to the address or a home telephone number which is not in his family name). Some competent authorities also require this information to obtain banking records to show possible money flows. The information can be used to identify relatives, co-habitants and possible "geographical links" between the insider and persons dealing in securities.

8.3.4 “Deal specific” and permanent lists

283. Taking into account the reactions to the CP with respect to the templates that were proposed for the insider lists, it is proposed to offer some flexibility to the issuers, EAMPs and auctions entities in the way they can draw up the insider list.

284. The approach is to require from an issuer, an EAMP and an auction entity to draw up the insider list in the form of Deal-specific/Event based sections, while allowing them to decide to also draw up, in addition, a separate and complementary section that will include only the permanent insiders:

- **Deal-specific/Event based sections**: each of the sections relate to a particular piece of inside information and include all the insiders in respect to that information. For the avoidance of doubt, the event referred to is the coming into existence of inside information which may or may not correspond to a temporal or contractual event.
- **Permanent insider section**: relating to insiders who are considered insiders in respect of all types of inside information, for example, due to the nature of their function or position within the organisation. Permanent insiders will not have to be reported also on each and every Deal-specific/Event based sections.

285. All the sections together (including the permanent insider one if any) will form the whole insider list of the issuer, EAMP or auction entity. Insiders that are included on the permanent insider section are considered to have access to all inside information within the issuer, EAMP or auction entity and to be insiders during the entire duration of the period of existence of the inside information. When a permanent insider is included on a permanent insider section while inside information already exists, the permanent insider is considered to be insider from the moment he/she joins the permanent insider section: a specific field is therefore included in the template,

286. Industry feedback confirmed that “permanent insider” is a term known and used in the market. This approach provides flexibility and reduces the burden of recording all those persons having access at all times to all the inside information within the entity, which could include the executives running the daily business of the issuer (e.g. the CEO), on each individual deal specific/event based insider section.

8.4 Transmission of the insider list upon request

287. For the transmission of the insider list to the requesting competent authority, issuers, EAMPs and auction entities have to use the Template 1 included in Annex I of the TS, filled in all its parts. If a permanent insider section has been prepared as a complementary section of the insider list, it has to be sent to the competent authorities every time they request the insider list using the Template 2 in Annex I of the TS.

288. In relation to the means of transmission, the final draft TS clarify that the electronic means to be used has to be specified by the competent authorities on their website. The electronic means selected by the competent authority should ensure that completeness, integrity and confidentiality of the information are maintained during the transmission as the information included in the insider list is sensitive. This new provision of the TS aims at improve clarity and legal certainty as to which electronic means should be used: according to it, issuers, EAMPs and auction entities will have to check the competent authority website and use the means identified there.

8.5 SME-growth market issuers

289. Article 18(6) of MAR exempts issuers whose financial instruments are admitted to trading on a SME growth market (SME issuers) from the obligation to draw up (and update) an insider list provided that:

    a. they 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 insider dealing and unlawful disclosure of inside information, and

    b. they are able to provide the competent authority, upon request, with an insider list.

290. By way of background, in accordance with Article 3(1)(11) of MAR in conjunction with Article 4(1)(12) of MiFID II a "SME growth market" means a MTF that is registered as an SME growth market in accordance with Article 33 of MiFID II. One of the conditions of Article 33 of MiFID II is that at least 50% of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market. Furthermore, Article 4(1)(13) of MIFID II states that (for the purposes of that Directive) SMEs means companies that had an average market capitalisation of less than EUR 200.000.000 on the basis of end-year quotes for the previous three calendar years.

291. The initial approach proposed in the CP was to require SME issuers to provide upon request a similar insider list, in terms of content, to the one used by non-SME issuers, as the risks of non-compliance with the provisions of MAR by SME issuers are the same (if not higher) than for non-SME issuers. Similarly, the formats proposed to use for transmitting the insider list to the competent authority were the same (electronic and machine readable form using secure electronic means).

292. However, further to the public consultation, ESMA proposes to have a "lighter" regime for SME issuers both on the content of the list and on the means for transmission.

293. Therefore a specific template for SME issuers has been added in Annex II. This new template has been designed with a reduced content: the items (a) Personal full address and (b) Personal telephone numbers should be included in the insider list only if the information is available to the SME issuer at the time of request of the insider list by the CA.

294. In other words, when the SME issuer is requested by a competent authority to provide an insider list in accordance with the template set out in the ITS, these two fields shall be populated if the information is available to the SME issuer at the time of the request and without resulting in the issuer informing the insiders about the competent authority's request (tipping-off) to collect the information.

295. With regard to the format for transmission of the insider list, the approach is to offer flexibility to the SME issuers by not prescribing the use of the electronic means published in the website of the CA, but just requiring the use of a format that ensures that the completeness, integrity and confidentiality of the information are maintained during the transmission.

8.6 Language of the insider list

296. The ESMA's proposal in the CP that the insider lists should be submitted in the official language of the relevant competent authority or in a language which is customary in the sphere of international finance, providing thus an option to the issuers, the EAMPs and the auction entities as well as to persons acting on their behalf or on their account, was

supported during the public consultation. However, after further review, due to the scope of the empowerment for the insider list ITS (formats), there is no longer any provision on language in the final draft ITS.

9 Managers' transactions: format and template for notification and disclosure

9.1 Background/Mandate

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

298. MAR has generally extended the scope of the financial instruments covered to financial instruments admitted to trading, or for which a request has been made to trade on a RM and a MTF, and those traded on an OTF. However, it should be noted that the notification and disclosure requirements of PDMRs/closely associated persons' transactions will only apply to those issuers that have requested or approved admission of their financial instruments to trading on a RM, as well as to those issuers that, in the case of financial instruments only traded on an MTF or an OTF, have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF (Article 19 (4) of MAR).

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

a. PDMRs, and closely associated persons, of an issuer are required to notify, to the issuer itself and to the relevant competent authority (indicated in Article 19(2) of MAR), every transaction conducted on their own account relating to shares or debt instruments of that issuer, or to derivatives or other financial instruments linked to the shares or debt instruments of the issuer;

b. PDMRs, and closely associated persons, of an emission allowance market participant (EAMP) are required to notify, to the EAMP itself and to the relevant competent authority (indicated in Article 19(2) of MAR), every transaction conducted on their own account relating to emission allowances, to auctioned products based on emission allowances or to derivatives relating to emission allowances.

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

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

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

303. ESMA is mandated to draft implementing technical standards concerning the format and the template to be used for the notification and publication of the PDMRs "and closely associated persons" transactions.

9.2 Means for transmission

304. Article 19 of MAR does not prescribe particular means for notification of transactions by the PDMRs and closely associated persons to the competent authority and to the issuer, the EAMP or the auction entity. ESMA maintains its view that the safety and integrity of the information should be ensured and therefore the use of secure electronic means should be required. The electronic means should ensure that completeness, integrity and confidentiality of the information are maintained during the transmission as well as provide certainty as to the source of the information transmitted.

305. In addition, to ensure full clarity on which means can be used for the transmission of the notifications to the competent authorities, ESMA has now introduced in the final draft ITS a new provision in which competent authorities are requested to publish on their website the electronic means that should be used for submitting to them the notifications.

306. Furthermore, ESMA continues to consider that making mandatory the notification to the competent authority to be conducted via the issuer or the Compliance function of the issuer, as suggested by some respondents, is not in line with the MAR provisions and would fall outside the scope for the ITS empowerment.

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

9.3 Template for notification and public disclosure

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

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

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

309. 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, by a systematic internaliser or outside a trading venue (OTC), should be notified.

310. In addition, Article 19(1) of MAR refers to every transaction. Therefore, the notifications to be received by the competent authorities and the issuers, the EAMPs or the auction entities and to be publicly disclosed should detail every transaction. However it is not expected that a separate notification is sent for each individual transaction. To limit the burden, a PDMR or a closely associated person should be able to send a single notification listing and detailing multiple transactions carried out, as long as the three-working day deadline foreseen in the second subparagraph of Article 19(2) of MAR, is complied with. For this purpose the template for notification contained in the ITS is designed in a way to allow, in case of multiple transactions conducted, the repetition of the section on the *"Details of the transaction(s)"* for (i) each type of instrument; (ii) each type of transaction; (iii) each date; and (iv) each place where transactions have been conducted. For example, if a PDMR in day 1 has bought a share of the company where he works, and on day 2 has bought a debt instrument of the same company, he can use the same notification with section 1, 2, and 3 of the template compiled once, and section 4 on the *"Details of the transactions"* repeated twice – one for the share and one for the debt instrument.

311. Taking into account the feed-back received from the public consultation and after a thorough legal analysis of the text of MAR Level 1, ESMA is changing its approach in relation to the template to be used. The CP was proposing a single template for notification, with two sections: the first section containing information on a transaction per transaction basis and meant to be for the sole use of the competent authority and the issuer, EAMP or auction entity; the second section was meant to be used by PDMRs and closely associated persons to notify transactions in an aggregated form and then by the issuer, EAMP or auction entity to proceed with the publication of this information.

312. Under the new final approach, there is a single template the entirety of which will have to be publicly disclosed. This change in approach has been decided on the fact that MAR Level 1 text does not envisage different sets of information to be given to competent authorities and issuers, on the one hand, and to the public, on the other. The wording of Article 19(3) of MAR leaves no room for such a distinction: *"the issuer or emission allowance market participant shall ensure that the information that is notified in accordance with paragraph 1 is made public promptly (…)"*. Besides, the wording of the empowerment to ESMA in Article 19(5) refers to the same information to be notified to national competent authorities and issuers and to be published: "(…) *ESMA shall develop draft implementing technical standards concerning the format and template in which the information referred to in paragraph 1 is to be notified and made public*".

313. The final template therefore does no longer distinguish between section not to be published and section to be published, as the notification will have to be publicly disclosed in full. Against this background, the items of the template have been amended so that still retain the information needed by the competent authorities, while at the same time being suitable for full publication. In particular, each and every transaction will have to be reported. The need to include information on each transaction comes directly from Article 19(1) of MAR: both point (a) and (b) this paragraph refer to "*every transaction*".

314. Besides the information on each single transaction, to provide a comprehensive view to the public, the template allows for the presentation of the transactions also, though not only, in an aggregated form. The requirement to also have aggregated information was widely supported by the respondents of the CP and therefore was retained under the new approach. The aggregated information should indicate the volume and the volume-weighted average price of all the transactions meeting the following conditions: (i) they are of the same nature; (ii) they are on the same financial instrument; (iii) they have been carried out on the same trading day; and (iv) they have been carried out on the same trading venue, or outside any trading venue. The aggregated volume is a cumulative figure obtained adding the volume of each of the transactions taken into account for the

aggregation. It should be noted that transactions of different nature, such as purchases and sales, should never be aggregated nor should be netted between themselves.The fact that the transactions meeting these conditions are reported in an aggregated form does not affect the requirement to report the information regarding the same transactions also in a separate transaction-by-transaction way within the same notification (see template section 3).

315. A common situation could be that, for example, during a single trading day the same financial instruments are bought in multiple transactions by a PDMR: these transactions would also have to be reported in aggregated form under item 4(d) of the template "*Aggregated information*". As already said, only transactions of the same type could be aggregated: for instance, lending transactions could be aggregated among them, but not netted with other types of transactions (e.g. borrowing transactions).

316. In the event that a notification made and disclosed is required to be corrected, the notifying party should submit a new notification containing the correct information and indicate in the relevant field of the new template (field (b) of section 2 - "*Initial notification/Amendment*") that the notification is an amendment, explaining the error that such notification is amending. Such an approach is considered by ESMA as simpler and clearer, more cost-efficient and less burdensome than an approach based on the designing and use of an "ad-hoc" cancellation template.

9.4 Specification of the content

317. In relation to the content, many concerns were raised by respondents to the CP on the amount of information, in particular of personal data such as the address and telephone number of the PDMR, included in the draft template for notification, and on the necessity, legality and proportionality of such a requirement. It was suggested that the draft template for disclosure to the public, which does not include such data, would be sufficient.

318. Article 19(6) of MAR already indicates the information that the notification should contain. The list of items in this article should be considered complete and not extendable with extra items, as the wording of this paragraph does not include any expression such as "*shall include at least*", which is used, for instance, in Article 18(3) of MAR defining the minimum content of the insider list. In particular, Article 19(6) states that:

> *"A notification of transactions referred to in paragraph 1 shall contain the following information:*
>
> *a) the name of the person;*
>
> *b) the reason for the notification;*
>
> *c) the name of the relevant issuer or emission allowance market participant;*
>
> *d) a description and the identifier of the financial instrument;*
>
> *e) the 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 7;*
>
> *f) the date and place of the transaction(s); and*
>
> *g) the 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."*

319. In light of the wording of Article 19(6) of MAR, the content of the notification has been simplified to reflect solely the items included in the list above, thus alleviating the personal data concerns raised, while still specifying the data standards to be used. The template for notification is now divided as follows:

I. Details of the person discharging managerial responsibilities / person closely associated – including the name: for natural persons: the first name and the last name(s); for legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable.

II. Reason for the notification – including

a. Position/status: For persons discharging managerial responsibilities: the position occupied within the issuer, emission allowances market participant / auction platform / auctioneer / auction monitor should be indicated e.g. CEO, CFO; and for persons closely associated an indication that the notification concerns a person closely associated with a person discharging managerial responsibilities and the name and position of the relevant person discharging managerial responsibilities should be included.

b. Initial notification/Amendment – including an indication that the notification is an initial notification or an amendment to prior notifications (in case of amendment, the explanation of the error that this notification is amending should be included).

III. Details of the issuer, emission allowance market participant, auction platform, auctioneer or auction monitor – including

a. Name - Full name of the entity; and

b. LEI - Legal Entity Identifier code in accordance with ISO 1744 LEI code.

IV. Details of the transaction(s): section to be repeated for (i) each type of instrument; (ii) each type of transaction; (iii) each date; and (iv) each place where transactions have been conducted. This section includes

a. Description of the financial instrument (type of instrument), and identification code as defined under MiFIR implementing text relating to transaction reporting (i.e. delegated acts adopted under Article 26 of Regulation (EU) No 600/2014);

b. Nature of the transaction – using where applicable the type of transaction identified in the Commission Delegated Regulation adopted under Article 19(14) of MAR, specifying the types of transactions that would trigger the requirement of notification (and it should also be indicated whether the transaction is linked to the exercise of a share option programme);

c. Price(s) and volume(s) - the standards set up for transaction reporting under MiFIR should be used. Where more than one transaction of the same nature on the same financial instrument or emission allowance are executed on the same day and on the same place of transaction, prices and volumes of these transactions shall be reported in this field, in the two columns form included in the template, inserting as many lines as needed;

d. Aggregated information – as explained in the previous section of this Report;

e. Date of the transaction - the standard data format to use is the one defined under MiFIR implementing text relating to transaction reporting;

f. Place of the transaction - it should indicate the trading venue identification code as defined under MiFIR implementing texts or mention “outside a trading venue” if the transaction was not executed on a trading venue.

320. To ensure consistency among the requirements on data standards stemming from different regulatory framework (namely the MAR and the MiFID II/R frameworks), ESMA finds preferable to cross-refer in the MAR ITS, to the relevant texts where these standards are defined in the MiFIR context rather than specifying the details in the draft ITS. In particular, items 4(a), (c), (d) and (f) of the template for notification cross refer to MiFIR implementing text relating to transaction reporting. The application date of the MAR technical standards is earlier that the application date of the MiFIR implementing texts defining the data standards to be used in these fields of the notification template. ESMA is aware of this time gap and has therefore used a dynamic cross-reference.

10 Investment recommendations

10.1 Background/Mandate

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

322. Since the mandate defined by Article 20(3) of MAR - developing draft RTS to determine the technical arrangements for the categories of person referred to in Article 20(1)[15], for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest - is very similar to the one that was given for Level 2 measures under the current MAD, ESMA holds the view that current Level 2 measures set out by Directive 2003/125/EC may constitute a sound starting point for responding to the mandate.

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

324. 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 3(1)(34) and (35) of MAR provide the definitions of "investment recommendation" and "information recommending or suggesting an investment strategy" directly in the Level 1 text, avoiding the need to include a definition for these terms in the technical standards.

10.2 Scope

10.2.1 Scope: Relevant persons

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

326. Both sets of rules of the Implementing Directive 2003/125/EC include "general standards" applicable to all so-called "relevant person", i.e. a natural or legal person producing or disseminating recommendations in the exercise of his profession or the conduct of his business, and additional obligations for a specific sub-set of persons, namely independent analysts, investment firms, credit institutions, any other person

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

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

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

> *(i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or*
>
> *(ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument”.*

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

329. It is appropriate to continue to associate to qualified persons under Article 3(1)(34)(i) of MAR those rules set out for financial analysts by the Implementing Directive 2003/125/EC.

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

331. Against this background, in the context of the production of investment recommendation ESMA suggests a twofold approach based:

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

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

- presents himself as having financial expertise or experience; or
- puts forward his recommendation in such a way that other persons would reasonably believe he has financial expertise or experience.

332. By way of illustration, an expert can be a person: who analyses companies or markets and issues with a certain frequency and regularly produces investment

recommendations; who has already been producing investment recommendations in the past; who has a relevant number of followers in relation to his recommendations; and whose proposals of investment decision could be (fully or partially) relayed by third parties, such as media.

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

334. The feedbacks provided to the CP in respect to the definition of expert are mixed (more details are provided in the feedback section). It should be noted that such definition does not have an impact on the MAR Level 1 text, but rather specifies a subset of persons included in the definition included in Article 3(1)(34)(ii) of MAR. ESMA has therefore decided to maintain the approach proposed in the CP based on the definition of expert, and has included some of the suggestions by the market participants related to such definition in a Recital of the TS.

10.2.2 Scope: Relation with MIFID

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

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

337. At the same time, ESMA confirms that irrespective of the label attached to a note, as long as a note meets the MAR definition of “investment recommendations” (Article 3(1)(35)) or of “information recommending or suggesting an investment strategy” (Article 3(1)(34)), is in scope of Article 20(1) and (3) of MAR.

10.2.3 Publication of recommendations “intended for distribution channels or for the public”

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

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

340. In addition ESMA holds the view that an investment recommendation is intended for distribution channels or for the public not only when it is intended or expected to be made available to the public in general, but also when it is intended or expected to be distributed to clients or to a specific segment of clients[16], 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.

341. In other words, ESMA believes that a "large number of persons" should have access to the recommendation irrespective of the nature of the channels through which the recommendation is distributed. For example, a recommendation is likely to become publicly available both when it is distributed via an electronic data dissemination system (including e-mail messages and faxes) and when it is posted on the web site of the producer (even if it is accessible only by its clients or a segment of its clients), or it is disseminated through social networks[17].

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

343. Several respondents to ESMA's papers have emphasised that today recommendations are easily distributed or re-distributed via the internet. For example, a recommendation sent to a few clients can be quickly re-distributed to a "large number of persons" thanks to platforms for sharing information on the internet. It was also suggested to analyse the content of the investment recommendation in order to detect whether it reveals the intention of the producer/distributor in relation to the extent to which the recommendation should be distributed, i.e. whether the recommendation is intended or expected to be made available to the public, to clients, or to a specific segment of investors. In all those cases the recommendation is clearly not a personal recommendation as defined by MiFID.

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

[16] "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.

[17] 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.

10.3 Date and time of production and dissemination

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

346. In this respect, considering the high speed of intraday price changes, it is relevant the indication of the expected time, during the day, on which the investment recommendation is first disseminated, as the date only (i.e. the day) is considered as not precise enough. In this way receivers can understand whether the market price has already incorporated the content of the information during the trading session of that day.

347. Considering also the feedback received during the consultation period, the text of the article on date and time of dissemination has been slightly amended to improve clarity. In particular, for the producer of the recommendation, the RTS now requires him to include in the recommendation the date and time when the recommendation was completed. On the other side, now also the disseminator of the recommendation has an obligation to disclose to the recipient the date and time when he first disseminated the recommendation: this provision has been added in the chapter of the RTS dedicated to dissemination. In fact, both for the investors and for the competent authorities, it is useful to be in position to assess the possible time lag between the investment recommendation completion and its effective dissemination.

10.4 Production of recommendations

10.4.1 Identity of the producers

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

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

10.4.2 Objective presentation of investment recommendations

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

10.4.2.1 General standard

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

352. 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.

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

10.4.2.2 Additional obligations for qualified persons and experts

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

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

10.4.2.3 Transparency of the methodology for qualified persons and experts

356. Typically, a research on a specific financial instrument or issuer could range from a few lines or pages, where it updates customers on the latest news, to as many as dozens of pages. In applying the requirement of Article 4(1)(b) of Directive 2003/125/EC about the summary of the basis of valuation or methodology used and according to observed practices, "financial analysts" are asked to give more indications on the underlying methodology used only in the latter case since it is assumed that in the former case customers can retrieve details from previous research or can contact the "financial analysts" for further direct clarifications.

357. 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 price targets.

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

359. 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.

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

361. These requirements should not be limited to qualitative reasoning, that many respondents consider crucial, but should also encompass quantitative analyses and numerical calibrations. Since most of such analyses and calibrations are well defined in the literature, transparency of the same should not put at risk the underlying investments in Research & Developments. Nevertheless, in order to protect such investments, ESMA proposes that when producers of recommendations adopt a proprietary model they do not need to disclose the underlying methodology in detail, provided that the recommendations refer to where the information on the proprietary model could be found. Following some responses to the CP, ESMA would like to clarify that it is not required to make available every detail of the proprietary model, i.e. is not required to make a proprietary model public.

362. In the same vein, ESMA considers that qualified persons and experts should seek, as a best practice, cross-recommendation consistencies in the methodologies adopted by commenting on possible divergences. For instance, recommendations produced by the same person and related to companies that belong to the same industry or to the same country should exhibit some consistent common factors. This consideration is included in a recital, and not in an article, of the RTS.

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

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

10.4.3 Disclosure of interests and conflicts of interest

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

10.4.3.1 General standard

366. Article 5 of Implementing Directive 2003/125/EC ("General standard for disclosure of interests and conflicts of interest") requires the disclosure of all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation, in particular where relevant persons have a significant conflict of interest in one or more financial instruments which are the subject of the recommendation or with respect to an issuer to which the recommendation relates. Where the relevant person is a legal person, that requirement applies also to any person working for it and involved in preparing the recommendation. Disclosure includes:

- 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
- 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.

367. These standards have been included in the draft technical standards, considering also that no market participant expressed concern related to these requirements during the consultation period.

10.4.3.2 Additional obligations for qualified persons and experts

368. 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's financial instrument and particular agreement it have had with the issuer for the provision of investment services or production of recommendation.

369. Recommendations produced by investment firms or credit institutions should contain the following further disclosures: i) in general terms, the effective organisational and administrative arrangements set up for the avoidance of conflicts of interest with respect to recommendations, ii) whether the remuneration of the persons involved in preparing the recommendation is tied to investment banking transactions performed by the investment firm or credit institution, iii) whether those natural persons received or purchased shares of the issuer prior to a public offering of such shares and, if the positive, the price and date of purchase, iv) on a quarterly basis, the proportion of all recommendations that are 'buy', 'hold', 'sell' or equivalent terms, as well as the proportion of issuers corresponding to each of these categories to which the investment firm or the credit institution has supplied material investment banking services over the previous twelve months.

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

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

372. It may also be problematic that the remuneration of the persons involved in preparing the recommendation is tied up the trading fees received by the investment firm or credit institution in relation to the instruments covered by the recommendation produced. Therefore, ESMA has also included a requirement to disclose the existence of such a link as an indication of conflict of interest, in order to allow investors to be fully informed. Following the responses to the CP, the wording of in the RTS related to this obligation has been slightly changed.

10.4.3.3 Thresholds for conflicts of interest for qualified persons and experts

373. In order to ensure the objectivity and reliability of the investment recommendations produced by qualified persons, i.e. all persons mentioned in Article 3(1)(34)(i), as well as experts within Article 3(1)(34)(ii) of MAR, interests or conflict of interest concerning the issuer or the financial instruments to which the recommendation relates should be disclosed.

374. Currently, the disclosure requirement set out in Article 6(1)(a) of the Implementing Directive 2003/125/EC for "financial analysts" is based on a threshold applicable to major shareholdings, i.e. at least when shareholdings exceeds 5% of the total issued share capital. It should be noted that Article 6(1)(a) gives an option to Member States to provide for lower thresholds than 5% which has been applied effectively by some Member States. 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.

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

376. Following the feedback received to the DP and the CP, ESMA decided to propose a common lower threshold both for long and short position at 0.5% of the issued share capital of the issuer to which the investment recommendation, directly or indirectly, refers. This implies that where an investment recommendation, or any other information recommending or suggesting an investment strategy, refers to an issuer, or to any of the issuer's financial instruments, a disclosure of long and short positions in the issuer's shares is required, only when these positions are above the thresholds of 0.5%. This lower threshold would bring the benefit of equally enhancing transparency both in long and short positions. The 5% threshold has proved itself too high in order to properly disclose conflict of interest. ESMA is aware that the administrative burden is likely to increase following a lower threshold, but also believes that the advantages of the new threshold exceed the attached drawbacks.

377. Also when the threshold is not breached, where positions or holdings are likely to lead to conflicts of interest, all producers of recommendations should disclose those conflicts in line with the general disclosure requirements of Article 5 of the existing Implementing Directive 2003/125/EC, now incorporated in the draft technical standards.

378. Following the responses to the CP, for calculating the net long or short position vis-à-vis the 0.5% threshold, it was decided to cross-refer to the Short Selling Regulation (SSR), so that market participants would have to use the same method of calculation as the one defined under this regime. The use of established rules already known by the market should alleviate the administrative burden linked to the calculation of these positions. The advantage of using the same method of calculation for long and short positions and to consider only the net overall position is that the final net position will be either long or short: in this way the reader of the recommendation will have a clear message on whether the producer's overall economic exposure on the shares of the

relevant issuer is long or short. In this context, it should be noted that according to the method of calculation under the SSR, the trading book should be taken into account when computing the net position. An alternative approach to the one proposed, foreseeing the use of two different methods for calculation of positions, one for the long positions and one for the short positions, would have implied the risk of the outputs of the two calculations not consistent with each other and also potentially not mutually exclusive: this was another reason to prefer an approach relaying on only one method for calculation focusing on the economic exposure.

379. Another important difference compared to the proposal included in the CP, is that in the new drafting of the RTS producers are requested just to disclose whether or not they breach the threshold, without mentioning the exact holding or the exact net short position (e.g. if a producer own a holding of 0.9% in the issuer, it would be sufficient to disclose that it breaches the 0.5% threshold related to holding, without disclosing the exact amount). This proposal aims at reducing the administrative burden on producers, as well as at avoiding the risk of disclosing the precise information about the holding to only some clients, without the same information being public (e.g. when the recommendation is disclosed just to some clients who are informed of a holding of 0.9% in the issuer). In this context, it should be noted that net short positions exceeding the 0.5% are already publicly disclosed under the SSR although they are updated only if another threshold is reached or crossed.

380. Finally, the TS also includes the following requirement: any holding held by the issuer to whom the recommendation refers exceeding 5% of the total issued share capital of the person producing the investment recommendation should be disclosed in the recommendation.

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

381. Article 6(4) of Implementing Directive 2003/125/EC outlines additional obligations in relation to disclosure of conflicts of interest for “financial analysts” and requires the disclosure of “the proportion of all recommendations that are ‘buy’, ‘hold’, ‘sell’ or equivalent terms, as well as the proportion of issuers corresponding to each of these categories to which the investment firm or the credit institution has supplied material investment banking services over the previous twelve months”. The same obligations should now apply to investment firms and credit institutions (see new Article 5(3) of the TS).

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

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

10.4.3.5 Requirement to properly disclose conflicts of interest

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

> *"The publisher and the authors reserve the right at any time to buy or sell stock in the companies described herein" or "The publisher and/or its clients may take or hold short or long positions in the stock discussed in the report" or "The publisher may hold short or long positions in the stock(s) mentioned".*

385. 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.

386. As already explained above, in relation to positions above the thresholds of 0.5% included in the draft RTS, it is important that the producer clearly discloses in the recommendation if it is breaching one of the thresholds and which one of the two, with no obligation to disclose the exact position.

10.5 Non-written recommendations

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

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

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

390. As for "objective presentation" and "conflicts of interest" requirements, non-written recommendations should follow the same rules set out for written recommendations. Some elements of flexibility are nevertheless included in the TS. In particular, new Article 6 on "Additional obligations in relation to disclosure of interests or of conflicts of interest" in paragraph 2 states that where the disclosure of the information referred to in that Article is disproportionate in relation to the length or form of the recommendation, including in the case of a non-written recommendations, the producer of the recommendation should state in the recommendation where the required information can be directly and easily accessed free of charge by the public. Also in new Article 3 on "Objective presentation of recommendations", it is included a provision in paragraph 2 foreseeing that for some items to be disclosed, when they are disproportionate in relation to the length or form of the recommendation (and again non-written recommendations are explicitly mentioned), the person who produces recommendations should state in the recommendation where the required information can be directly and easily accessed free of charge by the public. The same provision is also present in new Article 4 on "Additional obligations in relation to objective presentation of recommendations".

10.6 Dissemination of recommendations produced by third parties

391. The respondent to the CP widely supported ESMA's views that current Level 2 rules for dissemination of recommendation produced by third parties should still apply under the new regime. In particular, whenever a person disseminates recommendation produced by a third party in a substantially altered way, the recommendation should clearly indicate the alterations in detail. In this context, the disseminator should provide further indications not only for alterations consisting in a change of the direction of the recommendation (such as changing a "buy" recommendation into a "hold" recommendation) but also for changes of the price target.

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

393. Such summarised dissemination usually reports brief indications of the producer, the related financial instrument, the price target, and few other elements. It could potentially result as misleading without reference to the full picture outlined by the producer, including required information on conflicts of interest and the disclosures for objective presentation.

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

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

396. Therefore the draft RTS now include an Article dedicated only to summary or extract of investment recommendations (see new Article 9 "Additional arrangements for dissemination of summary or extract of recommendations"), including the obligations explained in the previous paragraph, namely the fact that the disclosures for objective presentation and the information on interest or conflict of interest of the producer should be made available free of charge to the recipient of the recommendation.

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

Annex I - Legislative mandate to develop technical standards

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

- draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU; and
- draft implementing technical standards, to be submitted for endorsement to the Commission and to be adopted by means of implementing acts under Article 291 TFEU.

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

Article 4(4) of MAR

ESMA shall develop draft regulatory technical standards to lay down:

(a) the content of the notifications referred to in paragraph 1; and

(b) the manner and conditions of the compilation, publication and maintenance of the list referred to in paragraph;

Article 4(5) of MAR

ESMA shall develop draft implementing technical standards to lay down the timing, format and template of the submission of notifications under paragraphs 1 and 2.

Article 5(6) of MAR

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

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

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

Article 11(9) of MAR

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

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

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

Article 11(10) of MAR

In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to specify the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 4, 5, 6 and 8 of this Article, particularly the precise format of the records referred to in paragraphs 4 to 8 and the technical means for appropriate communication of the information referred to in paragraph 6 to the person receiving the market sounding.

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

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

Article 13(7) of MAR

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

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

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

Article 16(5) of MAR

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

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

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

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

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

Article 17(10) of MAR

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

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

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

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

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

Article 18(9) of MAR

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

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

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

Article 19(15) of MAR

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

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

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

Article 20(3) of MAR

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

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

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

Annex II - Cost-benefit analysis

Introduction

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

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

This CBA has been developed in order to assist in the drafting of the RTS and ITS which MAR mandates ESMA to submit to the Commission. MAR empowers ESMA to develop technical standards on a range of topics:

- buy-back programmes and stabilisations;
- market soundings;
- accepted market practices;
- detection, prevention, and reporting of suspicious orders and transactions (STORs);
- disclosure and delays to the disclosure of inside information;
- Insider lists;
- transactions by persons discharging managerial responsibilities (PDMRs); and
- objective presentation and the disclosure of interests/conflicts of interest in investment recommendations.

To draw up this CBA, ESMA has sought assistance from an external consultant (Europe Economics) on most of the technical standards with respect to data collection and the cost analysis in order to ultimately produce a more detailed cost-benefit analysis when submitting the final draft technical standards to the Commission.

Compared to the high level and preliminary cost-benefit analysis CBA included in the Consultation Paper (ref. ESMA/2014/809), the present version of the CBA has been updated in light of responses received by the end of the consultation period and of the report of

Europe Economics. This report, to which this CBA frequently cross-refer, in particular for the quantitative cost aspects, is published on ESMA website[18] for sake of completeness.

It should be noted that Europe Economics report and findings are based on the CP proposals of draft technical standards. Where ESMA has changed or removed provisions proposed in the CP, the potential cost impact is qualitatively reflected in this CBA.

The CBA is structured in eight sections in accordance with the topics above mentioned.

For the scope of this CBA, the benefits and costs of having fully harmonised and detailed conditions, requirements, formats or templates, a, have been evaluated against a scenario where no harmonisation is provided and national competent authorities have discretion to determine them locally.

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

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

	Description
Benefits	For the purpose of ensuring adequate public disclosure of buy-back programmes and stabilisation measures information, the use of the information dissemination and storage mechanism(s) prescribed under the Transparency Directive 2004/109/EC for public disclosure of shares admitted to trading on a RM or, for other issuers, those established for the public disclosure of inside information, will facilitate the implementation of the requirement by issuers and EAMPs, will help to maintain consistency and avoid unnecessary complexity being introduced. They will also facilitate access to information by investors and competent authorities. In terms of reporting, the requirement of disclosure of a detailed report of the buyback trades and the stabilisation transactions and an

[18] http://www.esma.europa.eu/system/files/cost_analysis__for_final_report_on_mar_technical_standards.pdf

	aggregated report of those trades and transactions that includes the aggregated volume per day and per venue and the volume-weighted average price per day and per venue should provide an equal level of transparency in the information reported to competent authorities and disclosed to the public. The requirements will also provide greater certainty and enable the issuer to appreciate that its obligations have been discharged. The trade reporting requirements to all the competent authorities of all the trading venues where the transactions were conducted and where securities have been admitted to trading or are traded, provide a clear regime and allow all competent authorities with a supervisory interest to obtain the information directly. The suggested approach to continue to apply most of the MAD trading conditions, limitations and restrictions should facilitate the implementation of the requirements as well as the monitoring of their compliance by competent authorities, thus promoting market integrity. The simplification proposed with respect to the volume limitation (no extension of the volume threshold possible in case if extreme low liquidity) should enhance legal certainty.
Costs to regulator: *- One-off* *- On-going*	For competent authorities, the main cost will be in receiving information from issuers and sell-side institutions on buyback programmes and stabilisations, respectively. The main difference with the current regime is that they will not just receive granular information, but also aggregated figures. The cost profile will differ among competent authorities as those in larger markets may deal with this sort of detailed information and monitoring the market on a regular basis, but other competent authorities may have had little to no experience in processing this type of information. It is likely that competent authorities will have to train staff on the requirements of MAR (one-off cost), the fields of information to expect from market participants and the trading conditions that must be met to enjoy safe harbour status. Ongoing costs will arise due to the need to monitor the market for market abuse in buybacks and stabilisations. The need to report to multiple competent authorities, proposed in the L2 standards, could multiply the number of authorities monitoring buybacks or stabilisations by the same firm. Certain conditions laid out at L2 will need to be verified by authorities which could further increase operating costs. For additional information for costs to competent authorities, please refer to the “Cost Analysis” by Europe Economics, section 4.1.3, and in particular the paragraph “Competent Authorities”.

Compliance costs *- One-off* *- On-going*	The main cost drivers stemming from these technical standards are report-based and operations-based. From a reporting perspective, one-off and ongoing compliance costs could arise in respect of IT investment, staff training, and additional headcount. The bulk of the costs are likely to be borne by issuers and investment firms working on behalf of issuers in managing a buy-back programme or conducting stabilisation activities as part of an underwriting agreement. Current staff will need to be trained on the requirements for buy-backs and stabilisations. Training is likely to affect a number of different staff categories, such as those close to the compliance function (e.g. compliance staff) as well as those not directly related to the compliance function (e.g. sales and trading at a sell-side financial institution or the treasury staff at an issuer). For issuers, staff working in the compliance function will have to become familiar with new regulatory requirements and set up internal procedures to ensure that various reporting and operational requirements will be satisfied by the issuer. Therefore, one-off costs will relate to the time required to become familiar with requirements for buy-backs and stabilisations and redesigning internal procedures to ensure compliance. Ongoing costs will relate to the continual monitoring of reports disseminated with both, detailed and aggregated information, securities purchased in buy-backs and stabilisations and associated instruments traded in stabilisations. To the extent that additional staff would need to be hired to support an issuer's compliance operations, this would be an ongoing cost. From an issuer's perspective, the reporting requirements may increase the administrative burden and the complexity of reporting process by having potentially to report to more than one authority and having to prepare two types of report, a detailed one and an aggregated one. Pre-reporting and post-reporting to several competent authorities and the relevant internal procedures could, in theory, lead to additional costs. There are likely to be some cost synergies associated with reporting to multiple competent authorities. Although it is possible that the requirement to report to several competent authorities will itself noticeably increase operating costs, Europe Economics did not find much evidence to indicate that it was a significant cost driver. Issuers will also be required to invest in IT systems to log and maintain details on transactions disclosed to the general public and competent

	authorities. For additional compliance cost information, please refer to the "Cost Analysis" by Europe Economics, section 4.1.3, and in particular the paragraph "Issuers".
Costs to other stakeholders	Sell-side institutions will face both operational costs and reporting costs. Reporting requirements under buy-back programmes fall on the issuers, but for stabilisations the institution or institutions responsible for conducting the stabilisation programme are required to report the relevant information to the general public and to competent authorities. Many of the key cost drivers for reporting buy-back programmes also hold for reporting stabilisations and, thus, stabilisation managers are required to report to several competent authorities rather than to a single competent authority. Staff training costs will be required to familiarise existing staff with obligations under the MAR and, in particular, with ESMA's technical standards. This will include staff in the compliance function as well as various front office staff. In particular, staff that underwrite equity or fixed income offerings will need to be conscious of MAR requirements regulating the disclosure and transaction conditions surrounding stabilisations. Additional staff may also be required, especially if the sell-side institution has a number of clients in markets newly-regulated under the MAR, such as SME growth markets. Buy side firms and trading venues are unlikely to incur further costs. For additional information on costs for other stakeholders, please refer to the "Cost Analysis" by Europe Economics, section 4.1.3, and in particular the paragraphs "Sell-side institutions", "Buy-side" and "Trading venues".
Indirect costs	Europe Economics has highlighted three main potential adverse market impacts: 1) The risk that the obligation to report to multiple competent authorities works as an incentive for issuers to conduct buybacks and stabilisation only on a limited set of markets creating a "two tiered" capital market structure within Europe; 2) the possibility of regulatory arbitrage; and 3) a bias against OTC markets as investors who trade securities primarily OTC will not be able to benefit from the additional transaction activity associated with the buyback programme. For additional information on indirect costs, please refer to the "Cost Analysis" by Europe Economics, section 4.1.3, and in particular "*Other adverse market impacts*".

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

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

	Description
Benefits	The technical standards should not only provide for clarity and legal certainty by defining a common set of rules but also promote a consistent approach across Member States on how to conduct the sounding while reducing the risk of abuses and benefitting also the recipients of the market soundings. Furthermore, it facilitates the supervisory and investigative activities of the competent authorities. Overall, the main benefit would be enhanced market integrity.
Compliance costs *- One-off* *- On-going*	Most of the responsibility for compliance with the MAR in respect of market soundings falls on the DMPs. As DMPs, sell-side institutions and issuers are likely to bear the majority of the costs arising from the technical standards. Sell-side institutions and issuers will need to train or re-train staff involved in the market sounding process. It is likely that there will be three classes of staff to be trained, each with potentially different training costs. First, general compliance staff will need to become aware of firm-level and individual-level requirements on market soundings. This would be primarily a one-off staff training cost. Second, staff making market soundings will need to be aware of the requirements stemming from the MAR and ESMA's technical standards in particular. This will include, inter alia, the design and use of Standard sets of information ("Scripts") during market soundings and the appropriate records to keep before, during, and after soundings. Third, staff not directly related to the market sounding process but possessing information contained in the market sounding will need to be trained on obligations stemming from the MAR and in particular ESMA's technical standards. Sell-side institutions and issuers will be required to keep records on

	potential investors, including information on who does and does not give consent to be sounded, information on the context and content of market sounding communications, and information on who has been sounded and thus may hold inside information. All of this entails potential IT investment costs and is likely to be a significant cost driver. A list of potential costs includes: • Voice and audio visual recording and storage — Sell-side institutions and issuers will need to keep voice records of market soundings. Additionally, sell-side institutions may also wish to film in-person meetings when conducting market soundings. Firms may need to invest in recording and storage capacity to keep these records. • Due diligence records — Sell-side firms and issuers are required to keep due diligence documentation on the determination of whether information in market soundings is inside information. A storage system may need to be designed to facilitate compliance with this requirement. • Standard set of information ("Script") storage and maintenance — Sell-side firms and issuers will need to use a standardised script when conducting market soundings. This script must be reviewed periodically to ensure that it is sufficient to ensure compliance. Firms may need to invest in IT capacity to store and display market sounding scripts, as well as make them available for period review. Systems investment would contain a one-off element for the development of the system itself and an ongoing element for maintenance, troubleshooting, and further technical enhancements. Other costs, such as legal services or consultancy services, may also arise. Buy-side firms are unlikely to incur considerable further costs. Of the compliance costs identified, these firms would need to train a particular set of staff on requirements for receiving market soundings and the expectations they should have from the sell-side when approached to receive a sounding, which are specified in the L2 text. Furthermore, these firms may also have to incur some relatively minor IT costs, mostly associated with recording. This is a fairly minor IT investment since, according to stakeholders, a lot of the existing arrangements will satisfy the L1 and L2 requirements. Both sets of costs — staff training and IT investment — were deemed to be small and relatively trivial. This is reflected in the low cost figures reported. Buy-side firms could also be impacted by the requirements in a different manner. For instance, should the processes applied by DMPs be too burdensome for the recipients of the market sounding, the recipients may choose to be sounded less frequently, in particular in cases when

	inside information is disclosed through the market sounding. The beneficiary of the sounding (e.g. issuers) could then have less information on demand for new issuance which, in turn, could lead to less (or less optimal) capital market activity. For additional information regarding the compliance costs related to market soundings, please refer to the "Cost Analysis" by Europe Economics, in particular section 4.2.3, paragraph on "*Compliance costs and other impacts*".

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

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

	Description
Benefits	In specifying further the assessment criteria and the procedures related to the acceptance, modification and termination of the AMP, ESMA considers that main benefits will result from a clearer and common set of rules, ensuring thus consistency in the assessment to be conducted and ultimately enhancing market integrity across European markets. A higher level of transparency to the markets and, hence, a higher level of market integrity will be achieved by the specification of the elements to assess and the conditions to fulfil for a market practice to be established as an AMP. The RTS requires distinguishing between general transparency requirements upon the establishment of the AMP and requirements for allowing transparency at various stages of the use of the AMP (prior to the beginning of its performance, during its performance and when it ceases to be performed) which implies an exhaustive analysis. Furthermore, designing a common template for the notification of intention to accept an AMP and for the publication of an established AMP will facilitate the consultation process between competent authorities and with ESMA. A common template will also provide greater transparency of such practices through increased comparability of established AMP, in particular if they are similar in nature.

Costs to regulator *-One-off* *-On-going* 399.	In terms of costs, most of the implementation costs will be borne by competent authorities and ESMA, but they are not expected to be significant. The main one-off cost will be understanding the new regulation and training the staff accordingly. A different one-off cost will be the notification of AMPs established before the entry into force of MAR (2 July 2014) according to the conditions and elements set up in L2. Training and updating the staff will be the major on-going cost which is expected to be minor. However, the status of the firm performing the AMP (whether it needs to be supervised or not) could be a cost-driver: the supervisory cost for the competent authority would increase if the firm performing the AMP is a non-supervised firm.
Compliance costs *-One-off* *-On-going*	Compliance costs are not expected to be significant. One-off and on-going costs to train staff to become familiar and up-to-date with the new regulation are expected to be minor. However, the status of the firm performing the AMP (whether it needs to be supervised or not) could be a cost-driver also for firms: the costs to implement trading control and compliance systems within the firm performing the AMP would increase if the firm performing the AMP is a non-supervised firm.

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

STOR	
	Description
Benefits	The template provided in the Annex to the RTS for submitting the STORs will ensure consistency and uniformity in the reported information across the Union. This will facilitate the analysis of the information included in the STORs by competent authorities in the exercise of their supervisory and investigatory powers, together with fostering efficient sharing of information on suspicious orders and transactions between competent authorities in cross-border

	investigations. The obligation to have in place systems for monitoring market abuse (to a degree which is proportionate in relation to their scale, size and nature of their business activity) capable of producing alerts in line with predefined parameters in order to allow for further analysis by appropriately trained staff should increase the number of high-quality reports and decrease the number of low-quality reports. This will facilitate the investigations to be carried out by the competent authority. A single and harmonised format for electronically submitting STORs will also assist compliance in markets where orders and transactions are becoming increasingly cross-border. This will enable firms to use a single template where they are required to submit STORs to more than one competent authority (e.g. in the case of financial groups constituted of several firms located in different Member States), reducing their overall administrative burden.
Costs to regulator: - *One-off* - *On-going*	L2-related costs for competent authorities are likely to be relatively minor. Competent authorities are likely to incur some staff training costs, particularly for how their staff should receive and process reports from market players. Furthermore, competent authorities may have to invest in IT infrastructure for the secure receipt of STORs. The impact of changes to reporting requirements is not clear. STORs templates and required pre-reporting investigation processes are meant to increase the number of high-quality reports and decrease the number of low-quality reports sent to competent authorities. Therefore, over the medium-term, certain aspects of the L2 standards on STORs templates could decrease competent authorities' costs.
Compliance costs: - *One-off* - *On-going*	The primary cost driver for persons professionally executing or arranging transactions is likely to concern the detection of suspicious market activities; for market operators and investment firms operating trading venues cost drivers are likely to concern detection and prevention of suspicious market activities. However, this extension of scope is due to L1. It is important to note that the L1 standards already stipulate the use of a system for STORs, with L2 only specifying the requirement for the system to require some level of automation in conjunction with human analysis. However, it is inherently difficult to separate out these costs, as firms would invest in a new system which encompasses both the L1 and L2 costs as one expenditure. As a consequence, there is a material risk of over-statement of the incremental costs solely attributable to L2. Creating and maintaining systems to detect suspicious activity will

	result in both one-off and on-going costs for investment firms. Additionally, market operators and investment firms operating trading venues will incur one-off and ongoing costs with reference to systems to prevent market abuse. Small and large investment firms may face significantly different costs with respect to detection. Since larger firms will typically engage in transactions of greater complexity and because interaction between front office and middle/back office staff may be more limited it is likely that these firms will be required to implement automatic monitoring systems in order to comply with the technical standards. Where smaller firms invest in automated systems, their simpler operations may mean that they are able to purchase off-the shelf systems, rather than developing their own bespoke monitoring systems. The greatest one-off cost impact will come from investment in IT systems to meet the automated surveillance requirement. Increasing reporting to competent authorities and staff training are the second and third largest cost drivers, respectively. The technical standard should not imply any substantial incremental IT investment for market operators and investment firms operating trading venues, since trading venues currently have sophisticated automated surveillance systems and follow-up on activities with human investigation. Also firms professionally executing or arranging transactions might already have arrangements and systems in place ahead of the current requirements of MAD, which mitigates the cost increase for such firms. .Additional investigation of suspicious activities and near-misses is another key one-off and on-going cost driver. In order to ensure that staff have an understanding of what suspicious activities look like, it is also necessary to provide them with appropriate training. In fact, once potential suspicious activities have been detected, entities will be required to conduct an investigation in order to conclude whether they are actually suspicious activities to report or so called “near misses”. Firms will also be required to use a specified STOR template, which could impose some minor one-off adjustment costs while firms become accustomed to this new template (but also enable firms to access ongoing savings once implemented). This could be in the form of a short training session and/or the internal circulation of guidelines on how to fill out the new STORs templates. The final cost regarding the reporting of STORs relates to the administrative burden of completing the relevant report. This is likely to be an ongoing cost directly proportional to the frequency with which

	STORs are detected. Storage of information will add to compliance costs, but it is a less significant cost driver than the aforementioned drivers. The stored information will have to be maintained for a minimum of five years. These costs are directly attributable to the L2 technical standards. For additional description and quantitative compliance cost estimates please refer to the "Cost Analysis" by Europe Economics, in particular section 4.3.3.
Costs to other stakeholders	Issuers are unlikely to incur additional costs. With reference to the EAMPs affected by the technical standard (i.e. those directly involved in arranging or executing transactions in emission allowances) the key ongoing cost driver for them will be investigation of suspicious activities followed by additional reporting to competent authorities and maintaining records for an extended period of time. They might incur limited IT costs, likely in relation to the storage of records (including of "near misses").

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

Dissemination of inside information	
	Description
Benefits	The technical standards (TS) on dissemination of inside information are, to the extent possible, aligned and consistent with the requirements included in the Transparency Directive (2004/109/EC). The main benefit of this approach is to promote the same effectiveness of the dissemination, and thus transparency, to the markets and investors. This approach ensures a high continuity between the MAD and the MAR disclosure regimes by capitalising on existing and well-known disclosure mechanisms, and thus avoiding potential disruptions to market integrity during the transition from MAD to MAR. This is valid for issuers that are already subject to the MAD regime, i.e. issuers active in Regulated Markets. In relation to EAMPs, there are at least two important benefits in

	applying the same requirements as the ones for issuers, and not relying solely on the REMIT regime (as it was proposed by some respondents). First, there are some EAMPs subject to the MAR regime that are not market participants in the wholesale energy markets covered by REMIT (e.g. industrial combustion activities, such as steel making, are EAMPs covered by MAR but not by REMIT), and therefore the approach proposed ensures that all EAMPs covered by MAR are subject to identical requirements, whether or not they are also subject to REMIT. In particular, according to the analysis conducted by ESMA while developing the MAR technical advice on "*Minimum thresholds for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information* [19] , if the threshold suggested is accepted, only 70 companies would be covered by these requirements and 857 companies would be exempted. Of the 70 companies, approximately 56% are energy producers, and therefore already subject to REMIT, while the rest are industrial emitters not covered by REMIT. In addition, it should be considered that under the new MiFID framework emission allowances are going to be included in the definition of "financial instruments", and therefore it is important that, in relation to disclosure of inside information, they are subject to the same obligations applicable to all financial instruments. The approach of the TS ensures that the inside information related to emission allowances will reach the wider public, and not only a subset of "professional" investors. The TS also ensures the use of a set of common criteria for the publication of inside information on the website of the issuer (or potentially the ones of the trading venues, in case of SME). This obligation will provide clarity and legal certainty on how the information should be posted and maintained by the issuer on the website, while promoting accessibility to that information thanks to the requirement of allowing the users of the website to access the inside information posted there in a non-discriminatory manner and free of charge.
Costs to regulator: - *One-off* - *On-going*	N.A.
Compliance costs:	The costs relating to the dissemination of inside information are likely to be incremental costs to be borne especially by the particular sub-set of

[19] The final report of ESMA's draft technical advice on possible delegated acts concerning MAR is available on ESMA website: http://www.esma.europa.eu/system/files/2015-224.pdf

- *One-off* - *On-going*	issuers and EAMPs who are now covered for the first time by the Market Abuse Regulation (meaning that for issuers active on regulated markets costs should be virtually immaterial). Expected on-off costs will relate to the understanding of the new requirements and the preparation of internal system and procedures to use the dissemination mechanisms. The on-going costs of actually disseminating the inside information are not likely to be significant and would largely depend on the number of disclosures. In relation to EAMPs, it should be noted that the 70 companies covered by these requirements (if the threshold proposed by ESMA in its technical advice is accepted) are the largest actors in the emission allowances market and, as said, roughly half of them are large energy producer and the other half large industrial emitters. It is likely that the majority of these entities are also issuers of financial instruments and listed in regulated markets: in these cases they would be anyway subject to these requirements and they would already have to sustain the costs of building new internal system for dissemination of inside information, where needed. The posting and storage on the websites will potentially imply some costs for amending the existing website, if not already compliant with the new requirements. However, most of the websites should be already able to accommodate the specifications of this requirement. For quantitative data on the compliance costs with these requirements for issuers (including EAMPs) please refer to the "Cost Analysis" by Europe Economics, in particular section 4.4.3. This analysis is based on the draft TS included in the CP, which has been amended. In particular, it should be noted that the new requirements of the Article 3 dedicated to "*posting of inside information on a website*" are lighter than the ones included in the CP and therefore the cost should be lower to the ones identified in the "Cost Analysis". Indeed, in the new TS it is no more required to have a dedicated section of the website containing only the disclosed inside information, as it was in the old TS included in the CP.
Costs to other stakeholders	Costs that will be borne by other stakeholders in relation to these requirements are minimal, if any: please refer to the "Cost Analysis" by Europe Economics, in particular section 4.4.3, paragraphs on "sell-side institutions", "buy-side institutions" and "trading venue".
Indirect costs	Indirect costs

Delaying the disclosure of inside information	
	Description
Benefits	Although the possibility to delay the disclosure of inside information is not a new provision, the obligation to notify the delays to the competent authority ex-post or ex-ante (depending on the "type" of delay) is a new requirement under MAR. Establishing clear rules regarding the process of notification to competent authorities ensures enhanced market integrity through better informed competent authorities thanks to a standard processing of the notifications. In this context, it is also beneficial to specify the technical means to be used by issuers so as to ensure a proper audit trail and a correct management of the process of delaying the disclosure of an inside information, considering also the confidential nature of the information. Moreover, the definition of the technical means to be used by issuers should also assist in promoting a consistent approach within the issuers' community (and the EAMPs' one) on how to handle the process of delaying the disclosure of inside information, clarifying what competent authorities expect from them. Finally, standardising the content of notification and explanation of the delay is expected to reduce issuers and EAMPs' preparation burden for these communications.
Costs to regulator: - *One-off* - *On-going*	Competent authorities are likely to bear some additional costs in relation to two factors. The first factor is the establishment (one-off cost) and maintenance (on-going cost) of a dedicated contact point within (or designated by) the competent authority for the receipt of the notifications by issuers; the second factor is the identification and the publication on the competent authority's website of the electronic means to be used by issuers when transmitting the notification. For additional description of the costs for competent authorities please refer to the "Cost Analysis" by Europe Economics, in particular section 4.4.3, and in particular the paragraph "Competent Authorities". The new TS have added a new responsibility for competent authorities (the publication on the website of the electronic means to be used by issuers/EAMPs for the transmission of the notification) and therefore costs are likely to be slightly higher.
Compliance costs: - *One-off* - *On-going*	The main expected on-off and on-going costs for issuers are likely to relate to the understanding of the applicable standards and to the design, implementation and maintenance of the technical means to be used for the process of delaying the disclosure of inside information,

	including the maintenance in a durable medium of a set of information related to the process of delaying the disclosure and the format to be used when notifying the competent authority. Other cost drivers to consider could be the nature of the means for transmitting notifications to competent authorities: the new TS require issuers to use the electronic means published by the competent authority in its website, and this could imply the development of adequate IT infrastructure if the one already in place is not compatible with the electronic means selected by the competent authority. Such electronic means must ensure that completeness, integrity and confidentiality of the information is maintained during the transmission and therefore is possible that not all issuers are already equipped with this type of IT means. For additional description of the compliance cost with these requirements for issuers (including EAMPs) please refer to the "Cost Analysis" by Europe Economics, in particular section 4.4.3. The new TS have reduced the number of information to be maintained in a durable medium (e.g. smaller amount of information required in relation to confidentiality) and do not specify the content of the notification as it was done in the draft TS in the CP. As a result, the obligation applicable to issuers and EAMPs are less burdensome and for this reason the actual costs for issuers and EAMPs are likely to be lower than the costs reported in the "Cost Analysis".
Costs to other stakeholders	Costs that will be borne by other stakeholders in relation to these requirements are minimal, if any. Please refer to the "Cost Analysis" by Europe Economics, in particular section 4.4.3, in particular the paragraph on "sell-side institutions", "buy-side institutions" and "trading venue".
Indirect costs	N.A.

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

The implementing technical standards (TS) on the format and template for insider list will ensure the application of a common template for insider lists across the EU, where currently the insider list template to be used by market participants varies from Member State to Member State. The stakeholders directly impacted by the TS are issuers and those acting on

their behalf or on their account as well as EAMPs, auction entities[20], and competent authorities. Investors and market participants would be indirectly impacted through the increased market integrity they should overall entail.

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

	Description
Benefits	The use of common format and templates for setting up, maintaining and submitting to the competent authority the insider lists, and the determination of procedures for updating the list, will facilitate the implementation of these MAR provisions by those entities subject to the requirements, in particular when their instruments are admitted to traded or traded in trading venues across different Member States, because these entities would have to use exactly the same Template. This will therefore reduce the administrative burden for issuers and those acting on their behalf or on their account, EAMPs and auction entities. The use of a unified Template will imply full harmonisation for insider lists within the Union, and this will assist competent authorities when processing and examining the insider lists they received, and this decreases their administrative burden. In relation to the content of the insider lists, the data fields proposed in the draft TS will provide adequate information to competent authorities for performing the task of protecting the integrity of the financial markets and detecting possible insider dealing. This, in turn, could be one of the elements enhancing the public confidence in financial markets. In particular, each field included in the Template for insider lists is necessary for the supervisory activity of competent authorities because it provides a distinct benefit, in the form of additional intelligence related to the insiders which could be directly used in the process of an investigation. In the Final Report on insider lists, each field of the Template is explained and justified. The possibility of creating a section of the insider list dedicated only to “permanent insiders” (i.e. persons who have access at all times to all inside information within the insider list) has the benefit of directly decreasing administrative burden for the producer of the insider list, and also of improving readability of the full insider list, as the name of

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

	permanent insiders can all be read in a single section. The creation of the "permanent insider" section is an option offered to the entities subject to the insider lists provisions and thus has also the benefit of flexibility: entities are not required to use this section, they can do so if they believe it is convenient for them. Finally, the draft TS proposes for SME growth market issuers a lighter regime: for the transmission of the notification they will not have to use the electronic means identified by the competent authority, and also the Template that SME growth market issuers have to use it is simpler than the standard one. This approach will ensure both a high level of transparency in SME growth markets as well as lower administrative burden for the SME issuers.
Costs to regulator: *- One-off* *- On-going*	For competent authorities the upgrade of IT systems for receiving the insider list and their maintenance may constitute a cost, if the current systems are not compatible with the TS and the Template proposed. The new TS also require competent authorities to identify and publish on their website the secure electronic means to be used for the transmission of the insider lists: this represents a small cost for the modification of the website, as well as potential saving because it is now up to the competent authorities to decide which means have to be used, i.e. competent authorities can decide to use means they have already in place (as long as these means meet the requirements defined in the TS: these means have to ensure that completeness, integrity and confidentiality of the insider list are maintained during the transmission). For additional description of the compliance costs with these requirements for competent authorities please refer to the "Cost Analysis" by Europe Economics, in particular section 4.5.3, paragraph on "competent authorities".
Compliance costs *- One-off* *- On-going*	The costs imposed by the new TS on insider lists for issuers, EAMPs and auction entities will include both one-off implementation costs and ongoing administrative costs. The one-off implementation costs include the costs of understanding the standard and its requirements, which could include the employment of external professional services, such as consultancy and legal services, if competent in-house services are not available. A further potential upfront cost will be migrating to, upgrading or adding additional IT systems infrastructure, both hardware and software. This may be necessary in order to increase capacity for recording and reporting additional information, and in order to establish the secure electronic format for delivery to competent authorities in accordance with the electronic means that authorities have published on their website. This

	latter cost could be more material for those issuers who currently use standard email or hand-written submissions, and more generally for small companies with a less developed IT system. In addition, issuers would incur costs for adjusting their existing data collection process in order to obtain the extra information from insiders that would be required under the draft TS. It should be noted that the new Template to be used includes less fields than the ones included in the Template of the CP: the fields on professional and personal email addresses, start and end date of employment of the insider are no more included in the new Template. For this reason the actual compliance costs are likely to be lower than the costs reported in the "Cost Analysis" by Europe Economics. Ongoing administrative costs will primarily comprise the cost of staff time, for those staff tasked with developing, reviewing and maintaining the insider lists. This could be complemented, to a lesser extent, by the costs of maintaining IT systems and the costs of data storage. Again, the burden will be proportionately larger for smaller issuers. For additional description of the compliance costs with these requirements for issuers please refer to the "Cost Analysis" by Europe Economics, in particular section 4.5.3, paragraph on "issuers". With respect to SME Growth market issuers, requiring them to be able to provide an insider list containing the necessary information and to submit it in the proper format to the competent authority upon request, without neither requiring the establishment of internal systems and/or processes, should allow to achieve the objective of reducing their administrative burden and operational costs, while at the same time not creating major risks in terms of market integrity. The incremental costs of the proposed approach of the TS vis-à-vis the obligation stemming directly from MAR L1 are minimal and consistent with the general regulatory approach concerning SME issuers. In conclusion, it should be noted that the paragraph "*Quantitative compliance cost estimates*" in section 4.5.3 of the Cost analysis by Europe Economics states that: "(…) *these costs are trivial when compared with company operating expenditure and are, therefore, unlikely to have material impacts on market behaviour*".
Costs to other stakeholders	Sell-side institutions may be affected by the TS in so far as sell-side employees may have access to the inside information of issuer clients who they support in an advisory role. Insider lists, and hence the cost of the TS, would therefore only be relevant in the case of sell-side institutions with issuer clients, and not to those sell-side institutions who are exclusively involved in order execution. The latter are unlikely to

	incur costs as the processing of orders is unlikely to yield inside information that requires the maintenance of insider lists, as these orders are very quickly revealed to the market. For those sell-side institutions with issuer clients, the compliance costs of these TS are likely to be similar to those faced by issuers, as described in the previous section. However, according to the survey included in the Cost analysis by Europe Economics, the majority of sell-side firms does not anticipate any costs for redesigning/increasing reporting to competent authorities or employing external professional services. This suggests that most sell-side institutions reporting capacity is sufficient to cope with the changes and that they, in the most part, have sufficient in-house expertise to adapt to the regulatory changes. Buy-side institutions will not face extra-costs stemming from these TS unless they are issuers. Trading venues will not face extra-costs stemming from these TS. For additional description of the compliance costs with these requirements for sell-side and buy-side institutions, as well as for trading venues, please refer to the "Cost Analysis" by Europe Economics, in particular section 4.5.3, paragraphs on "sell side institutions", "buy side institutions", and "trading venues".
Indirect costs	The paragraph "*Other adverse market impacts*" of section 4.5.3 of the Cost analysis by Europe Economics reported a concern expressed by some market participants, who think that there may be a legal conflict between these TS and the European Directive 95/46/EC (i.e. the Data Protection Directive). This Directive is mandating that the collection of personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In this respect, ESMA believes that the new TS are fully in line with the principle of the Data Protection Directive, as each field included in the new Template is essential for the use of the insider lists by competent authorities, and is not excessive in relation to the purpose of the lists. In the Final Report section on insider lists, each field of the Template is explained and justified. In this context, it should also be noted that the new Template has a reduced number of fields compared to the one in the CP: the fields on professional and personal email addresses, start and end date of employment of the insider are no more included in the new Template.

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

	Description
Benefits	The technical standards (TS) on the format and template in which information on manager's transactions is to be notified and made public should ensure uniform application of the "managers' transactions" requirements across the EU and across all the financial instruments subject to Article 19 of MAR. Compared with MAD, MAR will increase the scope of the managers' transactions requirements in terms of types of financial instruments covered. The use of a common and single template both for the notification and for the public disclosure of the PDMRs' transactions will facilitate the implementation of the notification requirements by PDMRs and of the disclosure requirements by issuers, EAMPs and auction entities. The new single template requires both information on a "transaction-per-transaction basis" and information in an "aggregated form", and this approach ensures different types of benefits. The inclusion of details of all transactions will ensure that the information received by competent authorities and also published is as granular as possible: this will assist the competent authorities in their supervision and monitoring tasks, and at the same time will provide the markets with the highest level of transparency. The "aggregated information" related to transactions presenting exactly the same characteristics (as explained in the TS) represents also a benefit as this information is in practice a "summary" that provides the public (and also the authorities) with an overview of the transactions of the same "nature" made by the PDMRs on the same day, ensuring that the overall picture is clearly communicated to the market. Finally, a common, simple template will also facilitate the comparability of the information about PDMRs transactions across Europe, providing the market and the investor with greater common transparency within the Union, which in turn could be one of the elements strengthening the confidence in the market and its integrity.
Costs to regulator: *- One-off* *- On-going*	For competent authorities the upgrade of IT systems for receiving the notification and their maintenance may constitute a cost, if the current systems are not compatible with the TS. The new TS also require competent authorities to identify and publish on their website the secure electronic means to be used for the transmission of the notifications: this represents a small cost for the modification of the

	website, as well as potential saving because it is now up to the competent authorities to decide which means have to be used, i.e. competent authorities can decide to use means they have already in place (as long as these means meet the requirements defined in Article 2 of the TS).
Compliance costs *- One-off* *- On-going*	PDMRs as well as issuers, EAMPs and other auction entities will need to familiarise themselves with the new simplified template, which will imply one-off costs for understanding the rules, and both one-off and ongoing costs for training staff. Compared to the CP the text of the TS has been redrafted in order to improve clarity and has also been significantly simplified. There is now just a single template with a unique section, meaning that the template to be used for notifying the issuers and competent authority and the template to be published are exactly the same. For this reason the actual compliance costs are likely to be lower than the costs reported in the "Cost Analysis" by Europe Economics. The new TS also asks competent authorities to publish on their website the electronic means to be used when transmitting the notification: this new provision improves clarity and increases also legal certainty, as it will be sufficient to check the competent authority's website to precisely identify which electronic means have to be used for the transmission of the notification. PDMRs, issuers, EAMPs and auction entities may need to develop or replace their existing IT infrastructure to allow for the production and the transmission of the notification. This implies one-off costs for the potential update or replacement of the IT system already in place, as well as ongoing costs related to the maintenance of the same. Considering the simplified content and the basic format of the notification in the new TS, the cost related to the acquisition of adequate IT tools for the production of the notification should be minimal, if any. In relation to the transmission to competent authorities, because competent authorities will decide which secure means should be used by PDMR, the cost may be higher as these means have to ensure that completeness, integrity and confidentiality of the information is maintained during the transmission and provide certainty as to the source of the information transmitted. Additional on-going costs for PDMRs will arise with respect to preparing the notifications in accordance with the format, whereas for issuers, EAMPs and auction entities on-going costs will be related to the publication of the notifications (it should be noted that the cost of

	publication stems from MAR L1 and is not affected by these TS). In relation to the cost related to the production of the notification, the number of items now included in the Template has been significantly reduced compared to the draft Template proposed in the CP. In particular, personal contact details and full address of the PDMRs have been deleted, as well as the items "highest and lowest prices" in relation to the aggregated information of multiple transactions. For this reason, the actual compliance costs are likely to be lower than the costs of producing the notification reported in section 4.6.3 of the "Cost Analysis" by Europe Economics. Overall, the direct costs stemming from the TS are considered minimal for all parties affected. For additional description of the compliance costs with these requirements for please refer to the "Cost Analysis" by Europe Economics, in particular section 4.6.3.
Costs to other stakeholders	As highlighted in section 4.6.3 of the Cost analysis, only issuers will be subject to new material costs due to these TS, and no extra costs are foreseen for sell side institutions (unless they are issuers are well), buy side institutions and trading venues.
Indirect costs	The only "indirect" issue highlighted by the Cost Analysis by Europe Economics is the extent of personal data included in the Template presented in the CP. The amount of personal data, besides having a direct cost, could raise legal concern in terms of personal privacy. It should be noted that the new Template includes only the "Name" as personal data (full address and contact details have been deleted), and therefore the concerns expressed in the paragraph "*Other adverse market impacts*" in section 4.6 of the Cost analysis are no longer valid.

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

ESMA has proposed draft technical standards aiming at ensuring that investment recommendations or other information suggesting an investment strategy are objectively presented and that interests or conflicts of interest are properly disclosed by the persons who produce or disseminate them. ESMA has based its proposal on the existing requirements set out in Directive 2003/125/EC implementing MAD and used a similar approach to the one of this Directive when determining standards applicable to producers and to disseminators. The draft TS are divided into two chapters: (i) Production of Recommendation; and (ii)

Dissemination of recommendations produced by third parties. For producers of recommendations, general standards applicable to all producers are defined and furthermore additional standards are proposed for a sub-set of persons, namely any person mentioned in MAR Article 3(1)(34)(i) (i.e. independent analysts, investment firms, credit institutions, any other persons whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise) and also those persons that fall under the definition of "expert" included in Article 1 of the TS.

	Description
Benefits	These technical standards (TS) deal with information to be included in an investment recommendation by its producers or to be disclosed by the disseminators of a recommendation produced by a third party. Such a common set of standards will thus improve transparency, market confidence and consistency among the EU Member States. In particular, the draft TS has the advantage of being largely consistent with the currently applicable requirements set out in Directive 2003/125/EC, both in terms of structure and of content. As regards the production of recommendation, this implies that for entities already fully subject to the current requirements (including the additional ones), the changes brought by the new regime will be minimal, the most important of which is the lower threshold for the calculation of long or short positon in financial instruments to which the recommendation refers. This lower threshold will guarantee an enhanced transparency because the receivers of the investment recommendation will be informed about the existence of the producer's position in the recommended issuer every time producers are above 0.5% of the total issued share capital of the issuer. The approach therefore implies continuity with the current regime as well as more transparency for investors at the same time. A structural difference between the draft TS and the current regime is the fact that the category of "experts" will be required to comply with the "additional" requirements for producer of recommendation. The benefit of this approach is to ensure that influential persons that can have an impact on market' trends and that are not independent analyst, credit institutions or investment firms, are subject to strict obligations in terms of objectivity of their recommendations and conflict of interest. Because this type of producer could potentially become more important in the years to come (for example, because of the increasing use of blogs as source of advice), the draft TS aims at being "future-proof" thanks to the inclusion of "experts" in the category of producers subject to "additional" requirements. As regards the dissemination of recommendation produced by third parties, the main benefit of the draft TS is to clearly identify specific

	requirements in relation to the different types of dissemination, so that the receivers are always informed properly. In particular, the goal of transparency in respect both to the objectivity of the recommendation disseminated and its conflicts of interest is ensured by the fact that when disseminators disseminate only summary/extract of a recommendation, such summary/extract should include the reference to where the disclosure of the producer in relation to "objective presentation" and conflicts of interest could be found. In this way, also when only a summary or extract is disseminated, the objective presentation and conflicts of interest information are accessible to the receivers of the recommendations. Moreover, in the situation where the recommendation disseminated has been substantially altered, the disseminators not only have to include where the information on objective presentation and conflict of interest regarding the producer of the source recommendation could be found, but should also apply the "objective presentation" and "conflicts of interest" requirements to the substantial alteration it made on the source recommendation. Altogether, these requirements have the benefit to ensure that the receivers of the recommendation are always in a position to have the maximum level of transparency in terms of objective presentation and conflict of interest related to the recommendation in all cases of dissemination.
Compliance costs *- One-off* *- On-going*	Most of the incremental compliance costs related to these TS would be linked to the additional information that were not requested in the current MAD regime, such as more details about the valuation methodologies, the list of previous recommendations produced or the new requirements introduced with respect to reporting of long and short positions. The new regime will imply one-off compliance costs in the following domains: training staff (estimated to be the largest) and adjusting the investment recommendation and disclosure formats/processes in light of the additional detail required. It is clear that for those individuals who remain subject to the same obligations, either 'general' or 'additional', the incremental costs are likely to be smaller and primarily the result of providing additional information that is not requested in the current MAD regime. By contrast, for the category of "expert", for which the MAD regime was not imposing any additional requirement, the incremental cost is likely to be higher as in the proposed TS they are subject to both general and additional requirements. One-off costs may be particularly significant for smaller sell-side institutions who lack appropriate professional services in-house; for instance, new informational requirements may require investments to upgrade existing, or develop additional IT systems or to migrate to new hardware and software. One-off costs are also likely to comprise the

	costs of training staff in how to meet the new regulatory standards, in how to use the new IT systems, and in how to draft the disclosure sections of recommendations (in order to minimise the likelihood that the new disclosure requirements are not met). Finally, larger one-off costs may be imposed on those firms who do not currently have sufficient administrative and organisational structures in place to limit conflicts of interest arising. The new regime is expected to produce very small ongoing costs, these are driven by the need to compile additional detail related to additional disclosures in investment recommendations. This will to a large extent relate to the reduced significant shareholdings threshold from 5% to 0.5%. However, stakeholders responses reported in the cost analysis by Europe Economics suggest that these ongoing costs will not be material. This disclosure requirement has also been made less onerous in the review of the TS. The new TS for calculating the position vis-à-vis the 0.5% threshold cross-refers to already existing methodology for position calculations. The use of established rules already known by the market participants should alleviate the administrative burden linked to the calculation of these positions. Another important difference compared to the proposal included in the CP, is that in the new drafting of the TS producers are requested just to disclose whether or not they breach the threshold, without mentioning the exact position (e.g. if a producer own a holding of 0.9% in the issuer, it would be sufficient to disclose that it breaches the 0.5% threshold related to holding, without disclosing the exact amount). This adjustment also aims at reducing the administrative burden and costs for producers. For additional description of the compliance costs with these requirements for “sell side institutions” please refer to the “Cost Analysis” by Europe Economics, in particular section 4.7.3, and in particular the paragraph on “sell side institutions”. In general terms, it is important to note that the new draft TS includes now less stringent requirements than those included in the CP (for example, for the conflicts of interest requirements, in cases where a recommendation make reference to specific financial instruments in the recommendation, it is no more required that any holding in in these financial instruments is automatically disclosed). For this reason the actual compliance costs are likely to be lower than the costs reported in the “Cost Analysis” by Europe Economics.
Costs to other stakeholders	The survey conducted by Europe Economics in its cost analysis has shown that issuers, buy-side institutions, brokers and trading venues should not be subject to any specific cost in relation to these TS. For more details, see section 4.7.3 of the cost analysis, in particular the

	paragraph dedicated to “issuers”, “buy-side institutions”, “brokers” and “trading venues”.
Indirect costs	A potential adverse market impact of the proposed TS is the possible harm to research activity as a result of the requirements to disclose details on the valuation and methodology underpinning the recommendation. The results of the cost analysis conducted by Europe Economics indicate that the majority view among stakeholders is that innovation and the willingness to develop new valuation approaches will not be affected because, for instance, large sell-side firms already disclose their valuation models in this way, and therefore no incremental impact is foreseen. In this context it should be noted that the new requirements included in the TS are lighter that the ones first proposed in the CP, so that this potential issue has been even further mitigated (or completely eliminated) in the TS. For additional description of the “*other adverse market impacts*” with these requirements please refer to the “Cost Analysis” by Europe Economics, in particular section 4.7.3, last paragraph.

Annex III - Opinion of the Securities and Markets Stakeholder Group[21]

ADVICE TO ESMA

Response to ESMA's Consultation Paper on Draft Technical Standards on the Market Abuse Regulation and on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation.

I. Executive summary

The Market Abuse Regulation (MAR) establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS). Furthermore the European Commission has requested ESMA for technical advice on implementing acts. To this end ESMA has published a Consultation Paper on Draft Technical Standards on the Market Abuse Regulation and a Consultation Paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation.

One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide a high level advice to ESMA on the preparation of RTS and ITS and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach building a single rulebook on market abuse. In addition the SMSG has prepared answers for selected questions which are relevant for the aim of the MAR to avoid potential regulatory arbitrage and to provide more legal certainty and less regulatory complexity for market participants.

ESMA has made great efforts in developing a level 2-regime in line with the purpose of the MAR. With respect to the many informational elements of ESMA's proposals, the SMSG recognizes a welcome emphasis on the role transparency plays in mitigating the risk of market abuse but also on the need for related mandatory disclosure to be readable and understandable. Furthermore the SMSG agrees with ESMA's general concern that enforcement be supported.

[21] SMSG's response to ESMA's Consultation Papers on Draft Technical Standards and on ESMA's draft technical advice on possible delegated acts concerning the MAR is: http://www.esma.europa.eu/system/files/2014-smsg-047.pdf

The SMSG provides advice on nine topics ESMA's Consultation Papers are dealing with. Market soundings, insider lists, investment recommendations and manager transactions are key issues. The SMSG has the following position on these topics:

- *Market soundings are important for the proper functioning of financial markets. The SMSG welcomes that the MAR provides an exemption from the prohibition of market abuse provided that certain conditions are met. ESMA's approach determining appropriate arrangements, procedures and record keeping requirements principally seems flexible and practical. In particular the SMSG strongly supports EMSA's emphasis on the need to protect market soundings as a means of managing relations between the issuer and investors. However some processes proposed by ESMA seem to be too complex. As a result market sounding might be discouraged.*

- *Insider lists are an important tool for competent authorities when investigation market abuse. The SMSG therefore welcomes the harmonisation of insider lists. But the Group is concerned about the extensive information ESMA intends to be provided by insiders.*

- *With respect to investment recommendations, the SMSG observes that the current regime under the Market Abuse Directive and Directive 2003/125/EC principally has worked well. But given the developments in other areas of European capital markets law, it is reasonable tightening some rules. In particular, the SMSG generally agrees with ESMA's approach to provide stricter rules for qualified persons, such as the disclosure of financial interests and conflicts of interest.*

- *Disclosure of manager transactions is an important part of the MAR and plays a great role in practice. However the SMSG is concerned about ESMA's proposal defining the respective obligations in a broad way, which is not in line with the purpose of the law. A further concern relates to ESMA's advice how to interpret the closed period for managers. In fact the closed period is a complementary instrument aimed at preventing the abuse of inside information but it does not follow a transparency purpose. This should be taken into account when defining the circumstances under which a manager can be permitted to trade during a closed period.*

II. Background

1. On 2 July 2014, the EU Regulation on Market Abuse (MAR) entered into force. The MAR empowers ESMA to develop draft regulatory and implementing technical standards to be endorsed by the Commission. Furthermore, the MAR empowers the Commission to adopt implementing acts by means of delegated acts. To this end the Commission has requested ESMA for Technical Advice on Implementing Acts (mandates published on 21 October 2013 and 2 June 2014).

2. On 11 July 2014, ESMA published its Consultation Paper on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2014/808 – "CP on Technical Advice") and on 15 July 2014 its Consultation Paper on Draft Technical Standards on the Market Abuse Regulation (ESMA/2014/809

– “CP on draft RTS”). The CPs are the follow-up of ESMA’s Discussion Paper on ESMA’s policy orientations and initial proposals for MAR implementing measures published on 14 November 2013 (“DP on MAR”).

3. On 21 April 2014, the SMSG responded to ESMA’s DP on the MAR (ESMA/2014/SMSG011). After having published its CPs, ESMA requested SMSG’s opinion on the proposed technical standards (CP on draft RTS). The SMSG herewith gives advice to ESMA and also responds to ESMA’s CP on Technical Advice. In addition SMSG provides its opinion on ESMA's approach building a single rulebook on market abuse.

III. Comments

1. General comments on ESMA's approach building a single rulebook on market abuse

4. The MAR constitutes a new era for capital markets regulation in Europe. It establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. The MAR shall provide uniform rules and clarity of key concepts. In order to ensure uniform conditions, the Commission is empowered to adopt implementing acts and ESMA is required to elaborate standards to be adopted by the Commission. The MAR and the accompanying level 2-measures will build a single rulebook on market abuse in Europe.

5. The change from directives (to be transposed by the Member States into their national laws) to (directly applicable) regulations is probably one of the most important changes the European market abuse regime has undergone. However this implies that market participants are able to understand the law enacted by the European legislature. This is not the case for every provision of the MAR. In some language versions sentences are even incomplete. The SMSG is aware of the fact that a translation of the English version of the MAR into all EU languages is challenging. However it is extremely important to have a comprehensive legal text, especially given the fact that some prohibitions are part of criminal law (the Directive 2014/57/EU on criminal sanctions for market abuse refers in many provisions to the MAR!). The SMSG suggests that the Commission and/or ESMA ask NCAs to analyse the texts and provide them with an error list.

6. The single rulebook on market abuse is a fundamental element of EU capital markets regulation. Therefore ESMA´s proposals for a level 2-regime should be consistent with either, any other legislation in force or, with existing recommendations by ESMA, in particular with MiFID-II/MiFIR and the Transparency Directive (TD). Any inconsistency with other legislation has to be avoided otherwise it would lead to significant implementation difficulties for market participants and affect the reliability of data aggregation and analysis by the competent authority. The SMSG observes that ESMA’s draft RTS and draft Technical Advice take into account the developments

European capital markets law has went through in the last years. This is particularly the case for ESMA's proposals of disclosure obligations.

7. ESMA has made great efforts in developing a level 2-regime in line with the purpose of the MAR. With respect to the many informational elements of ESMA's proposals, the SMSG recognizes a welcome emphasis on the role transparency plays in mitigating the risk of market abuse but also on the need for related mandatory disclosure to be readable and understandable. Furthermore the SMSG agrees with ESMA's general concern across both the CP on draft RTS and the CP on Technical Advice that enforcement be supported (strong enforcement is essential if the new market abuse regime is to have teeth) and its emphasis on the application by the market of judgment when considering the risk of engaging in market abuse. Finally the SMSG welcomes ESMA's non-prescriptive approach in places, given the risks engaged in adopting highly detailed requirements which may be over-taken by market developments.

2. Market sounding (CP on draft RTS)

8. Market soundings are interactions between a seller of financial instruments and one or more potential investors prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. The MAR acknowledges that market soundings are important for the proper functioning of financial markets and should not in themselves be regarded as market abuse. Provided that a disclosing market participant (DMP) complies with the requirements laid down in the MAR, disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties (Art. 12 (4) MAR). In order to ensure consistent harmonisation, ESMA shall develop draft RTS to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in the MAR (Art. 12 IX MAR).

2.1. Principles of the new regime

9. The regime on market sounding is new on the European level. Even the Member States do not have respective rules in place,[22] the only exception being France where the AMF requires investment services providers that poll the market when preparing a corporate financing transaction to comply with the obligations laid down in the regulation of the AMF and with the code of good conduct that sets out the conditions of its implementation and has been approved by the AMF.[23] But market sounding is a common market practice and there is always a risk for market participants of violating prohibition of insider dealing. The SMSG therefore welcomes that the MAR following the example of France provides an exemption for market soundings from the market

[22] But NCAs have already dealt with this issue. In the UK the former FSA has imposed significant fines on investors for insider dealing after they have been sounded by brokers, cf. FSA, David Einhorn/Greenlight Capital, Inc. 25 Jan. 2012, FSA/PN/005/2012; FSA, Darren Morton und Christopher Parry/Dresdner Kleinwort, 7 Oct. 2009, FSA/PN/134/2009. Furthermore the FCA provides guidance in order to facilitate any commercial, financial or investment transaction (cf. FCA Handbook MAR 1.4.5).
[23] Cf. Art. 216-1 RG AMF.

abuse regime. It agrees with ESMA's approach generally which mainly seems to be flexible and practical. In particular, the Group strongly supports ESMA's emphasis on the need to protect market soundings as a means of managing relations between the issuer and investors (CP on draft RTS para. 72), and to reflect the purpose of the exemption, for example the inclusion of third parties (CP on draft RTS para. 64 and 66 – particularly with respect to the proposed flexibility in relation to more generally assessing market conditions and appetite). However, some processes proposed by ESMA seem to be too complex. As a result, market soundings might be discouraged, as can be observed in France in the last two years.

2.2. Inside information subject do disclosure by a DMP

10. According to Art. 11 (1) MAR, a market sounding comprises the communication of information in order to gauge the interest of potential investors. A DMP shall, prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information (Art. 11 (3) MAR). Provided that a DMP complies with this requirement and the ones laid down in Art. 11 (5) MAR, disclosure of inside information made in the course of a market sounding shall be made in the normal exercise of a person's employment, profession or duties (Art. 11 (4) MAR). The SMSG again highlights that a DMP only has to fulfil the obligations stipulated by Art. 11 (5)-(8) MAR if the respective information has to be considered as an inside information and the issuer did not have to disclose it. This is the case if the issuer had delayed disclosure (cf. Art. 17 (4) MAR) or when the inside information does not directly concern the issuer (cf. Art. 17 (1) MAR).

11. ESMA has dealt extensively with the requirement to specifically consider whether the market sounding will involve the disclosure of inside information (CP on draft RTS para. 73-83). One of its main conclusions is that the information a DMP may disclose would generally relate to the exact characteristics of the possible transaction in relation to which the DMP intends to sound out investors. However, it could also include other information not necessarily directly related to the possible transaction but providing important context to the transaction, such as the financial standing of the issuer (para. 74).

12. The SMSG generally agrees with this interpretation. Art. 11 MAR does not restrict the nature of the inside information disclosed by a DMP. It is therefore in line with the wording of the provisions on market sounding that not only inside information relating to the transaction, but also other inside information is disclosed. However the exemption has also to be interpreted in light of the purpose of Art. 11 MAR and the case-law of the ECJ still valid for the MAR. According to the ECJ, any exemption of the prohibition to disclose inside information must be treated restrictively and can only be justified if there is a close link between the disclosure and the exercise of the employment, profession or duties and the disclosure of inside information is strictly necessary for the exercise thereof.[24] The purpose of Art. 11 MAR is to facilitate corporate finance transactions.

[24] ECJ of 22 Nov. 2005, C-384/02 [2005] ECR I-9939.

Therefore a DMP is allowed to provide information to the buy side with regard to "the terms that will make up a transaction" (recital 33 MAR). But it is generally not necessary for gauging the interest of an investor to keep him updated about any other inside information. Thus inside information may not be disclosed by a DMP if it is not necessary for evaluating the respective transaction. Similarly, unless the issuer is obliged to generally disclose such inside information (Art. 17 (1) MAR), it has to ensure the confidentiality of that information (Art. 17 (4) MAR).

13. ESMA's approach on 'transaction' vs 'issuer' information is reflected in Annex IV draft RTS Recital 18, but not in either Annex IV draft RTS Article 13 (1) (v) or Annex V draft ITS Annex I (v), which should be amended to conform and read as following: "v. The information being sounded in accordance with Article 12(1) of the RTS on market sounding".

2.3. Standards for conducting a market sounding

14. With respect to Q3, the standards which apply prior to conducting a market sounding principally seem reasonable and proportionate. In particular the SMSG welcomes the fact that ESMA does not restrict the hours in which market soundings can take place. The time-lag between market sounding and the proposed transaction will vary depending on the circumstances and of course on the complexity of the transaction.

15. Art. 11 (5) (a) MAR requires the DMP to obtain the consent of the person receiving the market sounding (buy side) to receive inside information. In order to prevent unwanted wall-crossing, the buy side should be encouraged to inform the sell side of their unwillingness to be wall-crossed in any circumstances. ESMA's DP on MAR has dealt extensively with the requirements related to the issues of obtaining the buy side agreement and has brought up several options for discussion. Option 1 would be simply to require that the DMP prior to wall-crossing seeks the consent of the buy-side to be wall-crossed. Option 2 goes beyond this and requires that the DMP also keeps a list of those clients that have informed it that they would never want to be wall-crossed and does not contact these clients in relation to potential transactions. ESMA's CP on draft RTS (para. 87) notes that, whilst a majority of respondents favoured option 1, a significant minority stated investors should not be "prevented" from expressing their general wishes to the DMPs (the lists of the 'unwilling' proposed to be mandated in option 2 in the DP). The SMSG holds the view that investors should certainly not be prevented from expressing such wishes. However the adoption of option 1 by ESMA would not have prevented them from doing so. Thus ESMA's concern should not be necessarily a valid basis for the proposal to proceed on the basis of option 2. Instead ESMA should pursue option 1 which is more flexible,

16. The MAR requires a DMP to keep a record of its compliance with all the processes and procedures. ESMA is of the opinion that the record keeping requirements should apply in relation to every type of market sounding, irrespective of whether inside information is part of the communication or not (CP on draft RTS para. 90). Principally, procedural provisions where no inside information is involved should be outside of MAR's scope. But the SMSG acknowledges that it might be appropriate to apply record keeping

requirements for market soundings where the DMP categorises the information as not inside information (para. 91). This, if effective, may indeed be helpful to DMPs and might perhaps even (as suggested in para. 92) somewhat mitigate the likelihood of DMPs routinely treating information as inside. However it is unclear whether there is a competence for ESMA and Commission to adopt a respective rule under the MAR.

17. With respect to Q4 on the proposal for standard template for scripts, the SMSG draws the attention to the fact that Eurobond syndicates can be very large and only a minority of the syndicate members (usually the most active ones) will be involved in any market soundings. Consequently the statement (CP on draft RTS para. 64) that "each member of the syndicate is considered to be a DMP" seems technically incorrect at first glance. However, Annex IV draft RTS defines "syndicate" at Article 2(k) to only mean those members of a syndicate that are DMPs – so the approach seems workable after all.

18. Where information ceases to be inside information according to the assessment of the DMP, the DMP shall inform the recipient accordingly (Art. 11 (6) MAR). In order to bring as much clarity as possible to the potential investors as to the expected date at which the transaction is likely to become public, ESMA suggests this date should be part of the assessment conducted by the DMP prior to the sounding and also part of the information passed to potential investors in the course of the sounding (CP on draft RTS para. 108). With regard to the content of standard template for scripts, ESMA deals with the situation that the DMP has assessed the information to be inside information. In this case, the script should contain "the anticipated time when information will cease to be inside information" (cf. CP on draft RTS para. 94 (iv) (c) Annex IV draft RTS Article 13 (1) and Annex V draft ITS Annex I (iv) (c)). However it is difficult to assess for a DMP when information will cease to be inside information. A further argument against the proposed rule follows from Art. 11 (10) MAR. ESMA is only empowered to draft ITS to specify the technical means for appropriate communication of the respective information. The SMSG is of the opinion it would be sufficient to require "an explanation on how the market sounding recipient will be informed in case the disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Art. 11 (6) of Regulation 596/2014".

19. The standard template for the scripts should also contain an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid (CP on draft RTS para. 94 (iv.) (c), Annex IV draft RTS Article 13 (1) (iv) (c), Annex V draft ITS Article 5 and Annex V draft ITS Annex I (iv) (c)). However ESMA recognises that it is not always possible to go beyond the disclosure (referred to in para. 13) and to clarify what should happen where effectively that timeline is impacted (CP on draft RTS para. 109). Consequently Annex V draft ITS Article 5 and the latter part of Annex V draft ITS Annex I (iv) (c) should, respectively, be clarified as following, so as not to imply there will be further disclosure to sounding recipients in the cases envisaged in para. 109 that are not strictly within Article 11 (6) of MAR (and a [generally accepted] electronic method of communication should be sufficient): "[...] and an explanation on how the market sounding recipient will be informed in case the

disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Article 11(6) of Regulation 596/2014".

20. A further content of the template for the scripts of market sounding should be the "confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation. This seems to be a superfluous additional requirement, since the market sounding recipient will in any case have to also consent to receiving the sounded information itself.

21. In practice it is challenging for DMPs to correctly evaluate whether an information has to be considered as inside information, especially given the ever wider and less intuitive interpretation certain regulators have been placing on the inside information definition in recent years and the harsh sanctions. Consequently DMPs in practice treat much information as inside, even if they would consider it not so on a sensible interpretation of the inside information definition. This will likely continue to be so, even if some mitigation results from the approach suggested by ESMA in its CP on draft RTS para. 91 to establish at Level 2 procedures to enable a DMP to avail itself of the protection under Article 11 MAR where inside information is disclosed during sounding that has been categorised by the DMP as not being inside. This fact should be reflected in the wording of the sounding scripts in Annex V draft ITS Annex I (iv).

22. With respect to Q5 on the proposals regarding sounding lists, recording details of just the persons actually contacted by the DMP (and not any persons to whom information was subsequently distributed to internally), as proposed in CP draft RTS para. 96, seems sensible.

23. With respect to Q6, the risk of regulatory error relates to over-inclusive and onerous lists (the danger of replicating the 'insider lists' problem): the approach adopted by ESMA, however, seems proportionate and tailored to enforcement needs (CP on draft RTS para. 96-97).

24. DMPs should ensure all market soundings and subsequent discussions or communications are recorded on a durable medium. But there will be no contact details used for the sounding where it is conducted face to face (as acknowledged in CP on draft RTS para. 101), so Annex IV draft RTS Article 14 (1) (c) should be amended accordingly.

25. With respect to Q8 on the proposals regarding DMPs' internal processes and controls, the SMSG wishes to note that DMPs are internally organised between functions that are treated as 'private-side' (such as DCM/origination and syndicate) and those that are treated as 'public-side' (such as sales). This helps the efficient establishment and internal policing of information barriers. In this respect, it seems workable to limit the number of DMP employees, be they 'private-side' or 'public-side', not responsible for sounding yet having access to the sounded information, to those with a 'need to know'. However "ensuring" that non-sounding 'private-side' staff "are not in possession" of the sounded information (as provided for in Annex IV draft RTS Art. 11 (3) (c)) would disproportionately undermine the value of segregating such 'public' and 'private' sides.

3. Accepted market practices (CP on draft RTS)

26. The prohibition of market manipulation shall not apply, provided that the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction order or behaviour have been carried out for legitimate reasons and conform with an accepted market practice (AMP) in accordance with Art. 13 MAR. In order to ensure consistent harmonisation, ESMA shall develop draft RTS specifying the criteria, the procedure and the requirements for establishing an AMP as well as the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance.

27. The MAR has extended the scope of market abuse. In particular, it includes within its scope transactions that take place outside a trading venue (OTC transactions). The SMSG agrees with ESMA's view that such transactions should not be excluded from the scope of AMP (Q9 CP on draft RTS). In order to ensure appropriate supervision of the new regulatory perimeter (post MiFID II/MiFIR as well as MAR) it seems functionally necessary to adopt ESMA's proposed approach to including OTC transactions, which approach is also calibrated to the distinct features of OTC trading (the reference to the assessment of transparency). With respect to Q10 (CP on draft RTS), the (advised) limitation of AMP to supervised entities fits well with the MAR theme of supporting strong supervision and enforcement.

28. A competent authority has to take into account several criteria when deciding to establish an AMP. One of these is whether the market practice ensures a high degree of safeguard to the operation of market forces and the proper interplay of the forces of supply and demand (Art. 13 (2) (b) MAR). ESMA is of the opinion that the principle of independence of action of the firm executing the AMP should be recommended by competent authorities. In this respect the issuer or other interested party should not instruct the firm performing the AMP on how to conduct trading (CP on draft RTS para. 140). The SMSG generally agrees with this understanding. But independency can also be ensured in a different way, such as Chinese walls. In particular this would be helpful for a listed credit institution and investment firms belonging to the same group of the issuer. In this case the requirement of independence could be respected through the imposition of effective Chinese walls by the investment firm performing an AMP. This approach would be consistent with other EU regulation, such as the restrictions for buy-back programmes (cf. Art. 6 (2) EC Regulation 2273/2003).

29. With respect to an AMP already in place, the SMSG asks ESMA to clarify that a NCA can extend the AMP to a MTF/OTF upon request of an interested party, depending on the circumstances of the individual case. The SMSG understands that level 1 does not allow extending the AMP automatically but only under the conditions specified in Art. 13 (2) MAR and only under full approval process defined under MAR. The reason for this is that AMPs are fitted to specific market conditions of a given market.

4. Suspicious transaction and order reporting (CP on draft RTS)

30. Market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing and market manipulation (Art. 16 (1) MAR). ESMA shall develop draft RTS to determine the details (Art. 16 (5) MAR). To this end ESMA has dealt with the reporting obligations, level of suspicion required, the arrangements to detect prohibited behaviour, the templates for notification and the requirement to keep a record of submitted information for at least five years (CP on draft RTS para. 177-215). ESMA is of the view that an entity should be required to keep a record of "potentially suspicious transactions – near misses" (para. 214). It is of the opinion that it would not be particularly difficult for an entity to identify at the time those cases where it has considered seriously whether to submit a report but had decided against doing so.

31. The SMSG does not agree with ESMA's approach. Firstly it is not clear what ESMA means with a "near-miss", especially given the fact that ESMA's CP does not provide a clear definition. This will cause many implementation difficulties and will lead to different practices in the Member States. It will, contrary to ESMA's opinion, be complicated for an entity to apply the concept of a "near-miss". The process to determine transactions which have to be reported to the NCAs would have to be organized as a two stage-process. In the first stage some orders or transactions would be marked as requiring further examination. In practice this task is fulfilled by employees who are qualified in processing of client orders but typically not necessarily highly qualified in detecting market abuse. As a next step, selected orders and transactions would have to be examined more thoroughly by specialised persons who have the knowledge to decide whether a specific order or transaction is "reasonably suspicious" (cf. Art. 16 (2) MAR). As no definition of a "near-miss" exists, market participants could be afraid that this term would be applied to all orders selected in the first stage but rejected in the second stage as not suspicious at all. Ex post it is easy to say that such facts should have been detected as market abuse and declared to the NCA as such. Ex ante it is not that simple. The SMSG therefore finds it possible that there would be a natural tendency to diminish the number of orders and transactions marked in the first stage to further examination to avoid a risk of ex post examination by NCAs. In consequence really suspicious orders or transactions could be lost in the first stage, with a negative effect of lowering the effectiveness of the whole process.

32. Secondly the SMSG does not see any legal basis for a respective rule; Art. 16 (5) MAR does not empower ESMA to draft technical standards in order to deal with "near-misses" but to determine the "arrangements, systems and procedures for persons to comply with the requirement to report orders and transactions" that could constitute "insider dealing or market manipulation". Since a "near-miss" does not seem to be a suspicious transaction there is no need for record-keeping in such cases. The SMSG rejects ESMA's proposal. Instead of introducing the concept of "near-miss", NCAs should focus on the existence and quality of the procedures implemented by persons subject to the requirements under Art. 16 MAR to detect market abuse.

5. Insider list (CP on draft RTS)

33. Issuers or any person acting on their behalf or on their account, shall draw up a list of insiders (Art. 18 (1) MAR). In order to ensure uniform conditions of application, ESMA shall develop draft ITS to determine the precise format of insider lists and the format for updating insider lists (Art. 18 VIII MAR).

34. The SMSG notes that the obligation to create an insider list only arises when an issuer delays disclosure of inside information (cf. Art. 17 (4) MAR) or when the inside information does not directly concern the issuer (cf. Art. 17 (1) MAR).

35. ESMA emphasizes that insider lists are an important tool for NCAs when investigating possible market abuse (CP on draft RTS para. 291). The SMSG agrees and welcomes the harmonisation of insider lists. It can be observed in practice that the content of insider lists differs to a large extent. This is not only a problem of NCAs but also for employees.

36. The SMSG however is concerned about the extensive information that EMSA intends to be provided by insiders. Some of SMSGs' members support the inclusion of private addresses, private email accounts and private telephone numbers but have doubts whether this is in line with Member States' personal data laws. In particular it is questionable whether the principle of proportionality is respected by ESMA's proposals. Protection of personal data is part of the fundamental right to respect private life under Article 7 and 8 Charter of Fundamental Rights. In accordance with settled jurisdiction of the ECJ, intervention is strictly limited. Some of SMSGs' members hold the opinion that an intervention cannot be justified with the integrity of the market and the detection of insider trading. The minimal content of the list should be the name and another identification data of the insider.

37. ESMA proposes to require the inclusion of a number of categories of persons into the insiders list, as long as they have access to inside information, such as members of the management and/or supervisory board, executive officers, etc. (para. 298 and Q22). The list of categories is intended to be indicative and non-exhaustive (recital 8 Annex II draft ITS). The SMSG fully supports ESMA's approach. The specification will be helpful for issuers and persons acting on their behalf to comply with the legal obligation to establish an insider list.

38. A further proposal of ESMA relates to the obligation of Art. 18 (1) (c) MAR that an issuer or any person acting on the behalf of the issuer shall provide the insider list to the competent authority. In case of a third party, ESMA proposes a flexible way to comply with the obligation. The issuer could consider whether to provide to the NCA a single consolidated insider list, fully and solely maintained by the issuer, or separate insider lists (para. 302). However, the SMSG is concerned whether this is in line with the level 1-text. The MAR requires the person acting on behalf of the issuer to submit its insider list to the NCA by itself.

39. Issuers whose financial instruments are admitted to trading on an SME growth market shall be exempt from drawing up an insider list, provided that certain conditions are met (cf. Art. 18 (6) MAR). In addition ESMA wants issuers on SME Growth Market to be

able to provide an insider list containing the information specified in Table 2 of Annex 1 (para. 316 CP on draft RTS and Annex VII Art. 11 draft ITS). The SMSG observes that Art. 18 (6) MAR does not require a specific content of such an insider list and therefore asks ESMA to impose lower requirements for SME Growth market issuers.

6. Investment recommendation (CP on draft RTS)

40. Persons who produce or disseminate investment recommendations shall take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates (Art. 20 (1) MAR). ESMA shall develop draft RTS to determine the technical arrangements for these persons for objective presentation of investment recommendations and for disclosure of particular interests or indications of conflicts of interest.

6.1. Privilege for journalists

41. Journalists are exempt from the obligations provided that they are subject to equivalent appropriate regulation in a Member State, including equivalent appropriate self-regulation. Member States shall notify the text of that equivalent appropriate regulation to the Commission (Art. 20 (3) MAR). This privilege, already in place under the current Market Abuse Directive (MAD), is justified by the freedom of the press and the freedom of expression in other media. The SMSG acknowledges that journalists are not subject to supervision by ESMA. However, the SMSG would like to draw attention to the fact that investment recommendations and other information recommending an investment strategy are often published by journalists. In particular, stock market information services have to be considered as journalists, irrespective of whether they disseminate the information in print or via electronic media. It is therefore important that self-regulation for journalists is equivalent to the rules laid down in the MAR. The SMSG encourages the Commission to ask ESMA to monitor respective instruments of self-regulation accepted by NCAs and to compare the content of the codes of conduct with the requirements laid down in the MAR and the accompanying level 2-regulations, especially given the fact that qualified persons will be subject to specific disclosure requirements.

6.2. Principles of the future level 2-regime

42. With regard to the future level 2-regime, ESMA holds the view that the current Level 2 measures set out by Directive 2003/125/EC may constitute a sound benchmark for responding to its mandate developing draft RTS (CP on draft RTS para. 347). The SMSG observes that the investment recommendations regime has not experienced reform since it was adopted and contrasts accordingly with the rating agency regime in relation to which very extensive disclosures are now required. But the original regime seems to have worked well and there seems to be little evidence of detriment and/or enforcement action relating to poor/inadequate disclosures on investment recommendations. But this is a key area, not least given the well-documented dependence of retail investors on investment recommendations, and their attachment

to headline ‘buy’/’sell’ etc. recommendations. ESMA’s decision to base its advice on the original regime seems sensible, given overall experience but also in light of the need not to impose undue cost burdens on this sector: this is particularly the case given that investment research is typically subsidized within the investment firm and the independent research house is not common in the EU. As is well known, SME issuers can accordingly struggle to ensure coverage. In order to ensure alignment with the other measures designed to support SMEs (i.e. under MiFID II), efforts should be made not to impose undue costs on the provision of research. But allowing for this, a widely drawn approach (within which the rules are reasonable) seems appropriate given the sensitivity of investment recommendations and the vulnerability of investors to online dissemination in particular.

43. ESMA suggests a “twofold” approach based on a general set of requirements applying to any person, and on applying a set of additional requirements to any person mentioned in Art. 3 (1)(34)(i) MAR and also to other persons that are considered “experts”, both together called by ESMA and hereinafter as qualified persons (CP on draft RTS para. 354). The SMSG agrees with the approach and in particular the reliance on the “experts” device (Q26 CP on draft RTS). With respect to the qualifications on the “expert” classification, it seems useful to add the “regular basis” qualification to the others. It is difficult to suggest the appropriate frequency – leaving it open may be more effective; otherwise perhaps “at least quarterly” given the recurrence of quarterly in other elements of EU regulation (Q27 CP on draft RTS). This seems an area where some degree of regulatory flexibility is needed which allows a regulator to take a risk-based approach, although some minimum degree of legal certainty is also required.

6.3. Standards for objective presentation

44. The proposed standards for objective presentation (Q28 CP on draft RTS) are based on the tested 2003 regime and seem reasonable and proportionate, particularly with respect to non-qualified persons and non-experts. With respect to access to the information about the methodology and underlying assumptions used, ESMA proposes a stricter approach than the current regime (cf. para 382). The SMSG strongly supports this. In particular it seems appropriate to require qualified persons to indicate and summarise any changes in the valuation, methodology or underlying assumptions (Q29 CP on draft RTS). The disclosure rules will enhance industry discipline.

6.4. Financial interests and conflicts of interest

45. In order to ensure the objectivity and reliability of investment recommendations produced by qualified persons, ESMA proposes to establish stricter disclosure of significant financial interests and conflicts of interest compared to the 2003 regime. Currently, the recipient of a recommendation must be informed about major shareholdings between the relevant person on the one hand and the issuer on the other hand. This encompasses all cases in which the relevant person holds more than 5 % of the total issued share capital of the issuer or vice versa. The SMSG acknowledges that conflict of interest disclosure is of fundamental importance and the

current 5 % threshold appears high, particularly by comparison with the conflict disclosure rule which applies to CRAs. But it is not clear what the 0.5% threshold (cf. Art. 5 (3) (c) (i) draft RTS) is based on – is it an average of the approach adopted by NCAs (cf. Q31 CP on draft RTS)? More detail on why this threshold has been chosen is necessary to support ESMA's position.

46. In addition, the disclosure of any actual holding in financial instruments to which a recommendation relates (cf. Art. 5 (3) (a) draft RTS), is a strict approach. Nevertheless the SMSG considers this rule for qualified persons to be reasonable. ESMA further aims at improving disclosure by introducing a disclosure requirement for net short positions, while no thresholds are considered for positions in debt instruments such as bonds, structured finance products and related derivatives contracts. Principally this approach seems appropriate, but again it is not clear what the 0.5% threshold (cf. Art. 5 (3) (c) (ii) draft RTS) is based on. The SMSG interprets the instances laid down in Art. 5 (3) (c) (i)-(iii) draft RTS as alternatives; this should be made clear (by replacing "and" with "or").

47. Another point are the interdependencies between the specific obligations for qualified persons (Art. 5 (3) draft RTS) and the general rules for non-qualified persons (Art. 5 (1) draft RTS). It is also not fully clear whether non-qualified persons have to disclose the actual holding in the financial instruments to which their recommendations relates. Do major shareholdings held by non-qualified persons constitute a conflict of interest that a non-qualified person has to disclose? The SMSG understands that ESMA does not want to provide specific instances of financial interests and conflicts of interest subject to disclosure by all other persons but in order to achieve a single rulebook on market abuse it will be helpful to explain at least in the recitals of the respective RTS that the general disclosure obligations should be interpreted in the light of the special provisions for qualified persons.

48. Finally the SMSG would like to draw attention to the fact that recommendations do not always provide clear information about inducements and conflicts of interest; sometimes the information is hidden or can be found somewhere in related documents. This should be prevented in the future. ESMA should develop a common standard with regards to how financial interests and conflicts of interest are disclosed to the market. The information that has to be disclosed should also be regulated in a consistent manner: Does a person subject to disclosure have to make public the amount of shares he holds or indicate the shareholdings in percentage? The SMSG pleads for the latter approach.

7. Manager Transactions (CP on draft RTS and CP on Technical Advice)

49. Persons discharging managerial responsibilities ("PDMR") have to notify the issuer and the competent authority of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives linked thereto (Art. 19 (1) MAR). The same applies to persons closely associated with them. Furthermore a PDMR shall not conduct any transactions on its own account or for the account of a third party during a closed period of 30 days before the announcement of an interim

financial report or a year-end report which the issuer is obliged to make public (Art. 19 (11) MAR). Under certain circumstances an issuer may allow a PDMR to trade during a closed period (Art. 11 (12) MAR). This rule is new on the European level.

7.1. Principles of the regime

50. The disclosure requirement is a preventive measure against market abuse, particularly insider dealing. The publication of those transactions can also be a highly valuable source of information to investors and constitutes an additional means for competent authorities to supervise markets (cf. recitals 58 and 59 MAR). Empirical studies on capital markets in Europe have confirmed the legislature's reasons for the disclosure obligations. The SMSG believes that whilst the closed period will weaken the disclosure approach, it will also contribute to the purpose of the prohibition on insider dealing ensuring equal information of investors. Compared to the disclosure obligations, the scope of application of the rules on a closed period is smaller: Only PDMRs are prohibited from trading during a closed period whilst persons closely associated with them, such as a spouse, partner, child, relative or a legal person controlled by a PDMR, are not subject to the closed period. There are good reasons for this. The most important one is that the regulatory approach of entitling an issuer to allow a PDMR to trade during a closed period fits very well for a PDMR but not for a closely associated person who does not have any contractual relationships with the issuer. But the SMSG is concerned about a potential circumvention of the provisions on a closed period and encourages ESMA and NCAs to examine potential cases in the future. These results should be taken into account by the Commission when reporting to the European Parliament and the Council on the application of MAR by 3 July 2019 (cf. Art. 38 MAR).

7.2. Transactions subject to disclosure

51. ESMA is mandated to provide technical advice to the Commission for specifying the types of transactions which trigger the duty to notify. Art. 19 (1) MAR states that "every transaction conducted on their own account" has to be notified. ESMA intends to define these terms in a broad way. First, any transaction irrespective of where it was conducted, i.e. on a regulated market, on an MTF, on an OTF or OTC, should be notified. Second, the term acquisition shall also include transactions where the PDMR or the closely associated person does not play an active role in the investment decision, such as gifts, inheritances and donations received by a PDMR or a closely associated person (para. 94 and 95 draft Technical Advice).

52. The SMSG only partly agrees with ESMA's proposal (Q10 CP on draft Technical Advice). It is satisfied with ESMA's interpretation that the disclosure obligation should not depend on the question of where the transaction has been carried out. But in contrast to ESMA's CP on draft Technical Advice, the type of transactions should be interpreted in line with the purpose of the law, as the SMSG has already pointed out in its response to ESMA's DP on MAR (cf. ESMA/2014/SMSG011). The disclosure obligations laid down in Art. 19 (1) MAR are intended as a preventive measure against market abuse. A promptly notification prevents the suspicion of the PDMR taking

advantage of his insider knowledge. Furthermore, the disclosure of managers' transactions provides a better informational basis for investment decisions (signal effect). However, a donor does not give relevant signals to the market when he makes a gift/donation to a third party. Furthermore there are no grounds for fearing that he will take advantage of insider knowledge. This applies all the more so in the situation of an inheritance. For these reasons gifts, inheritance and donations are currently not considered as transactions triggering the duty to disclose in some Member States such as Germany and Italy. The SMSG recommends interpreting the MAR in the same way: Transactions by gifts or inheritance should not be subject to notification requirements under Art. 19 (1) MAR.

53. A further observation refers to the disclosure obligations of persons closely associated with a PDMR. The MAR requires the issuer to make public any transaction of such a person relating to the shares or debt instruments of the issuer. However, the issuer has no information as to whether the respective person falls under the category of persons closely associated with a PDMR. This is because a PDMR is not obliged to disclose such information to the issuer. Thus it is in particular the task of competent authorities to ensure that information is given to the markets only by those who are obliged to do so.

7.3. Closed period

54. ESMA is also mandated to provide technical advice to the Commission for the specification of the circumstances under which trading during a closed period may be permitted by the issuer. The SMSG has already pointed out in its response to ESMA's DP on MAR (cf. ESMA/2014/SMSG011) that the closed period is a new rule on the European level. But provisions on closed periods can be found in some Member States, in by-laws of exchanges and in Codes established by listed companies on a voluntary basis. For example it is stated in the UK LR 9.2.8 FCA Handbook that a listed company must require every PDMR to comply with the Model Code which prohibits transactions within a closed period without obtaining clearance to deal in advance by the chairman of the board.

55. It will be of utmost importance to ensure a uniform application of the rules on a closed period (single rulebook on market abuse). The SMSG welcomes ESMA's efforts to interpret the closed period in a way that takes into account the purpose of the law and ensures legal certainty for market participants (Q12 CP on draft Technical Advice). However, the SMSG does not agree with ESMA's position that the closed period would follow a transparency purpose (cf. CP on draft RTS para. 114). The closed period is a complementary instrument aimed at preventing the abuse of inside information. But it even goes further and restricts the possibility for PDMRs to profit from any other information which is not price relevant as defined by Art. 7 (4) MAR.

56. The SMSG has already asked ESMA to clarify the temporal scope of the closed period (cf. ESMA/2014/SMSG011). The Group agrees with ESMA's interpretation that any interim report (e.g. quarterly and half yearly financial report) will trigger the closed

period (cf. para. 109 draft Technical Advice); this should be laid down in the recitals of the respective delegated act by the Commission.

57. ESMA of course concentrates on the circumstances under which a PDMR can be permitted to trade during a closed period by the issuer. SMSG agrees with ESMA's interpretation that the permission on a case by case basis (cf. Art. 19 (12) (a) MAR) is only possible for the sale of shares and that any situation in which trading is permitted should be exceptional (para. 121 and Q12 CP on draft Technical Advice). In fact, the crucial question is how the term "exceptional circumstances" should be interpreted. The UK law follows a strict approach: "A person may be in severe financial difficulty if he has a pressing financial commitment that cannot be satisfied otherwise than by selling their relevant securities of the company. A liability of such a person to pay tax would not normally constitute severe financial difficulty unless the person has no other means of satisfying the liability. A circumstance will be considered exceptional if the person in question is required by a court order to transfer or sell the securities of the company or there is some other overriding legal requirement for him to do so." The same is true for the ASX Listing Rules in Australia. These rules do not prescribe what types of exceptional circumstances an issuer may specify in this regard. It is the responsibility of each issuer to determine what circumstances are sufficiently exceptional to warrant giving a PDMR approval to trade during a prohibited period.

58. Interestingly, the wording of Art. 19 (12) (a) MAR ("exceptional circumstances") corresponds one-to-one to the rules of the Model Code in the UK. This is not a compelling argument for adopting the same approach. But a strict interpretation of the exemption is in line with the wording ("exceptional circumstances which require the immediate sale") and purpose of Art. 19 (12) (a) MAR and does not impose a disproportionate burden on PDMRs given the fact that trading will be prohibited under Art. 19 (11) MAR only up to 120 calendar days/year. Thus the SMSG agrees with ESMA's position that a PDMR has to present situations which are extremely urgent, unforeseen, compelling and beyond his control (cf. draft Technical Advice 8 CP on page 47 and Q12). Of course, it has to be determined in every single case whether these requirements are fulfilled. The SMSG can very well imagine that other examples for a permission to trade might be a disposal of securities arising from the acceptance of a takeover or scheme of arrangement (see Rule 2 UK-Model Code and ASX Listing Rules Guidance Note 27: commonly excluded from the operation of a trading policy).

59. Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate (Q13 CP on draft Technical Advice), ESMA is of the opinion that they would be covered by the prohibition of trading during a closed period (para. 114). At first sight this interpretation seems to be in line with the wording of Art. 19 (11) MAR. According to this provision a PDMR shall not conduct any transactions "on its own account or for the account of a third party, directly or indirectly". The term "indirectly" may also cover portfolios managed by portfolio/asset managers at their own discretion. But from a teleological point of view, this is not at all convincing: How can a PDMR abuse information when he does not have any influence on the respective transaction? The SMSG again wishes to highlight that the closed period is not based on a transparency purpose but intends to prevent the abuse of inside information (see

para. 55 of this Advice). ESMA should take this into account when providing technical advice to the Commission.

60. According to Art. 19 (12) (b) MAR, an issuer may allow a PDMR to trade (i) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, or (ii) where the beneficial interest in the relevant security does not change. As to the second category, ESMA suggests that the request should be motivated and should only relate to a transfer of the concerned instruments between accounts of the PDMR. Such a transfer should not entail a change in the price of the instruments transferred. The SMSG does not agree with this strict interpretation. Neither the wording nor the purpose of Art. 14 (4a) MAR require to interpret the exemption in such a narrow way. For example, the "beneficial interest in the relevant security does not change" when a PDMR transfers securities to a trust. The same is true for transactions by a PDMR within his group of companies. Example: A (= PDMR) holds 1000 shares and sells them to A-plc wholly owned by him. Again, such a transaction should not be forbidden during a closed period, provided that the shares remain within A's group of consolidated companies.

8. Specification of indicators of market manipulation (CP on Technical Advice)

61. The MAR prohibits market manipulation in general terms (Art. 12 (1) and (2) MAR) and defines non-exhaustive indicators of manipulative behaviour (Annex I MAR). The Commission is empowered to adopt delegated acts specifying the indicators, in order to clarify their elements and to take into account technical developments on financial markets (Art. 12 (5) MAR). It has invited ESMA to provide technical advice on whether any elements listed in the Annex I of the MAR need to be further clarified and whether additional indictors should be clarified.

8.1. Principles of the regime

62. The SMSG observes that ESMA has dealt carefully with the Commissions' request for technical advice and agrees that the proposed examples of practices and the indicators relating to these practices clarify the indicators of manipulative behaviours listed in Annex I of the MAR (Q1 CP on Technical Advice). It would therefore just like to suggest some minor modifications of ESMA's draft technical advice (p. 12-21).

8.2. Indicators

63. ESMA's draft advice clarifies indicators of manipulative behaviours by providing non-exhaustive examples of practices. Some examples are specified as "transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument […] prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument […] – usually known as creation of a floor in the price pattern" (cf. draft technical advice 4(2) on p. 13, 8(1) on p. 15, 9(4) on p. 16 and 10(3) on p. 17). The SMSG fully agrees that this is a good example of a possible manipulation. However this is a one-sided case and it may result in a false impression that only forcing a high price (and not a low price) may constitute price manipulation. There are cases known where a manipulator is interested in keeping a low price, either

in direct manipulation or in a cross-product manipulation. Therefore this example should be supported with a symmetrical example of a possible price manipulation where “obstacles are created to prices *rising over* a certain level.

64. In addition, a small but important correction is necessary with regard to the technical advice 6(1) on p. 14, which is about wash trades “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”. SMSG’s concern is about the term “only” as it often happens that some small outside orders may be caught in such a manipulation accidentally, with a main part of the transaction being between colluding parties. Using the word “only” could exclude such a case. The SMSG is concerned that market participants could take advantage from the wording and argue that beneficial interest or market risk was not transferred “only” between parties who were acting in concert or collusion but also between other market participants. In criminal procedures courts would be bound by the wording of the prohibition. The SMSG therefore proposes to remove “only” and to reformulate the sentence as follows: “where beneficial interest or market risk is transferred between parties (...)”.

8.3. Phishing

65. ESMA asks whether the practice known as “Phishing” should be included in the list of examples of practices set out in the draft technical advice (Q3). This depends on how “Phishing” has to be understood. The CP explains: “In this context, ‘phishing’ should be understood as the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication”. The SMSG does not support the inclusion of “phishing” under this premise. After acquiring such information an account may be used for market manipulation, but it may be acquired also by a “traditional” robbery. There would be no reason why a robbery should be treated as market manipulation and not as robbery. Phishing would be much more similar to robbery than to market manipulation, as it is a tool that can be used for several and very different criminal sanctions, out of which market manipulation would be rather in minority cases, so it should be treated accordingly.

66. However phishing is also a methodology used by High Frequency Traders to uncover orders of other market participants and take advantage of them, in particular through ping orders. In this case it is clearly a subject for MAR and NCAs should be able to prosecute such unacceptable behaviour as market manipulation.

8.4. OTC-transactions

67. Finally the SMSG agrees with the inclusion of OTC transactions (Q4) given the risks of cross-market abuse, and the related theme of the MAR to catch cross-asset, cross-venue manipulation.

9. Determination of the competent authority for notification of delays in public disclosure of inside information (CP on Technical Advice)

68. Issuers of financial instruments have to publicly disclose inside information as soon as possible. However, they may, under their own responsibility, delay the public disclosure of inside information provided that certain conditions are fulfilled (Art. 17 (4) MAR). Where an issuer has delayed the disclosure of inside information, it shall inform the competent authority that disclosure was delayed and shall provide a written explanation. The Commission is empowered to adopt delegated acts specifying the competent authority for the notification (Art. 17 (3) MAR). It has asked ESMA to provide technical advice on this issue.

69. The problem behind the determination of the competent authority is that issuers may have their financial instruments traded on venues in different Member States, but the MAR requires the notification to only one competent authority (cf. para. 59 and 61 CP on Technical Advice).

70. ESMA has identified different options to determine the authority for the purpose of notification. It suggests a three-fold approach which principally refers to the competent authority of the Member State where the issuer's registered office is located. The proposed approach seems efficient and supportive of market monitoring.

10. Reporting of infringements (CP on Technical Advice)

71. Member States shall ensure that NCAs establish effective mechanisms to enable reporting of actual or potential infringements of the MAR to competent authorities, such as specific procedures for the receipt of reports of infringements, appropriate protections for persons who report infringements and protection of personal data (Art. 32 MAR). The Commission shall adopt implementing acts to specify the procedures and protection measures. To this end, it has invited ESMA to provide technical advice. ESMA has developed many procedures for protection of the reporting and of the reported persons (para. 12-22 CP on draft Technical Advice on p. 54-55).

72. The SMSG strongly supports EMSA's approach. But it would however also like to highlight that protection of employees should become a matter of practice. Employees should be aware of the respective rules and policies and to this end they should receive the necessary training. Furthermore technical conditions (proper IT systems) should be available for them in order to identify suspicious transactions or any other activities. In particular training could be handled more efficiently in practice. Employees should be confronted with real-life examples and not only with a paper-based test. They should have the chance to ask questions in order to understand how market abuse takes place. Some of the members of SMSG also hold the position that the persons responsible for the reporting and for the identification of suspicious transactions should have unlimited access to all information within the company.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Annex IV - Feedback on the Consultation Paper

Buy-back and stabilisation

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

1. Generally responses referred not only explicitly the question above but addressed various issues connected to buy-backs (sometimes also overlapping with stabilisation measures).
2. In general there was positive feedback to the idea to preserve the well working rules of Regulation (EU) No 2273/2003 to the extent this is coherent with the new legal framework.

General conditions that buy-backs must meet

3. Five respondents disagreed with taking derivatives out of the scope of the safe harbour.
4. One respondent requested that the safe harbour should not be inapplicable to an entire programme if derivatives are used but only to the extent derivatives are used.

Volume limitation / possible 50%-extension

5. Nine respondents disagreed with the proposed method of calculating the volume limitation for multi-listed shares per venue. They argued especially that this might reduce the total number of shares that can be bought back. One respondent explicitly agreed with the calculation of the volume limitation for multi-listed shares per venue.
6. There was (rather general) agreement with the (25%) approach of volume limitation among six respondents but three respondents stated that there would be a need for a volume limitation of 15% (for liquid shares) instead of 25%.
7. Six respondents agreed with the removal of the 50%-extension in case of extreme low liquidity. Nine respondents disagreed with the removal of the 50%-extension in case of extreme low liquidity and one even stated that the volume limit should be higher than 50% for illiquid stocks.
8. Three respondents requested that each competent authority should be authorized to set its own volume limitations to grant exemptions.

Deadline for public disclosure

9. Three respondents requested that the deadline for the publication of transactions should be T+1 instead of seven market sessions.

Price limitation / auctions

10. One respondent disagreed with the calculation of the price restriction for multi-listed shares per venue.
11. Another asked for clarification regarding the wording (“including”) in Article 4(2) of the draft RTS included in the CP.
12. One respondent disagreed with excluding orders placed during auctions from the safe harbour. Instead the reference price for the previous day (in case of an opening auction) and the last independent price before a closing auction/auction after volatility break should be used as price limit.

Disclosure towards competent authorities

13. Four respondents disagreed with reporting to different authorities in cases of multi-listings whereas one agreed with reporting to different authorities in cases of multi-listings.

OTC transactions

14. Six respondents disagreed with taking OTC transactions out of the scope of the safe harbour.

Other points

15. Two respondents requested that trades "on a riskless principal basis" should be within the safe harbour.
16. One respondent requested to add a "prescribed process".
17. One respondent articulated a need to clarify that buy-backs for other purposes do not constitute market abuse per se.
18. One respondent requested to specify the requirement of disclosure of "full details of programme" with an exhaustive list including a clarification regarding "subsequent changes".
19. One respondent requested guidance regarding "time scheduled programmes".

ESMA's response:

20. ESMA believes derivatives are not suitable for granting a safe harbour as it would be very difficult to monitor price and volume limits. ESMA also thinks that by using derivatives it could be relatively easy to circumvent the prohibition of market manipulation. Generally ESMA is of the opinion that buy-backs with derivatives can be legitimate but it is not appropriate to grant them a safe harbour as they depend on too many factors like strike, time, etc. which cannot be properly anticipated and, as a result, monitored. MAR provides for price and level conditions to be met that clearly refer and are intended to apply to situations where buy-backs are implemented by buying shares and not by using derivatives. In many cases it would not even make economic sense to develop a derivative programme to comply with these conditions.
21. Regarding the calculation of the volume limit per venue, ESMA believes this is the most effective way to prevent abuse and also the most unambiguous way to calculate the volume limits. As the 50% extension has been used only very rarely in the past it does not seem to be required by the market. Considering that only one competent authority has reported cases of extreme low liquidity situations justifying the application of the extended volume limitations, ESMA considers it neither useful nor necessary to maintain such a possibility. Furthermore, this would avoid having to provide a strict definition of "extreme low liquidity" as this depends much on a case-by-case assessment considering the characteristics of the specific instrument and venue. In addition, would the possibility to exceed the 25% limit on a trading venue basis be maintained, this may potentially result in different volume limits on the different trading venues where the shares are traded. In such a context, to mitigate the risk of circumvention and abusive use of such an exception, ESMA believes that the competent authority of the trading venue should therefore be in position to object to the proposed extension of the volume limits and that buy-back transactions should always take place on the venues where the 25% volume limit applies as long as they exist. ESMA is of the view that the risks of abusive behaviour linked to an extension of the volume limit outweigh possible advantages. Finally, different limits in different Member States and/or individual exemptions would not be in line with a homogenous EU approach.

22. With respect to the existing deadline of seven days, ESMA believes there seems to be a good balance between transparency and administrative burden and that if market participants are willing to disclose earlier they can, of course, voluntarily do so. As the deadline of seven days is set for stabilisations even in Level 1, for alignment reasons the same deadline should be used for buy-backs as well.

23. The proposals of ESMA regarding the price limitation and auctions did not attract many controversial responses so they seem to be in line with the majority of the market. ESMA still believes that orders entered during auctions should generally not benefit from a safe harbour possibility as auctions are especially vulnerable to abusive behaviour.

24. As regards disclosure towards competent authorities and as explained in the report, ESMA has changed its approach for the final draft RTS so as to ensure full alignment with MAR Level 1 requirement. Besides, in cases where a share is admitted to trading or traded on several trading venues in the EU, all concerned competent authorities would be in position to ensure the protection of the investors on their market. ESMA considers that not determining a single competent authority is a legally sound approach that would also avoid the setting up of complex (and probably lengthy) mechanisms for exchanging information between competent authorities.

25. In order for the price conditions set out in the draft technical standard to apply and to avoid any risk of circumvention through OTC trading, only the buy-back transactions carried out on a trading venue where the shares are admitted to trading or traded should benefit from the “safe harbour”. This is in line with the approaches currently in place in many Member States and also ensures that the shareholders are treated equally in case of buy-backs as required under the Directive 2012/30/EU (Second Company Law Directive). In ESMA’s view the calculation of the volume limit for OTC trading is not feasible. Generally OTC transactions might lack the same level of transparency that trading on other venues can offer so that, in order to prevent abusive behaviour, there is no room for granting a safe harbour for OTC trading.

26. ESMA is of the view that in general there might be various situations where certain trades might be perfectly legitimate and are not violating the prohibition of market manipulation. However, not for every constellation there is space for granting a safe harbour. For trades “on a riskless principal basis” competent authorities do not want to restrict themselves from assessing the legitimation on an individual case by case basis.

27. In ESMA’s view, the final RTS offers a detailed prescription on how to conduct in a legitimate way a buy-back (or stabilisation) programme.

28. With regard to the calculation of the price limitation, in ESMA’s opinion the wording in the RTS is self-explanatory: issuers always have to calculate the price limitation per venue – even if the share is listed on multiple venues.

29. ESMA is of the view that it does not require a further explanation that every trade or behaviour which is not within the safe harbour is generally subject to the test of the prohibition of market manipulation and subject to a case by case assessment and not a “per se” evaluation. Recital 12 of MAR is also providing clarification in this respect.

30. With respect to the full disclosure of the details of the programme, ESMA is of the opinion that buy-back programmes can individually be quite differently designed so that an exhaustive list would rather limit the freedom to design such a programme.

31. ESMA is of the opinion that, at the moment, the majority of the feedback does not express a widespread desire or need of the market participants for further guidance on “time scheduled programmes”.

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

32. ESMA received 23 answers to the question related to stabilisation measures. As there has been only one broad general question related to the topic, the answers cover a wide range of topics.

General approach

33. There were no objections against the general approach to keep the main ideas of the Regulation (EC) No 2273/2003. Moreover, many respondents explicitly supported this approach.

Stabilisation period

34. One respondent asked for clarification with regard to a specific case of IPO (existing shares have been offered and started trading before newly issued shares offered within the same offering).

35. Three respondents proposed to add that in cases where there is no allotment the stabilisation period should end - in line with the time period for debt instruments - 30 calendar days after the day in which the issuer or selling shareholder received the proceeds of the issue.

Reporting obligations

36. With regard to the reporting obligations, some respondents stated that in their view the timeframe regarding the reporting towards the competent authority is too long.

37. With regard to cases where the issuer, offeror and entities undertaking the stabilisation decide to appoint one of them as responsible for fulfilling the disclosure and reporting obligations of Article 7(1) and 7(2) of MAR, it was suggested by respondents that in such circumstances, a party which has undertaken stabilisation measures would discharge its individual responsibility for reporting and public disclosure through timely reporting to the duly appointed coordination stabilisation manager.

38. With regard to the content of the reporting obligation, one respondent suggested to delete the cross-reference to Articles 25 and 26 of MiFIR and to replace it by a wording repeating the existing stabilisation record-keeping requirement, as the suggested obligation would create a new burden for non-EEA stabilisation managers who are not subject to the MiFID II regime and so will not already be subject to Articles 25 and 26 of MiFIR.

39. One respondent raised the issue whether only the stabilisation coordinator should also be responsible for the post-stabilisation public disclosure, even if the stabilisation measures have been undertaken by several investment firms or credit institutions.

40. Some respondents proposed to establish a system that would allow sharing information provided to one competent authority with other competent authorities automatically.

“Refreshing the greenshoe” – Selling activities

41. Regarding the topic “Refreshing the greenshoe”, the responses were mixed and covered different issues:

42. In general, the respondents agreed to ESMA’s opinion that selling securities is not a behaviour that can be characterized as being for the purpose of supporting the price and therefore is not covered by the safe harbour.

43. However, some respondents stated that Article 10 of the draft RTS is unnecessary and/or asked for clarification (in the recitals) that selling securities or purchasing securities after such sales is not deemed abusive solely because being outside of the safe harbour.

44. Besides that, some respondents challenged ESMA's view that sell transactions and further acquisitions conducted after such sales do not fall under the safe harbour. According to their view, also such acquisitions fall under the definition of "stabilisation" and should benefit from the safe harbour, as – with prior disclosure of a potential refreshing – there is no danger of misleading the market.

45. Furthermore in this context some respondents stated that at least the recitals should note that the mere act of selling securities will not be deemed abusive solely because it falls outside the scope of the safe-harbour.

Block trades

46. Some respondents stressed that block trades should not be out of the scope of the safe harbour in general, especially if a significant block of securities is placed by way of accelerated book building, such placement should be considered as a significant distribution and therefore should not be excluded from the scope of the exemption.

47. Clarification was further requested regarding spin-offs via a stock exchange that do not involve standard approach of selling shares to outside investors.

ESMA's response:

48. Regarding the request made by one respondent to specify the stabilisation period for a special case of IPO, ESMA considers that there can be very different structures of IPOs and that there is no need to calculate the stabilisation period in a different way in the case described.

49. In relation to the timeframe regarding the reporting towards competent authorities and the complaint made about its long duration, ESMA recalls that this is a MAR provision so there is no possibility to amend it in any way.

50. As regards the proposal to have a system that allows sharing information provided to one competent authority with other competent authorities automatically, ESMA considers this is not within the remit of its mandate and reiterates its view already expressed in the CP, in which ESMA clarified that "multiple reporting in case of stabilisation measures taken simultaneously in different Member States is fully in line with MAR Level 1 and thus does not contradict the relevant provision. It also avoids the need of setting up complex (and probably lengthy) mechanisms for exchanging information between competent authorities". Besides, having regard to the objective of investor protection across the EU with respect to the securities under stabilisation, taking into account that stabilisation can be conducted both on or outside trading venues and to bring the required immediate transparency to those authorities having a supervisory interest in the stabilisation transactions, including those transactions in associated instruments, carried out on a trading venue they monitor, ESMA has amended its proposal. ESMA is now requiring, compared to the CP, a different multiple reporting: all the transactions, in the securities and in associated instruments conducted on or outside a trading venue should be notified to all the competent authorities of all the trading venues where the securities under stabilisation are admitted to trading or are traded and to the competent authorities of the trading venues where stabilisation transactions in associated instruments were carried out.

51. Concerning the "refreshing of the greenshoe" practice, ESMA reminds that selling activities do not benefit from the exemption provided by Article 5(4) of Regulation (EU)

No 596/2014, as the purpose of a stabilisation programme is to support the price and this aim is not achieved through selling transactions. As it is easy to fix the price through buy and sales, ESMA is further of the opinion that acquisitions conducted after such purchases also do not fall under the exemption provided by Article 5(4) of Regulation (EU) No 596/2014. Such behaviour also causes supervision issues as it is difficult to make the difference between those sales under the stabilisation programme and those that are not performed under the programme. Therefore, ESMA is still of the opinion that selling activities as well as acquisitions conducted after such selling activities do not benefit from the exemption provided by Article 5(4) of Regulation (EU) No 596/2014. However ESMA would like to emphasize again that as a recital in the final RTS clearly states, although such activities do not fall in the scope of this regulation, they should not in itself be deemed to constitute market abuse.

52. Regarding block trades, ESMA reminds that block trades are covered by the safe harbour granted by this Regulation as long as they meet the criteria of a significant distribution as set out by Article 3(2)(c) of Regulation (EU) No 596/2014, otherwise they would not benefit from the exemption that the safe harbour offers.

53. Relating to spin-offs via a stock exchange, ESMA recommends applying the general regime, as there is no need to provide specific rules for particular cases.

Market soundings

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

54. The feedback received from the respondents was related to general and specific issues, summed up as follows:

Safe harbour

55. Eight respondents including SMSG stressed that the market soundings provisions represent a safe harbour with reference to unlawful disclosure of inside information, partly in response to ESMA's different statement at the Open Hearing. Respondents cited the language in Article 11(4) as well as Recital 32 and 35 of MAR. Two respondents also noted that breach of Article 14(c) MAR (the prohibition of unlawful disclosure of inside information) can be sanctioned, but there can be no sanction for failure to comply with the provisions set forth in Article 11 of MAR (market soundings). Two respondents requested ESMA to include this point in a Recital of the Technical Standard.

Provisions on non-wall-crossed soundings

56. 14 respondents stated the provisions should only apply to market soundings involving the disclosure of inside information. One respondent highlighted that Article 11(1) of MAR should be read together with Recital 34. A couple of respondents, including the SMSG, challenged ESMA's point that where there is doubt as to whether inside information is being passed, the DMPs can avail themselves of the protection. They contended that in such cases DMPs would take a cautious approach and classify such information as inside information in any case. Another respondent noted that the market soundings provisions should not be used a shield where the assessment of information is debatable. It should either treat information as inside information or not.

Acting on behalf or on account of

57. There was some feedback regarding ESMA's proposal on acting on behalf or on account of, supporting some aspects and proposing alternative views on some others. ESMA's proposal was that where a third party has obtained enough information from a MSB which is sufficient for it to believe that a deal is highly likely to be undertaken, such party should be considered as acting on behalf or on account of the market sounding beneficiary. Six respondents made comments to this and suggested amendments or deletion.

58. Two respondents suggested this could capture situations where an investment firm is acting on its own initiative to test the market without any prior instruction from the issuer. There were other comments agreeing with the principle that a MSB's formal mandate should not be required.

Block trades and private placements

59. There were two responses on block trades. One respondent supported the clarification. Another respondent did not support it. They considered block trades and private placements to be outside the market soundings regime.

Mergers, acquisitions and IPOs

60. A respondent suggested that the market sounding regime should not apply when a professional investor is looking to buy a minority stake or in cases of possible mergers or acquisitions by one company of another. Another respondent referred to non-deal road shows covering potential issues of securities and suggested that ESMA should recognise these as outside of the scope of the market soundings regime.

Distinction between soundings and transactions

61. There was some feedback noting the difficulty in distinguishing between gauging the conditions relating to the potential size of the transaction (i.e. a market sounding) and trying to conclude a transaction. Private placements were highlighted as an area of difficulty. Three respondents pointed out that, where transactions take place on a bilateral basis and the parties share the same inside information, there is information advantage over the other. They wanted this to be specifically noted in the context of block trades as well as where the DMP and potential investor have identical information. They noted that a Member State's current market abuse rules will not consider this to be insider dealing provided the transaction goes ahead as planned prior to the discovery of inside information during the due diligence process. Without more clarity it is not clear how this is relevant to the markets soundings regime. It seems that the type of communication in this context appears to relate to negotiating the terms of a transaction rather than an earlier market sounding stage.

Joint market soundings

62. A number of respondents highlighted that there are circumstances where market soundings will be conducted jointly by more than one DMP and a potential investor. For example an issuer and its financial advisor may act jointly as a DMP for these purposes. They highlighted it is not clear if a group working together (e.g. on a joint conference call or in a face-to-face meeting) would each need to comply with the various provisions to ensure they can benefit from the protection. They suggested it would be helpful to include a concept of a lead person where more than one person is conducting the market sounding.

Cleansing

63. Respondents commented on this on both Q3 and Q8. One respondent noted that setting up a cleansing strategy is essential prior to approaching investors. Two respondents noted that the cleansing strategy provisions were not adapted in the CP, with one expressing disagreement with the approach. Two respondents suggested that a specific period of time should be set after an investor has been sounded in order to make it clear when MSRs can start again trading.

Determining which information to disclose

64. A respondent agreed that potential investors should be given sufficient information during market soundings. Another respondent went further and suggested that DMPs should be required to share their assessment on the information that would be disclosed in the course of the sounding. This will allow investors themselves to better assess the inside nature of the information passed to them in the course of the market sounding. In contrast, five respondents disagreed with para. 74 of the CP. Two wanted to delete the following sentence: "Information disclosed by a DMP should enable a potential investor to make a sufficiently informed assessment". They suggested this is unhelpful as market soundings are typically undertaken at an early stage in a transaction when full information is not likely to be available for disclosure. Another three respondents pointed out that issuers may be unwilling or unable (for confidentiality or other reasons) to give a potential investor more information than necessary. Three other respondents referred to ESMA's statement that investors should not be given information that is not useful. They asked that this should be removed as the meaning of "useful" is not clear in this context. Other two respondents disputed the statement that the DMP is best placed to assess the information.

Estimated time of the transaction

65. The feedback was predominantly focused on the issue of when information regarding a transaction was expected to be published. A couple of respondents noted this should only apply when the DMP has concluded the information subject to the market sounding is inside information. Two respondents also noted that the expected time when information will cease to be inside information can also reflect changes within an issuer as well changes to markets conditions. Two respondents raised concerns that the estimated time for an announcement is highly speculative and may lead to grounds for dispute. Several respondents pointed out that it is not always possible for the DMP to determine ex ante the expected time when the information will cease to be inside information. Another respondent wanted ESMA to delete this reference.

Determining which investors to sound

66. One respondent requested further clarification with reference to the number of potential investors to sound out. Another respondent noted that small DMPs in some specific sectors may need to sound more investors, therefore ESMA should clarify thatit does not envisage to impose a bright line limit.

DMPs assessment on the inside nature of the information

67. Some respondents suggested improvement to the way Article 12 has been presented. For example, a couple of respondents highlighted a duplication between Article 12(2) and 12(5). Two respondent highlighted that ESMA cannot elaborate on the record keeping requirement under Article 11(3), in light of Article 11(10) which refers to para. 4 to 8.

Syndicate

68. Three respondents, including the SMSG, supported ESMA's view that the market soundings provisions (and consequently the related protection) should only be relevant to the members who are actually conducting market soundings, as proposed in the technical standards.

69. One respondent supported ESMA's approach that DMPs shall have arrangements aimed at establishing an agreement among the syndicate members.

With reference to determining which investors to sound

70. One respondent was concerned that syndicate members would be sharing sensitive information if they were to ensure that the same investor is not questioned by several syndicate members in relation to the same transaction. Two other respondents expressly supported the proposal.

Timing of sounding

71. Two respondents expressed a view to restrict the time between the sounding and when the actual transaction takes place.

Obtaining the potential investor's agreement

72. There were four responses on obtaining the potential investor's consent including SMSG. Three respondents viewed Option 1 of the DP to be sufficient and did not envisage DMPs having a list of potential investors which have informed them about their wish not to be sounded. One of these respondents did however acknowledge that these lists, as indicated in Recital 22, do not need to be proactively maintained, which they viewed as helpful. The fourth respondent supported the proposal.

ESMA's response:

73. In relation to the safe harbour issue, ESMA is of the view that the nature of the provision is to serve as a protection for DMPs against unlawful disclosure of inside information, provided that the DMP complied with the requirements set forth in the TS.

74. In relation to the provisions on non-wall-crossed soundings, taking into account the feed-back from the public consultation, ESMA has considered reviewing its initial approach to propose a record keeping obligation only with reference to market soundings where, according to the DMP, inside information is disclosed.

75. However, after thorough consideration, ESMA decided to keep its initial approach, considering that the last part of Article 11(3) of MAR, together with the last part of Article 11(5) of MAR, when referring to the record keeping requirements make reference to the general term "information" and not only to "inside information". Therefore the first word includes in a broader manner the latter. In other words, according to this part of MAR the Level 1 legislator deliberately wanted to propose a drafting which would have comprehended "inside information" but it was not limited to it.

76. The mere reference to "information" is also present in several other versions of MAR (e.g. the Spanish, Swedish, French and German one) confirming the rationale above referred to.

77. Furthermore a different reading of the relevant provisions (i.e. limiting the scope only to inside information) would lead to a very narrow interpretation of the objectives underling this part of the provision on market soundings. According to such approach the entire structure would only rely on the action (or inaction) of the DMP assessing (rightly or wrongly, negligently or intentionally) that the market sounding will involve or not the disclosure of inside information. The consequence of this interpretation would be that, in case of a misjudgement (e.g. further to an assessment stating that the market sounding did not involve an inside information, it was subsequently suspected that inside information was indeed transmitted) the CAs would not have any possibility to trace and eventually check the relevant information and whether the assessment made was correct or not. This would give rise to a big loophole that the Level 1 legislator surely did not envisage.

78. Moreover, ESMA is of the view that there is also a risk that inside information is passed in the course of a market sounding the DMP has categorised as not containing inside information. Keeping records of such market soundings too is also in the DMP's interests, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information

79. In any case, ESMA is of the view that in case DMPs have doubts as to whether or not the information to be disclosed in the course of a market sounding contains inside information, it should be prudent for the DMP to classify the information as inside information and treat it as such.

80. In relation to the acting on behalf or on account of issue, ESMA is of the view that in order for the provisions on market sounding to apply the DMP must act in accordance with the MSB's mandate, irrespective of the fact that the instructions were given orally or in writing. In all cases, ESMA considers it advisable that DMPs keep records of the instructions or the mandate received in order to evidence that they are acting on behalf of the MSB.

81. In relation to the block trades and private placement issue, ESMA is of the view that market soundings related to and conducted prior to undertaking a block trade where the

DMP is acting on behalf of a secondary market offeror will be captured within the scope of Article 11 of MAR.

82. In relation to the mergers, acquisitions and IPOs issue, Recitals 32 and 33 of MAR provide specific information in relation to certain types of transactions. Moreover, Article 11(2) of MAR also indicates how mergers or acquisitions constitute market sounding.

83. In relation to the distinction between soundings and transactions, ESMA is of the view that, when in relation to possible counterparties the DMP is not trying to gauge the conditions relating to the potential size or pricing of a transaction but actually trying to conclude the transaction, then the market sounding regime will not apply.

84. In relation to joint market soundings, ESMA is of the view that there are circumstances in which more than one DMP may conduct market soundings jointly. For example, an issuer and its financial advisor may both act in their capacity as DMPs for the purposes of Article 11 of MAR. However, the issue has not been specifically elaborated in the TS as it was deemed to be beyond ESMA's mandate.

85. In relation to cleansing issue, in order to foster clarity as to the estimated date at which the information disclosed will cease to be inside information (e.g. because the transaction has become public), DMPs should include in the standard set of information, where possible, an estimation of when the information will cease to be inside information, the factors that may alter such estimation and the manner in which the person receiving the market sounding will be informed of any change in such an estimation

86. ESMA is of the view that the TS should not set a time period within which inside information can be considered to no longer be inside information. In any case, MAR Article 11(6) sets out that the DMP should notify all MSRs when the information communicated in the course of the market sounding ceases to be inside information. This should address any concerns on when trading can recommence. Moreover, ESMA does not consider it appropriate to presume that the DMP has complied with its obligation under Article 11(6) of MAR only because the transaction the receivers were sounded about has been made public. In any case, ESMA reminds that according to Article 11(7) MAR, the person receiving a market sounding remains responsible for assessing when the information received ceases to be inside information.

87. In relation to determining which information to disclose, ESMA is of the view that DMPs should determine what information will be disclosed to potential investors in the course of a sounding taking into account what is necessary and appropriate to disclose in order to gauge potential investors' interest in a possible transaction and its pricing, size and structuring. DMPs should determine prior to conducting the market sounding a standard set of information to be provided to and requested from potential investors during the sounding, ensuring that no unnecessary potentially sensitive information is disseminated and that all the MSRs will obtain the same level of information.

88. Besides, with respect to estimated time of the transaction, DMPs should, to the extent available, include in the standard set of information an estimation of when the information will cease to be inside information (for instance because the information is made public), the factors that may alter such estimation and the manner in which the person receiving the market sounding will be informed of any change in such an estimation.

89. In relation to determining which investors to sound, ESMA considers that the type and number of potential investors will depend on the circumstances, such as the subject matter of the market sounding, the issuer and type of financial instruments involved, and the willingness of potential investors to be sounded out. However, unlike the version proposed in CP, the final version of the draft technical standards does not elaborate on the obligation for DMPs to determine type and number of investors they intend to sound

out, as any additional provision to what set forth in Level 1 is considered beyond the scope of the mandate. The issue may be dealt with in future guidelines.

90. In relation to the DMPs assessment on the inside nature of the information, ESMA deems that elaborating on the record keeping requirement under Article 11(3) of MAR does not fall within the empowerment, as Article 11(10) of MAR refers to para. 4 to 8 only. The TS have been redrafted accordingly.

91. In relation to syndicate, ESMA recognise that there are circumstances in which more than one DMP may conduct market soundings jointly. For example, an issuer and its financial advisor may both act in their capacity as DMPs for the purposes of Article 11 of MAR. However, irrespective of how in practice more than one DMP may decide to arrange for a market sounding to be jointly conducted, every DMP will have to comply with the requirements set forth in Level 1 and present draft technical standards, as the issue of joint market soundings has not been considered within the mandate.

92. As the issue of the timing of market soundings falls within the arrangements prior to conducting market soundings, unlike the version of the draft TS proposed in the CP, the final version of the draft TS does not set forth any additional provision in this respect. Any more elaboration on this may be addressed in future guidelines.

93. In relation to the issue of obtaining the potential investor's agreement, the final draft TS reflect ESMA's views that DMPs should draw up a list of the potential investors that have informed them that they do not wish to receive market soundings, in relation to either all potential transactions or particular types of potential transactions. Therefore, DMPs should refrain from communicating information for the purposes of market soundings to such potential investors. It should be up to the potential investor to keep the DMP up to date if its wishes change. DMPs will not be required to continually approach the potential investors on such a list to ensure the list remains up-to-date, although it may be in their commercial interest to reconfirm the position with potential investors.

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

94. There were responses by 38 respondents to this question. 14 broadly supported the proposals subject to specific comments, 8 disagreed with the proposals and 16 made specific comments without agreeing or disagreeing with the proposals overall.

95. There were some general comments. Two respondents considered these to be very burdensome and costly, resulting in reduced market soundings and less willingness for DMPs to represent smaller issuers in light of the costs. Another respondent suggested ESMA should include a provision stating the DMP should follow the order of the script unless there is good reason not to.

96. The feedback received from the respondents can be grouped as follows:

Clarification that the conversation is a market sounding

97. One respondent stated that it should permissible at this stage to indicate whether the call will or will not involve the disclosure of inside information.

Confirmation that the DMP is speaking with the right person and the receiver's consent to proceed

98. Three respondents considered that the consent to proceed as superfluous, as consent will always be required before inside information is being disclosed. One of these respondents also stated this is outside the ESMA mandate. Another respondent specifically supported this as it avoids the risk of disclosing inside information.

Market soundings where the DMP has assessed that the information that will be disclosed is not inside information

99. Ten respondents noted that this part of the script should be completely removed largely because they viewed it as outside ESMA's mandate. A couple of respondents noted it could be confusing to investors and the DMPs should have the flexibility to use a script if it considers it appropriate. One respondent made the point that if a DMP makes a mistake in their assessment it is inappropriate for ESMA to afford them protection and they should be liable for improper disclosure.

100. On the other hand, three respondents, representing buy-side views, were supportive of non-wall crossing scripts. Another respondent seemed to support some of the elements of the script for non-wall crossed sounding.

101. One respondent was concerned about the potential liability implications as a rationale against elements of the script on non-wall crossed soundings.

With reference to the risk of incorrect assessment of information and the fact that MSR should make their own assessment

102. A respondent supported the caveat but five respondents disagreed with it. The considered this to be either disproportionate, highlighted that instances of such errors are rare (implying they do happen), confusing for the investors or considered inappropriate to state that the assessment could be incorrect. Another respondent requested an option for DMPs to state they are still considering their assessment so that these cases can go through this script. It reflects that an assessment cannot always be clearly made.

103. Two respondents referred concerns about the statement that information could represent inside information when taking into account other public information the MSR may hold. One respondent was concerned that this was confusing and another was concerned that this inappropriately goes beyond the definition of inside information in Article 7 of MAR.

104. Two of the respondents agreed that it should be made clear to the MSR that they have to make their own assessment of the information. Three disagreed with this element. One argued this is disproportionate. Another respondent was concerned about the reference to MSRs keeping the information confidential insofar as they may disagree on the fact that they are subject to such an obligation.

Consent to receive the information

105. Two respondents expressed disagreement with this element of the script.

Market soundings where the DMP has assessed the information to be inside information

106. A respondent highlighted a technical point that not all information disclosed in a wall-crossed sounding will necessarily involve the disclosure of inside information. In some cases only part of the information disclosed will be inside information. Two respondents, including the SMSG, preferred an approach (as an alternative to non-wall crossed sounding scripts) that the information being disclosed is being "treated" as inside information rather than being inside information.

Expected time when information ceases to be inside information

107. Seven respondents, including the SMSG, disagreed with this element of the script, similar to the feedback to Question 3 on the issue of the assessment including when information is expected to cease to be inside information. Three of these respondents suggested it is not in ESMA's mandate and that there are legal and regulatory risks in requiring a date to be specified. The same respondents also mentioned that the Level 1

requirement to cleanse the MSR should be deemed fulfilled when a transaction is launched at the anticipated date.

108. Other comments were also provided: three respondents also noted this information is not always available and therefore providing this information is potentially misleading where it is not clear what the anticipated time is. Another respondent stated that the MSR can ask for this information in any case. The SMSG also noted it should be sufficient for the DMP to inform the potential investor of how it will inform it that the information has ceased to be inside information under Article 11(6).

109. A respondent did not disagree with the proposal but stated there should be also be a caveat that changing market conditions could lead to the abandonment of the planned transaction and therefore the MSR would not be cleansed through public disclosure.

110. One respondent supported the provision and proposed that DMPs should disclose to the MSR whether the information passed during a sounding remains inside information after the confidentiality period expires. This would make potential investors less reluctant to engage in market soundings.

Informing the MSR of the prohibitions and obligations

111. A respondent noted that the DMP is required to inform the MSR of the obligation set forth in Article 11(5)(b) and (c) (prohibition on dealing) as well as of the obligation to keep the information confidential. Another noted the MSR should not be bound by the DMP's assessment on whether or not the information is inside information (and therefore subject to the insider dealing prohibition and the obligation to keep the information confidential), and therefore should assess the information themselves.

The information regarding the transaction to be disclosed

112. There were some comments regarding cross-references to be corrected. Two respondents including the SMSG noted Recital 18 and Part III.2.1 of the CP refers to other information being disclosed "which may provide context and background to the possible transaction, but is not directly related to it" in a sounding. They pointed out that Article 13(1)(v) was more restrictive and referred to "information regarding the transaction". One respondent suggested DMPs should clarify if it acts on behalf of a market sounding beneficiary.

Simplified scripts

113. Six respondents noted that the simplified script is not simple enough. Two of them considered the DMP should be given maximum flexibility on what to say provided that it is clear that the information is inside information. One respondent questioned the need for simplified scripts for non-wall crossings.

Legal drafting

114. Two respondents provided their own alternative drafting. Essentially they prefer an approach where Article 13(1) (full script) and (2) (simplified script) of the RTS simply cross refers to Annex I if the ITS.

Communications in writing

115. A respondent suggested that the DMP should be able to email the script to make the process more practical and efficient and allow for the market sounding to proceed once consent has been obtained on the basis of the written communication. Another respondent also specified a preference to receive basic sounding disclosures in writing at the outset of the discussion. They consider that basic written disclosure would lead to more consistent and effective communication than oral scripts which may be hurried or inconsistent.

Other points

116. A respondent suggested specific templates should be adopted for block trades where the line between soundings and canvassing is less clear. Another respondent requested specific guidance where a market sounding recipient that did not want to be wall-crossed has received a market sounding not including inside information but the information later becomes inside information.

ESMA's response:

117. The TS have been redrafted in order to improve their clarity and ensure consistency with the legal basis. As a result of this the concept of "Script" (the standard and the simplified one) previously included in the TS has been replaced by a predetermined standard set of information to be provided to and requested from potential investors. Such standard set of information should include, among others, whether or not the market sounding will involve the disclosure of inside information and a confirmation from the receiver that the DMP is communicating with the person entrusted by the potential investor to receive the market sounding. All market soundings should be subject to record keeping requirements.

118. In relation to the provisions on market soundings where the DMP has assessed that the information to be disclosed is not inside information, ESMA is of the view that they should be subject to the record keeping obligation. As explained in detail in ESMA's response to Question 3, a different reading of the relevant provisions would lead to a very narrow interpretation of the objectives underling this part of the provision on market soundings. In other words, according to such an approach the entire structure would only rely on the action (or inaction) of the DMP assessing (rightly or wrongly, negligently or intentionally) that the market sounding will involve or not the disclosure of inside information. The consequence of this interpretation, would be that, in case of a misjudgement (e.g. further to an assessment stating that the market sounding did not involve an inside information, it was subsequently suspected that inside information was indeed transmitted) the competent authorities would not have any possibility to trace and eventually check the relevant information and whether the assessment made was correct or not. This would give rise to a big loophole that the Level 1 legislator surely did not envisage.

119. Moreover, ESMA is of the view that there is also a risk that inside information is passed in the course of a market sounding the DMP has categorised as not containing inside information. Keeping records of such market soundings too is also in the DMP's interests, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information

120. In any case, ESMA is of the view that in case DMPs have doubts as to whether or not the information to be disclosed in the course of a market sounding contains inside information, it should be prudent for the disclosing market participant to classify the information as inside information and treat it as such.

121. In respect of the MSRs' obligation to assess for themselves whether or not they are in possession of inside information under Article 11(7) of MAR, it has been deemed to be beyond ESMA's mandate to elaborate in the TS.

122. In relation to the provisions on market soundings where the DMP has assessed that the information to be disclosed is inside information, the standard set of information to be provided to and requested from potential investors is the one set forth in Article 3(3). The standard set of information prepared by the DMP may include, in addition to the inside

information, also some non-inside information. The recording of the communications taking place in the course of the market sounding (or the minutes where no recording facility is being used) will evidence the communication of both such inside and non-inside information.

123. With reference to the expected time when information ceases to be inside information, the standard set of information should include, where possible, an estimation of when the information will cease to be inside information, the factors that may alter such an estimation and the manner in which the potential investor will be informed of any change in such an estimation. The fact that a transaction has been undertaken and made public does not relieve the DMP from their obligation to notify the receivers that the information they received is no longer inside information. In case of abandonment of the planned transaction, when the information is no longer inside information, the DMP should notify the receivers too.

124. With reference to the information to be given to the MSR regarding their prohibitions and obligations, the standard set of information explicitly include the obligation for the DMP to provide such information to the MSR. The TS will not elaborate on the MSR's assessment of the inside nature of the information received, as it will be the object of future guidelines.

125. With reference to market soundings taking place in writing, the standards allow for that possibility. In such cases, DMPs should keep a copy of the correspondence. In such case it will be a two-step process, where the DMPs first request and obtain the MSR's consent prior to transmitting any information, and then they communicate the information for the purposes of the market sounding. DMPs will have to provide to and request from every potential investors the same standard set of information.

126. Finally, ESMA is of the view that if somehow information which the DMP has considered not to be inside information at a later stage becomes inside information, it is likely because there is subsequent information which has changed its status. As expressly provided for in the Level 1, the DMP's assessment as to inside nature of the information to be disclosed in the market sounding will have to be conducted for each disclosure prior to conducting the market sounding or throughout the market sounding.

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

127. There were responses by 33 respondents to this question. 20 broadly supported the proposals subject to specific comments, 8 disagreed with the proposals and five made specific comments without agreeing or disagreeing with the proposals overall. The responses can be grouped with reference to the following issues:

ESMA mandate and non-wall crossings

128. Three respondents specifically indicated that sounding lists should not be included for non-wall-crossed communications (others have made the broader point that the market soundings provisions should not apply to non-wall crossings in Question 3). In cases where a disclosing market participant discloses information but considers there is an argument that information could be inside information, and therefore wants to avail itself of the protection afforded by Article 11(5), should maintain sounding lists for non-wall-crossed soundings as well as for reasons for good practice.

Contact details, telephone and emails

129. Five respondents raised concerns about maintaining telephone and email information on the sounding list. Three stated such information should be available upon request rather than systematically recorded for each sounding as that would be administratively

too burdensome to maintain. One respondent argued this should not be included because of privacy concerns regarding this information. The SMSG state that there are no contact details for face-to-face market soundings.

Follow up communications

130. Four respondents made comments regarding follow-up calls or conversations. Three suggested updating only the sounding list of follow-up communications which are relevant or materially important communications or discussions where inside information is disclosed.

The names of persons sounded

131. A respondent noted that market soundings may be received by persons who are not employees. Another respondent requested that ESMA confirm that the sounding list does not include any other person with access to inside information working with the market sounding recipient such as advisers, accounts and CRAs. It also highlighted that this is a duplication, presumably with reference to insider lists.

Other points

132. Three respondents considered that records of communications are already made, for example on recorded lines on written records. Two other stated that in the case of face-to-face meetings the written records should be sufficient. A respondent noted an overlap with insider lists. Another respondent sought clarification as to whether sounding lists could be included in insider lists. Four respondents noted where joint market soundings are made, only one DMP should maintain the list. One respondent pointed out that ESMA does not have a legal mandate for contact lists. They stated DMPs, as a matter of good practice, will not contact investors who do not want to be sounded.

ESMA's response:

133. With reference to the non-wall crossings sounding, the standards provide for the record keeping of the details of the potential investors that have received information in the course of the sounding, irrespective of the fact that they received or not inside information. This is consistent with the approach of keeping record of all market soundings described in details in ESMA's response to Question 3.

134. With reference to the contact details and the follow up communications, ESMA is of the view that DMPs should obtain and keep records of the names of all natural and legal persons that received information, and not of other persons working with the MSR. ESMA considers this to be proportionate as well as consistent with Article 11(5), second subparagraph of MAR, which refers to recording "the legal and natural persons acting on behalf of the potential investor". DMPs should also obtain and keep records of date and time of each communication and the contact details of the potential investors used for the purposes of the market sounding, irrespective of the importance of the communication per se. This is consistent with the provision of keeping record of all communications of information taking place for the purposes of the market sounding. ESMA is of the view that the record keeping of the above information is important irrespective of the fact that DMPs will have to keep records of all the communication with the MSR (audio or video recording or written minutes) as chronology of communications is more clearly presented. ESMA's mandate with reference to this point stems from Article 11(5) of MAR.

135. ESMA has not proposed a separate template for sounding list, but has stated the information contained in the list and the fact that it must be kept in an electronic format.

136. ESMA recognises that there might be some overlapping between the information contained in the sounding lists and in the insider list drawn up in accordance with Article 18 of MAR. However, there are differences in the information that such lists contain as they are meant to serve different purposes.

137. The final versions of the standards no longer make reference to market soundings that take place jointly as there is no explicit reference to this in the legal basis. Therefore, according to Level 1 text, every DMP should be responsible for meeting the requirements set forth in the market sounding provisions, including the obligation of drawing up and keeping records of sounding lists.

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

138. There were responses by 31 respondents to this question. 21 broadly supported the proposals subject to specific comments, seven disagreed with the proposals. Four others referred to their responses in another question that the provisions should only apply to market soundings involving inside information.

139. Of the respondents who did not support the proposal, a variety of reasons were provided. A respondent did not think ESMA has a mandate according to MAR. Three respondents did not think contact lists would materially improve the information exposure management and considered other elements of the technical standards more effective, including the Script provision covering the consent of potential investors.

140. A couple of respondents stated that these are not very useful compared with the burden of updating them. One respondent who supported the proposal also stated that investors often designate several people for receiving the soundings so it would be burdensome to continuously update a list of points of contact.

141. Another respondent noted that soundings are so much more frequent in a DCM context than in an ECM context and that the provision would be burdensome even though it represents good practice.

142. Two respondents stated that where an issuer participates in a sounding jointly with their advisor, only the advisor should maintain the contact list.

ESMA's response:

143. After further consideration, ESMA now is of the view that any provision on list of contact details of designated persons or contact points entrusted by potential investors to receive market soundings is not within the scope of ESMA's mandate. Therefore, in the standards every reference to them has been deleted. That will not prevent DMPs to keep records of such information for commercial purposes.

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

144. There were responses by 37 respondents to this question. 15 broadly supported the proposals subject to specific comments, 12 disagreed with the proposals and 10 made specific comments without agreeing or disagreeing with the proposals overall. The issues raised by the respondents can be summed up as follows:

Scope

145. Aside from the general responses received with reference to Question 3, nine respondents specifically made the point that the record keeping provisions should not apply to non-wall crossings. Three respondents, in response to Question 4, made the same point. They highlighted that in respect of DCM in particular, stating information subject to a sounding (size of position and fact that market participants are contemplating a sale) is not typically inside information. Including this would inhibit market participants and negatively impact the bond market. Another respondent, in response to Question 3, made the point that including record provisions for non-wall crossed soundings would be onerous and burdensome for DMPs.

Market soundings other than through recorded lines

146. A respondent was specifically grateful for the recognition of market soundings being undertaken other than through a recorded line.

Issuers and recorded lines

147. Four respondents expressed views on recordings in Question 3 of which are relevant to this question. They noted that a distinction should be made between issuers and other DMPs on the basis that issuers do not usually have recording facilities. ESMA received similar feedback to the DP.

Format of records

148. 11 respondents made points about the provisions on the format for recordings stressing that they are burdensome for various reasons. 10 respondents made specific comments on the written record provisions. Eight of these noted that parties agreeing to the record through written minutes would involve discussions about content and diction and will entail review by lawyers on each side, and would be extremely costly and time consuming. However, one of these respondents noted it may be good practice for DMPs to share minutes with market sounding recipients and other parties in line with Article 16(7) of MiFID II. Another respondent noted that signatures would be less useful in ECM contexts when the markets soundings take place in writing. For DCM markets signatures are excessive, burdensome and wasteful having already obtained consent and recorded the consent.

149. Another respondent sought more clarity on what a “sufficient written record” for face-to-face meetings. A line by line recording may be too burdensome whereas an audio recording in line with recorded phone conversations would be practical. There were concerns that the CP proposal would result in different standards of recording. Another respondent specifically noted, where market soundings are conducted by an issuer without their broker, file notes and Scripts should be sufficient as a record and avoid a disproportionate burden for issuers. Another respondent also stated a graduated approach should be adopted for SMEs.

150. Five pointed out that written records should be sufficient for face-to-face meetings, noting the standards appear to require video or tape recordings. Another respondent welcomed the clarification of audio recordings for market soundings.

151. There were four specific comments as regards mobile phones. One respondent stated these should not be permitted at all. Three respondents stated that soundings on mobile phones should only be permissible where necessary and provided that no other form of communication is possible in the circumstances. One of these respondents recognised mobile phones may be necessary out of hours, but wanted ESMA to provide further clarity on how to adapt the record keeping to this case. It proposed a written summary the next business day and the signature of the MSR to verify its accuracy.

152. A respondent (in response to Question 8) specifically disagreed with proposed ITS Article 3(2) as regarding keeping records in electronic format. Except for recorded telephone lines it considered the proposal to be disproportionate, citing communications between syndicate members, proof of employee training, the assessment of information requests by potential investor not to be sounded, requiring a "document warehouse".

Joint soundings

153. Six respondents reiterated feedback to Question 3 that one set of records for joint market soundings should be sufficient and would avoid unnecessary duplication.

Other comments

154. Two respondents welcomed that ESMA is no longer putting forward the proposal to have written confirmation of the MSR's consent to receive inside information. Another respondent noted there should be no provisions on recordings as clearly this is contrary to what stated in Level 1.

ESMA's response:

155. In order to provide certainty as to the content of the information communicated in the course of market soundings, where they are conducted by telephone and the DMP has access to recorded telephone lines, the DMP should use such lines, provided that the MSR has given their consent to the recording. Where market soundings are conducted through channels other than by recorded telephone lines, records of the market sounding communications should be kept in written form, or in the form of audio or video recordings. The persons working for a DMP should send and receive telephone calls and electronic communications for the purposes of market soundings using only equipment provided by the DMP.

156. This proposal does not preclude market soundings from taking place via other channels. Indeed, draft Article 2(1) of the RTS states that DMPs "*may communicate information to potential investors for the purposes of market soundings orally, in physical meetings, audio or video telephone calls, or in writing, by mail, fax, or electronic communications including email.*" The intention is not to introduce an absolute requirement that all market soundings conducted via telephone must be done on recorded lines but to maximize the accuracy of the records, through reasonable and proportionate tools, by requiring that where recorded telephone lines already exist within a DMP, they are used.

157. It is crucial that accurate and complete records of market sounding conversations are kept as these are vital for competent authorities to be able check that disclosures of inside information have been made lawfully and to determine who received precisely what information when. Competent authorities view recorded telephone lines as the highest quality form of records as there is no role for discretion or subjectivity in their content and communications can be checked verbatim. Recorded telephone lines allow competent authorities to reconstruct the full chain of information flow and also provide the highest degree of accuracy in terms of pinpointing at precisely what time disclosures were made; this level of precision is often extremely important in investigating insider dealing cases. The ability to re-play exactly what was said is beneficial from a DMP's perspective too as it allows them to evidence proper conduct and acts as indisputable defence should, for example, the recipient consider that the market sounding was not properly conducted.

158. Nevertheless, the standards recognise that it would be disproportionate to require all market soundings via telephone to be conducted on recorded lines as this would contain

an implicit requirement that DMPs who do not already have recorded lines established must invest in these. Particularly in cases where issuers act as DMP themselves, this would be burdensome and costly.

159. However, common market practice is that issuers employ an investment firm to act on their behalf as DMP, and investment firms are already required under other provisions to have recorded telephone lines established. It is a well-known fact that, beyond regulatory requirements, recording of phone conversations is usual practice among treasury and bond desks of investment banks (among the most active DMPs). In this case, those records are being already kept for commercial or contractual purposes, which would make the proportionality of the requirement even more robust. This would impose no extra cost to them.

160. In terms of data protection concerns, the use of recorded telephone lines is subject to the MSR's consent to the recording. Where the MSR does not give their consent to the recording or where the communication of information takes place during unrecorded meetings or telephone conversations (for instance because the DMP does not have access to recorded lines), the DMP should draw up written minutes or notes of such meetings or telephone conversations. The written minutes or notes should be signed by both parties. If no agreement on their content can be reached within a prescribed time limit, the DMPs should keep two versions of the written minutes or notes, either of them signed by one party. Where the MSR does not provide the DMP with any signed written minutes or notes within five working days after the market sounding, the disclosing market participant should keep a copy of the version of the minutes or notes signed by the DMP.

161. Where the communication of information within the sounding takes place in writing, the DMPs should keep a copy of the correspondence. In such case it will be a two-step process, where the DMPs first request and obtain the MSR's consent prior to transmitting any information, then they communicate the information for the purposes of the market sounding.

162. ESMA is of the view that all records should be kept in an electronic format, as it is accessible and easily transmitted to the competent authority upon request.

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

163. There were responses by 36 respondents to this question. 22 broadly supported the proposals subject to specific comments, two disagreed with the proposals and 12 made specific comments without agreeing or disagreeing with the proposals overall. The issues raised by the respondents can be summed up as follows:

Non-wall crossings

164. Five respondents specifically indicated that no provisions should be set forth for non-wall-crossed communications (others have made the broader point that the market soundings provisions should not apply to non-wall crossings in Question 3).

Limiting number of employees responsible for sounding

165. No specific comments though generally many respondents emphasised the general principle of limiting access inside information on a need-to-know basis.

Education and training

166. Two respondents, even though they did not disagree with the principle of education and training, did not consider it practical that specific training is given to all employees on

whether information is inside information, as this is a highly specialised task and is generally undertaken by qualified professionals who have developed expertise through practice. One of these respondents preferred appropriate training to be limited to relevant staff as to their regulatory obligations. The other respondent sought more clarification from ESMA as the exact level of training may differ depending on the role of the employees.

167. Another respondent highlighted their support for properly trained staff who conducts market soundings.

Limiting access to inside information in relation to non-sounding employees

168. Six respondents highlighted that employees will have access to inside information for reasons other than conducting market soundings. These include operational reasons, such as planning, negotiating or executing the transaction which is the subject of the market sounding (and not just in connection with the market sounding itself), and for advising the issuer. These employees should be excluded. Another buy-side respondent agreed with the principle of limiting access to inside information but stated that sell-side firms should have flexibility on a transaction by transaction basis as regards who within their firm should have access to information and when.

169. Three respondents, including the SMSG made references to “private side” employees in the CP text. One respondent sought clarification of this term. Two others, including the SMSG, suggested “ensuring” that stating that non-sounding “private side” staff “are not in possession” of inside information would disproportionately undermine the value of segregating the “public” and “private” sides in investment banks.

170. One respondent wanted ESMA to specifically recognise that working groups for equity and equity-linked debt transactions often involve large numbers of employees to be effectively managed and carried out.

171. Finally, one respondent questioned whether ESMA has a legal mandate on this provision as it goes beyond Article 11(4) of MAR. It empowers ESMA to develop RTS provisions in relation to persons wishing to benefit from the statutory protection only.

Time between inside information available and market sounding

172. A respondent did not consider this provision to be useful as firms already limit access to information on a need-to-know basis in any case.

173. Two respondents stated that this provision would not be applicable with reference to an issuer. They gave the practical example of CEO, Finance Director or advisors to the issuer, who have been involved in advising from an early stage. If the provision remains, an exception is needed for advising the issuer as opposed to being involved in the market sounding.

Record keeping requirements

174. A respondent considered that Article 3(2) of the draft ITS in the CP requiring that each record (except those set forth in Article 3(3)) are kept in an electronic form is disproportionate considering the breadth of the records to be kept, (it would apply for example to communications between sounding syndicate members, to proofs of employees’ training, to the characterisation of the information, to the request by a potential investor not be sounded, etc.). This would require a document warehouse system that not all firms have in place.

ESMA's response:

175. After thorough consideration, ESMA is of the view that provisions regarding internal arrangements and staff training in order for the DMPs to benefit from the protection provided for by the market sounding provisions are out of the scope of the empowerment.

176. As a consequence all references to such issues have been deleted from the standards.

Accepted Market Practices

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

178. The vast majority of respondents and the SMSG agreed with ESMA's view taken in relation to OTC transactions. Notably respondents generally thought that OTC transactions should not be "per se" excluded from the scope of AMP but that they require a further assessment from competent authorities to determine if they meet the criterion of substantial transparency level.

179. Those who did not favour ESMA's view believed that OTC transactions, for its own nature, do not meet the criteria of substantial level of transparency set out in MAR.

180. There was a particular comment that suggested that if OTC transactions were authorized under an AMP, those should not have impact (price impact) on the "underlying" securities traded on regulated markets, MTFs or OTFs. Another comment noted that when an AMP can be executed on or off-exchange (OTC) competent authorities should accept one or the other, independently, based purely on the criteria set out in Article 13 of MAR.

181. A respondent mentioned explicitly that transactions in OTC derivatives, as being subject to the relevant reporting and transparency regime (EMIR, MiFID/R), would deserve the same consideration as other OTC trading, therefore proposing a revision in the vocabulary used in the CP.

182. Some respondents asked for more clarity in relation to terms used in the CP. More clarity was requested in relation the definition of "interested parties" used in the CP. A couple of respondents pointed out the need to replace the term "financial services provider" with the term "market participants" as the former has no proper definition in any securities primary legislation.

183. There were again some requests to ESMA to clarify if it is possible to automatically extend to a MTF/OTF and to financial instruments admitted to trading on a MTF an AMP already in place.

184. It is necessary to note that two answers mentioned hedging taking place in trading platforms as a practice to be established as AMP.

ESMA's response:

185. In order to address some concerns highlighted by respondents to the consultation, ESMA has provided some clarifications in the final report.

186. On the request to define the concept of "interested parties", ESMA would like to remind that a definition was given in Article 3(l) of the draft of the RTS proposed in the CP. However, in light of the comments received and for sake of clarity, ESMA is no longer using this term and has replaced it with "beneficiary" of an AMP, which has been developed in the final draft RTS.

187. On the suggestion to replace the expression "financial services provider" in Article 16(1)(b) of the draft of the RTS presented in the CP, with the terms "market participants", ESMA would like to highlight that the terms "financial services provider" has been taken from Article 3(2) of the Commission Directive 2004/72/EC that deals with bodies that need to be consulted before establishing an AMP under the current MAD regime. On the lack of clarity of the concept, ESMA is replacing the words "financial services provider"

simply with the terms “investment firms or credit institutions”, noting also the list of bodies provided in the final draft RTS is non-exhaustive.

188. ESMA would also like to emphasize that the term OTC relates to “place or venue” where a transaction has been carried out. In the CP, OTC meant “off exchange” and should be understood, by reference to the MAR text, as referring to “traded outside a trading venue” whatever is the nature of the financial instrument traded (underlying or derivative).

189. On the comment suggesting that if OTC transactions were authorised under an AMP, those should not have impact (price impact) on the “underlying” securities traded on regulated markets, MTFs or OTFs, ESMA is of the opinion that, as OTC trading is not excluded by principle from the scope of AMPs and in cases where, after assessment, a competent authority accepts OTC trading for a particular AMP, then the price impact of the AMP cannot be ruled out in the security traded on the RM/MTF/OTF.

190. With respect to a situation where a financial instrument is traded both on and outside a trading venue, situation that currently applies to many financial instruments, ESMA would like to point out that depending on the specific situation this might be relevant for the consideration of the competent authority that is establishing the particular AMP. Competent authorities are, however, compelled by Article 13 of MAR to go through a process and to assess requirements to establish, maintain and terminate an AMP.

191. On the issue of the automatic extension to financial instruments admitted to trading on a MTF or for which a request for admission has been made, or traded on a MTF or an OTF of an AMP already established under the current MAD regime, ESMA acknowledges that considering the extended scope of MAR, such financial instruments can be subject of an AMP. Besides ESMA wishes to highlight that according to Article 13(11) of MAR competent authorities shall notify to ESMA within three months of the entry into force of the RTS the AMPs that they have established before 2 July 2014 and that ESMA should issue an opinion on these AMPs. As part of this process, competent authorities will have to indicate the financial instruments concerned by the specific AMP and that may include financial instruments admitted to trading on a MTF or for which a request for admission has been made, or, traded on a MTF or an OTF.

192. Finally, with respect to hedging as a practice that should be granted the status of an AMP, ESMA reiterates the distinction, already drawn in the CP (para. 112), between practices and activities carried out in financial markets; “market practice” means “the way an activity is handled and executed in the market” while “activity” would cover “different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling”.

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

193. Around 53% of the respondents supported ESMA’s view that the status of supervised person of the entity performing AMPs is an essential criterion in the assessment to be conducted by the competent authority. Among those backing ESMA’s position, approximately 20% consider that only supervised persons should be performing an AMP, irrespective of the assessment of the competent authority. A respondent even considers that restrictions to supervised persons would fall under the mandate of ESMA under Article 13(7) of MAR and therefore supports the limitation of AMPs performance to supervised persons only. A few respondents claimed that, in general, competent

authorities are better placed to oversight “supervised firms” and that these will be more likely to comply with the regulation.

194. An answer recognized explicitly the rationality of ESMA’s main reasoning to restrict AMP execution to “supervised firms” stated in para. 123 of the CP, as services that can be provided may be close to, or overlap with, some investment services in both existing and future MiFID regime.

195. 47% of responses considered that the requirement that only supervised persons should perform AMPs is overly restrictive and that there is no difference between supervised and non-supervised firms with regard to the application of Market Abuse Regulation. To support their claims they pointed out that a) such restriction is outside the mandate of ESMA according to Article 13(7) of MAR and, b) all market participants are, in principle, bound by the same relevant rules on trading venues and therefore they all should enjoy the same benefits. Additionally, some viewed that ESMA had expanded the concept of “supervised firms” as opposed to MiFID firms/credit institutions.

196. One respondent mentioned that there is no definition in the primary legislation as to what constitutes “performing or executing” an AMP, terms used in the CP.

197. A special issue expressed by a couple of respondents relates to AMPs in energy markets and the qualification of “supervised entity” in those markets. A respondent thinks that the definition of “supervised persons” in the CP (para. 121) is still not clear, since it leaves question marks as it would include energy companies that are supervised by national energy regulators or subject to any kind of supervision under existing regulations such as REMIT or EMIR. Another is of the view that, in any case, it is necessary to clarify the definition of “supervised person”.

ESMA’s response:

198. ESMA remains of the view that there is no general restriction to perform an AMP and considers that MAR does not allow to exclude ex ante and by principle non-supervised persons, but, at the same time, leaves competent authorities with the discretion to assess whether in particular cases and in order to provide safeguards to the operation and to the market, the performance of a particular AMP requires a supervised person status.

199. ESMA is of the view that from a prudential supervision perspective and to adequately protect market participants, it is necessary that in some particular cases, following the assessment of competent authorities, persons performing a particular AMP are to be required the status of supervised person.

200. Following the comments received, ESMA also appreciates the merits in offering a broader and more precise definition of “supervised persons”. In this respect, the definition of supervised persons needs to specifically account for supervised persons or entities in energy, emission allowances and commodities markets as a result of the wider scope of MAR.

201. Consequently, ESMA provides in the final draft RTS a more precise definition of “supervised persons” in the context of the EU financial regulation.

STORs

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

203. This question elicited 35 responses. Six respondents agree with both analyses with respect to Article 16(1) and (2) of MAR on attempted market abuse as well as OTC derivatives trading. Thirteen respondents agree with the extension of the obligation to submit STORs with reference to OTC derivatives, but have questions about the STOR obligation regarding attempted market abuse. One respondent agrees with the obligation to submit STORs in case of attempted market abuse, but has questions about the obligation to submit STORs with respect to OTC derivatives.

204. One respondent argues that the STOR obligation should not apply to trading on own account of investment firms.

OTC derivatives:

205. With respect to OTC derivatives, the majority of the expressed concerns revolve around the difficulties of monitoring suspicious trading with regards to OTC derivatives. Apparent abusive behaviour can often be motivated by hedging purposes, and therefore an assessment of whether or not an order is abusive must be conducted taking into consideration the overall circumstances; such process requires subjectivity and cannot be addressed by technical means.

Attempted market abuse:

206. The majority of the concerns expressed regard the practical difficulties of monitoring attempted abuse. Moreover, the responses state that it is not clear what type of behaviour might constitute attempted abuse and that practical examples would help.

207. One respondent states that it must be clear that “attempt” should be interpreted in the same manner as the corresponding criminal law, as laid down in each member state or as set forth in A.11bis of the Corpus Juris. The definition of “attempt” should not be too broad, but should include activities that are undertaken in furtherance of the goal of manipulation, and not simply activity that could result in manipulation.

ESMA’s response

208. ESMA stresses that under MAR, the obligation to submit STORs does include trading of investment firms on own account.

209. Although ESMA understands that monitoring suspicious trading behaviour with reference to OTC derivatives can be complex and often require an assessment by the firm of whether or not the trading is suspicious, OTC financial instruments are unquestionably within the scope of MAR where their price or value depends on, or has an effect on, a financial instrument which is traded on a trading venue. ESMA believes that STORs regarding OTC derivatives are important signals for national competent authorities to act upon. Therefore, ESMA considers trading of OTC derivatives under the scope of the obligation to submit STORs.

210. In response to a large number of participant’s asking for more clarification or examples of what constitutes attempted market abuse, ESMA would point to Recital 41 of MAR which refers to situations where the activity is started but not completed, for example as a result of failed technology or an instruction to trade which is not acted upon.

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

211. 17 respondents (out of 38) agree with ESMA's clarification on the timing of STOR reporting. The remaining respondents' feedback focusses on the two-week timeframe included in the RTS. A large number of respondents argue that the timeframe, if any, should start from when reasonable suspicion is formed and some believe that "without delay once reasonable suspicion has formed" provides enough guidance and that two weeks is too restrictive and would lead to defensive reporting.

212. Some believe reporting by phone will lead to confusion – Article 9(2) of the draft RTS proposed in the CP already provides for flexibility in how the competent authority can be contacted to provide additional info. Next to that, the wording "to facilitate timely submission" confuses the requirement to submit "without delay".

213. Furthermore, two respondents express concern regarding ESMA's remark that reporting shall be based on all information available "such as public disclosure of other trades" –they argue that this goes too far and is impossible for smaller firms.

ESMA's response:

214. ESMA notes that the MAR Level 1 requirement is to submit reports without delay. The wording in Recital 3 of the draft RTS proposed in the CP explained that generally and indicatively reports should be made within two weeks of the transaction/order. The intention was not to introduce a hard requirement that STORs should always be submitted within two weeks, however, given the high degree of concern expressed in this area, ESMA has amended the language of Recital 3 of the RTS and the reference to two-weeks has been deleted. Suspicious transaction and order reports should be submitted to the relevant competent authority without delay once reasonable suspicion has formed in relation to a trading behaviour.

215. ESMA agrees with the respondents that the wording "to facilitate timely submission" included in the CP confuses the requirement to submit "without delay". The relevant section of this report is therefore amended and clarifies that even though a suspicion can be reported by phone, the STOR requirement is only fulfilled when a STOR is submitted in accordance with the RTS.

216. ESMA recalls that smaller firms are subject to the obligation to report any suspicious order and transaction and to conduct a preliminary analysis based on the information available to them.

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

217. This question attracted a large number of responses (41) with the vast majority disagreeing that automated systems should be required for all entities. Those respondents call for proportionality and argue that automated systems should not be mandatory, as it should depend on the size, complexity and nature of business of an entity. Automated systems should only be required where appropriate and proportionate, which is not the case for all types of financial institutions.

218. Some respondents state that the statement "where a chain of market participants are involved in a transaction, each entity has its own obligation to report suspicions", could actually lead to inefficient monitoring and detection, as it could prevent entities within a financial group from centralising its monitoring and reporting. It is often more efficient in a group to create expertise in market abuse monitoring and develop systems centrally.

ESMA's response:

219. ESMA is of the view that the emphasis should be on requiring an effective surveillance system. For the large majority of entities, the most effective form of surveillance would indeed involve automated systems which generate alerts. However, ESMA is of the view that this should not be mandatory for every entity, if another form of surveillance is more appropriate and effective. Therefore, the draft RTS are not prescriptive on the format of the surveillance system but allow for flexibility in the development of a system that will have to be effective and appropriate. Consequently, it is required that entities establish and maintain arrangements, systems and procedures that ensure the "effective and ongoing monitoring of all orders received and transmitted and all transactions executed" and that are "appropriate and proportionate to the scale, size and nature of their business activity". The draft RTS specify that the whole process is likely to require some level of automation and also set out that in all cases entities must be able to demonstrate to the competent authority "the appropriateness and proportionality of their systems including their level of automation.

220. ESMA agrees that in some instances the centralisation of monitoring, detection and identification functions within a group structure can sometimes be more efficient and effective compared to each entity within the group having their own systems to perform such functions. Therefore, the draft RTS allow for the possibility of delegation of monitoring, detection and identification of suspicious orders and transactions to a legal persons forming part of the same group.

221. In addition to the possibility of delegating to entities of the same group persons, under certain conditions persons professionally arranging or executing transactions may outsource the performance of data analysis, including order and transaction data, and the generation of alerts necessary to conduct monitoring, detection and identification of suspicious orders and transactions. The outsourcing entities will remain fully responsible for discharging all of their obligations under Article 16 of Regulation (EU) No 596/2014.

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

222. Numerous respondents raise the question of whether all fields in the template need to be completed.

223. Some respondents raise the issue of data protection that could arise with the number of fields that are requested.

224. Concern was expressed from some respondents that, as currently drafted, this section is not very relevant for trading venues (as it seems focussed on natural persons).

225. One respondent states that the template appears designed to report transactions in equities and derivatives related to listed securities, and that to complete the template for other financial instruments the text box at the end would be the only place to record relevant information.

226. Two respondents suggest amending "type of breach suspected" to "nature of suspicion".

ESMA's response:

227. ESMA clarifies that every field in the STOR template will not necessarily be relevant for every suspicion. Reporting persons should provide as much information as possible and complete the fields which are relevant to each case. It is important that competent authorities receive as much relevant information as possible, without delay, in order that a preliminary review of the reported behaviour can be conducted as soon as possible.

228. With regard to the concern expressed about data protection, ESMA reiterates that a series of personal data are required in order for competent authorities to be able to conduct follow-up investigations. Where an investigation commences, time is of the essence.

229. In response to the concern expressed that the template as proposed in the CP was not appropriate for trading venues, ESMA has made amendments to the template to address this.

230. ESMA proposes to amend several fields and the relevant order as follows:

a. ESMA proposes to replace "security" with "financial instrument".

b. ESMA agrees with amending "type of breach suspected" to "nature of suspicion".

In addition to the above amendments, the STOR template has been restructured and amended to enhance clarity and accuracy in the reporting (see the Annex to the draft RTS).

Q15: Do you have any additional views on templates?

231. Some respondents raise the question about whether all fields in the template need to be completed and whether the information provided depends on the nature of the order/transaction.

232. One respondent raises a question regarding the scope of market participants that fall under the definition "persons professionally arranging or executing transactions".

233. Two respondents emphasize that requiring an electronic format with adequate level of security will entail additional costs for investment firms.

234. One respondent proposes to reorder the sections of the STOR.

ESMA's response:

235. As per ESMA's response to concerns expressed under Question 14, reporting persons should aim to provide as much information as possible and complete all the fields that are relevant in each case. Not every field will necessarily be relevant in every circumstance. Competent authorities need to receive as much relevant information as possible, without delay, in order to ensure that preliminary review of the reported behaviour can be conducted as expediently as possible.

236. ESMA clarifies that "persons professionally arranging or executing transactions" also includes non-MiFID firms.

237. ESMA understands that an electronic format with adequate levels of security can, in some instances, increase the costs for investment firms. However, ESMA believes that adequate and proportionate security measures are necessary for STORs as they would contain sensitive information.

238. ESMA partially agrees with the proposal to reorder the sections of the STOR and proposes to organise the sections of the STOR as follows:

Section 1 (identity of person submitting the STOR)

Section 2 (transaction/order)

Section 3 (description of the nature of the suspicion)

Section 4 (identity of entity/person suspected)

Section 5 (additional information)

Section 6 (documentation attached)

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

239. Four respondents agree expressly with the proposal to retain records of near misses. Twelve agree but have comments or suggestions:

a. There is insufficient guidance as to what constitutes a near-miss/the definition needs to be clearer.

b. The RTS needs to clarify that a near miss does not cover each potential suspicion and actual alert. Near misses should only include cases where it has been seriously considered whether to submit a report.

c. Firms already have an audit trail of considerations; it is burdensome and duplicative to record a summary of considerations too.

240. Seventeen respondents disagree with the proposal to maintain records of near misses. The arguments given are the following:

a. ESMA does not have a legal basis to require the retention of near misses.

b. It is not clear what a near-miss is.

c. This requirement would impose complexity and costs with no surveillance benefit.

d. Retention of personal information where there is no suspicion of a punishable offence cannot be justified.

ESMA's response:

241. ESMA deems that retaining records of behaviour that is investigated, but ultimately has not lead to a STOR being submitted, is important. ESMA therefore favours the retention of this provision.

242. ESMA's mandate is to determine arrangements, systems and procedures for persons to comply with Articles 16(1) and (2) MAR. Therefore, the retention of near-misses is deemed to be part the arrangements and procedures to detect and prevent market abuse, firstly as they assist entities subject to STOR reporting in refining their surveillance systems and in detecting patterns of repeated behaviour, the aggregate of which could result in a reasonable suspicion of insider dealing, market manipulation or attempted insider dealing or market manipulation, secondly as they will facilitate the performance by competent authorities of their supervisory, investigatory and enforcement functions.

243. Contrary to push-back from four respondents, ESMA agrees that the record should contain a summary of the reasons for not submitting the STOR, as that is a vital component.

Public disclosure of inside information delays to the disclosure of inside information

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

244. The responses to this question can be divided into three general groups:

- 17 respondents are in favour of the proposal;
- 8 respondents are against what the call an “extension” of the Transparency Directive (TD) to MTF/OTF;
- 9 respondents are against the proposal for Emission Allowance Market Participants (EAMPs).

245. Besides these three main types of responses, the following requests for clarifications or additions were raised:

- More detailed explanation on the method to be used for disseminating inside information.
- Technical Standards need to include further details of expectations on how issuers can achieve the active distribution of information, and to be consistent with the standards already in situ, these should include the use of a RIS as a means of complying with the obligation.
- Definition of issuer for the commodity derivatives: although they are financial instruments under MiFID II, these products do not have issuers. Some respondents raised similar concerns in their introductory comments received to both CPs: the term “issuer” covers only legal entities issuing or proposing to issue financial instruments (as defined under Article 3(1)(21) of MAR); and that does not include any counterparty to a transaction in a financial instrument, regardless whether this is executed on a regulated market, MTF or OTC. Contracts which are financial instruments as described in Sections C(4) to C(10) of Annex I to MiFID II (derivatives) do not have an “issuer” for the purposes of MAR, irrespective of whether they are entered into on or outside a trading venue. A person who is a counterparty to the contract (or enters into the contract as an agent for a counterparty to the contract), a central counterparty that clears that contract or the operator of a trading venue on which that contract is traded is not the issuer of the contract for the purposes of MAR.

246. Some respondents in favour of the proposal made additional suggestions:

- Two respondents proposed some draft suggestion as they do not consider it necessary for EAMPs to use OAMs where the intent of Article 17(2) MAR is the disclosure in a timely manner of inside information concerning emission allowances it holds in respect of its business.
- One respondent invited ESMA to investigate the possibility of creating a central repository that aggregates information from national competent authorities and is publicly available.
- Another respondent considered that the current standard practice of an “investor relations” section including all regulatory announcements is sufficient to ensure that inside information are easily located and distinct from marketing materials, and that the requirement to have inside information disclosed separately on an issuer’s website dedicated section (Article 4(1)(b) of the draft ITS) will result in

unnecessary duplication and impose an administrative burden on issuers, without improving access for investors.

247. The following paragraphs detail the three main topics listed above.

Against the (presumed) "extension" of TD to MTF/OTF

248. The general arguments put forward are:

- TD applies to Regulated Markets (RM) only, and it is not correct to extend its provisions to other trading venues as it would exceed the mandate received by ESMA; and
- this change could be addressed only at Level 1 and not through a Level 2 text.

249. Two respondents argued that trading on MTF only is typically used by small bank-issuers that have not (by fact or by law) access to regulated markets and act locally (by fact or by law) in a defined territory. In such cases, the requirements proposed are excessive and do not have any added value for its clients In particular, the use of media allowing dissemination throughout the EU is futile and inefficient for a local bank (issuer) whose clients (investors) live in the same limited territory. For such kind of issuers, it is considered sufficient to publish inside information either on the issuer's website or on the one of the market (i.e. MTF) or on both websites. Otherwise, it may result in discouraging trading on MTF, causing in effect a reduction of the solutions which are necessary in strengthening the liquidity of these financial instruments and which otherwise would not be possible or would take place in a less effective way.

250. Three respondents noted that a contradiction in the proposal is compared with the one for buy-backs, where it is said that the TD does not apply to issuers of financial instruments traded on an MTF and, with reference to the buy-back programmes, allows them to use their websites for the publication of information. One of them proposes as a solution the publication on the website of the MTF operator, as already foresees for the publication of inside information of SMEs traded on SME growth market. Finally, also cost reasons were put forward as argument against this proposal.

Against the proposal for EAMP:

251. According to these respondents any disclosure made under REMIT is sufficient for MAR purposes in respect of EAMPs also within REMIT scope. The general arguments are:

- the application of TD requirements would put in place duplicative reporting for EAMPs already covered by REMIT (Article 17 of MAR equivalent to Article 4 of REMIT);
- "active distribution" and dissemination are not required by Article 17 of MAR; and
- the fact that participants in the EA market are more professional than retail investors.

252. One respondent explained further that if the co-legislator had intended the same approach to be applied for both the general inside information disclosure obligation (Article 17(1)) and the disposition on inside information specifically concerning EAMPs (Article 17(2)), they would not have created two different regimes – in two different paragraphs – using different language. Instead, the Level 1 text creates a separate regime for the manner of disclosure of information for EAMPs. Indeed, Article 17(2) applies a different and less stringent language - the disclosure obligation in this paragraph merely needs to "*publicly, effectively and in a timely manner disclose inside information concerning emission allowances*". This contrasts to the language used under

paragraph 1 (“ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public”).

253. One respondent said that the requirements foreseen under REMIT, as detailed in the ACER Guidance, are exactly intended to favour the active distribution of information in a speedy and simultaneous manner, without the need actively to seek out any information. In particular, the use of a platform for the publication of inside information (e.g. platforms operated by the transmission system operator or by the energy exchange, transparency platforms in accordance with Regulations (EC) No 714/2009 or (EC) No 715/2009) does not merely imply the availability of information but allows for the effective access to that information. The minimum quality requirements listed in Chapter 7.2.2 of the ACER Guidance, including the use of RSS feeds, together with the obligation for market participants to inform via the ACER’s European register of market participants where they disclose their information (according to Article 9 of REMIT) permits the interested public to process relevant information automatically. Therefore, through this approach, the goal of an effective disclosure to the public is achieved as widely as possible (across the EU) and in an easy and fast manner. With regard to the possibility of using market participants’ own website in the context of REMIT, we should clarify that this option was introduced as an interim solution in the ACER Guidance due to the lack of central inside information platforms at that early stage of REMIT implementation.

254. Similarly, another respondent said that the publication of inside information for REMIT purposes is already very transparent and fast because in practice, new publications are instantaneously (or near-instantaneously) picked up (and in this way disseminated) by: web crawling programmes; free-access platforms run by transmission system operators (TSOs), exchanges or other bodies; and news providers such as Bloomberg and Reuters.

255. Finally, one respondent argued that the requirement of the TD to allow disclosure only in the language of the competent authority of the home Member State is conducive to effective dissemination. Inside information related to all instruments should be disclosed in a language accepted by the competent authority of the home Member State as well as English. A second respondent is in favour of the proposal for EAMPs to have both local language and English.

ESMA’s response:

256. In relation to the drafting suggestion on Article 2 of the draft ITS proposed in the CP made by some respondents, ESMA recognises that the intention was not to request EAMPs of using the OAMs. This article has been entirely re-drafted and it does not anymore directly cross-refer to the TD framework, so that no reference to the OAMs is now made in the TS.

257. ESMA also agrees with the suggestion in relation to the structure of the issuer website, and the TS drafting has been changed in order to allow issuers to use the “investor relations”, as long as: (i) the inside information are easily located (potentially in a subsection of the “investor relations” section); and (ii) the whole “investor relations” section has to be distinct from marketing materials, i.e. it should not include any type of marketing material.

258. The proposal of creating a central repository at ESMA level that aggregates information from national competent authorities and is publicly available is surely a valid one, but is currently not foreseen in the ESMA work-plan for the next years.

259. Active distribution should be meant as a process that meets the requirements described in Article 17(1) of MAR, i.e. a distribution enabling fast access and complete, correct and timely assessment of the information by the public. In particular, through the active distribution, the inside information should be disseminated to as wide a public as possible on a non-discriminatory basis, and as close to simultaneously as possible throughout the Union. It should be noted that MAR technical standards (in line with the TD) require a communication of the information to the media, and prescribe specific criteria for this transmission. It should be also considered that the TS do not use the term "active distribution".

260. ESMA would like to recall that Article 17 covers issuers of financial instruments as defined under Article 3(21) of MAR, and mentioned in the 3rd subparagraph of Article 17(1) of MAR. Some respondents to the CP argued that "commodity derivatives", although they are financial instruments under MiFID II, do not have issuers and therefore should not be in scope of MAR Article 17. The meaning of "issuer of financial instruments" in relation to derivative contracts may be further explained in the future, but at this stage this specific issue is outside of ESMA's mandate for the ITS related to Article 17 of MAR. Also to note the concept of inside information in relation to commodity derivatives is defined in point (b) of Article 7(1) of MAR, and Article 7(5) requires ESMA to issue Guidelines to establish a non-exhaustive indicative list of information, which is reasonably expected or is required to be disclosed in relation to commodity derivatives.

261. In relation to the claim of the extension of the TD to the MTF and OTF environment, ESMA notices that similar comments were submitted to the DP. Already in the CP (para. 237) ESMA explained that the proposed standards do not include an extension of the scope of the TD, but rather require the use of the same dissemination mechanism of inside information as the one identified under the TD. The CP was also explaining that in this context the OAM, being a storage (and not a disclosure) mechanism, would not be required for issuers whose financial instruments are traded only on a MTF/OTF (unless national laws require so). As said, considering both the comments addressed to the DP and the CP on this topic and in order to increase clarity, ESMA has decided to amend the text of the TS, avoiding a direct reference to the TD and instead inserting in the standards the characteristics that the dissemination mechanism has to meet.

262. The interaction between the MAR and the REMIT regimes has received many comments as part of the responses to this question as well as to the Questions 18 and 19 that are dedicated to EAMP. ESMA has carefully considered all the comments and analysed the possible unintended consequences of the proposed approach. As explained in a section of the Report dedicated to the interplay between MAR and REMIT for disclosure purposes, ESMA is broadly maintaining the same approach as the one presented in the CP, but a Recital explaining how to avoid duplication has been added, and the report now includes a more granular comparison vis-à-vis the current situation under REMIT. It should be noted that the current recognised platforms used under REMIT already meet most of the requirements defined under MAR TS, and where they are able to disseminate the inside information, including the communication to the media, and they meet also all the other requirements, they could be considered compliant with these TS. More details are provided in the text of the Report.

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated

to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

263. Most of the respondents said that the current REMIT regime is effective and just one said that MAR standards are preferable. In the vast majority of the responses received, there is the underlying opinion that the emission allowance markets are different from the markets in financial instruments, and therefore different rules should apply.

264. The majority of the respondents indicated that the REMIT regime is adequate for the purpose of properly disclosing inside information, as potential investors and market participants have already a good knowledge of this specific market and know where to access (inside) information, notably because they are sophisticated professional traders.

265. In relation to EAMPs not covered by REMIT, some respondents suggested that instead of establishing a parallel reporting regime under MAR, ESMA should closely cooperate with ACER and other energy regulators to ensure that e.g. EAMPs that are not wholesale energy market participants can access and use the EMFIP platform (to be set up by ENTSO-E under Regulation (EU) No 543/2013) or other centralised information repositories upon request.

266. Some argue also that apart from the disclosure made under REMIT, they do not see EAMPs who are wholesale energy market participants to possess any other inside information to be disclosed under MAR.

ESMA's response:

267. In considering the feedback provided to this question, the nature of the information disclosed under REMIT needs to be carefully considered. Inside information published under REMIT usually is, among others, supply-demand information required by internal energy market rules, or information on capacity and use of energy infrastructures, typically expected and non-expected outages (such as non-availability of a power plant). Most of the time it is an availability-type of information, normally updated frequently, related to networks, generation and consumption facilities.

268. In its Guidance on the application of REMIT[25], ACER has defined the content of the information to be published according to Article 4(1) of REMIT, "Obligation to publish inside information". Considering the content of the information published, as well as the volume and the frequency of the updates, it is clear that not all REMIT inside information fall under the MAR definition of inside information for emission allowance, defined in point (c) of Article 7(1) of MAR, and potentially just a fraction of the information published according to Article 4(1) of REMIT is also relevant for MAR. On the other hand, there could be information covered by the MAR definition of inside information for emission allowance that is outside the REMIT scope.

269. It should also be considered that in the future also retail investors, and not just "professional" ones, could increasingly become active in the emission allowance market, and therefore there must be in place a system capable of granting them effective access to disclosed information.

[25] See section 7.2.2 of the ACER Guidance on REMIT: http://www.acer.europa.eu/remit/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf

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

270. The vast majority of responses are not in favour of the application of MAR requirements to EAMPs subject to REMIT, arguing that this would:

- imply a duplication of reporting through both the REMIT and MAR channels;
- go against the meaning of MAR Recital 51 and the distinction made between MAR Article 17(1) (issuers) vis-à-vis 17(2) (EAMPs);
- increase costs and administrative burden; and
- not provide any added value.

271. Six respondents argued that, as duplication between the two frameworks would be unavoidable, this could undermine the current mechanisms that are working well. Furthermore, they refer to legal uncertainty in relation to the situation where information is no longer considered as inside information under REMIT (as immediately published on the market participant website or other transparency platform) but is not yet public through the channels requested by MAR. This would restrict market actions of an EAMP which is already subject and compliant to REMIT but not with MAR Level 2, and would also complicate internal compliance processes of this EAMPs.

272. In relation to extra costs, one respondent highlighted that trading and commercial divisions are usually separate from the operational installations and it would therefore be necessary to train individuals in each installation on what is considered 'relevant information'. In addition, traders would need to be trained to ensure that they are aware of their corresponding obligations. These trainings would be time consuming, costly and very difficult to implement.

273. Finally, two respondents proposed to include in the TS a Recital equivalent to MAR Recital 51. The supporting argument is that EAMPs may meet the requirement to "actively distribute" inside information within the ambit of Article 7(1)(c) MAR through mechanisms established pursuant to Article 4 REMIT; these respondents argued that in fact most TSO-owned/operated platforms for REMIT disclosures include features and functionality for "active distribution" (e.g. Nord Pool Spot UMM subscription services). The proposed recital is the following: "*EAMPs may comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011. To avoid the duplication of mandatory disclosures with substantially the same information, EAMPs should be able to use established mechanisms for the disclosure of inside information where required under Article 17(2) of Regulation (EU) No 596/2014*".

ESMA's response:

274. It should be noted that the current platforms recognised for the purpose of Article 4 of REMIT are already compliant with some of the requirements of the MAR TS, because they follow the ACER Guidance. Where these platforms would meet all the requirements of the MAR TS, duplication would be indeed avoidable. The main gap may be the active distribution through a communication to the media following the criteria included in the technical standards (which reflect the ones of the TD). A new Recital has been added to the TS, reflecting this situation and explaining how duplication is avoidable.

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

275. Regarding the format itself, four respondents explicitly supported the ESMA proposals whereas three respondents seemed to challenge the proposal that the decision of delaying is provided by written notification, as such written form is only required for the explanation, as stated in the Level 1 text (Article 17(4)). The content of the notification attracted mixed reactions from the respondents:

- a third of respondents are in favour of the proposal;
- the majority of respondent think that requirements are disproportionate, suggest to decrease the level of details for some parts of the notifications (confidentiality, identification of persons) and ask for clarification; and
- a small group requests an "exemption" for EAMPs when EAMPs comply with REMIT.

276. 14 Respondents agreed with the proposal. Two of them expressed concerns about the possibility that under Article 17(5) the explanation is submitted at a later stage, which is not consistent with the Level 1. Some respondents instead are questioning the fact that under Article 17(4) Member States may decide to request the reasons only at a second stage: ESMA is requested by these respondents to clarify about the need for further national legislation or guidance on this point.

277. Among the majority of responses, the issues raised are recurring and could be summarised as follow:

- Confidentiality: a detailed description on how confidentiality is guaranteed in each particular case is not necessary if the competent authority has no reason to doubt the existence of the "confidentiality process", and would be unduly burdensome. It should be considered sufficient to provide a general description of the procedures and processes in place or even the mere confirmation of the fact that such procedures and processes are in place.
- Date and time of the decision to delay: Instead of the precise time, a "time period" should be allowed if the decision is taken during a meeting, or during multiple discussions potentially in different time zones. One of them is even suggesting that the date only is sufficient.
- Identity of person participating to the decision: The names included should be only the ones of the person(s) responsible for taking the decision, not those of the persons participating in the decision who can be numerous and internal or external (advisers) to the issuer. One of them considers that a named person as contact point is sufficient. On the contrary, one respondent considers advisable to require not only the persons within the issuer who decided on the delay to be identified, but also the persons within the issuer who had access to this delayed information be identified (in case the insider list is not up-to-date/complete).
- Language of notification: It should be clarified that only one language is requested, even when the inside info is disclosed in multiple language. Proposed drafting of Art 5.5: "*The notification and the written explanation shall be drafted in one of the languages in which the inside information is disclosed"*.
- On the use of the website: All regulatory announcements should be posted in a single section (as happening currently), and there is no need for a section for inside information only. Proposed draft for 4(a) *"… allows users to view the inside information on an easily identifiable section of the website which does not include*

materials marketing its activities…". Besides, it should be explained that html-text is not required and a link to the disclosure is enough.

278. On EAMPs, five respondents have concerns on EAMPs which are already subject to REMIT, similar to ones already expressed in Questions 17, 18 and 19. They believe that the electronic notification of delay currently used under REMIT, and uploaded in a dedicated ACER notification platform, should be consider as sufficient also for MAR purposes as this notification would cover the same information.

ESMA's response:

279. In relation to the comment on the "confidentiality" section, ESMA understands the comments received and has decided to review the proposal on this item. It should be noted that now the new TS do not include anymore a paragraph on the content of the written explanation (ex-Article 5(3) of the TS of the CP), and the confidentiality issue is referred to in new Article 4(1), on the maintenance of certain information regarding the process of delaying disclosure of inside information. As part of the evidence for the fulfilment of the confidentiality condition, required by points (i) and (ii) of Article 4((1)(c), ESMA thinks that a general description of the standard procedures that the issuer has in place to ensure the confidentiality of the inside information is enough, unless for the concerned inside information a specific procedures (meaning different from the standards one) has been used. In this latter case, the description of the actual procedure used by the issuer is required.

280. The date and time of the decision of delaying the disclosure of inside information is clearly a critical information to be used in potential investigations regarding the concerned inside information. ESMA therefore does not agree with the proposal of having a flexible approach to this item, considering that even when the decision is taken during a meeting or during multiple discussions, there is always a moment in time in which the decision is officially taken by the person with the power and responsibilities to do so. Accordingly, the approach proposed in the CP on this item is confirmed.

281. In relation to the identity of the persons participating in the decision to delay the disclosure, ESMA appreciates the comments and proposals received. In this context, it should be also noted that MAR includes also a separate obligation to maintain an adequate "insider list", where all the persons having access to the inside information are registered. Considering this, and with an aim of not repeating a (partial) insider list in the notification, it seems appropriate to require the precise identification of only the persons with responsibilities for the decision of delaying the public disclosure of inside information. The TS have been amended accordingly (see Article 4(3)(f)).

282. In relation to the suggested drafting on the language of the notification, it should be noted that any references to the language in the TS have been deleted because out of ESMA's empowerment.

283. In relation to the organisation of the issuer's website and where the inside information should be published, ESMA has amended its approach as explained in Question 17.

284. In relation to EAMPs, ESMA has concluded that the same obligations should apply to them, consistently with the approach used for the requirements for disclosure channels. Motivations behind this decision could be found in the dedicated section of the Report.

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

285. More than half of the respondents expressed their full or general support to the proposal. A limited number of concerns were raised both from negative feedback and from respondents who were generally supportive of the proposals, and these concerns are summarised in the following paragraphs.

Clarification and concerns about "rumours":

286. Seven respondents have comments relating to "rumours". In particular, it is asked to clarify when a rumour should be considered "sufficiently accurate" and also to explain that, to trigger the disclosure, "the inside information should be truly and correctly released in details in the rumour", in order to avoid "guessing activities" by external parties. One of the respondents recalled that it is up to the issuer to analyse whether the confidentiality is no longer ensured: the issuer will have to consider the potential impact of the rumour, if it is sufficiently accurate to attract investors and the likelihood of the rumour having been intentionally created to obstruct this issuer (particularly relevant in case of delays that follow from a protracted process that occurs in stages and that is intended to bring about, or that results in a particular circumstance, or a particular event). Another respondent argued instead that the obligation to comment on rumours should take place only when there are clear evidences that that the leak has occurred in the "sphere of the issuer".

287. Finally, one respondent noticed that disclosure of delayed information could also be triggered by market signals (e.g. increasing/decreasing price, higher volatility, significantly deviating trade volumes).

On-going monitoring and records of changes in condition for delays:

288. Two respondents considered that keeping records of on-going monitoring of delay conditions should be necessary only when there is a change on how the original conditions were met, and a new assessment of the delay is needed; therefore a record will include only updates after a change in conditions.

289. For one respondent the reference to "evidence" in Article 7(1)(b) of the TS on the CP is inappropriate and burdensome; it is suggested to replace it with "*an explanation of the fulfilment of the conditions for the delay*".

290. Another respondent requested clarification of the meaning of "*on-going monitoring*" as it may imply a disproportionate requirement of record on a continuous basis in relation to the outcome of the monitoring.

Exact date when the inside information came into existence:

291. Five respondents argued that an issuer may not know the exact date when the inside information came into existence (e.g. where there has been a serious fraud by an employee but it is impossible to establish when it first started, or where a major customer is considering terminating a significant contract, or matters outside the issuer's control) and suggest to use the moment when the issuer becomes aware of the inside info. One respondent proposed some drafting "(*i) the issuer or emissions allowance market participant became aware of the inside information*".

The likely date of publication of the inside information:

292. Five respondents argued that such date is event driven (or anyway matters outside the issuer's control) and will not be known with any certainty, if at all, on the date a decision to delay inside information is made (if the inside information is in respect of a

transaction in the course of negotiation, it may be that the negotiations ultimately fail so that no disclosure of inside information will be required). One respondent suggested to redraft Article 7.1(a)(iii) as "*the circumstances in which it is likely that the issuer or emissions allowance market participant will publish the inside information*".

Confidentiality concerns:

293. Two respondents say that it should not be necessary for the issuer to keep a separate record each time there is a delay regarding confidentiality, access and awareness relating to that specific delay, considering also that the proposal would have costly implication. They propose instead that the issuer should be able to refer to the general procedures and processes it has in place to protect the confidentiality of inside information.

294. Another respondent argued that ESMA's interpretation is beyond the mandate of the Level 2 as the MAR basically leave it to the issuers how they ensure confidentiality, and suggested that Article 7(1)(d) of the draft implementing regulation as well as para. 274 of the explaining text should be deleted.

The proposal is too prescriptive, notably for EAMPs:

295. The general reasons behind the disagreement with the proposal are that the requirements are disproportionate, it is not clear what "on-going monitoring" actually means, records required for the identity of person conflict with data-protection and privacy, and that the focus should be in the substance rather than the form. In particular, one respondent said that overlaying prescriptive and detailed requirements on existing practices that are working well is unhelpful and that the proposal includes more than is necessary to achieve MAR's objectives.

Request to align appropriate disclosure of delayed information and approach to cleansing under Market Soundings

296. Two respondents considered that ESMA should consider the cleansing paragraphs of the CP in implementing procedures and record keeping requirements upon issuers, in respect of delays in disclosure of inside information, in particular in relation to the statement that issuers should "*ensure that inside information is eventually disclosed in an appropriate manner*" (para. 270). There may not be disclosure required if negotiations fail or the information which was inside information otherwise ceases to be inside information (for example, where it was thought a major supplier might fail to renew a contract but it does not so).

ESMA's response:

297. As a general remark, it should be noted that the new TS do not include anymore an Article dedicated to "Record keeping" (ex-Article 7 of the TS of the CP), and instead Article 4(1) is now requiring that the technical means used for delaying the disclosure of inside information are able to ensure the maintenance in a durable medium of certain information of the process of delay. This information is similar to the one originally included in the "Record keeping" article.

298. The concept of "rumours" has attracted a number of comments. It should be noted that Article 17(7) of MAR states that the rumour has to explicitly relate *"to inside information the disclosure of which has been delayed (…), where that rumour is sufficiently accurate to indicate that the confidentiality of the information is no longer ensured*". In the MAR Level 1 text, there is no reference to the fact that the "leak"

spreading the rumour has to come from the “sphere of the issuer”, as commented by one respondent. In the context of this report, ESMA is empowered of drafting implementing technical standards determining the technical means for appropriate public disclosure, as well as for delaying public disclosure, of inside information, and therefore ESMA cannot provide more details and explanation on what is meant by MAR Level 1 in relation to rumour. It is also true that ESMA will issue in the future some Guidelines to establish “*a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in Article 17(4)(a), and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in Article 17(4)(b*)”, and in the context of these Guidelines ESMA may be able to provide additional information on what should be considered a rumour under Article 17(7) of MAR.

299. In relation to the “on-going monitoring and records of changes in condition for delays” (ex-Article 7(1)(b) in the CP), ESMA would like to clarify that, as expressed by some respondents, it is requested to modify the records on how the required conditions are met only after a change in the conditions, meaning that the record will include only relevant updates. This was already explained in the CP para. 273(b) and in the draft TS Article 7(1)(b), with both stating that “*a new record is needed when there has been a change in the original conditions*”. The drafting of the TS has been modified, as this provision is now included in Article 4(1)(c), while, as said, the Article dedicated only “Record keeping” does not exist anymore. The term “evidence” at the beginning of Article 4(1)(c)of the new TS is well placed, as in case of an investigation, the issuer should be able to provide evidence(s) to the national competent authority; the term is therefore maintained in the TS and not amended as suggested by one respondent.

300. Ex-Article 7(1)(a)(i) of the TS of the CP required the record keeping of “*the date when the inside information came into existence*”, and ESMA received some suggestion to redraft this obligation. It is also important to highlight that the “*starting date*” of an inside information is a crucial piece of information, and it is necessary in the context of delay of publication of inside information, but also (indirectly) in the context of the production of insider list. ESMA is aware that there are some circumstances where the inside information is not generated within the issuer because, for example, the source is a public body such us a prudential supervisor or a patent office. For accommodate for this type of situations, Article 4(1)(a)(i) of the new TS (which substitutes ex- Article 7(1)(a)(i) of the TS of the CP) now use the following wording: “*date and time when the inside information first existed within the issuer or emission allowance market participant” (Article 4(1)(a)(i)).*

301. On “the likely date of publication of the inside information”, the proposed draft of the TS already include an element of probability, as it states “likely to publish the inside information”, so although ESMA is sympathetic with the comments received, it does not believe there is a need to substantially amend the TS, that now use the following wording: “*the dates and times when the issuer or emission allowance market participant is likely to disclose the inside information*” (Article 4(1)(a)(iii)).

302. On the issue of “confidentiality” requested by Article 7(1)(d) of the TS of the CP, ESMA has carefully considered the comments received. As ESMA has explained in Question 20 in relation to the description in the notification of how confidentiality is ensured, in the context of new Article 4(1)(c) the reference to the standard procedure for confidentiality is enough unless a different procedure has been used.

303. Finally, the technical means for delaying the public disclosure of inside information referred to in Article 17(4) should be the same for all the entities in scope in order to ensure that the obligation is applied in the same manner, irrespective of the characteristics of the entity in scope, excepted for the publication of the inside information on the website for SME issuers, as foreseen in Article 17(9).

Insider lists

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

304. The feedback received from the respondents can be grouped in several main categories:

Proportionality and invasiveness

305. Nearly all respondents found that the amount of information ESMA proposes to be in the insider list is disproportionate to the purpose of an insider list and that it is too personally invasive for the employees on the insider list. Most of the critique focussed on the elements: "National Identification Number", home address, personal e-mail address and personal telephone numbers.

Costs to implement

306. Many respondents put the argument forward that if they were to be required to include all the proposed elements in the insider list, the systems that are necessary to manage this information would be disproportionately costly, especially as the information needs to be updated constantly and adequate safeguards have to be built in. For example, one respondent argues that introducing additional fields requires significant adaptation to existing IT infrastructure, such as including a direct feed from HR databases. Others argue that these costs go against the spirit of Level 1 regulation, as in Recital 56 it states that "data fields required for insider lists should be uniform [across national regulators] in order to reduce costs".

Data protection and privacy issues

307. A majority of the respondents argue that the proposed elements by ESMA go against the Commission's Data Protection Directive (Directive 95/46/EC). This directive provides that the collection of personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed" (Article 6(1)(c)). Moreover, some argue that privacy laws may require firewalls that need to be designed for the insider lists.

An alternative proposal for the obligation to continuously record and update information

308. Many respondents indicated that information such as date of birth, place of birth and home address can be readily provided to the regulators when required so in case of an investigation. This alternative, rather than continuously recording and updating this information on the insider lists, would reduce the administrative burden. At the same time, this would alleviate some of the data protection issues.

The mandate of ESMA

309. Several respondents argued that the amount of information ESMA proposes to include in the insider list does not fall within the scope of the mandate that is given to ESMA. The mandate in Article 18 spells out that the information in the insider list must include "the identity of any person having access to inside information". These respondents argue that the amount of required fields in the insider list go far beyond the mandate.

The extent to which the information is used

310. Some respondents argue that the fact that as insider lists are not very frequently inquired by regulators, the costs for implementing the proposed insider lists do not weight up to the benefits.

311. Furthermore, there were several comments regarding the exemption granted by ESMA to SME growth market issuers. These respondents argue that the exemption to establish internal systems and/or processes for the relevant information to be recorded is negated when there is the requirement to provide the same information to the regulator as any other issuer.

ESMA's response:

312. In relation to the comments on the content of the insider lists, it should be noted that the number of fields has been reduced as some items included in the original format have now been deleted. In particular: email addresses (personal and professional) are no more included in the insider list, and also starting and ending date of employment of the insider are fields no more present in the new format to be used. ESMA has therefore taken on board to the extent possible the responses that were asking a "less-demanding" format for insider list. Indeed, the fields that remain in the final version of the format for insider list are of vital importance for the appropriate and efficient use of insider lists by competent authorities. The reasons why each and every field included is necessary are detailed in the insider list chapter of the final Report.

313. Some respondents argued that the content of the format proposed is not aligned with the wording of MAR Level 1. It should be noted that Article 18(3) of MAR states that: "*The insider list shall include at least: (a) the identity of any person having access to inside information; (b) the reason for including that person in the insider list; (c) the date and time at which that person obtained access to inside information; and (d) the date on which the insider list was drawn up*". Such provision, because of the use of the expression "*at least*", clearly identifies the minimum content of the list, and therefore it could be considered part of ESMA mandate to more granularly detail some of the items included in the Level 1 text, such as "*the identity of any person having access to inside information*".

314. In relation to the "alternative proposal for the obligation to continuously record and update information", ESMA has carefully taken into consideration the proposed arrangement, which clearly presents some interesting aspects. Even if the proposal can generally be considered valid, ESMA does not have the power to include it in these TS, as they are Implementing TS focusing exclusively on the determination of "*the precise format of insider lists and the format for updating insider lists*" (See Article 18(9) of MAR). The proposal has therefore been considered out of empowerment and it is not reflected in the final version of the ITS.

315. In relation to the SME situation, the comments received refer to the obligation directly stemming from MAR Level 1, and ESMA has no power to amend what is already included in the Regulation (see also response to Q23).

Q.23: Do you agree with the two approaches regarding the format of insider lists?

316. Many respondents find that the flexibility offered by ESMA by allowing two different formats of insider lists is helpful. The feedback can be grouped in the following categories:

Third parties insider lists & responsibilities

317. Many respondents voiced their concern regarding the establishment of a single centralised list of all insiders with access to inside information and maintaining it up-to-date at the level of the issuer or investment firm. These respondents argue that it is not feasible to do so and that each entity participating in a deal should maintain its own insider list without a centralised list. This would require insider lists to explicitly allow the entry of legal entities, rather than solely natural persons. Finally, if there is not such a centralized list but rather several decentralized lists, some respondents asked ESMA for clarification on the responsibility for issuers for delays and incorrectness caused by involved third parties when handing over insider lists. Next to these responsibilities, questions arose as to which party is responsible for handing over the decentralized third party insider lists to the regulatory authority in case of an inquiry.

Permanent insider list

318. Many respondents proposed an additional insider list which contains 'permanent insiders', which could potentially be exposed to many types of inside information due to their position in the organization. Due to the nature of these permanent insiders, it would not have any added value and be burdensome to include date stamps or specific projects of when the inside information had reached these permanent insiders. Next to that, some of the respondents confused the consolidated format of insider lists for a 'permanent insiders' list, noticing that the start and end dates and the specific project fields would require duplicate entries for a single person.

Obligation to update information on insider lists

319. Some respondents expressed their concern relating ESMA's proposal regarding the updating of the lists. The alternative proposal put forward by these respondents is to end the duty to update the list as soon as the inside information is published or ceases to exist. Otherwise, issuers would be obliged to collect and update data for projects that have ended or for persons that may have left the company, especially given the fact that ESMA requires the information to be stored for five years.

SME growth market issuers

320. Finally, some respondents find that the proposed simplification for issuers in SME growth markets is not effective. The proposal is to include "appropriate information", but subsequently the requirement is to provide an insider list containing the full information required by ESMA. One respondent furthermore argues that compliance with the amount of information required under both templates is costly due to data protection requirements. These costs would be disproportionally high for small and mid-size issuers.

ESMA's response:

321. In relation to the comments on "third parties insider lists & responsibilities", ESMA has carefully considered the issue raised by the respondents. Similarly to other industry's concerns expressed during the consultation period, also in this case the concerns refer to

provisions included in MAR Level 1, and ESMA has neither power nor mandate to define how MAR Level 1 should be interpreted in this context. The empowerment that ESMA has received, as already said, is limited to "precise format of insider lists and the format for updating insider lists", and therefore this issue cannot be solved through these TS. On this, ESMA cannot add anything else from what is already included in text of MAR: see Article 18(2), in particular the second subparagraph that states that the issuer remains responsible for complying with Article 18 also when the task of drawing up and updating the insider list was assumed by another person acting on behalf or on the account of the issuer.

322. In relation to the "permanent insiders section" of the insider list, the concept has been included in the new version of the TS reflecting the suggestions of the responses. Template 2 of Annex I is the format to be used for the permanent insiders section. The insiders included in this section should not be repeated in the other sections of the insider list, as inclusion in the permanent insiders section implies that the insiders have access to all inside information at all times. The permanent insiders section should be integrated in the insider list as part of it and provided to competent authorities upon request with the other sections, so that competent authorities will receive the information on insiders in its entirety. Details on how the permanent insiders section interacts with the rest of the insider list are included in the final Report chapter on "insider lists", and the recitals of the TS also provide explanation in this respect.

323. In relation to the "obligation to update information on insider lists", it should be noted that the TS themselves focus on the format to be used when updating the insider list and require that the information within it is accurate (at all times). The original requirement to update the insider list is stated in MAR Level 1, which identifies also the circumstances when the update is required. In particular, Article 18(4) of MAR states the following: "*Issuers or any person acting on their behalf or on their account shall update the insider list promptly, including the date of the update, in the following circumstances: (a) where there is a change in the reason for including a person already on the insider list; (b) where there is a new person who has access to inside information and needs, therefore, to be added to the insider list; and (c) where a person ceases to have access to inside information. Each update shall specify the date and time when the change triggering the update occurred*".

324. In relation to SME issuers, besides what has already been said in response to the previous question, it should be noted that in the revised format to be used by SME issuers (see Annex II of the ITS) the difference, in terms of content, with the standards template in Annex I is that the items (a) Personal full address and (b) Personal telephone numbers should be included in the insider list only if are available to the SME issuer at the time of request of the insider list by the CA. In other words, when the SME issuer is requested by a competent authority to provide an insider list in accordance with the template set out in the ITS, these two fields shall be populated if the information is available to the SME issuer at the time of the request and without resulting in the issuer informing the insiders about the competent authority's request (tipping-off) to collect the information.

Managers' transactions

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

325. The majority of respondents are in favour of the method of aggregation proposed in the CP although some have suggestions and requests for clarification:

a) A few respondents questioned the inclusion of the highest and lowest prices, arguing that this obligation goes beyond existing requirements and has no direct bearing on the purpose of managers' transaction provisions as outlined in Recital 58 of MAR.

b) It was suggested that the final ITS specify the weighting method of the number of decimals.

c) One respondent also suggested making the content of the Annex clearer for managers and their closely associated persons by setting out in full the cross-references and specific examples.

d) Another requested clarification regarding a practical concern on the threshold of EUR 5,000: this is considered very low and it is not clear whether, when the threshold is reached and exceeded as part of an aggregated transaction, the fully aggregated transactions have to be disclosed or only the part of that transaction in excess of the relevant threshold.

e) One respondent requested clarification as to whether the disclosure requirement on PDMRs and their closely associated persons impose to make two separate notifications, using the single template, to the competent authority and to the issuer, whereas under certain national regimes in place, only one notification is made which is in turn notified by the issuer to the competent authority.

f) Another respondent commented that it is not clear how the notification would work in case of pledging or lending of financial instruments, gifts/donations as well as inheritances and derivatives transactions.

326. A couple of other respondents raised the following concerns:

a. It is considered that the aggregated notification is sufficient for the purpose of informing the market and for detection of insider dealing as well, as national competent authorities will have information on every single trade from the MIFID II requirements. A "Transaction per transaction" notification will therefore just increase compliance costs. For these reasons, they suggested deleting this requirement in the final ITS.

b. They argued that the Level-1-text creates a situation where compliance by issuers may prove to be impossible. According to Article 19(1) of MAR it is the PDMR's obligation to notify the competent authority and the issuer within three business days after the transaction has taken place. The Level 1 text obliges also the issuers to notify the public within three working days after the transaction. They therefore asked that ESMA clarifies the compliance duties in the sense that the issuers have at least one business day time to react on the PDMR's notification.

ESMA's response:

327. Considering the wide support received, ESMA is not amending the method of aggregation proposed in the CP for the purpose of public disclosure, whereby all the transactions on a financial instrument carried out on the same day may be aggregated

but not netted. As part of the aggregated information, the weighted average price should be reported to provide the full picture on the aggregated information. Besides, ESMA disagrees with those respondents arguing that there should not be a transaction per transaction notification to the competent authorities because, first, the Level 1 text requires such notification and, second, this granular information is vital for the authorities to conduct their monitoring and supervisory tasks. Moreover, under the new template for notification, information on a transaction per transaction basis will also be published and it should be noted that the aggregated information does not substitute the "granular" information for the transactions aggregated, i.e. whenever information is provided in aggregated way, there should always be also the information on a transaction per transaction basis for those aggregated transactions. Consequently, there is no longer a need to require the notification of the highest and lowest prices of the transactions that have been aggregated as initially proposed in the CP.

328. With regards to the functioning of the cumulated €5,000 threshold below which no notification is required, one has to read Article 19(8) of MAR in conjunction with the last paragraph of Article 19(1) of MAR. ESMA's understanding is that the single transaction that leads to reaching and crossing the threshold should be reported as well as any subsequent transactions. So, when during the same day, a PDMR carried out several transactions, the notification should only include the transaction that resulted in crossing the threshold and the subsequent ones carried out during the day. These transactions are also the ones to take into account for the purpose of providing the aggregated information to be notified and disclosed.

329. As similar comments by other respondents have been made in responses to Q25, the following issues are addressed in the Q25 ESMA's response:

a. the issue of clarifying the content of the description of the information and the cross-referencing approach;

b. the issuer acting as interface;

c. the clarification on transactions other than buying and selling;

d. the concern regarding the MAR Level 1 text "three-business days" deadline and the difficult situation it creates for issuers.

330. Regarding the decimal convention for price, ESMA in this context is not prescribing any specific convention.

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

331. Whereas a few respondents explicitly supported the ESMA proposal of content, the vast majority of the respondents have expressed concerns with the proposal.

332. Personal/private data: by far, the main concern raised by the majority of respondents relates to personal/private data to be reported in the notification. The inclusion of such data is considered to be: lacking legal basis in the MAR text, not proportionate, presenting risks in terms of privacy and data protection, intrusive and/or unnecessary as issuers have the relevant records.

333. More specifically,

a. Most of these respondents have general concerns covering all the personal/private data included, full address, personal contact details (phone, email), "National Identification Number" (NIN), arguing that, upon request, the issuer can provide such data to national competent authorities if needed, and therefore only business contact data should suffice.

b. Some just asked for the removal of the NIN, stating that it does not add any value, it is not required under MAR or its inclusion in the notification might be a breach of the MS's national law. One suggested that place and date of birth could easily substitute the NIN.

c. Another argued that the disclosure of private data will disseminate the manager's confidential data within the organisation of the issuer, external service providers, and the competent authority, which could put the personal security of particularly prominent PDMRs at risk of disclosure. In addition to this, a couple of respondents are afraid that the personal data would be disclosed to the public and not retained at authority's level.

d. Data of closely associated persons was a further concern for some, as it is not clear how the issuer can oblige them to deliver personal data, and how these data should be stored. The principle of proportionality is not respected, and the proposal goes far beyond MAR's intention of greater transparency.

e. Another respondent suggested that, as requesting personal data about the closely associated persons is excessive, in particular with respect to the category of a dependent child, the PDMRs should notify their transaction (in a c/o capacity) and should include the PDMRs' personal details instead.

334. With regards to the template, several proposals have been put forward:

a. Two respondents argued for the use of single template, sufficiently flexible to deal with transactions that are connected with the operation of employee share plans or share based incentives, or similar to the ones for public disclosure. If transaction-by-transaction information is to be provided, it should be submitted as attachments.

b. For cost reasons, another respondent suggested to simplify the template: all details in Section 2 of the form proposed in the CP are completed and are notified and disclosed accordingly, and then any additional fields from Section 1 of the form are included as supplementary information for the competent authority (i.e. the more specific personal details and the individual transaction details). In other words, all duplicated fields of the form in the CP i.e. 1(a) and (b), 2(a), and (b), 3(a), (b), (e) and (f) in both sections 1 and 2 of the form should only have to be completed once.

c. Three respondents argued for a separate template for emission allowance market participants/auction platforms in order to clarify the obligations. They also argued that there should be a possibility either to give the contact details of the notifying party or the contact details of the person who is filling the form on behalf of the notifying party.

d. A couple of respondents advocated for a more "user friendly" template in which the "Description" column should set out clearly the information required for each field, rather than using cross-references to other legislation; and a second one said that Annex II of the draft TS presented in the CP would be easier to complete by setting out in full the cross-references / specific examples, for example the full list of "closely associated persons" as regards section 1.2 and the description of transaction type in section 1.8.

e. One respondent expressed preference for a separate cancellation template instead of information to be provided through the "comments" field; it would be simpler and clearer.

335. With respect to data standards, the following comments were received:

a. Some respondents welcomed the use of international code like LEI with one of them even requesting the deletion of “if available” in the template to force its use.

b. Another asked whether the LEI, Identification Code of Financial Instrument, Place of Transaction should be stated on all request and notification documentation and, when they are captured within a company profile on the associated regulated market upon which the securities are traded, whether it is necessary for them to be stated.

336. Other more general comments were made by some respondents

a. One respondent asked for clarification on (i) when there is both a duty to request authorisation from the issuer and an obligation of the issuer to disclose the transaction thereafter, and (ii) when there is only a duty to disclose the transaction to the competent authority and the public, as the transaction taking place is within a previously approved employee scheme and would not ordinarily require written request.

b. As in Q24, a couple of other respondents complained that the MAR Level 1 text sets out a timeframe for notification (no later than three business days) that applies also to issuers (Three business days after the transaction). As the issuer is dependent on the PDMR/closely associated person for information it is suggested that this should be reflected in the public notification and the current requirement to disclose the ‘Date Issuer Informed of Transaction’ should be maintained in the notification template for public disclosure.

c. Another respondent sees the new requirement of PDMRs notifying the competent authority as highly impractical to administer or resource for the competent authority, unlike the current approach (in the UK) whereby notifications are made by the PDMR to the issuer only, and any follow-up which the competent authority has would be through the issuer, not with the individual PDMR.

ESMA’s response:

337. Regarding the inclusion of personal/private data in the template, the content of the template is now aligned with the list in Article 19(6) of MAR as explained in the relevant section of the Report. In particular, the only personal items in the template for notification are the name (item 1.a) and the position/status of the reporting person (item 2.a). This information will be publicly disclosed with the rest of the notification. In this context, it should be noted that the technical means for transmission of the notifications should provide certainty as to the source of the information transmitted.

338. Regarding the requests to have a flexible template to accommodate for “employee share plans” and similar remuneration packages or to accommodate for the cases of pledging, lending, gifts/donations, inheritances and derivatives transactions, or to design a separate template for EAMPs, ESMA considers that the single common template proposed is much more preferable for sake of clarity and simplicity. Designing several templates to accommodate the specific situations identified is not perceived as a viable approach in the long run as new instruments would emerge calling for designing new specific templates.

339. In relation to the structure of the template, ESMA has simplified it in light of the fact that now all the information contained in the template should be both notified to issuers and competent authorities, and made public. In this way, the repetitions included in the previous version of the template of the CP are avoided and a much clearer structure is obtained.

340. Section 3 of the notification template has also been amended to itemise and better clarify the data fields expected in relation to the transaction-by-transaction information to be notified. This concerns particularly the information about the prices and volumes of several transactions of the same type, conducted on the same instrument and executed on the same trading venue (or outside a trading venue) on the same day.

341. Regarding the comments on the lack of clarity of the description of the information fields included in the template (due to cross-references to other texts) and the request to have full and plain text description including a full list of closely associated persons and examples (information fields on transactions), ESMA is of the view that cross-referencing to MAR Level 1 text, MAR Level 2 texts and MIFIR implementing text is preferable for legal certainty, so they should be maintained. However, for sake of simplicity and clarity, the structure of the Annex of the draft ITS has been modified and the notification/disclosure template has been merged with the description table (i.e. these ITS have now a single Annex).

342. ESMA notes that the “three-business days” deadline stems from the Level 1 text and that it may result in difficult situations for issuers. Unlike suggested by some respondents, an additional delay for the issuer to disclose the information notified and different from the one set out in MAR Level 1 text cannot be introduced through the technical standards.

343. ESMA notes that, under the current MAD regime, the transactions of PDMRs and closely associated persons need to be notified to the competent authority only. MAD being a directive, was offering some flexibility regarding the way the notification is made to the competent authorities, allowing thus for issuers to act as an interface with the competent authorities. Under the new regime, Article 19(1) of MAR requires that both the issuer/EAMP and the competent authority are notified, and though it has been suggested that the issuer could act as an interface with the competent authority, this would put an obligation on the issuer that is not in line with the provisions of the MAR Level 1.

Investment recommendations

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

344. Half of the respondents supported the proposal presented in the CP, most of them unconditionally. The SMSG also agrees with ESMA's approach, including the reliance on the concept of "expert". However, some of the respondents considered that ESMA should provide more guidance as to what would classify a non-qualified person as an expert, while another requested confirmation that employees of investment firms who produce recommendations would be considered as qualified persons as per Article 3(1)(34) (i) of MAR and not as experts.

345. Several respondents are not supporting the approach presented in the CP. Four respondents question the underlying view and the legal basis. In particular, one respondent argued that the introduction of the proposed "expert" category not only is not necessary but has the effect of altering the Level 1 legislation so that an additional category of person is included into the list in Article 3(1)(34)(i) of MAR, which cannot be done through Level 2 legislation. It is suggested however that would the expert concept be retained, the only requirements imposed on an expert should be those which relate to the direct proposal of particular investment decisions, to remain in line with the Level 1 text, and particularly with the definition under Article 3(1)(34)(ii). Other respondents maintained that ESMA should keep the current MAD approach, without introducing new elements.

346. A group of those respondents disagreeing with ESMA's approach requested a change in the draft RTS presented in the CP to avoid any confusion in relation to the advice to a single client. They welcomed ESMA's clarification that investment recommendations under MAR will not include personal recommendations involving the provision of the investment service of investment advice, but suggested ESMA to delete the words "in itself" in the final sentence of Recital 5 of the draft RTS.

347. They also commented on the broad scope set out in para. 363 of the CP stating that an investment recommendation is intended for distribution channels or for the public not only when it is intended or expected to be made available to the public in general, but also when it is intended or expected to be distributed to clients or to a specific segment of clients. On ground of proportionality, they considered that certain "specialist sales personnel" should not be covered by the requirements (i) when they propose investments to clients, but do so in reliance upon research providers, who provide the analysis and true expertise, and (ii) when they produce short term trade ideas rather than investment ideas or draft 'sales notes' which are sent to clients.

348. One respondent questioned the CP statement that the concepts of "investment recommendation" and "information recommending or suggesting an investment strategy" are understood to include research, morning notes and technical analysis as these items should not be automatically covered by the two concepts. Their inclusion should instead depend upon their substantive content and whether they are intended for distribution channels or for the public. This is particularly relevant for "technical analysis", which is used in a wide range of materials that would not be "recommendations" as defined in Level 1 and for which, if it were always regarded as such, the current Level 2 requirements would not be appropriate. This respondent therefore called for clarity on why morning notes should automatically be seen as intended for distribution channels or the public if they are only sent to a few clients, and suggested to require that, where relevant, it should be made clear to the client that the material sent to it is neither a MiFID

personal recommendation nor research which has been produced in accordance with MAR.

349. One respondent expressed strong concerns about the inclusion of so-called marketing communications under the definition of investment recommendations, as said in the CP (para. 357), and questioned ESMA reference to Recital 28 of the MiFID I as a justification. It argued that this recital does not refer to marketing communication. This respondent regretted the risks of confusion that the ESMA's statement implies as investment recommendations could encompass plain advertising (such as an advertisement in a magazine) or even legal documents such as prospectuses, whereas the latter communications are already subject to legal requirements to be fair, clear and not misleading. This is particularly the case for "marketing communication" under the UCITS Directive (Article 77 of the UCITS Directive) and MiFID Implementing Directive (Article 27). In this respect, legal documentation required by law cannot be considered in itself as investment recommendation, in particular where the law requires the issuer to draft prospectuses or information documents, such as the UCITS Key Investor Information Document (see. Article 78 of the UCITS Directive), which have to be made available to the investor. Therefore, the respondent suggested to add a recital to clarify the relationship with MiFID and other directives and to specify that where specific rules apply to marketing communication shall prevail the rules of the MAR RTS.

350. Finally, a couple of respondents criticised the use of the definition of "persons closely associated" in Article 3(1)(26) of MAR to extend the concept of related persons in Article 2(b) of the draft RTS for the purpose of the disclosure of interests, and they asked ESMA to not include such definition, as it is under the current MAD regime. According to the respondents, the proposed approach is contrary to the general principles of employment law and it will not be possible for the person preparing the investment recommendation or his/her employer to mandate that the relevant related persons inform the person preparing the investment recommendation of shareholdings in relation to the issuer to which the recommendation relates.

ESMA's response:

351. In relation to the inclusion of the definition of expert, it should be noted that such definition does not have an impact on MAR Level 1 (e.g. enlarging the scope), but rather specifies a subset of persons included in the definition included in Article 3(1)(34)(ii) of MAR. Experts, besides producing their own recommendations, could also disseminate recommendations produced by third parties, and in this case the relevant obligation would apply.

352. In relation to the activity of sales persons, ESMA wishes to clarify that:

- Tailored personal recommendation emanating from sales departments are not covered by these RTS as they do not fall within the notion of investment recommendation.
- Non-personal recommendations, i.e. recommendations without the provision of the investment service of investment advice, are covered by these RTS. Depending on their role in the process, sales persons should be considered as "disseminators" only, and therefore there would be also a "producer" that is not the sale person, or also as "disseminators" and "producers". Depending on the actual role played, the relevant obligations would apply.
- Sales notes and morning notes are covered by these RTS only when they meet the definitions in Article 3(1)(34) and (35) of MAR. In other words, there could be some

sales/morning notes that are not in scope because they do not meet those definitions. The number of clients reached, as long that is more than one, should not be considered as an element for not including these notes in those definition. This is the meaning of the Recital (6) in the RTS, that has been redrafted to improve clarity.

353. In relation to technical analyses, it is not possible to exclude them from the definitions in Article 3(1)(34) and (35) of MAR ex-ante as a general category. Their content will be the determining factor for assessing whether they meet the criteria of those definitions. To avoid confusion, the term technical analysis has been deleted from ex-Recital 3.

354. "Key Investor Information Document" (KIID) under UCITS Directive should not be considered in scope of these RTS, as this is a type of document legally required under other EU texts and its content is already regulated.

355. In relation to "marketing communication", only when this type of document meets the characteristics of the definitions in Article 3(1)(34) and (35) of MAR it will be covered by these RTS. A complete and ex-ante exclusion of marketing communication as defined under the MIFID framework is not possible, as its exclusion will depend on its content.

356. In light of the comments received to the concept of "related person", the RTS now refers to "person closely associated", as defined in the MAR Level 1 text, and to the definition of "group" included in Article 2(11) of Directive 2013/34/EU (the same used under MiFID II). The reason behind the inclusion of "persons closely associated" is to avoid circumvention of the transparency obligations through dealing in the account of persons close to the producer of the document.

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

357. Mixed views were expressed as to include "regular basis" in the definition of expert or not, with a small majority in favour of the inclusion of this criteria. The SMSG expressed its positive opinion for the criterion of "regular basis", suggesting at least a "quarterly basis".

358. The main argument of the negative responses, is that the frequency does not improve by itself the level of expertise of the producer, and two respondents argued that the term "repeatedly proposes particular investment decisions" already narrows the set of circumstances significantly.

359. The ones in favour of the "regular basis" criterion did not provide many arguments and the impression is that this would just characterise more precisely the concept of expert.

360. Additional characteristics were suggested to further specify the concept of experts:

a. persons who are paid, or seek payment, for disseminating investment recommendation;

b. persons who possess the requisite qualifications to write investment recommendations (and is not writing as a qualified person) and advertises this qualification; or who has several years of experience acquired as a qualified person (but no longer writes as a qualified person) and publicises this fact to substantiate his publications;

c. individual's works on a particular topic or business area, an individual's level of education, an individual's work history.

361. A couple of respondents explained that through social trading websites, analysts or investors - even retail investors - can publish and explain their own investment strategy. Strategies which generate sufficient interest can be securitized and listed on-exchange so that other investors are enabled to buy the instrument and participate in the strategy. These platforms themselves are actively promoted and reach a wide audience. Therefore, it may be worth to consider whether promoting an investment strategy through a social trading platform requires a qualified person/expert status for the operator of the platform and/or for the "analysts" themselves.

ESMA's response:

362. ESMA has decided not to include these characteristics in the definition, in order to maintain it broad and more flexible, but it has added some wording in the recital in order to better explain the concept of "expert". In relation to "social trading websites", they could be covered by the definition of expert when they are directly proposing a particular investment decision. Where they meet the characteristics of expert, social trading websites would have to meet the relevant requirements.

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

363. The majority of the respondents as well as the SMSG considered that the suggested standards for objective presentation of investment recommendations are suitable to all asset classes.

364. A few respondents answered negatively to the questions and raised various types of concerns.

365. One respondent argued that Article 4(2)(h) and (i) of the draft RTS presented in the CP do not apply well to credit research and quantitative research, as these provisions refer to "issuers". Similarly, Article 5.5(a) of the draft RTS on proportion of buy/sell/hold may not apply to macroeconomic strategies.

366. The same respondent also suggested that documents labelled as marketing communication under MiFID, i.e. not objective and not independent communication, should not be subject to Articles 4(2) (objective presentation) and 5 (disclosure of interest) (see also Q26 on marketing communication).

367. A couple of respondents suggested to delete the reference to morning and sales notes in Recital 6 of the draft RTS in the CP to avoid capturing them automatically (although the recital already says "often labelled as"). Another respondent also proposed a drafting for this recital aimed at excluding from the scope of investment recommendations those communications from salespeople to their clients not related to research produced by their firm and which are not tailored as personal recommendations.

368. A couple of respondents considered the wording of Recital 3 of the draft RTS in the CP too broad, and suggested some additional wording that would ensure consistency with the current Recital 3 of the Directive 2003/125/EC.

369. The same respondents said that under the proposed framework, the normal investment communications between investment firms and investors with whom they have existing relationships will be materially impeded, if they are required to send the full

panoply of information for objectivity and conflicts purposes every time they approach an existing client to determine that client's interest in an investment.

370. Finally, on time of dissemination, a couple of other respondents argued that obligation under Article 4(1)(d) of the draft RTS included in the CP to report date and time when the note was first released for distribution is not useful, as there is a separate obligation to include date and time of any price mentioned in the note. In addition, in case of delay of delivery via email, the precise time of dissemination may be difficult to define.

ESMA's response:

371. In relation to the obligations under ex-Article 4 of the RTS (now Article 3), a reference to "financial instrument" has been added where relevant, so that they can apply also when in the recommendation there is no reference to an issuer. It should be noted that both the definition in Article 3(1)(34) and (35) of MAR refer to financial instruments and issuers, and therefore as long as a quantitative/credit/macro research expresses, directly or indirectly, an investment proposal on a financial instrument, the relevant obligations under ex-Article 4 of the RTS would apply.

372. It should be clarified that where a document, meeting the criteria of the definitions of invest recommendation/information recommending or suggesting an investment strategy, is including proposals of investment on several issuers and/or several types of financial instruments, the requirements set out in the ex-Article 4 of draft the RTS in the CP apply to each separate issuer and/or financial instrument.

373. In relation to the obligation to specify date and time, it should be noted that new Article 3 of the final draft RTS applies to all persons in scope, whereas new Article 4 applies only to persons under Article 3(1)(34)(i) of MAR and experts. The draft of ex-Article 4 of the RTS in the CP (now Article 3 and 4) has been amended to improve clarity.

374. Finally, in light of the feedback received, ex-Recitals 3 and 6 of the draft RTS in the CP have been amended to avoid ambiguity.

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

375. The SMSG approved the proposed standards and thinks it is appropriate to require qualified persons to indicate and summarise any changes in valuation, methodology, or underlying assumptions. Some respondents explicitly agreed with the proposal, while others suggested a number of amendments, which could be summarised as follows.

376. In relation to proprietary models and valuation/methodology: three respondents suggested that, instead of having a summary of key factors of the proprietary model, it would be sufficient to mention its use, and indicate the location where more details could be found. On the contrary, another respondent said that both for valuation/methodology and proprietary models, indicating where more detailed information could be found can create a problem in relation to business secrets; and a second respondent requested as well to delete the obligation to request additional details on valuation/methodology. Finally, one respondent proposed to also exempt from disclosure of underlying methodology the standardised (non-proprietary) models, as the public already knows these models.

377. With regard to the disproportionality of the information to be provided compared to the recommendation (ex-Article 4(3) of the draft RTS in the CP), a respondent asked to also include the requirement relating to the summary of valuation or methodology in the list of items for which a reference of where the information could be found is enough. Another respondent requested clarification on the meaning of "disproportion".

378. The issue of marketing communications (as in previous questions) was also a topic of concern for one respondent, who considered that marketing communications need a simplified regime in consideration of their characteristic features, and it suggested that the requirements of objective presentation (Article 4 of the draft RTS in the CP) should not apply to them.

379. One respondent considered that ex-Recital 8 of the draft RTS in the CP on common factors to be exhibited when recommendations by the same persons refer to same industry or country, is setting a requirement too prescriptive and is not needed.

ESMA's response:

380. In relation to proprietary models, ex-Article 4(2)(d) of the draft RTS in the CP has been amended, and now just refers to where the information could be found. It is understood that is not required to make available every detail of the proprietary model, i.e. is not required to make a proprietary model public.

381. On disproportionality, the dimension of the recommendation itself should be compared with the dimension of the requirements mentioned in ex-Article 4(3). Also the format of the recommendation should be considered. For example, some of the sub point of ex-Article 4(2) might not be properly communicated in a telephone communication of an investment recommendation, and therefore ex-Article 4(3) could apply.

382. It should be noted that point (b) of ex-Article 4(2) of the draft RTS in the CP has been added to ex-Article 4(3), as suggested by some respondents (see new paragraph 4(2) of the final draft RTS).

383. On ex-Recital 8 of the draft RTS in the CP (new Recital 4 of the final draft RTS), it should be noted that it is not creating any binding requirement, but rather presenting a best practice and expectations for producers of recommendations. It highlights the importance of informing about the valuation or methodology and the underlying assumptions of a recommendation as compared to similar ones, for ensuring objective presentations of their content.

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

384. Just three respondents explicitly supported the proposal and three other completely approved the proposal to disclose situations where the remuneration of the producer is linked to trading fees, investment banking or other types of transactions (also covered in Q33). The others raised a number of issues.

385. Some respondents asked an exemption from disclosure of position when a "producer" is also a market maker or another exempted party under the SSR regime. They also supported that the disclosures of net short position should be consistent with the jurisdictional requirement for method of calculation for short selling and large shareholder reporting.

386. One respondent asked whether the obligation to disclose the actual holding in the financial instruments to which the recommendation relates (Article 5(3)(a) of the draft RTS in the CP) simultaneously fulfils the elements of Article 12(2)(d) of MAR, where a disclosure "to the public in a proper and effective way" exempts the disclosing party from a finding of market manipulation This respondent also requested clarification on the meaning of "proper and effective" disclosure.

387. A couple of respondents asked to remove from the requirements on disclosure of interest (Article 5(1) of the draft RTS in the CP) the reference to "significant conflict of interest with respect to an issuer to which the recommendation indirectly relates". Such a reference to indirect relations is said to be not clear to the producer at the time the note is issued.

388. One respondent suggested including in the disclosure the identification of Corporate Access payments - where the broker is being paid to arrange meetings with the company being recommended.

389. Finally a respondent added a comment on the sales persons, issue already raised in other questions (Q26 and Q28). It is argued that sales staff disseminating their own view could also be caught by the requirements, and that non-personal market commentary and trade-ideas could be caught by the same rules as independent research if sent to a wide audience. According to this respondent, if this is the intention this could be of concern and may be an unnecessary approach provided the views and ideas are not held out as being objective research.

ESMA's response:

390. In relation to short position, it should be noted that just the ones above the threshold mentioned in ex-Article 5(3)(ii) of the draft RTS in the CP should be included in the recommendation. A short position larger than the 0.5% of the issued share capital of an issuer represents valuable information also in cases where the producer is market maker in the shares of this issuer, and therefore the obligation has not been amended. In relation to the comment on Article 12 of MAR on "market manipulation", it should be noted that the provisions for disclosure of conflicts of interest in these RTS are driven by transparency purposes and relate to the particular context of investment recommendation. A disclosure conducted in this context is not providing a "safe harbour" with regards to the prohibition to manipulate the market. Nevertheless, when assessing, on a case by case basis, a potential market abuse under Article 12(2)(d) of MAR, competent authorities would take into consideration all the disclosures made by the market participant in relation to conflicts of interest.

391. In relation to ex-Article 5(1) of the draft RTS in the CP and the word "indirectly" within it, it should be noted that this word refers to the situation where the recommendation "indirectly" refers to the issuer, and therefore significant conflicts of interest between the producer and such issuer should be disclosed.

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

392. Whereas a minority of respondents completely approved the proposal regarding the level of the thresholds for disclosure of conflicts of interest, the majority of them commented the proposal and raised some concerns.

393. Most of them argued that 0.5% is too low a level. A number of respondents suggested different alternatives but all with higher levels:

a. 1%, as in the US requirements (one respondent);

b. 2% or 3% (2 respondents).

394. Four other respondents referred, also for consistency reasons, to the TD threshold, which has been recently reviewed and remained unchanged.

395. The most common arguments against the 0.5% level are that: it would imply a large amount of information which may in reality decrease transparency by virtue of the volume of information being provided, notably for organisations with larger capabilities, where disclosures would be made almost continuously, thus reducing the effectiveness of the disclosure to the recipient of the recommendation; it would increase significantly the cost of compliance, as new tools would have to be developed; and holding of 0.5% would not endanger the independence of the analyst.

396. Another respondent said that the proposed disclosure regime could cause the dissemination of information that is neither public nor accessible by independent analysts.

397. Some respondents questioned the dual approach regarding the application of the disclosure obligation based on thresholds depending on whether the investment recommendation (or any other information recommending or suggesting an investment strategy) relates to an issuer rather than to specific financial instruments (para. 396 of the CP). They argued that the approach requiring disclosure of long and short positions in the issuer's shares (if above the defined thresholds) when the recommendation only refer to the issuer (Para. 396(a)) is in practice useless, as investment recommendations almost always refer to particular financial instruments and not only to issuers. They proposed a single approach referring only to the financial instrument mentioned in the recommendation.

398. Some clarifications were also requested in relation to:

a. the disclosure of shares under point (b) of para. 396 of the CP;

b. the use of the expression "holding" and whether it refers to long positions only, or also to short ones.

399. Finally, the SMSG argued that is not clear how the 0.5% is determined, and more details backing this decision would be necessary. The SMSG is also providing drafting suggestions of the draft RTS in the CP (see para. 46 of the SMSG's response) to make clear that the situations listed under Article 5(3)(c) of the draft RTS in the CP reads as alternatives. It was also asked to clarify the interaction between the general rules for non-qualified persons (Article 5(1)) and the specific obligations for qualified persons (Article 5(3)) (See para. 47 of SMSG's response).

ESMA's response:

400. In relation to the threshold, it should be noted that the Transparency Directive (TD) focuses on the influence that a shareholder has on the issuer; hence the thresholds are higher. Disclosure under MAR is related to conflict of interest, and in this context to potential benefit that the producer of a recommendation could derive because of the recommendation's impact on its positions on the instruments to which the same recommendation refers. So, as it is the case under the SSR for disclosure of net short positions, the thresholds needs to be set at a lower level than in the TD. In this respect, the 0.5% level ensures consistency with the SSR level on the one hand, and between

long and short position on the other hand. When recommendations refer to large issuers, this percentage already could represent large investments, where also a small impact on the price by the recommendations could produce substantial profit. For calculating the net long or short position vis-à-vis the 0.5% threshold, it was decided to cross-refer to the Short Selling Regulation, so that market participants would have to use the same methods of calculation as the one used under this regime (including the ways this regime takes into consideration entities belonging to the same group). The use of established rules already known by the market should alleviate the administrative burden linked to the calculation of these positions.

401. Disclosure in relation to ex-Article 5(3)(b) of these RTS should be formulated as a statement declaring that the threshold was breached, with no need to disclose the exact percentage amount of the position (more details on this are provided in the Report).

402. The general approach included in ex-Article 5 of the CP is retained, although the obligation under ex-Article 5(3)(a) has been deleted. It should be noted that the disclosure of long and short positions in share of the issuer above the threshold is required also when the recommendation refers to financial instruments of the issuer other than shares. For example, there is a clear added value in knowing that the producer of a recommendation is suggesting investment in debt instruments of an issuer, when he is a shareholder of that issuer.

403. In light of the comments and suggestions of the SMSG, ex-Article 5 has been redrafted to improve clarity (see new Article 6 of the final draft RTS).

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

404. Mixed views were expressed by respondents on the aggregation of the position of the producer with the ones of the related person(s): almost half of them are in favour of the aggregation, a quarter against, and the rest expressing a more articulated response.

405. Half of those favouring aggregation provided particular comments:

- aggregation would be especially meaningful where legal person(s) are concerned, and in these cases the aggregated figures of the legal person/firm and any affiliated company should be used to assess whether the threshold has been reached; or
- aggregation should cover all those involved in the production of the recommendation.

406. Those opposing raised the following arguments against aggregation:

- it would dilute or confuse the actual position of the producer;
- it would be not compatible with normal principle of employment law (see also Q26);
- it is not needed, as the recommendation should already be free of conflict of interest, considering the existing code(s) of ethics/conduct requiring investment analysts to exercise due diligence and to issue only investment recommendations that are independent and have a reasonable and adequate basis.

407. Some respondents requested clarification on the meaning of “related person”, stating that:

- the breadth of the definition proposed would make in practice the calculation of the aggregated position difficult;
- if the term relates to a consolidated approach in the context of a group, the same rules should apply as set forth in the current legislations requiring calculation of positions (SSR) and major shareholdings (TD).

408. A couple of respondents strongly supported an approach whereby any amount of investment in a recommended security by the individual responsible for producing the recommendation must be disclosed as it amounts to a potential conflict of interest but questioned in this context, a requirement to disclose actual holdings.

409. Finally, one respondent said that aggregating positions would only result in ensuring the objectivity and reliability of the recommendations if the position(s) in question are held in one distinct part of an organisation that would or could influence the recommendation provided in another. But it considered that when other effective measures are in place to ensure this influence is not exerted (e.g. “Chinese Walls” or information barriers), the aggregation of the positions is not necessary.

ESMA’s response:

410. In relation to related persons, the RTS now refers to “persons closely associated”, as defined in MAR Level 1, and to “group”, as defined in Article 2(11) of Directive 2013/34/EU.

411. Considering the comments received, the RTS have been amended to clarify that aggregation is required in accordance with the calculation method used in regime of the Short Selling Regulation.

412. With aggregation of the positions at group level, the thresholds are more likely to be reached and the overall transparency on the conflicts of interest is increased, with a lower risk of circumvention. A producer will be less likely to indirectly (e.g. through an entity belonging to the same group) take position on a recommended instrument to benefit from the potential effect of the recommendation on the price of that instrument.

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

413. The vast majority of respondents agreed that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer. Among these respondents, some advocated for such disclosure to be of general nature or not too detailed:

a. the disclosures should only apply where remuneration is tied up to the subject of the particular transaction, and not to the sector in which the recommendation is;

b. it should sufficient to simply state that a link exists; or

c. it should be indicated whether variable pays or commissions are tied up to trading fee but that, for privacy reasons, details about the individual salary should not be included.

414. Out of the few respondents who explicitly disagreed with the proposal, one also considers that a generic disclaimer is sufficient as the development and dissemination of reports of investment is an ancillary activity linked to the activity of sales.

415. Along the same line, another opponent claimed that such a disclosure requirement is redundant, as it is implicit in the recommendation that it would generate trading in the recommended security, furthermore arguing that trading fees may not be conditional on the direction of the recommendation (e.g. buy or sell) thus negating the likelihood that the recommendation would be conflicted. This respondent added that the disclosure requirement is excessive in the sense that no meaningful information will be provided to the investors.

416. Another advocates that preventing tying up remuneration of analysts to fees generated by specific transactions related to the investment recommendation should be dealt up front through the organisational requirements rather than through disclosure requirements, thus being also consistent with MiFID II on conflicts of interest and suggested amending the final report and RTS by, at least, referring to “direct ties”. This would allow linking remuneration to the overall performance of the firm and to recognise that the remuneration of analysts cannot be totally independent from the transactions/trading carried out by the firm and the overall revenue they generate.

417. More generally, the SMSG advised that the RTS should ensure that the information about inducement (and the conflicts of interest) is provided in a clear way, rather than being hidden in the recommendation or to be found in related documents.

ESMA’s response:

418. Considering the clear support for the disclosure of a remuneration tied to trading fees, ESMA considers that no major amendment is required with regard to the provisions proposed in the draft RTS presented in the CP (ex-Article 5(4)). Ex-Article 5(4) refers now to “directly tied” instead of tied, as suggested by one respondent, and in general the Article has been redrafted to improve clarity (see new Article 6 of the final draft RTS, in particular paragraph 2, point (b)). The RTS require the disclosure of the existence of direct ties, without the need to include further details. In this way information about potential conflict of interest is provided to the reader of the recommendation, without disproportionately increasing the administrative burden on the producer.

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

419. The vast majority of the 15 respondents explicitly supported the proposed standards relating to the dissemination of recommendations produced by third parties; one insisting that any alterations to the third party recommendation should be clearly indicated and justified, including changes of the price target.

420. A clarification was also requested so that the identity of the disseminator is required to be made clear and prominent, whether or not it is in the recommendation itself.

421. A couple of respondents strongly encouraged ESMA to provide a carve-out for unaffiliated third-parties where those who disseminate do so as part of their distribution agreement with the provider and have no input into the content or selection of recommendations.

422. Besides, on a non-directly related issue, a respondent expressed concerns on the proposal in Article 5(7) of the draft RTS presented in the CP relating to non-written recommendations. As drafted, the article allows the producer of a non-written investment recommendation to omit the disclosure information set out in the draft RTS in specified circumstances, including when it is indicated, within the non-written recommendation, where the written recommendation upon which it is based is available free of charge to the public. Financial institutions produce their investment recommendations for their client base, for which a fee is often payable. It is inappropriate for research written for an institutional client base to be made available to the wider public for free. It is suggested that if ESMA's objective is to ensure the disclosure information referred to within the written investment recommendation is available to the audience of a non-written investment recommendation, then the obligation should extend solely to making that disclosure information available to the public free of charge rather than the whole publication. It also notes that this also contradicts ESMA's advice on unbundling where it is proposed that each client will have to pay separately for the research.

ESMA's response:

423. With regards to where the identity of the disseminator should be clearly and prominently disclosed, ESMA agrees that some flexibility could be offered and has amended the final draft TS accordingly. The important element is that the identity of the disseminator is effectively disclosed, without ambiguity for the recipient of the disseminated information.

424. In relation to "distribution agreement", ESMA has decided to retain the same approach as in the CP and therefore no carve-out is offered to unaffiliated third parties. An exemption for this type of "disseminators" could open the door to potential circumvention of the general obligation applicable to entities disseminating recommendations.

425. In relation to the last comment, ex-Article 5(7)(c) of the RTS in the CP has been amended so that there is no need to make available the whole recommendation free of charge.

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

426. The vast majority of the 15 respondents consider that publication of extracts rather than the whole recommendation by news disseminators is not a substantial alteration of the investment recommendation produced by a third party, provided however that certain conditions are fulfilled.

427. Such publication of extracts should be clearly identified as extracts and should be clear and not misleading, and one respondent suggested that a short comment is included in the publication to state that the full context is not given.

428. The original source and/or the identity of the producer(s) are cited; or the original report is accessible to the readers, one respondent even suggesting to attach it to the extracts published, if allowed by the producer.

429. Another respondent commented that the onus should be put on the disseminators/authors of the extracts to ensure that the recommendation is not reproduced in a substantially altered way.

430. One respondent however considered that extracts of a recommendation produced by a third party may miss significant elements of the analysis, the assumptions or exemptions which are important in assessing the credence to give the recommendation.

431. On a non-directly related issue, a couple of respondents agreed that, in case of a non-written recommendation, it should be indicated where the written recommendation is available but did not support the proposal to make it available free of charge. They suggested instead that to simply have the required disclosures made available free of charge would be sufficient (see also last comment in the summary of Q34).

ESMA's response:

432. ESMA agrees with the majority of respondents that the publication of extracts rather than the whole recommendation by news disseminators should not be considered as a substantial alteration of the investment recommendation produced by a third party providing that certain safeguards are in place.

433. ESMA is of the view that proposed arrangements that "qualified persons" should have in place in case of publication of a summary of an investment recommendation could apply also to the publication of extracts. Furthermore, it is noted that not only "qualified persons" can disseminate a summary of an investment recommendation, but any person, including news disseminators. The text of the RTS has been amended accordingly.

434. With the view to complement the regime and to ensure appropriate information of the investors, ESMA is therefore amending the scope of the provisions relating to dissemination of a summary of an investment recommendation (ex-Article 7(2) of the RTS in the CP) along two lines: (i) the requirement would not only apply in relation to dissemination of an investment recommendation, but also to publication of extracts of an investment recommendation; (ii) extension of the persons covered so as to encompass any person disseminating extracts or a summary of an investment recommendation.

435. In addition, the revised article also clarifies that both a summary or published extracts are clearly identified as such by the disseminator.

436. In relation to the disclosure of conflicts of interest, ex-Article 7(2) has been amended so that there is no need to make the whole recommendation available free of charge, but just the information about conflicts of interest and about objective presentation.

Annex V – Draft regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications

EUROPEAN COMMISSION

Brussels, XXX
[…] (2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 May 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1] and in particular Article 4(4) thereof,

Whereas:

(1) Article 2 of MiFIR RTS 23 requires ongoing submissions of identifying reference data for financial instruments admitted to trading or the subject of a request for admission to trading on a trading venue. By contrast, Article 4 of Regulation (EU) No 596/2014 requires trading venues to notify their competent authorities only once of details of financial instruments which are the subject of a request for admission to trading, admitted to trading or traded and once subsequently where a financial instrument ceases to be traded or admitted to trading. Subject to the foregoing difference in reporting obligations under Regulation (EU) No 596/2014 and Article XX of MiFIR RTS 23, the reporting obligations under this Delegated Regulation should be aligned with the reporting obligations under [MiFIR RTS 23] so as to reduce the administrative burden for entities subject to such obligations.

(2) In order to enable effective and efficient use of the list of notifications of financial instruments, trading venues should provide complete and accurate notifications of financial instruments. For the same reasons, competent authorities should monitor and assess completeness and accuracy of notifications of financial instruments received from trading venues and promptly informs them of incompetency or inaccuracy identified. Likewise, ESMA should monitor and assess completeness and accuracy of notifications received from competent authorities and promptly inform them of incompleteness or inaccuracy identified.

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

(3) The list of notifications of financial instruments should be published by ESMA in an electronic, machine-readable and downloadable form in order to facilitate efficient use and exchange of the data.

(4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission. The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council [2] establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC,

HAS ADOPTED THIS REGULATION:

Article 1

Notifications of financial instruments pursuant to Article 4(1) of Regulation (EU) No 596/2014 shall include all details referred to in Table 2 of the Annex to this Regulation that pertain to the financial instruments concerned.

Article 2

2. Competent authorities shall monitor and assess, using automated processes, whether the notifications received pursuant to Article 4(1) of Regulation (EU) No 596/2014 comply with the requirements under Article 1 of this Regulation and Article 2 of the ITS.

3. Competent authorities shall, using automated processes, without delay inform the trading venue operators of any incompleteness in the received notifications and of any failure to deliver the notifications before the deadline specified in Article 1 of the ITS.

4. Competent authorities shall, using automated processes, transmit complete and accurate notifications of financial instruments to ESMA pursuant to Article 1.

On the day following receipt of the notifications of financial instruments in accordance with Article 4(2) of Regulation (EU) No 596/2014, ESMA shall, using automated processes, consolidate the notifications received from each competent authority.

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

5. ESMA shall, using automated processes, monitor and assess whether the notifications received from competent authorities are complete and accurate and comply with the applicable standards and formats specified in the table 3 of the Annex in the ITS.

6. ESMA shall, using automated processes, without delay inform the competent authorities concerned of any incompleteness in the transmitted notifications and of any failure to deliver notifications before the deadline specified in Article 1(3) of the ITS.

7. ESMA shall, using automated processes, publish the complete list of notifications in an electronic, downloadable and machine readable form on its website.

Article 3

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 3 July 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX

Table 1

Classification of commodity derivatives for Table 2 (fields 35-37)

Base product	Sub product	Further sub product
'AGRI' -Agricultural	'GROS' -Grains Oil Seeds	'FWHT' - Feed Wheat 'SOYB' – Soybeans 'CORN' – Corn 'RPSD' – Rapeseed 'OTHR' -Other
	'SOFT' -Softs	'CCOA' – Cocoa 'ROBU' - Robusta Coffee 'WHSG' - White Sugar 'BRWN' -Brown Sugar 'POTA' – Potatoe 'RICE' - Rice 'OTHR' - Other
	'OOLI'-Olive oil	'LAMP' - Lampante'
	'DIRY'- Dairy	
	'FRST' - Forestry	
	'SEAF' - Seafood	
	'LSTK' -Livestock	
	'GRIN' - Grain	'MWHT' - Milling Wheat
'NRGY' –'Energy	'ELEC' -Electricity	'BSLD' -Base load 'FITR' - Financial Transmission Rights 'PKLD' - Peak load 'OFFP' – Off-peak 'OTHR' - Other
	'NGAS' - Natural Gas	'GASP' – GASPOOL 'LNGG' – LNG 'NBPG' – NBP 'NCGG' – NCG 'TTFG' - TTF
	'OILP' -Oil	'BAKK' – Bakken 'BDSL' – Biodiesel 'BRNT' – Brent 'BRNX' - Brent NX 'CNDA' – Canadian 'COND' – Condensate 'DSEL' – Diesel 'DUBA' – Dubai 'ESPO' – ESPO ''ETHA' – Ethanol 'FUEL' – Fuel

		'FOIL' - Fuel Oil 'GOIL' – Gasoil 'GSLN' – Gasoline 'HEAT' - Heating Oil 'JTFL' - Jet Fuel 'KERO' – Kerosene 'LLSO' - Light Louisiana Sweet (LLS) 'MARS' – Mars 'NAPH' – Naptha 'NGLO' – NGL 'TAPI' – Tapis 'URAL' – Urals 'WTIO' - WTI
	'COAL' - Coal 'INRG' -Inter Energy 'RNNG' - Renewable energy 'LGHT' - Light ends 'DIST' - Distillates	
'ENVR' -Environmental	'EMIS' - Emissions	'CERE' - CER 'ERUE' - ERU 'EUAE' - EUA 'EUAA' – EUAA
	'WTHR' - Weather 'CRBR' - Carbon related'	
'FRGT' –'Freight'	'WETF' - Wet	'DBCR' -Dry bulk carriers 'CSHP' - Containerships
	'DRYF' - Dry	'TNKR' –Tankers 'CSHP' - Containerships
'FRTL' –'Fertilizer'	'AMMO' - Ammonia 'DAPH' -DAP (Diammonium Phosphate) 'PTSH' - Potash 'SLPH' -Sulphur 'UREA' -Urea 'UAAN' - UAN (urea and ammonium nitrate)	
'INDP' - Industrial products'	'CSTR' - Construction 'MFTG' - Manufacturing	
'METL' - Metals'	'NPRM' - Non Precious	'ALUM' – Aluminium 'ALUA' - Aluminium Alloy 'CBLT' – Cobalt 'COPR' – Copper 'IRON' - Iron ore 'LEAD' – Lead 'MOLY' – Molybdenum 'NASC' – NASAAC 'NICK' – Nickel 'STEL' – Steel

		'TINN' – Tin 'ZINC' – Zinc 'OTHR' - Other
	'PRME' - Precious	'GOLD' – Gold 'SLVR' – Silver 'PTNM' – Platinum 'PLDM' – Palladium 'OTHR' - Other
'MCEX' - Multi Commodity Exotic'		
'PAPR' - Paper'	'CBRD' - Containerboard 'NSPT' - Newsprint 'PULP' - Pulp 'RCVP' - Recovered paper	
'POLY' - Polypropylene'	'PLST' - Plastic	
'INFL' - Inflation'		
'OEST' - Official economic statistics'		
'OTHC' - Other C10 'as defined in Table [10.1 Section 10 of Annex III to MiFIR RTS 2 on transparency requirements in respect of bonds, structured financial products, emission allowances and derivatives]	'DLVR' - Deliverable 'NDLV' - Non-deliverable	
'OTHR' - Other		

Table 2

Content of the notifications to be submitted to competent authorities in accordance with Article 4(1) [MAR]

N.	FIELD	CONTENT TO BE REPORTED
General fields		
1	Instrument identification code	Code used to identify the financial instrument.
2	Instrument full name	Full name of the financial instrument.
3	Instrument classification	Taxonomy used to classify the financial instrument. A complete and accurate CFI code shall be provided.
4	Commodities derivative indicator	Indication as to whether the financial instrument falls within the definition of commodities derivative under Article 2(1)(30) of Regulation (EU) No 600/2014.
Issuer related fields		
5	Issuer or operator of the trading venue identifier	LEI of issuer or trading venue operator.
Venue related fields		
6	Trading venue	Segment MIC for the trading venue or systematic internaliser, where available, otherwise operating MIC.
7	Financial instrument short name	Short name of financial instrument in accordance with ISO 18774.
8	Request for admission to trading by issuer	Whether the issuer of the financial instrument has requested or approved the trading or admission to trading of their financial

		instruments on a trading venue.
9	Date of approval of the admission to trading	Date and time the issuer has approved admission to trading or trading in its financial instruments on a trading venue.
10	Date of request for admission to trading	Date and time of the request for admission to trading on the trading venue.
11	Date of admission to trading or date of first trade	Date and time of the admission to trading on the trading venue or the date and time when the instrument was first traded or an order or quote was first received by the trading venue.
12	Termination date	Date and time when the financial instrument ceases to be traded or to be admitted to trading on the trading venue. Where this date and time is unavailable, the field shall not be populated.
Notional related fields		
13	Notional currency 1	Currency in which the notional is denominated. In the case of an interest rate or currency derivative contract, this will be the notional currency of leg 1 or the currency 1 of the pair. In the case of swaptions where the underlying swap is single-currency, this will be the notional currency of the underlying swap. For swaptions where the underlying is multi-currency, this will be the notional currency of leg 1 of the swap.
Bonds or other forms of securitised debt related fields		
14	Total issued nominal amount	Total issued nominal amount in monetary value.

15	Maturity date	Date of maturity of the reported financial instrument. Field applies to debt instruments with defined maturity.
16	Currency of nominal value	Currency of the nominal value for debt instruments.
17	Nominal value per unit/minimum traded value	Nominal value of each instrument. If not available, the minimum traded value shall be populated.
18	Fixed rate	The fixed rate percentage of return on a Debt instrument when held until maturity date, expressed as a percentage.
19	Identifier of the index/benchmark of a floating rate bond	Where an identifier exists.
20	Name of the index/benchmark of a floating rate bond	Where no identifier exists, name of the index.
21	Term of the index/benchmark of a floating rate bond.	Term of the index/benchmark of a floating rate bond. The term shall be expressed in days, weeks, months or years.
22	Base Point Spread of the index/benchmark of a floating rate bond	Number of basis points above or below the index used to calculate a price.
23	Seniority of the bond	Identify the type of bond: senior debt,

		mezzanine, subordinated or junior.
Derivatives and Securitised Derivatives related fields		
24	Expiry date	Expiry date of the financial instrument. Field only applies to derivatives with a defined expiry date.
25	Price multiplier	Number of units of the underlying instrument represented by a single derivative contract. For a future or option on an index, the amount per index point.
26	Underlying instrument code	ISIN code of the underlying instrument. For ADRs, GDRs and similar instruments, the ISIN code of the financial instrument on which those instruments are based. For Convertible bonds, the ISIN code of the instrument in which the bond can be converted. For derivatives or other instruments which have an underlying, the underlying instrument ISIN code, when the underlying is admitted to trading, or traded on a trading venue. When the underlying is a stock dividend, then the instrument code of the related share entitling the underlying dividends. For Credit Default Swaps, the ISIN of the reference obligation should be provided. In case the underlying is an Index and has an ISIN, the ISIN code for that index. When the underlying is a basket, include the ISINs of each constituent of the basket that is

		admitted to trading or is traded on a trading venue. Hence, fields 26 and 27 shall be reported as many times as necessary to list all instruments in the basket.
27	Underlying issuer	In case the instrument is referring to an issuer, rather than to one single instrument, the LEI code of the Issuer.
28	Underlying index name	In case the underlying is an Index, the name of the index.
29	Term of the underlying index	In case the underlying is an Index, the term of the index.
30	Option type	Indication as to whether the derivative contract is a call (right to purchase a specific underlying asset) or a put (right to sell a specific underlying asset) or whether it cannot be determined whether it is a call or a put at the time of execution. In case of swaptions it shall be: - "Put", in case of receiver swaption, in which the buyer has the right to enter into a swap as a fixed-rate receiver. -"Call", in case of payer swaption, in which the buyer has the right to enter into a swap as a fixed-rate payer. In case of Caps and Floors it shall be: -"Put", in case of a Floor. -"Call", in case of a Cap. Field only applies to derivatives that are

		options or warrants.
31	Strike price	Predetermined price at which the holder will have to buy or sell the underlying instrument, or an indication that the price cannot be determined at the time of execution. Field only applies to options, warrants, spread bet on an option on an equity or contract for difference on an option on an equity. Where price is currently not available but pending, the value shall be 'PNDG'. Where strike price is not applicable the field shall not be populated.
32	Strike price currency	Currency of the Strike Price.
33	Option exercise style	Indication as to whether the option may be exercised only at a fixed date (European, and Asian style), a series of pre-specified dates (Bermudan) or at any time during the life of the contract (American style). This field is only applicable for options, warrants and entitlement certificates.
34	Delivery type	Indication as to whether the financial instrument is settled physically or in cash. Where delivery type cannot be determined at time of execution, the value shall be 'OPTL'. This field is only applicable for derivatives.
Commodity derivatives		
35	Base product	Base product for the underlying asset class as specified in the classification of commodities derivatives table.
36	Sub product	The Sub Product for the underlying asset class as specified in the classification of commodities derivatives table.

		Field requires a Base product.
37	Further sub product	The Further sub product for the underlying asset class as specified in the classification of commodities derivatives table. Field requires a Sub product.
38	Transaction type	Transaction type as specified by the trading venue.
39	Final price type	Final price type as specified by the trading venue.
Interest rate derivatives - The fields in this section should only be populated for instruments that have non-financial instrument of type interest rates as underlying.		
40	Reference rate	Name of the reference rate.
41	IR Term of contract	If the asset class is Interest Rates, this field states the term of the contract. The term shall be expressed in days, weeks, months or years.
42	Notional currency 2	In the case of multi-currency or cross-currency swaps the currency in which leg 2 of the contract is denominated. For swaptions where the underlying swap is multi-currency, the currency in which leg 2 of the swap is denominated.
43	Fixed rate of leg 1	An indication of the fixed rate of leg 1 used, if applicable.
44	Fixed rate of leg 2	An indication of the fixed rate of leg 2 used, if applicable.
45	Floating rate of leg 2	An indication of the interest rate used if applicable.

46	IR Term of contract of leg 2	An indication of the reference period of the interest rate, which is set at predetermined intervals by reference to a market reference rate. The term shall be expressed in days, weeks, months or years.
Foreign exchange derivatives - The fields in this section should only be populated for instruments that have non-financial instrument of type foreign exchange as underlying.		
47	Notional currency 2	Field should be populated with the underlying currency 2 of the currency pair (the currency one will be populated in the notional currency 1 field 13).
48	FX Type	Type of underlying currency.

Annex VI: Draft implementing technical standard with regard to the timing, format and template of the submission of notification to competent authorities

EUROPEAN COMMISSION

Brussels, XXX
[…] (2015) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

of XXX

[…]

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

laying down implementing technical standards with regard to the timing, format and template of the submission of notifications to competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council

of XXX

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 May 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1] and in particular, the third subparagraph of Article 4(5) thereof,

Whereas:

(1) In order to ensure the alignment of reporting obligations of financial instrument reference data and to reduce the administrative burden for entities subject to such obligations, the reporting obligations under this Regulation should be aligned with the reporting obligations under [MiFIR RTS 23].

(2) There should be prompt receipt of complete notifications by competent authorities and the European Securities and Markets Authority (ESMA) in respect of each trading day so as to enable the competent authorities and ESMA to ensure data quality and effective market monitoring, to the benefit of market integrity.

(3) For the purposes of effective and efficient use of data by competent authorities, there should be consistency in the templates and formats used when submitting notifications of financial instruments.

(4) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

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

(5) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council[2] establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC,

HAS ADOPTED THIS REGULATION:

Article 1

2. By no later than 21:00 CET on each day that it is open for trading, a trading venue shall, using automated processes, provide to its competent authority pursuant to Article 4(1) of Regulation No 596/2014 the notifications of all financial instruments which, before 18:00 CET on that day, were for the first time subject to a request for admission to trading or admitted to trading or traded on the trading venue, including where orders or quotes were placed through its system, or ceased to be traded or to be admitted to trading on the trading venue.

3. Notifications of financial instruments which, after 18:00 CET, were for the first time subject to a request for admission to trading or admitted to trading or traded on the trading venue, including where orders or quotes were placed through its system, or ceased to be traded or to be admitted to trading on the trading venue, shall be made, using automated processes, by the trading venue to its competent authority by no later than 21:00 CET on the next day on which it is open for trading.

4. Competent authorities shall transmit notifications pursuant to Article 4(2) of Regulation (EU) No 596/2014 to ESMA each day by no later than 23:59 CET using automated processes and secure electronic communication channels between them and ESMA.

Article 2

All details to be included in notifications pursuant to Article 4(1) and (2) of Regulation (EU) No 596/2014 shall be submitted in accordance with the standards and formats specified in Table 3 of the Annex, in an electronic and machine-readable form and in a common XML template in accordance with the ISO 20022 methodology.

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 3

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 3 July 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX

Table 1

Legend for Table 3

SYMBOL	DATA TYPE	DEFINITION
{ALPHANUM-n}	Up to n alphanumerical characters	Free text field.
{CFI_CODE}	6 characters	ISO 10962 CFI code.
{COUNTRYCODE_2}	2 alphanumerical characters	2 letter country code, as defined by ISO 3166-1 alpha-2 country code.
{CURRENCYCODE_3}	3 alphanumerical characters	3 letter currency code, as defined by ISO 4217 currency codes
{DATE_TIME_FORMAT}	ISO 8601 date and time format	- Date and time in the following format: YYYY-MM-DDThh:mm:ss.ddddddZ. - 'YYYY' is the year; - 'MM' is the month; - 'DD' is the day; - 'T' – means that the letter 'T' shall be used - 'hh' is the hour; - 'mm' is the minute; - 'ss.dddddd' is the second and its fraction of a second; - Z is UTC time. Dates and times shall be reported in UTC.
{DATEFORMAT}	ISO 8601 date format	Dates shall be formatted by the following format: YYYY-MM-DD.
{DECIMAL-n/m}	Decimal number of up to n digits in total of which up to m digits can be fraction digits	Numerical field for both positive and negative values. - decimal separator is '.' (full stop); - negative numbers are prefixed with '-' (minus); Values are rounded and not truncated.

{INDEX}	4 alphabetic characters	‘EONA’ - EONIA ‘EONS’ - EONIA SWAP ‘EURI’ - EURIBOR ‘EUUS’ - EURODOLLAR ‘EUCH’ - EuroSwiss ‘GCFR’ - GCF REPO ‘ISDA’ - ISDAFIX ’LIBI’ - LIBID ‘LIBO’ - LIBOR ‘MAAA’ – Muni AAA ‘PFAN’ - Pfandbriefe ‘TIBO’ - TIBOR ‘STBO’ - STIBOR ‘BBSW’ - BBSW ‘JIBA’ - JIBAR ‘BUBO’ - BUBOR ‘CDOR’ - CDOR ‘CIBO’ - CIBOR ‘MOSP’ - MOSPRIM ‘NIBO’ - NIBOR ‘PRBO’ - PRIBOR ‘TLBO’ - TELBOR ‘WIBO’ – WIBOR ‘TREA’ – Treasury ‘SWAP’ – SWAP ‘FUSW’ – Future SWAP
{INTEGER-n}	Integer number of up to n digits in total	Numerical field for both positive and negative integer values.
{ISIN}	12 alphanumerical characters	ISIN code, as defined in ISO 6166.
{LEI}	20 alphanumerical characters	Legal entity identifier as defined in ISO 17442.
{MIC}	4 alphanumerical characters	Market identifier as defined in ISO 10383.
{FISN}	35 alphanumeric characters	FISN code as defined in ISO 18774.

Table 2

Classification of commodity derivatives for Table 3 (fields 35-37)

Base product	Sub product	Further sub product
‘AGRI’ -Agricultural	'GROS’ -Grains Oil Seeds	'FWHT’ -Feed Wheat 'SOYB’ - Soybeans 'CORN’ - Corn ‘RPSD’ - Rapeseed ‘OTHR’ -Other
	'SOFT’ -Softs	'CCOA’ - Cocoa 'ROBU’ - Robusta Coffee 'WHSG’ - White Sugar ‘BRWN’ -Brown Sugar ‘POTA’ - Potatoe ‘RICE’ - Rice ‘OTHR’ - Other
	'OOLI’-Olive oil	'LAMP’ - Lampante'
	'DIRY’- Dairy	
	'FRST’ - Forestry	
	'SEAF’ - Seafood	
	'LSTK’ -Livestock	
	'GRIN’ - Grain	‘MWHT’ - Milling Wheat
'NRGY’ –‘Energy	'ELEC’ -Electricity	'BSLD’ -Base load 'FITR’ - Financial Transmission Rights 'PKLD’ - Peak load ‘OFFP’ – Off-peak ‘OTHR’ - Other
	'NGAS’ - Natural Gas	'GASP’ - GASPOOL 'LNGG’ - LNG 'NBPG’ - NBP 'NCGG’ - NCG 'TTFG’ - TTF
	'OILP’ -Oil	‘BAKK’ - Bakken 'BDSL’ - Biodiesel 'BRNT’ - Brent 'BRNX’ - Brent NX 'CNDA’ - Canadian 'COND’ - Condensate 'DSEL’ - Diesel 'DUBA’ - Dubai 'ESPO’ - ESPO ’’ETHA’ - Ethanol 'FUEL’ - Fuel

		'FOIL' - Fuel Oil 'GOIL' - Gasoil 'GSLN' - Gasoline 'HEAT' - Heating Oil 'JTFL' - Jet Fuel 'KERO' - Kerosene 'LLSO' - Light Louisiana Sweet (LLS) 'MARS' - Mars 'NAPH' - Naptha 'NGLO' - NGL 'TAPI' - Tapis 'URAL' - Urals 'WTIO' - WTI
	'COAL' - Coal 'INRG' -Inter Energy 'RNNG' - Renewable energy 'LGHT' - Light ends 'DIST' - Distillates	
'ENVR' -Environmental	'EMIS' - Emissions	'CERE' - CER 'ERUE' - ERU 'EUAE' - EUA 'EUAA' – EUAA
	'WTHR' - Weather 'CRBR' - Carbon related'	
'FRGT' –'Freight'	'WETF' - Wet	'TNKR' -Tankers 'CSHP' - Containerships
	DRYF' - Dry	'DBCR' -Dry bulk carriers 'CSHP' - Containerships
'FRTL' –'Fertilizer'	'AMMO' - Ammonia 'DAPH' -DAP (Diammonium Phosphate) 'PTSH' - Potash 'SLPH' -Sulphur 'UREA' -Urea 'UAAN' - UAN (urea and ammonium nitrate)	
'INDP' - Industrial products'	'CSTR' - Construction 'MFTG' - Manufacturing	
'METL' - Metals'	'NPRM' - Non Precious	'ALUM' - Aluminium 'ALUA' - Aluminium Alloy 'CBLT' - Cobalt 'COPR' - Copper 'IRON' - Iron ore 'LEAD' - Lead 'MOLY' - Molybdenum

		'NASC' - NASAAC 'NICK' - Nickel 'STEL' - Steel 'TINN' - Tin 'ZINC' - Zinc 'OTHR' - Other
	'PRME' - Precious	'GOLD' - Gold 'SLVR' - Silver 'PTNM' - Platinum 'PLDM' - Palladium 'OTHR' - Other
'MCEX' - Multi Commodity Exotic'		
'PAPR' - Paper'	'CBRD' - Containerboard 'NSPT' - Newsprint 'PULP' - Pulp 'RCVP' - Recovered paper	
'POLY' - Polypropylene'	'PLST' - Plastic	
'INFL' - Inflation'		
'OEST' - Official economic statistics'		
'OTHC' - Other C10 'as defined in [Table 10.1 Section 10 of Annex III to MiFIR RTS 2 on transparency requirements in respect of bonds, structured financial products, emission allowances and derivatives.]	'DLVR' - Deliverable 'NDLV' - Non-deliverable	
'OTHR' - Other		

Table 3

Standards and formats to be used in the notifications to be submitted in accordance with Article 4(1) and (2) of Regulation no 596/2014

N.	FIELD	STANDARDS AND FORMATS TO BE USED FOR REPORTING
General Fields		
1	Instrument identification code	{ISIN}
2	Instrument full name	{ALPHANUM-350}
3	Instrument classification	{CFI_CODE}
4	Commodities derivative indicator	true' - Yes 'false' – No
Issuer related fields		
5	Issuer or operator of the trading venue identifier	{LEI}
Venue related fields		
6	Trading venue	{MIC}
7	Financial instrument short name	{FISN}
8	Request for admission to trading by issuer	'true'- Yes 'false' - No
9	Date of approval of the admission to trading	{DATE_TIME_FORMAT}

10	Date of request for admission to trading	{DATE_TIME_FORMAT}
11	Date of admission to trading or date of first trade	{DATE_TIME_FORMAT}
12	Termination date	{DATE_TIME_FORMAT}
Notional related fields		
13	Notional currency 1	{CURRENCYCODE_3}
Bonds or other forms of securitised debt related fields		
14	Total issued nominal amount	{DECIMAL-18/5}
15	Maturity date	{DATEFORMAT}
16	Currency of nominal value	{CURRENCYCODE_3}
17	Nominal value per unit/minimum traded value	{DECIMAL-18/5}
18	Fixed rate	{DECIMAL-11/10} Expressed as a percentage (e.g. 7.0 means 7% and 0.3 means 0.3%)
19	Identifier of the index/benchmark of a floating rate bond	{ISIN}

20	Name of the index/benchmark of a floating rate bond	{INDEX} Or {ALPHANUM-25} - if the index name is not included in the {INDEX} list
21	Term of the index/benchmark of a floating rate bond.	{INTEGER-3}+'DAYS' - days {INTEGER-3}+'WEEK' - weeks {INTEGER-3}+'MNTH' - months {INTEGER-3}+'YEAR' - years
22	Base Point Spread of the index/benchmark of a floating rate bond	{INTEGER-5}
23	Seniority of the bond	'SNDB' - Senior Debt 'MZZD' - Mezzanine 'SBOD' - Subordinated Debt 'JUND' - Junior Debt
Derivatives and Securitised Derivatives related fields		
24	Expiry date	{DATEFORMAT}
25	Price multiplier	{ DECIMAL-18/17}
26	Underlying instrument code	{ISIN}

27	Underlying issuer	{LEI}
28	Underlying index name	{INDEX} Or {ALPHANUM-25} - if the index name is not included in the {INDEX} list
29	Term of the underlying index	{INTEGER-3}+'DAYS' - days {INTEGER-3}+'WEEK' - weeks {INTEGER-3}+'MNTH' - months {INTEGER-3}+'YEAR' - years
30	Option type	'PUTO' - Put 'CALL' – Call 'OTHR' – where it cannot be determined whether it is a call or a put
31	Strike price	{DECIMAL-18/13} in case the price is expressed as monetary value {DECIMAL-11/10} in case the price is expressed as percentage or yield 'PNDG' in case the price is not available
32	Strike price currency	{CURRENCYCODE_3}
33	Option exercise style	'EURO' - European 'AMER' - American 'ASIA' - Asian 'BERM' - Bermudan 'OTHR' - Any other type

34	Delivery type	'PHYS' - Physically Settled 'CASH' - Cash settled 'OPTN' - Optional for counterparty or when determined by a third party
Commodity derivatives		
35	Base product	Only values in the 'Base product' column of the classification of commodities derivatives table are allowed.
36	Sub product	Only values in the 'Sub product' column of the classification of commodities derivatives table are allowed are allowed.
37	Further sub product	Only values in the 'Further sub product' of the classification of commodities derivatives table are allowed.
38	Transaction type	'FUTR' - Futures 'OPTN' - Options 'TAPO' - TAPOS 'SWAP' - SWAPS 'MINI' - Minis 'OTCT' - OTC 'ORIT' - Outright 'CRCK' - Crack 'DIFF' - Differential 'OTHR' - Other
39	Final price type	'ARGM' - Argus/McCloskey 'BLTC' - Baltic 'EXOF' - Exchange 'GBCL' - GlobalCOAL 'IHSM' - IHS McCloskey 'PLAT' - Platts 'OTHR' - Other
Interest rate derivatives - The fields in this section should only be populated for instruments that have non-financial instrument of type interest rates as underlying.		

40	Reference rate	{INDEX} Or {ALPHANUM-25}- if the reference rate is not included in the {INDEX} list
41	IR Term of contract	{INTEGER-3}+'DAYS' - days {INTEGER-3}+'WEEK' - weeks {INTEGER-3}+'MNTH' - months {INTEGER-3}+'YEAR' - years
42	Notional currency 2	{CURRENCYCODE_3}
43	Fixed rate of leg 1	{DECIMAL -11/10} Expressed as a percentage (e.g. 7.0 means 7% and 0.3 means 0.3%)
44	Fixed rate of leg 2	{DECIMAL -11/10} Expressed as a percentage (e.g. 7.0 means 7% and 0.3 means 0.3%)
45	Floating rate of leg 2	{INDEX} Or {ALPHANUM-25} - if the reference rate is not included in the {INDEX} list
46	IR Term of contract of leg 2	{INTEGER-3}+'DAYS' - days {INTEGER-3}+'WEEK' - weeks {INTEGER-3}+'MNTH' - months {INTEGER-3}+'YEAR' - years
Foreign exchange derivatives - The fields in this section should only be populated for instruments that have non-financial instrument of type foreign exchange as underlying.		
47	Notional currency 2	{CURRENCYCODE_3}
48	FX Type	'FXCR' - FX Cross Rates 'FXEM' - FX Emerging Markets 'FXMJ' - FX Majors

Annex VII - Draft regulatory technical standards for the conditions that buy-back programmes and stabilisation measures must meet

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular, the third subparagraph of Article 5(6) thereof,

Whereas:

(1) To benefit from the exemption against the prohibitions on market abuse, trading in own shares in buy-back programmes and trading in securities or associated instruments for the stabilisation of securities should comply with the requirements and conditions set out in Regulation (EU) No 596/2014 and in this Regulation.

(2) Although Regulation (EU) No 596/2014 allows stabilisation through associated instruments, the benefit of the exemption for the transactions relating to buy-back programmes should be limited to actual trading in the own shares of the issuer and should not apply to the transactions in financial derivatives.

(3) As transparency is a prerequisite for the prevention of market abuse, it is important to ensure that adequate information is disclosed or reported prior to, during and after the trading in own shares in buy-back programmes and trading for stabilisation of securities.

(4) In order to prevent market abuse, it is appropriate to set conditions regarding the purchase price and permitted daily volume of trading in own shares in buy-back programmes. To avoid circumvention of such conditions, the buy-back transactions should be carried out on a trading venue where the shares of the issuer are admitted to trading or traded. However, negotiated transactions that do not contribute to price formation could be used for the purpose of a buy-back programme and benefit from

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

the exemption, provided that all the conditions referred to in Regulation (EU) No 596/2014 and this Regulation are met.

(5) To avoid the risk of abusing the exemption for trading in its own shares in buy-back programmes, it is important that this Regulation sets out restrictions with regards to the type of transactions an issuer can carry out during a buy-back programme and the timing of the trading in its own shares. Those restrictions should therefore prevent the selling of own shares by the issuer during the duration of a buy-back programme and take into account the possible existence of temporary prohibitions to trade within the issuer and the fact that an issuer may have legitimate reasons to delay public disclosure of inside information.

(6) Stabilisation of securities is intended to provide support for the price of an initial or secondary offering of securities during a limited time period if the securities come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in those securities. It thus contributes to greater confidence of investors and issuers in the financial markets. Therefore, in the interest of those investors having subscribed or purchased the securities in the context of a significant distribution, and in the interest of the issuer, those block trades that are strictly private transactions should not be considered as a significant distribution of securities.

(7) In the context of initial public offers, certain Member States allow for trading prior to the commencement of official trading on a regulated market. This is commonly referred to as 'when issued trading'. Therefore, it should be possible for the purpose of the exemption that the stabilisation period starts before the beginning of the official trading provided that certain transparency and trading conditions are met.

(8) Market integrity requires the adequate public disclosure of stabilisation measures. Reporting of the stabilisation transactions is also necessary to allow competent authorities to supervise stabilisation measures. In order to ensure investor protection, preserve the integrity of markets and deter market abuse, it is important that competent authorities in the performance of their supervisory activities become aware of all stabilisation transactions, irrespective of whether they take place in or outside a trading venue. Furthermore, it is beneficial to clarify in advance the division of responsibilities between the issuers, the offerors or the entities undertaking the stabilisation as regards fulfilment of applicable reporting and transparency requirements. Such division of responsibilities should take into account who is in possession of the relevant information. The appointed entity should be also responsible to respond to any request from the competent authority in each Member State concerned. To ensure easy access for any investor or market participant, the information to be disclosed prior to the opening of the offer period of the securities to be stabilized under Regulation (EC) No 809/2004 implementing Directive 2003/71/EC, is without prejudice to disclosure requirements under Article 6 of this Regulation.

(9) There should be adequate coordination in place between all investment firms and credit institutions undertaking stabilisation. During stabilisation, one investment firm or credit institution should act as a central point of inquiry for any regulatory intervention by the competent authority in each Member State concerned.

(10) To provide resources and hedging for stabilisation activity, ancillary stabilisation in the form of exercising overallotment facilities or greenshoe options should be allowed. However, it is important to set out conditions regarding the transparency of such ancillary stabilisation and the manner in which it is exercised, including the period during which it can be carried out. Morever, particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilisation when it results in a position that is not covered by the greenshoe option.

(11) In order to avoid confusion, stabilisation activity should be carried out in a manner that takes into account the market conditions and the offering price of the securities. Transactions to liquidate positions that were established as a result of stabilisation measures should be undertaken to minimise market impact, having due regard to prevailing market conditions. As the purpose of stabilisation is to support the price, selling securities that have been acquired through stabilising purchases, including selling in order to facilitate subsequent stabilising activity, should not be deemed to be for the purpose of price support. Neither these sales nor the subsequent purchases should be considered as abusive in themselves even though they do not benefit from the exemption provided under Regulation (EU) No 596/2014.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(13) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council[2],

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

a) ‘time-scheduled buy-back programme’ means a buy-back programme where the dates and volume of shares to be traded during the time period of the programme are set out at the time of the public disclosure of the buy-back programme;

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

b) ‘adequate public disclosure’ means making information public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and of the Council[3] in accordance with the implementing technical standards referred to in point (a) of Article 17(10) of Regulation (EU) No 596/2014;

c) ‘offeror’ means the prior holders of, or the entity issuing, the securities;

d) ‘allotment’ means the process or processes by which the number of securities to be received by investors who have previously subscribed or applied for them is determined;

e) ‘ancillary stabilisation’ means the exercise of an overallotment facility or of a greenshoe option by investment firms or credit institutions, in the context of a significant distribution of securities, exclusively for facilitating stabilisation activity;

f) ‘overallotment facility’ means a clause in the underwriting agreement or lead management agreement which permits acceptance of subscriptions or offers to purchase a greater number of securities than originally offered;

g) ‘greenshoe option’ means an option granted by the offeror in favour of the investment firm(s) or credit institution(s) involved in the offer for the purpose of covering overallotments, under the terms of which such firm(s) or institution(s) is allowed to purchase up to a certain amount of securities at the offer price for a certain period of time after the offer of the securities;

CHAPTER II

BUY-BACK PROGRAMMES

Article 2

Disclosure and reporting obligations

1. Prior to the start of trading, the issuer shall ensure adequate public disclosure of the following documentation concerning a buy-back programme permitted in accordance with Article 21 or 22 of Directive 2012/30/EU of the European Parliament and of the Council[4] and the following information:

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[3] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

[4] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

a) the purpose of the programme as referred to in Article 5(2) of Regulation (EU) No 596/2014;

b) the maximum pecuniary amount allocated to the programme;

c) the maximum number of shares to be acquired; and

d) the duration of the period for which authorisation for the programme has been given (duration of the programme).

The issuer shall ensure adequate public disclosure of subsequent changes to the programme and to the information already published in accordance with the first subparagraph.

2. The issuer shall have in place mechanisms that allow it to fulfil reporting obligations to the competent authority and to record each transaction related to buy-back programme including the information specified in Article 5(3) of Regulation (EU) No 596/2014. The issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are traded no later than by the end of the seventh daily market session following the date of their execution, all the transactions relating to the buy-back programme, in a detailed form and in an aggregated form. The aggregated form shall indicate the aggregated volume and the weighted average price per day and per trading venue.

3. The issuer shall ensure adequate public disclosure of the information on the transactions relating to buy-back programmes referred to in paragraph 2 no later than by the end of the seventh daily market session following the date of execution of such transactions. The issuer shall also post on its website the transactions disclosed and keep that information available to the public for at least a five year period from the date of publication.

Article 3

Conditions for trading

1. In order to benefit from the exemption granted by Article 5(1) of Regulation (EU) No 596/2014, transactions relating to buy-back programmes within the meaning of Article 5(1) of that Regulation shall meet the following conditions:

a) the shares shall be purchased by the issuer on a trading venue where the shares are admitted to trading or traded;

b) for shares traded continuously on a trading venue, the orders shall not be placed during an auction phase and the orders placed before the start of the auction phase shall not be modified during that phase;

c) for shares traded solely on a trading venue through auctions, the orders shall be placed and modified by the issuer during the auction provided that other market participants have sufficient time to react to them.

2. In order to benefit from the exemption granted by Article 5(1) of Regulation (EU) No 596/2014, issuers shall not, when executing transactions under a buy-back programme, purchase shares at a price higher than the higher of the price of the last independent trade and

the highest current independent purchase's bid on the trading venue where the purchase is carried out, including when the shares are traded on different trading venues.

3. In order to benefit from the exemption granted by Article 5(1) of Regulation (EU) No 596/2014, issuers shall not, when executing transactions under a buy-back programme, purchase on any trading day more than 25% of the average daily volume of the shares on the trading venue on which the purchase is carried out.

For the purposes of the first subparagraph, the average daily volume shall be based on the average daily volume traded in either of the following:

a) the month preceding the month of the disclosure required under Article 2(1); such a fixed volume shall be referred to in the programme and apply for the duration of that programme; or

b) the 20 trading days preceding the date of purchase, where the programme makes no reference to that volume.

Article 4

Trading restrictions

1. In order to benefit from the exemption granted by Article 5(1) of Regulation (EU) No 596/2014, the issuer shall not, during its participation in a buy-back programme, engage in the following activities:

a) selling of own shares during the duration of the programme;

b) trading during a closed period as defined under Article 19(11) of Regulation (EU) No 596/2014;

c) trading where the issuer has decided to delay the public disclosure of inside information in accordance with Article 17(4) and (5) of Regulation (EU) No 596/2014.

2. Paragraph 1 shall not apply if:

a) the issuer has in place a time-scheduled buy-back programme; or

b) the buy-back programme is lead-managed by an investment firm or a credit institution which makes its trading decisions independently from the issuer concerning the timing of the purchases of the issuer's shares.

3. Point (a) of Paragraph 1 shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information between those having access to inside information related, directly or indirectly, to the issuer and those responsible for any decision relating to the trading of own shares, when trading in own shares on the basis of such any decision.

4. Points (b) and (c) of paragraph 1 shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information between those having access to inside information related, directly or indirectly, to the issuer, including acquisition decisions under the buy-back programme, and those responsible for the trading of own shares on behalf of clients, when trading in own shares on behalf of those clients.

CHAPTER III

STABILISATION MEASURES

Article 5

Conditions regarding the limited period of stabilisation

1. In respect of shares and other securities equivalent to shares, the limited period during which stabilisation may be carried out for the purpose of Article 5(4) of Regulation (EU) No 596/2014 shall:

a) in the case of a significant distribution in the form of an initial offer publicly announced, start on the date of commencement of trading of the securities on the concerned trading venue and end no later than 30 calendar days thereafter.

b) in the case of a significant distribution in the form of a secondary offer, start on the date of adequate public disclosure of the final price of the securities and end no later than 30 calendar days after the date of allotment.

2. For the purposes of point (a) of paragraph 1, where the initial offer publicly announced takes place in a Member State that permits trading prior to the commencement of trading on a trading venue, the limited period shall start on the date of adequate public disclosure of the final price of the securities and last no longer than 30 calendar days thereafter. Such trading shall be carried out in compliance with the applicable rules of the trading venue on which the securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.

3. In respect of bonds and other forms of securitised debt, including securitised debt convertible or exchangeable into shares or into other securities equivalent to shares, the limited period referred to in paragraph 1 shall start on the date of adequate public disclosure of the terms of the offer of the securities and end either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the securities, whichever is earlier.

Article 6

Disclosure and reporting obligations

1. Before the opening of the offer period of the securities, the person appointed in accordance with paragraph 5 shall ensure adequate public disclosure of the following information:

a) the fact that stabilisation may not necessarily occur and that it may cease at any time;

b) the fact that stabilisation transactions are aimed to support the market price of the securities during the stabilisation period;

c) the beginning and the end of the stabilisation period, during which stabilisation may be carried out;

d) the identity of the entity undertaking the stabilisation, unless this is not known at the time of publication, in which case it shall be subject to adequate public disclosure before any stabilisation activity begins;

e) the existence and the maximum size of any overallotment facility or greenshoe option, the exercise period of the greenshoe option and any conditions for the use of the overallotment facility or exercise of the greenshoe option; and

f) the place where the stabilisation may be undertaken including, where relevant, the name of the trading venue(s).

2. During the stabilisation period, the persons appointed according to paragraph 5 shall ensure adequate public disclosure of the details of all stabilisation transactions no later than the end of the seventh daily market session following the date of execution of such transactions.

3. Within one week of the end of the stabilisation period, the person appointed in accordance with paragraph 5 shall ensure adequate public disclosure of the following information:

a) whether or not the stabilisation was undertaken;

b) the date on which stabilisation started;

c) the date on which stabilisation last occurred;

d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out; and

e) the trading venue(s) on which the stabilisation transactions were carried out, where applicable.

4. For the purpose of Article 5(5) of Regulation (EU) No 596/2014, the entities undertaking the stabilisation, whether or not they act on behalf of the issuer or the offeror, shall record each stabilisation order or transaction in securities and associated instruments pursuant to Article 25(1) and Article 26(1), (2) and (3) of Regulation (EU) No 600/2014. The entities undertaking the stabilisation, whether or not they act on behalf of the issuer or the

offeror, shall notify all stabilisation transactions in securities and associated instruments carried out to:

a) the competent authority of each trading venue on which the securities under the stabilisation are admitted to trading or are traded; and

b) the competent authority of each trading venue where transactions in associated instruments for the stabilisation of securities are carried out.

5. The issuer, the offeror and any entity undertaking the stabilisation, as well as the persons acting on their behalf, shall appoint one among them to act as central point responsible:

a) for the public disclosure requirements referred to in paragraphs 1, 2 and 3; and

b) for handling any request from any of the competent authorities referred to in paragraph 4.

Article 7

Price conditions

1. In the case of an offer of shares or other securities equivalent to shares, stabilisation of the securities shall not in any circumstances be carried out above the offering price.

2. In the case of an offer of securitised debt convertible or exchangeable into shares or into other securities equivalent to shares, stabilisation of these debt instruments shall not in any circumstances be carried out above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

Article 8

Conditions for ancillary stabilisation

Ancillary stabilisation shall be undertaken in accordance with Articles 6 and 7 and comply with the following:

a. securities shall be overallotted only during the subscription period and at the offer price;

b. a position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the greenshoe option shall not exceed 5% of the original offer;

c. the greenshoe option shall be exercised by the beneficiaries of such an option only where the securities have been overallotted;

d. the greenshoe option shall not amount to more than 15% of the original offer;

e. the exercise period of the greenshoe option shall be the same as the stabilisation period required under Article 5;

f. the exercise of the greenshoe option shall be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of securities involved.

CHAPTER IV

FINAL PROVISION

Article 8

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

Annex VIII - Draft regulatory technical standards on the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular the third subparagraph of Article 11(9) thereof,

Whereas:

(1) Appropriate arrangements, procedures and record keeping requirements are necessary to ensure that market sounding activities are managed and controlled effectively. As part of the appropriate arrangements, disclosing market participants should establish procedures describing the manner in which market soundings are conducted. Such procedures should set out a standard set of information to be provided to and requested from the persons receiving the market sounding, ensuring that no unnecessary potentially sensitive information is disseminated and that all the persons receiving the market sounding receive the same level of information.

(2) In order to provide certainty as to the content of the information communicated in the course of market soundings, where they are conducted by telephone and the disclosing market participant has access to recorded telephone lines, the disclosing market participant should use such lines. Where market soundings are conducted through channels other than by recorded telephone lines, records of the market sounding communications should be kept in the form of audio or video recordings or in written form. For personal data protection reasons, when the market sounding is made by recorded telephone lines or audio or video recording is being used, the consent to the recording should be obtained from the person receiving the market sounding.

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

(3) To facilitate the conduct of investigations by competent authorities on suspected market abuse, disclosing market participants should, for each market sounding, keep a record of the persons that received the market sounding.

(4) In order to minimise the risk of improper diclosure of inside information, a disclosing market participant should keep a record of the potential investors that have informed it that they are not willing to receive market soundings. Potential investors should be able to express their wish not to receive market soundings in relation to all potential transactions or only particular types of transactions and disclosing market participants may periodically reconfirm their position with them.

(5) Given the evolving nature of information and the fact that an assessment of what constitutes inside information can be complex, disclosing market participants should keep records of all market soundings, including the ones that are not considered by the disclosing market participant to involve disclosure of inside information. Such records should assist disclosing market participants in providing evidence of proper conduct to the competent authority, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information.

(6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(7) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2],

HAS ADOPTED THIS REGULATION:

Article 1

General requirements

Disclosing market participants shall ensure that the arrangements and procedures they establish to comply with paragraphs 4, 5, 6 and 8 of Article 11 of Regulation (EU) No 596/2014 are regularly reviewed and updated where necessary.

Article 2

Procedures for the purposes of conducting market soundings

1. Disclosing market participants shall establish procedures describing the manner in which market soundings are conducted.

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Disclosing market participants may communicate information for the purposes of market sounding to the persons receiving the market sounding orally, in physical meetings, audio or video telephone calls, or in writing, by mail, fax, or electronic communications.

2. Disclosing market participants shall establish procedures for conducting market soundings by telephone ensuring that recorded telephone lines are used where the disclosing market participant has access to such lines and the persons receiving the market sounding have given their consent to the recording of the conversation.

3. The procedures referred to in paragraphs 1 and 2 shall ensure that persons working for a disclosing market participant under contract of employment or otherwise only use equipment provided by the disclosing market participant when sending and receiving telephone calls and electronic communications for the purposes of market soundings.

Article 3

Standard set of information for the communications to persons receiving the market sounding

1. Disclosing market participants shall have in place procedures to provide to and request from persons receiving the market sounding a standard set of information during market soundings, in a pre-determined sequence.

2. The standard set of information referred to in paragraph 1 shall be determined by the disclosing market participant for each market sounding, prior to conducting that market sounding. The disclosing market participant shall use that standard set of information with all the persons receiving that market sounding.

3. Where disclosing market participants consider that the market sounding will involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to, in the following order:

(a) a statement clarifying that the communication takes place for the purposes of a market sounding;

(b) where the market sounding is conducted by recorded telephone lines, or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

(c) a request to and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding;

(d) a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

(e) where possible, an estimation of when the information will cease to be inside information, the factors that may alter that estimation and, in any case, information about the manner in which the person receiving the market sounding will be informed of any change in such an estimation;

(f) a statement informing the person receiving the market sounding about the obligations laid down in Article 11(5), letters (b), (c) and (d) of Regulation (EU) No 596/2014;

(g) a request for consent and the consent of the person receiving the market sounding to receive inside information, as referred to in Article 11(5)(a) of Regulation (EU) No 596/2014;

(h) where the consent required under point (g) is given, the information being disclosed for the purposes of the market sounding, identifying the information considered by the disclosing market participant to be inside information.

4. Where the disclosing market participant considers that the market sounding will not involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to, in the following order:

(a) a statement clarifying that the communication takes place for the purposes of a market sounding;

(b) where the market sounding is conducted by recorded telephone lines or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

(c) a request to and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding;

(d) a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers not to be inside information and information about the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

(e) a request for consent and the consent of the person receiving the market sounding to proceed with the market sounding;

(f) where the consent required under point (e) is given, the information being disclosed for the purposes of the market sounding.

5. The disclosing market participant shall ensure that the same level of information is communicated to each person receiving the market sounding in relation to the same market sounding.

Article 4

Data regarding persons receiving the market sounding

1. For each market sounding conducted, the disclosing market participant shall draw up a list containing the following information:

(a) the names of all natural and legal persons to whom information has been disclosed in the course of the market sounding;

(b) the date and time of each communication of information which has taken place in the course of or following the market sounding;

(c) the contact details of the persons receiving the market sounding used for the purposes of the market sounding.

2. Disclosing market participants shall draw up a list of any potential investors that have informed them that they do not wish to receive market soundings, in relation to either all potential transactions or particular types of potential transactions. The disclosing market participant shall refrain from communicating information for the purposes of market soundings to such potential investors.

Article 5

Procedure for notifying when the information has ceased to be inside information

1. Where disclosing market participants assess as referred to in Article 11(6) of Regulation (EU) No 596/2014, that the inside information disclosed in the course of a market sounding has ceased to be inside information, they shall provide the recipient with the following information:

(a) the identity of the disclosing market participant;

(b) an identification of the transaction subject to the market sounding;

(c) the date and time of the market sounding;

(d) the fact that the information disclosed has ceased to be inside information;

(e) the date on which the information ceased to be inside information.

Article 6

Record keeping requirements

1. Disclosing market participants shall ensure that records of the following are kept on a durable medium that ensures their accessibility and readability over the period of retention laid down in Article 11(8) of Regulation (EU) No 596/2014:

(a) the procedures referred to in Articles 1 and 2;

(b) the standard set of information determined for each market sounding in accordance with Article 3;

(c) the data regarding persons receiving the market sounding referred to in Article 4;

(d) all communications of information which have taken place between the disclosing market participant and all persons that received the market sounding for the purposes of the market sounding, including any documents provided by the disclosing market participant to the persons receiving the market sounding;

(e) the information leading to the assessment that the information communicated during the market sounding has ceased to be inside information and the relevant notifications referred to in Article 5.

2. For the purposes of Article 6(1)(d), the disclosing market participant shall keep:

(a) where the communication of information has taken place by telephone on recorded lines, recordings of telephone conversations provided that the persons to whom the information is communicated have given their consent to such a recording;

(b) where the communication of information has taken place in writing, a copy of the correspondence;

(c) where the communication of information has taken place during video or audio recorded meetings, the recordings of those meetings provided that the persons to whom the information is communicated have given consent to such a recording;

(d) where the communication of information has taken place during unrecorded meetings or telephone conversations, the written minutes or notes of those meetings or telephone conversations.

3. The written minutes or notes referred to in paragraph 2(d), shall be drawn up by the disclosing market participant and duly signed by both the disclosing market participant and the person receiving the market sounding and shall include:

(a) the date and time of the meeting or telephone conversation and the identity of the participants;

(b) the details of the information related to the market sounding which were exchanged between the disclosing market participant and the person receiving the market sounding in the course of the market sounding, including information provided to the person receiving the market sounding and requested from the person receiving the market sounding in accordance with the standard set of information referred to in Article 3;

(c) any document and material provided by the disclosing market participant to the person receiving the market sounding in the course of the market sounding.

Where the disclosing market participant and the person receiving the market sounding do not agree upon the content of the minutes or notes or the disclosing within five working days after the market sounding, the disclosing market participant shall record both the version of the minutes or notes signed by the disclosing market participant and the version signed by the receiver.

Where the person receiving the market sounding does not provide the disclosing market participant with any signed written minutes or notes within five working days after the market sounding, the disclosing market participant shall keep a copy of the version of the minutes or notes signed by the disclosing market participant.

4. The records referred to in paragraphs 1 and 2 shall be made available to the competent authority upon request.

Article 7

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

Annex IX - Draft implementing technical standards on systems and notification templates to be used by disclosing market participants conducting market soundings

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

of XXX

[…]

COMMISSION IMPLEMENTING REGULATION (EU) No …/... laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records according to Regulation (EU) No 596/2014 of the European Parliament and of the Council

of XXX

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular the third subparagraph of Article 11(10) thereof,

Whereas:

(1) Disclosing market participants are to keep records of the communications of information taking place for the purposes of the market sounding between themselves and all persons receiving the market soundings. Such records should assist disclosing market participants in evidencing proper conduct to the competent authority, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information.

(2) To ensure the consistent record of the information communicated, where market soundings take place during unrecorded meetings or telephone conversations, written minutes or notes should be drafted in accordance with uniform templates.

(3) To ensure the consistent record of the information communicated, disclosing market participants should keep records of the written communications to inform the persons that received the market sounding when the information disclosed in the course of the market sounding has ceased to be inside information.

(4) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.

(5) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2],

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

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Electronic format for the records

All the records referred to in Article 6 of Delegated Regulation (EU) …/… [RTS on market soundings] shall be kept in an electronic format.

Article 2

Format for the record keeping of the written minutes or notes

Disclosing market participants shall draw up the written minutes or notes referred to in Article 6(2)(d) of Delegated Regulation (EU) …/… [RTS on market soundings] in an electronic form using:

(a) the template set out in Annex I where disclosing market participants consider that the market sounding involves the disclosure of inside information;

(b) the template set out in Annex II where disclosing market participants consider that the market sounding does not involve the disclosure of inside information.

Article 3

Format for the record keeping of the data regarding potential investors

1. Disclosing market participants shall keep records of the information referred to in Article 4(1) of Delegated Regulation (EU) …/… [RTS on market soundings] in the form of separate lists for each market sounding.

2. Disclosing market participants shall keep records of the information referred to in Article 4(2) of Delegated Regulation (EU) …/… [RTS on market soundings] in the form of a single list.

Article 4

Format for communicating and recording that the information has ceased to be inside information

1. Disclosing market participants shall inform in writing the persons that received the market soundings that the information disclosed in the course of the market sounding has ceased to be inside information

2. The record of the information given in accordance with paragraph 1 shall be in compliance with the template set out in Annex III.

Article 5

Entry into force

This Regulation shall enter into force on the the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

ANNEX I

Template for the written minutes or notes referred to in Article 6(2)(d) of Delegated Regulation (EU) No xx/xx [RTS on market soundings] where inside information is disclosed

Item		**Text field**
i.	Identity of the disclosing market participant	*Full names of the disclosing market participant and of the person within the disclosing market participant providing the information and the contact details used for the communication.*
ii.	Identity of the person receiving the market sounding	*Full name of the person receiving the communication and the contact details used for the communication.*
iii.	Date and time of the communication	*Date and time(s) of the communication specifying the time zone.*
iv.	Clarification of the nature of the conversation in accordance with Article 3(3)(a) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the statement that the communication takes place for the purposes of a market sounding.*
v.	Confirmation of the identity of the person receiving the market sounding in accordance with Article 3(3)(c) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the information about the confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding.*
vi.	Clarification in accordance with Article 3(3)(d) of Delegated Regulation (EU) No xx/xx [RTS on market soundings] that inside	*Record of the statement claryfing that, if agreeing to receive the market sounding, the person receiving the communication of information will receive information which the disclosing market participant considers inside information and a reference to the obligation set forth in Article 11(7) of*

	information will be communicated	*Regulation (EU) No 596/2014.*
vii.	Information on the estimation of when the information ceases to be inside information, in accordance with Article 3(3)(e) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the information given, if any, on the estimated time when the information is expected to be made public or the transaction launched, with an explanation of why this may be subject to change and how the person receiving the market sounding will be informed in case the estimated time is no longer valid.*
viii.	Statement regarding the obligations of the person receiving the communication in accordance with Article 3(3)(f) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the statement explaining the obligations that apply to the possession of inside information, including points (b), (c) and (d) of Article 11(5) of Regulation (EU) No 596/2014 to the person receiving the communication.*
ix.	Confirmation of consent in accordance with Article 3(3)(g) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the information about the consent of the person receiving the market sounding to receive the inside information, as referred to in Article 11(5(a)) of Regulation (EU) No 596/2014 (request and reply).*
x.	Disclosure of information in accordance with Article 4(3)(h) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Description of the information disclosed for the purposes of the market sounding, identifying the information considered to be inside information.*

ANNEX II

Template for the written minutes or notes referred to in Article 6(2)(d) of Delegated Regulation (EU) No xx/xx [RTS on market soundings] where no inside information is disclosed

Item		Text field
i.	Identity of the disclosing market participant	*Full names of the disclosing market participant and of the person within the disclosing market participant providing the information and the contact details used for the communication.*
ii.	Identity of the person receiving the market sounding	*Full name of the person receiving the communication and the contact details used for the communication.*
iii.	Date and time of the communication	*Date and time(s) of the communication specifying the time zone.*
iv.	Clarification of the nature of the conversation in accordance with Article 3(4)(a) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the statement that the communication takes place for the purposes of a market sounding.*
v.	Confirmation of identity in accordance with Article 3(4)(c) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the information about the confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the person receiving the market sounding to receive the market sounding.*
vi.	Clarification in accordance with Article 3(4)(d) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]that no inside information will be communicated	*Record of the statement claryfing that, if agreeing to receive the market sounding, the person receiving the communication of information will receive information which the disclosing market participant does not consider inside information and a reference to the obligation set forth in Article 11(7) of Regulation (EU) No 596/2014.*

vii. Confirmation of consent in accordance with Article 3(4)(e) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Record of the information about the consent of the person receiving the market sounding to proceed with the market sounding (request and reply).*
viii. Disclosure of information in accordance with Article 3(4)(f) of Delegated Regulation (EU) No xx/xx [RTS on market soundings]	*Description of the information disclosed for the purposes of the market sounding.*

ANNEX III

Template for recording the communication informing the person having received the market sounding that the information disclosed has ceased to be inside information

Item		**Text field**
i.	Identity of the disclosing market participant	*Indication of the full names of the disclosing market participant and of the person within that disclosing market participant providing the information and the contact details used for the communication.*
ii.	Identity of the person receiving the communication	*Indication of the full name of the person receiving the communication and the contact details used for the communication.*
iii.	Date and time of the communication	*Indication of the date and time(s) of the communication specifying the time zone.*
iv.	Identification of the transaction	*Information to identify the transaction that was subject to the market sounding.* *It may include information about the type of transaction, e.g. IPO/ secondary offer/ merger/ block trade/ private placement/ share capital increase.*
v.	Date and time of the market sounding	*Information about the date and time when the inside information was disclosed as part of the market sounding.*
vi.	The fact that the information has ceased to be inside information	*Statement to inform the market sounding recipient of the fact that the information disclosed has ceased to be inside information.*
vii.	Date when the information ceased to be inside information	*Indication of the date at which the information disclosed as part of the market sounding ceased to be inside information.*

Annex X - Draft regulatory technical standards on accepted market practices

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council on the criteria, procedure and requirements for establishing an accepted market practice and for maintaining it, terminating it and modifying the conditions for its acceptance

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular Article 13(7) thereof,

Whereas:

(1) The specification of common criteria, procedures and requirements should contribute to the development of uniform arrangements in the sphere of accepted market practices (AMPs), improve the clarity of the legal regime under which these practices are permitted and promote fair and efficient conduct among market participants. It should further serve to reinforce the orderly functioning of the market and market integrity.

(2) To ensure that AMPs do not undermine innovation and the continued dynamic development of financial markets, new or emerging market trends that could result in novel market practices should not automatically be assumed to be unacceptable by competent authorities. Rather, those competent authorities should assess whether such market practices comply with the criteria set out in this Regulation and in Regulation (EU) No 596/2014.

(3) AMPs should be conducted in a manner that ensures market integrity and investor protection without creating risks for other market participants and other related markets. Consequently, due regard should be given to transparency and the conditions governing the market practices proposed for designation as AMPs. When assessing the level of transparency of market practices proposed as AMPs both to the public and to the competent authorities, competent authorities should consider the various stages of

1 OJ L 173, 12.6.2014, p. 1.

the performance of the potential AMPs. Consequently, it is also appropriate to lay down specific transparency requirements for those stages, namely before the AMP is performed by market participants, during its performance and when the market participants cease to perform the AMP.

(4) Market practices proposed as AMPs can be different in type and nature. When establishing a market practice as an AMP, a competent authority should assess the frequency of the disclosure required from all the persons who will perform it to ensure it is adapted and appropriate to the market practice under consideration. The frequency of disclosure should achieve a balance between the need to inform the public and to provide the competent authority with information for the on-going monitoring and the burden to periodically disclose information by those performing the AMP. Moreover, when assessing a market practice that may be performed outside a trading venue, competent authorities should consider whether the requirement for a substantial level of transparency to the market is met.

(5) Competent authorities that have accepted a market practice should ensure it is monitored adequately with due care and attention. Therefore, persons performing the market practice should be required to keep sufficient records of all transactions and orders undertaken so as to enable competent authorities to fulfil their supervisory functions and to carry out the enforcement actions provided for in Regulation (EU) No 596/2014. It is also of paramount importance that their activity of performing the market practice can be distinguished from the other trading activities they conduct on their own account or on the account of clients. This may be achieved through the maintenance of separate accounts.

(6) The status of the entity performing the accepted market practice is a particular element to be considered, especially when that entity is acting on behalf of or on the account of another person who is the direct beneficiary of the market practice. Competent authorities should assess whether being a supervised person is relevant for the acceptance of the particular market practice under consideration.

(7) When assessing the impact of market practices proposed for designation as AMPs on market liquidity and efficiency, competent authorities should consider their objectives including, whether they seek to promote regular trading of illiquid financial instruments, avoid abusive squeezes, provide quotes when there is the risk of not having counterparties for a trade or facilitate orderly operations where a participant has a dominant position. With regards to price, such objectives could also be to minimize price fluctuations due to excessive spreads and limited supply or demand of a financial instrument without compromising a market trend, provide transparency of prices or facilitate fair evaluation of prices in markets where most trades are conducted outside a trading venue.

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(9) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of

the Securities Markets Stakeholder Group established in accordance with Article 37 of that Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2],

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISION

Article 1

Definitions

For the purposes of this Regulation, "supervised persons" means any of the following:

i. investment firms authorised under Directive 2014/65/EU of the European Parliament and of the Council[3];

ii. credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council[4];

iii. financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 of the European Parliament and of the Council[5];

iv. any person subject to authorisation, organisational requirements and supervision by "competent financial authority" or "national regulatory authority" as defined in Regulation (EU) No 1227/2011 of the European Parliament and of the Council[6];

v. any person subject to authorisation, organisational requirements and supervision by competent authorities, regulators or agencies responsible for commodities spot or derivatives markets;

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[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

[3] Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.06.2014, p. 349.

[4] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 26.06.2013, p. 338.

[5] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.

[6] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

vi. operators with compliance obligations under Directive 2003/87/EC of the European Parliament and of the Council [7] establishing a scheme for greenhouse gas emission allowance trading.

CHAPTER II

ACCEPTED MARKET PRACTICES

SECTION 1

ESTABLISHING AN ACCEPTED MARKET PRACTICE

Article 2

General requirements

1. Prior to establishing a market practice as an AMP competent authorities shall:

   (a) evaluate the market practice against each of the criteria set out in Article 13(2) of Regulation (EU) No 596/2014 and specified further in Section II of this Chapter;

   (b) consult as appropriate with relevant bodies including, at least, representatives of issuers, investment firms, credit institutions, investors, market operators operating a multilateral trading facility (MTF) or an organised trading facility (OTF) and operators of a regulated market, and other authorities on the appropriateness of establishing a market practice as an AMP.

2. Competent authorities intending to establish a market practice as an AMP shall notify ESMA and the other competent authorities of that intention in accordance with the procedure laid down in Section 3, using the template set out in the Annex.

3. Where competent authorities establish a market practice as an AMP in accordance with Article 13 of Regulation (EU) No 596/2014 and with this Regulation, they shall publicly disclose on their website the relevant decision of establishment and the AMP itself in accordance with the format set out in the Annex including the following information:

   (a) the description of the types of persons who can perform the market practice to be established as an AMP;

[7] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, *OJ L 275, 25.10.2003, p.32.*

(b) the description of the types of person or a group of persons who can benefit from the performance of the market practice to be established as an AMP, either by performing it directly or through the appointment of another person performing the AMP ("beneficiary");

(c) the description of the type of financial instruments to which the market practice to be established as an AMP relates;

(d) the indication of whether the market practice to be established as an AMP can be performed for a determined period of time and of any situations or conditions leading to a temporary interruption, suspension or termination of the practice.

The persons referred to in point (a) of the first subparagraph shall be responsible for any trading decision, including, the submission of an order, the cancellation or modification of an order, and conclusion of a transaction or for the trading execution in relation with the AMP.

SECTION 2

SPECIFICATION OF THE CRITERIA TO CONSIDER WHEN ESTABLISHING ACCEPTED MARKET PRACTICES

Article 3

Transparency

1. In determining whether a market practice proposed to be established as an AMP fulfils the criterion set out in point (a) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall examine whether the market practice ensures that the following information will be disclosed to the public:

(a) before the performance of a market practice to be established as AMP:

i. identities of the beneficiaries and the persons who will perform it and the one among them that is responsible to fulfil the transparency requirements under points (b) and (c) of this paragraph;

ii. identification of the financial instruments in relation to which the AMP will apply;

iii. period during which the AMP will be performed and situations or conditions leading to the temporary interruption, suspension or termination of its performance;

iv. identification of the trading venues on which the AMP will be carried out, and, where applicable, indication of the possibility to execute transactions outside a trading venue;

v. reference to the maximum amounts for cash and number of financial instruments allocated to the performance of the AMP, if relevant.

(b) once the market practice established as AMP is performed:

i. on a periodic basis, details of the trading activity relating to the performance of the AMP such as the number of transactions executed, volume traded, average size of the transactions and average spreads quoted, prices of executed transactions;

ii. any changes to previously disclosed information on the AMP, including changes relating to available resources in terms of cash and financial instruments, changes to the identity of persons performing the AMP, and any change in the allocation of cash or financial instruments in the accounts of the beneficiary and the persons performing the AMP.

(c) when the market practice ceases to be performed as an AMP on the initiative of the person who has been performing it, of the beneficiary or of both:

i. the fact that the performance of the AMP has ceased;

ii. a description of how the AMP has been performed;

iii. the reasons or causes for ceasing the performance of the AMP.

For the purposes of point (b)(i), where multiple transactions in a single trading session are performed, daily aggregated figures may be acceptable in relation to the appropriate categories of information.

2. In determining whether a market practice proposed to be established as an AMP fulfils the criterion set out in point (a) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall examine whether the market practice ensures that the following information will be disclosed to them:

(a) before the market practice established as an AMP is performed, the arrangements or contracts between the identified beneficiaries and the persons who will perform the market practice once established as an AMP where such arrangements or contracts are needed for its performance;

(b) once the market practice is performed as an AMP, periodic report to the competent authority providing details about the transactions executed and about the operations of any arrangement or contract between the beneficiary and the persons performing the AMP.

Article 4

Safeguards of the operations of the market forces and interplay of the forces of supply and demand

1. In determining whether a market practice proposed to be established as an AMP complies with the criterion set out in point (b) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall consider whether the market practice limits the opportunities for other market participants to respond to transactions. Competent authorities shall also consider at least the following criteria relating to the types of persons who will perform the market practice once established as an AMP:

    (a) whether they are supervised persons;

    (b) whether they are members of a trading venue where the AMP will be performed;

    (c) whether they maintain records of orders and transactions relating to the market practice performed in a way that allows it to be easily distinguished from other trading activities, including through the maintenance of separate accounts for the performance of the AMP, in particular to demonstrate that orders introduced are entered separately and individually without aggregating orders from several clients;

    (d) whether they have put in place specific internal procedures allowing:

        i. immediate identification of the activities relating to the market practice;

        ii. ready availability of the relevant orders and transaction records to the competent authority upon request;

    (e) whether they possess the compliance and audit resources necessary to be able to monitor and ensure compliance at all times with the conditions set for the AMP;

    (f) whether they keep the records mentioned in point (c) for a period of at least five years.

2. Competent authorities shall consider the extent to which the market practice establishes an ex ante list of trading conditions for its performance as an AMP, including limits with regard to prices and volumes and limits on positions.

3. Competent authorities shall assess the extent to which the market practice and the arrangement or contract for its performance:

(a) enables the person performing the AMP to act independently from the beneficiary without being subject to instructions, information or influence from the beneficiary as regards the manner in which trading is to be conducted;

(b) allows for avoidance of conflicts of interest between the beneficiary and the clients of the person performing the AMP.

Article 5

Impact on market liquidity and efficiency

In determining whether a market practice proposed to be established as an AMP complies with the criterion set out in point (c) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall assess the impact the market practice has on at least the following elements:

(a) volume traded;

(b) number of orders in the order book (order depth);

(c) speed of execution of the transactions;

(d) volume weighted average price of a single session, daily closing price;

(e) bid/offer spread, price fluctuation and volatility;

(f) regularity of quotations or transactions.

Article 6

Impact on the proper functioning of the market

1. In determining whether a market practice proposed to be established as an AMP complies with the criterion set out in point (d) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall consider the following elements:

(a) the possibility that the market practice could affect price formation processes in a trading venue;

(b) the extent to which the market practice could facilitate the evaluation of prices and orders entered into the order book and whether the transactions to be carried out or orders to be introduced for its performance as an AMP do not contravene the trading rules of the corresponding trading venue.

(c) the modalities by which the information referred to in Article 3 is disclosed to the public including where it is disclosed on the website of the relevant trading platform and, when appropriate, where it is simultaneously released on the websites of the beneficiaries;

(d) the extent to which the market practice establishes an ex ante list of situations or conditions when its performance as an AMP is temporarily suspended or restricted, inter alia particular trading periods or phases such as auction phases, takeovers, initial public offerings, capital increases, secondary offerings.

For the purposes of point (b), a market practice where transactions and orders are monitored in real time by the market operator or the investment firm or market operators operating a MTF or an OTF is also an important factor to consider.

2. Competent authorities shall assess the extent to which a market practice enables:

(a) orders related to its performance to be submitted and executed during opening or closing auction phases of a trading session;

(b) orders or transactions related to its performance to be introduced or carried out during periods when stabilisations and buy-back operations are conducted.

Article 7

Risks for the integrity of related markets

In determining whether a market practice proposed to be established as an AMP complies with the criterion set out in point (e) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall consider:

(a) whether the transactions related to the performance of the market practice once established as an AMP will be reported to competent authorities on a regular basis;

(b) whether the resources (cash or financial instruments) to be allocated to the performance of the AMP are proportionate and commensurate with the objectives of the AMP itself;

(c) the nature and level of the compensation for services provided within the performance of an AMP and whether that compensation is established in a fixed amount; where variable compensation is proposed, it shall not lead to behaviour which may be prejudicial to market integrity or to the orderly functioning of the market and the competent authority shall be able to asses it;

(d) whether the type of persons who will perform the AMP ensure, where appropriate to the market under consideration, an adequate separation of the assets dedicated to the performance of the AMP from the assets of its clients, if any, or its own assets;

(e) whether the respective duties of the beneficiaries and of the persons performing the AMP or, where appropriate, the duties shared by them are clearly defined;

(f) whether the type of persons who will perform the AMP have in place an organisational structure and adequate internal arrangements to ensure that the trading decisions relating to the AMP remain confidential from other units within that person and independent from orders to trade received from clients, portfolio management or orders placed on its own account;

(g) whether an adequate reporting process between the beneficiary and the person who will perform the AMP is in place to allow the exchange of the necessary information to fulfil their respective legal or contractual obligations, if applicable.

Article 8

Investigation of the market practice

In determining whether a market practice proposed to be established as an AMP complies with the criterion set out in point (f) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall in particular take into account the outcome of any investigation in the markets they monitor that might question the AMP to be established.

Article 9

Structural characteristics of the market

In taking into account, in accordance with point (g) of Article 13(2) of Regulation (EU) No 596/2014, the participation of retail-investors in the relevant market, competent authorities shall assess at least:

(a) the impact the market practice might have on retail investors' interests where the market practice concerns financial instruments traded on markets in which retail investors participate;

(b) whether the market practice increases the probability of retail investors to find counterparties in low-liquidity financial instruments, without increasing the risks borne by them.

SECTION 3

PROCEDURES

Article 10

Notification when intending to establish an accepted market practice

1. Competent authorities shall notify, in accordance with Article13(3) of Regulation (EU) No 596/2014, their intention to establish an AMP by post or email to ESMA and to the other competent authorities simultaneously, using a pre-identified list of contact points to be set-up and regularly maintained by competent authorities and ESMA.

2. The notification referred to in paragraph 1 shall include the following elements:

   (a) a statement of the intention to establish an AMP, including the expected date of establishment;

   (b) the identification of the notifying competent authority and the contact details of the contact person(s) within that competent authority (name, professional telephone number and email address, title);

   (c) a detailed description of the market practice including:
      i. the identification of the types of financial instrument and trading venues on which the AMP will be performed;
      ii. the types of persons who can perform the AMP;
      iii. the type of beneficiaries;
      iv. the indication of whether the market practice can be performed for a determined period of time and of any situations or conditions leading to a temporary interruption, suspension or termination of the practice;

   (d) the reason for which the practice could constitute market manipulation under Article 12 of Regulation (EU) No 596/2014;

   (e) the details of the assessment made according to Article 13(2) of Regulation (EU) No 596/2014.

3. The notification referred to in paragraph 1 shall include the table for assessing a proposed market practice using the template in the Annex.

Article 11

ESMA opinion

1. Following receipt of the notification referred to Article 13(4) of Regulation (EU) No 596/2014 and before issuing the opinion required under that paragraph, ESMA, on its own initiative or upon request of any competent authority, shall initiate a process to

provide the notifying competent authority with preliminary comments, concerns, disagreement or request for clarifications, if any, about the notified market practice. The notifying competent authority may provide to ESMA any additional clarification regarding the notified market practice.

2. Where in the course of the process referred to in paragraph 1, any fundamental or significant change is introduced that affects the basis or substance of the notified market practice or the assessment carried out by the notifying competent authority, the process of issuing the ESMA opinion on the notified practice shall cease. If appropriate, the competent authority shall initiate a new process for establishing the modified practice as an AMP in accordance with Article 13(3) of Regulation (EU) No 596/2014.

SECTION 4

MAINTAINANCE, MODIFICATION AND TERMINATION OF ACCEPTED MARKET PRACTICES

Article 12

Review of an established AMP

1. Competent authorities that have established AMPs shall regularly, and at least every two years, assess whether the conditions for establishing the AMP set out in Article 13(2) of Regulation (EU) No 596/2014 and in Section 2 of this Chapter continue to be met.

2. Notwithstanding the regular review in accordance with Article 13(8) of Regulation (EU) No 596/2014, the assessment process referred to in paragraph 1 shall also be triggered:

   (a) when any sanction involving an established AMP has been imposed;

   (b) when due to a significant change in the market environment referred to in Article 13(8) of that Regulation, one or more of the conditions of acceptance of an established practice are no longer met;

   (c) when a competent authority has reasons to suspect that acts contrary to Regulation (EU) No 596/2014 are being or have been carried out by beneficiaries of the AMP, or by persons performing it.

3. In the event that the assessment reveals that an established AMP no longer meets the conditions of the competent authorities' original assessment set out in Section 2, competent authorities shall either propose the modification of the conditions of the acceptance or terminate the AMP, taking into account the criteria set out in Article 13.

4. Competent authorities shall inform ESMA of the outcome of the assessment process, including when the AMP is maintained without modification.

5. Where a competent authority proposes to modify the conditions of acceptance of an established AMP, it shall comply with the requirements set out in Article 2.

6. Where a competent authority decides to terminate an established AMP, it shall publicly disclose and communicate its decision, mentioning the date of termination, simultaneously to all other competent authorities and to ESMA, in view of updating the list of AMPs published by it in accordance with Article 13(9) of Regulation (EU) No 596/2014.

Article 13

Criteria for modifying or terminating an established AMP

In determining whether to terminate an established AMP or propose modification of the conditions of its acceptance, competent authorities shall have regard to:

(a) the extent to which the beneficiaries or the persons performing the AMP have complied with the conditions established under that AMP;

(b) the extent to which the conduct of the beneficiaries or the persons performing an AMP has resulted in any of the criteria set out in Article 13(2) of Regulation (EU) No 596/2014 no longer being met;

(c) the extent to which the AMP has not been used by market participants for a period of time;

(d) whether a significant change in the relevant market environment referred to in Article 13(8) of Regulation (EU) No 596/2014 results in any of the conditions for establishing the AMP being no longer possible to meet or being not necessary to be met, considering in particular:

   i. whether the objective of the AMP has become unfeasible;

   ii. whether the continued use of the established AMP might adversely affect the integrity or efficiency of the markets under the supervision of the competent authority;

(e) whether there exists a situation falling within any general termination provision included in the established AMP itself.

CHAPTER VI

FINAL PROVISION

Article 14

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

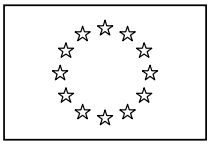
ANNEX

Format of the template for notifying the intention to establish accepted market practices

Accepted market practice (AMP) on *[insert name of the AMP]*	
Proposed date of establishment of the AMP: *[insert the date on which the AMP is intended to be established by the notifying competent authority]*	
Description of the AMP: *[insert text, including the identification of the types of financial instrument and trading venues on which the AMP will be performed; the types of persons who can perform the AMP; the type of beneficiaries, and, the indication of whether the market practice can be performed for a determined period of time and of any situations or conditions leading to a temporary interruption, suspension or termination of the practice]*	
Rationale for which the practice could constitute market manipulation *[insert text]*	
ASSESSMENT	
List of criteria taken into account	**Conclusion of the competent authority and rationale:**
(a) Level of transparency provided to the market	*[insert text to fill in the rationale for this criterion]*
(b) Degree of safeguards to the operation of market forces and the proper interplay	*[insert text to fill in the rationale for this*

of the forces of supply and demand.	*criterion]*
(c) Impact on market liquidity and efficiency.	*[insert text to fill in the rationale for this criterion]*
(d) The trading mechanism of the relevant market and the possibility for market participants to react properly and in a timely manner to the new market situation created by that practice.	*[insert text to fill in the rationale for this criterion]*
(e) Risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instruments within the Union.	*[insert text to fill in the rationale for this criterion]*
(f) Outcome of any investigation of the relevant market practice by any competent authority or other authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse or codes of conduct, irrespective of whether – it concerns, directly or indirectly, – the relevant market or related markets within the Union.	*[insert text to fill in the rationale for this criterion]*
(g) Structural characteristics of the relevant market, inter alia, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail investors' participation in the relevant market.	*[insert text to fill in the rationale for this criterion]*

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



EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular, the third subparagraph of Article 16(5) thereof,

Whereas:

(1) It is necessary to specify appropriate requirements for the arrangements, procedures and systems that market operators, investment firms operating a trading venue and any person professionally arranging or executing transactions should have in place to report orders and transactions that could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation under Regulation (EU) No 596/2014. Such requirements should assist the prevention and detection of market abuse. They should also assist in ensuring that notifications submitted to competent authorities are meaningful, comprehensive and useful. In order to ensure that detection of market abuse is effective, appropriate systems should be in place to monitor orders and transactions. Such systems should provide for human analysis carried out by appropriately trained staff. The systems for monitoring market abuse should be capable of producing alerts in line with predefined parameters in order to allow for further anaysis to be conducted on potential insider dealing, market manipulation or attempted insider dealing or market manipulation. The whole process is likely to require some level of automation.

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

(2) This Regulation should help promote a consistent approach and practices across the Union, notably with respect to the content, the template and timelines for the reporting of suspicious orders and transactions.

(3) Persons that are professionally engaged in arranging or executing transactions should be able to delegate the monitoring, detection and identification of suspicious orders and transactions within a group or to outsource the data analysis and the generation of alerts, subject to appropriate conditions. Such delegation or outsourcing should make it possible to share resources, to centrally develop and maintain monitoring systems and to build expertise in the context of monitoring orders and transactions. The entitlement to delegate or outsource should be subject to the entitlement of the competent authorities to assess, at any time, whether the systems, arrangements and procedures of the person to whom the functions are delegated or outsourced are effective to comply with the obligation to monitor and detect market abuse. The obligation to report as well as the responsibility to comply with Article 16 of Regulation (EU) No 596/2014 should remain with the delegating or outsourcing person.

(4) Trading venues should have appropriate trading rules contributing to prevent insider dealing, market manipulation or attempted insider dealing or market manipulation. Trading venues should also have facilities to replay the order book in order to analyse the activity of a trading session in a context of algorithmic trading including high frequency trading.

(5) A single and harmonised template for electronically submitting a suspicious transaction and order report (STOR) should assist compliance in markets where orders and transactions are becoming increasingly cross-border. It should also facilitate the efficient sharing of information on suspicious orders and transactions between competent authorities in cross-border investigations.

(6) The relevant information fields contained in the template, if completed clearly, comprehensively, objectively and accurately, should assist the competent authorities to promptly assess the suspicion and initiate relevant actions. The template should therefore allow the persons submitting the report to provide the information considered relevant about the suspicious orders and transactions reported and to explain the reasons for suspicion. The template should also allow to provide personal data that would make it possible to identify the persons involved and to assist the competent authorities in the conduct of investigations, in order to rapidly analyse the trading behaviour of the suspected persons and to establish connections with other persons involved in other suspicious trades. Such information should be provided at the outset, so that the integrity of the investigation is not compromised by the potential necessity for a competent authority to revert in the course of an investigation to the person who submitted the STOR. It should include the date of birth, the address, information about the person’s employement and accounts, and, where applicable, the client identifier code and the national identification number of the individuals concerned.

(7) To facilitate the submission of a STOR, the template should allow for the attachment of documents and materials considered necessary to support the notification made, including in the form of an annex listing the orders or transactions relevant for the same report and detailling their prices and volumes.

(8) Market operators and investment firms operating a trading venue and persons professionally arranging or executing transactions should not notify all orders received or transactions conducted that have triggered an internal alert. Such a requirement would be inconsistent with the requirement to assess on a case-by-case basis whether there are reasonable grounds for suspicion.

(9) The reports of suspicious orders and transactions should be submitted to the relevant competent authority without delay once a reasonable suspicion has been formed in relation to such orders or transactions. The analysis as to whether or not a given order and transaction is to be considered suspicious should be grounded on facts, not speculation or presumption and should be carried out as quickly as practicable. The practice of delaying the submission of a report, in order to be able to incorporate further suspicious transactions is irreconcilable with the obligation to act without delay, where reasonable suspicion has already been reached. In any case the submission of a STOR should be assessed on a case by case basis to determine if several orders and transactions could be reported in a single STOR. Furthermore, the practice which consists of waiting for a particular number of STORs to accumulate before reporting them should not be regarded as consistent with the requirement to notify without delay.

(10) There might be circumstances when a reasonable suspicion of insider dealing, market manipulation or attempted insider dealing or market manipulation is formed some time after the suspected activity occurred, due to subsequent events or available information. This should not be considered a reason for not reporting the suspected activity to the competent authority. In order to demonstrate compliance with the reporting requirements in these specific circumstances, the person submitting the report should be able to justify the time discrepancy between the occurrence of the suspected activity and the formation of the reasonable suspicion of insider dealing, market manipulation or attempted insider dealing or market manipulation.

(11) Retention of and access to STORs which have been submitted and of the analysis performed on suspicious orders and transactions which did not result in the submission of a STOR forms an important part of the procedures to detect market abuse. Firstly, the ability to recall and review the analysis performed on STORs which have been submitted, as well as those suspicious orders and transactions which were analysed, but in relation to which it was concluded that the grounds for suspicion were not reasonable, assists persons professionally executing or arranging transactions and market operators or investment firms operating a trading venue in exercising their judgement when considering subsequent suspicious orders or transactions. Secondly, the analysis performed on suspicious orders and transactions which did not ultimately lead to a STOR being submitted assists those persons in refining their surveillance systems and in detecting patterns of repeated behaviour, the aggregate of which could result in a reasonable suspicion of insider dealing, market manipulation or attempted insider dealing or market manipulation. Lastly, the above records assist in evidencing compliance with the requirements laid down in this Regulation and facilitate the performance by competent authorities of their supervisory, investigatory and enforcement functions under Regulation (EU) No 596/2014.

(12) Any processing of personal data under this Regulation should be carried out in compliance with the national laws, regulations or administrative provisions transposing Directive 95/46/EC of the European Parliament and of the Council[2].

(13) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(14) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council[3],

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

a) "suspicious transaction and order report" (STOR) means the report of suspicious orders and transactions, including any cancellation or modification thereof, to be made by persons referred to in Article 16(1) and (2) of Regulation (EU) No 596/2014 to the relevant competent authority as defined by Article 16(1) and (3) of Regulation (EU) No 596/2014.

b) "electronic means" are means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technologies, or any other electromagnetic means;

c) "group" means a group as defined in Article 2(11) of Directive 2013/34/EU;

d) "order" means each and every order, including each and every quote, irrespective of whether its purpose is initial submission, modification, update or cancellation of an order and irrespective of its type.

Article 2

General requirements

1. Persons professionally arranging or executing transactions shall establish and maintain arrangements, systems and procedures that ensure:

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[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31).

[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

a. effective and ongoing monitoring of all orders received and transmitted and all transactions executed for the purpose of detecting and identifying suspicious orders and transactions;

b. the transmission of STORs to competent authorities in accordance with the requirements set out in this Regulation and using the template set out in the Annex.

2. The obligations referred to in paragraph 1 shall apply to orders and transactions relating to any financial instrument and shall apply irrespective of:

a. the type of capacity in which the order is placed or the transaction is executed;

b. the types of clients concerned;

c. whether the orders were placed or transactions executed on or outside a trading venue.

3. Market operators and investment firms operating a trading venue shall establish and maintain arrangements, systems and procedures that ensure:

a. effective and ongoing monitoring of all orders received and all transactions executed for the purpose of preventing, detecting and identifying insider dealing, market manipulation and attempted insider dealing and market manipulation;

b. the transmission of STORs to competent authorities in accordance with the requirements set out in this Regulation and using the template set out in the Annex.

4. The obligations referred to in paragraph 3 shall apply to orders and transactions relating to any financial instrument and shall apply irrespective of:

a. the type of capacity in which the order is placed or the transaction is executed;

b. the types of clients concerned.

5. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall ensure that the arrangements, systems and procedures referred to in paragraphs 1 and 3:

a. are appropriate and proportionate to the scale, size and nature of their business activity;

b. are regularly assessed, including through an audit and internal review conducted at least annually, and updated when necessary;

c. are documented, including any changes or updates to them for the purpose of complying with this Regulation, and that the documenting information is maintained for a period of five years.

The persons referred to in the first subparagraph shall provide the competent authority with the information under point (b) and (c) upon request.

Article 3

Prevention, monitoring and detection

1. The arrangements, systems and procedures referred to in Article 2(1) and (3) shall:
    a. allow for the analysis, individually and comparatively, of each and every transaction executed and order placed, modified, cancelled or rejected in the systems of the trading venue and outside a trading venue in the case of persons professionally arranging or executing transactions;
    b. produce alerts indicating activities requiring further analysis for detecting potential insider dealing or market manipulation or attempted insider dealing or market manipulation;
    c. cover the full range of trading activities undertaken by the persons concerned.
2. Persons professionally arranging or executing transactions engaged in algorithmic trading and subject to Directive 2014/65/EU shall establish and maintain the systems referred to in paragraph 1 and shall remain subject to Article 17(1) of Directive 2014/65/EU.
3. Persons professionally executing or arranging transactions and market operators and investment firms operating trading venues shall provide the competent authority upon request with the information to demonstrate the appropriateness and proportionality of their systems in relation to the scale, size and nature of their business activity, including the level of automation put in place in such systems.
4. Market operators and investment firms operating trading venues shall, to a degree which is proportionate in relation to the scale, size and nature of their business activity, employ software systems and have in place procedures which assist the prevention and detection of insider dealing, market manipulation or attempted insider dealing or market manipulation.

    The procedures referred to in the first subparagraph shall include software capable of deferred automated reading, replaying and analysis of order book data, with sufficient capacity to operate in an algorithmic trading environment.
5. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall put in place and maintain arrangements and procedures that ensure an appropriate level of human analysis in the monitoring, detection and identification of transactions and orders that could constitute insider dealing, market manipulation and attempts of insider dealing and market manipulation.

    Market operators and investment firms operating a trading venue, shall put in place and maintain arrangements and procedures that ensure an appropriate level of human analysis also in the prevention of insider dealing, market manipulation or attempted insider dealing or market manipulation.
6. Persons professionally arranging or executing transactions shall have the right to enter into an arrangement with another entity to delegate the performance of the functions of monitoring, detection and identification of suspicious orders and transactions. In such case, the persons delegating those functions shall remain fully responsible for compliance with Article 16 of Regulation (EU) No 596/2014 and shall ensure the arrangement is clearly documented and the tasks and responsibilities are assigned and agreed, including

the duration of the delegation. The entitlement to enter into such an arrangement to delegate is conditional on the delegating person and the delegated person constituting legal persons forming part of the same group.

Notwithstanding the previous subparagraph, persons professionally arranging or executing transactions may outsource the performance of data analysis, including order and transaction data, and the generation of alerts necessary for such persons to conduct monitoring, detection and identification of suspicious orders and transactions. Persons outsourcing those functions shall remain fully responsible for discharging all of their obligations under Article 16 of Regulation (EU) No 596/2014 and shall comply at all times with the following conditions:

a. they shall retain the expertise and resources necessary for evaluating the quality of the services provided, the organisational adequacy of the providers, for supervising the outsourced services effectively and for managing the risks associated with the outsourcing on an ongoing basis;

b. they shall have direct access to the relevant information of the outsourced data analysis and generation of alerts; and

c. they shall define in a written agreement their rights and obligations and those of the providers. The outsourcing agreement shall allow the persons professionally arranging or executing transactions to terminate it.

7. As part of the arrangements and procedures referred to in Article 2(1) and (3), persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall maintain for a period of five years the information documenting the analysis carried out with regard to suspicious orders and transactions which have been examined and the reasons as to whether or not submitting a STOR. This information shall be provided to the competent authority upon request.

The persons referred to in the first subparagraph shall ensure that the arrangements and procedures referred to in Article 2(1) and (3) guarantee and maintain the confidentiality of the information under the first subparagraph except to the natural persons working for them who, by virtue of their function or position, need to be aware of their existence.

Article 4

Training

1. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall organise and provide effective and comprehensive training to the staff involved in the monitoring, detection and identification of suspicious orders and transactions, including the staff involved in the processing of orders and transactions. Such training shall take place on a regular basis and shall be appropriate and proportionate to the scale, size and nature of their business.

2. Market operators and investment firms operating a trading venue shall in addition provide the training referred to in paragraph 1 to staff involved in the prevention of insider dealing, market manipulation and attempts of insider dealing and market manipulation.

Article 5

Reporting obligations

1. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall establish and maintain effective arrangements, systems and procedures that enable them to assess whether to submit a STOR, taking into account the elements constituting the actual or attempted insider dealing or market manipulation, referred to in Articles 8 and 12 of Regulation (EU) No 596/2014 and the non-exhaustive list of indicators of market manipulation defined in Annex I of that Regulation and further defined in the delegated act adopted by the Commission under Article 12(5) of Regulation (EU) No 596/2014.

2. Any of the persons referred to in paragraph 1 and involved in the processing of the same order or transaction shall be responsible for assessing whether to submit a STOR.

3. Persons referred to in paragraph 1 shall ensure that information submitted as part of a STOR is based on facts and analysis, taking into account all information available to them.

4. Persons referred to in paragraph 1 shall have in place procedures to ensure that the person in respect of which the STOR was submitted and anyone who is not required to know about the submission of a STOR by virtue of their function or position within the reporting person, is not informed about the fact that a STOR has been or will be submitted to the competent authority.

Article 6

Timing of STORs

1. Persons professionally arranging or executing transactions and market operators and investment firms operating a trading venue shall ensure that they have in place effective arrangements, systems and procedures for the submission of STORs without delay, in accordance with Article 16(1) and (2) of Regulation (EU) No 596/2014, once reasonable suspicion of actual or attempted insider dealing or market manipulation is formed.

2. The arrangements, systems and procedures referred to in paragraph 1 shall entail the possibility to report STORs in relation to transactions and orders which occurred in the past, where suspicion has arisen in the light of subsequent events or information.

In such cases, the person professionally arranging or executing transactions, the market operator and investment firm operating a trading venue shall explain in the STOR to the competent authority the delay between the suspected breach and the submission of the STOR according to the specific circumstances of the case.

3. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall submit to the competent authority any relevant additional information which they become aware of after the STOR is originally submitted, and shall provide any information or document requested by the competent authority.

Article 7

Content of STORs

1. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall submit a STOR using the template set out in the Annex.

2. The persons referred to in paragraph 1 submitting the STOR shall complete the information fields relevant to the reported suspicious orders or transactions in a clear and accurate manner. The STOR shall contain at the least the following information:

a. identification of the person submitting the STOR and in the case of persons professionally arranging or executing transactions, the capacity in which the person submitting the STOR operates (such as dealing on own account or executing orders on behalf of third parties);

b. description of the order or transaction, including:

i. the type of order and the type of trading (such as block trades) and where the activity occurred;

ii. price and volume.

c. reasons for which the order or transaction is suspected to constitute insider dealing, market manipulation or an attempt of insider dealing or market manipulation;

d. means of identifying any person involved in the suspicious order or transaction, including the person who placed the concerned order or executed the order and the person on whose behalf the order has been placed or executed;

e. any other information and supporting documents which may be relevant for the competent authority.

3. The persons referred to in paragraph 1 shall complete the STOR without informing the person in respect of which the STOR was submitted, or anyone who is not required to know, that a STOR will be submitted, including through requests of information relating to the person in respect of which the STOR was submitted in order to complete certain fields.

Article 8

Means for transmission

1. Persons professionally arranging or executing transactions, market operators and investment firms operating a trading venue shall submit a STOR, including the supporting documents and attachments, to the competent authority as defined by Article 16(1) and (3) of Regulation (EU) No 596/2014 using the electronic means specified by that competent authority.

2. Competent authorities shall publish on their website the electronic means referred to in paragraph 1. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.

Article 10

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX

STOR template

SECTION 1 - IDENTITY OF ENTITY/PERSON SUBMITTING THE STOR **Persons professionally arranging or executing transactions/ Market operators and investment firms that operate a trading venue – Specify in each case:**	
Name of the natural person	[First name(s) and surname(s) of the natural person responsible for submitting the STOR.]
Position within the reporting entity	[Position of the natural person responsible for submitting the STOR within the reporting entity.]
Name of the reporting entity	[Full name of the reporting entity, including for legal persons: - the legal form as provided for in the register where it is incorporated, if applicable, and, - the Legal Entity Identifier (LEI) code in accordance with ISO 17442 LEI code when applicable.]
Address of the reporting entity	[Full address (e.g. street, street number, postal code, city, state/province) and country.]
Acting capacity of entity with respect to suspicious activity	[Description of the capacity in which the reporting entity was acting with regards to the suspicious orders and/or transactions, e.g. executing orders on behalf of clients, dealing on own account, operating a trading venue, systematic internaliser.]
Type of activity of trading desk (market making, arbitrage etc.) and type of instrument traded (securities, derivatives, etc.) involved within the reporting entity	(If available)
Relationship with the person in respect of which the STOR is	

submitted	
Contact for additional request for information	[Person to be contacted within the reporting entity for additional request for information relating to this report (e.g. compliance officer) and relevant contact details: - First name(s) and surname(s); - Position of the contact person within the reporting entity; - Professional email address.]
SECTION 2 - TRANSACTION / ORDER	
Description of the financial instrument:	[Describe the financial instrument subject to the STOR specifying: - The full name or description of the financial instrument; - The instrument identifier code as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014 when applicable or other codes; - The type of financial instrument according to the taxonomy used to classify the financial instrument and the associated code (ISO 10962 CFI code).] [Additional elements for orders and transactions relating to OTC derivatives (The list of data below is not exhaustive) - Describe the type of OTC derivative (e.g. CFD, swap, CDS, OTC option) using the type identified under Article 4(3)(b) of Commission Implementing Regulation (EU) No 1247/2012. - Describe the characteristics of the OTC

	derivative including at least, where relevant to the particular derivative type, the following: - nominal amount (face value); - currency of the price denomination; - maturity; - premium (price); - interest rate. - Describe at the least the following, where relevant for the particular type of OTC derivative: - Margin, up-front payment and nominal size or value of underlying financial instrument; - Transaction terms such as the strike price, the contract terms (e.g. spread bet gain/loss per tick move). - Describe the underlying financial instrument of the OTC derivative specifying: - The full name of the underlying financial instrument or description of the financial instrument; - The instrument identifier code as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014 when applicable or other codes; - The type of financial instrument according to the taxonomy used to classify the financial instrument and the associated code (ISO 10962 CFI

	code).]
Date and time of suspicious activity/activities (transactions; orders)	[Indicate the date(s) and time(s) of the order(s) and/or transaction(s) specifying the time zone.]
Market where activity occurred	[Specify: - name and code to identify the MiFID trading venue, the systematic internaliser or the organised trading platform outside the Union where the order was placed and the transaction was executed as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014 or, - if the transaction was not executed on any of the above mentioned venues, please mention "outside a trading venue".]
Location (country)	[Full name of the country and the ISO 3166-1 two character country code.] [Specify: -where the order is given (if available); -where the order is executed.]
Description of the order/transaction	[Describe at least the following characteristics of the order(s) or the transaction(s) reported - Transaction reference number/Order; reference number (if applicable); - Settlement date and time; - Purchase price/sale price; - Volume/quantity of financial instruments [Where there are multiple suspicious orders or transactions, the details on the prices and volumes of such orders and transactions can be provided to the competent authority in an Annex to the STOR.] - Information on the order submission, including at least the following:

	- type of order e.g. “buy with limit €x”; - the way the order was placed e.g. electronic order book; - the timing when the order was placed; - the person who placed the order; - the person who received the order; - the means by which the order is transmitted. - Information on the order cancellation or alteration (if any): - The time of the alteration and/or cancellation; - The person who altered and/or cancelled the order; - The nature of the alteration (e.g. change in price or quantity) and the extent of the alteration; [Where there are multiple suspicious orders or transactions, the details on the prices and volumes of such orders and transactions can be provided to the competent authority in an Annex to the STOR.] - The means to alter the order (e.g. via e-mail, phone, etc.).]
SECTION 3 - DESCRIPTION OF THE NATURE OF THE SUSPICION	
Nature of the suspicion	[Specify the type of breach the reported orders or transactions could constitute: - market manipulation; - insider dealing;

	- attempted market manipulation; - attempted insider dealing.]
Reasons for the suspicion	[Narrative text to describe the activity (transactions and orders, way of placing the orders or executing the transaction and characteristics of the orders and transactions that make them suspicious) and how the matter came to the attention of the reporting person, and to specify the reasons for suspicion. As non-exhaustive guiding criteria, the description may include: - for financial instruments admitted to trading on/traded on a trading venue, a description of the nature of suspicious order book interaction/transactions; - for OTC derivatives, details concerning transactions or orders placed in the underlying asset and information on any possible link between dealings in the cash market of the underlying asset and the reported dealings in the OTC derivative.]
SECTION 4 - IDENTITY OF ENTITY/PERSON SUSPECTED	
Name	[For natural persons: the first name(s) and the last name(s).] [For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable, and Legal Entity Identifier (LEI) code, if available and when applicable, in accordance with ISO 17442.]
Date of birth	[For natural persons only.] [yyyy-mm-dd]
National Identification Number (if applicable)	[Where applicable in the concerned Member State.] [Number and/or text]

Address	[Full address (e.g. street, street number, postal code, city, state/province) and country.]
Information about the employment: - Place - Position	[Information about the employment of the suspected person, from information sources available internally to the reporting entity (e.g. account documentation in case of clients, staff information system in case of an employee of the reporting firm).]
Account Number(s)	[Numbers of the cash and securities account any joint accounts or any Powers of Attorney on the account the suspected entity/person holds.]
Client identifier under transaction reporting pursuant to MiFIR (or any other code of identification)	[In case the suspected person is a client of the reporting entity.]
Relationship with the concerned issuer (if applicable and if known)	
SECTION 5 - ADDITIONAL INFORMATION **Background or any other information considered by the reporting entity relevant to the report**	
[The list below is not exhaustive. - The nature of the suspected entity/person (e.g. retail client, institutions); - The nature of the suspected entity's/person's intervention (on own account, on behalf of a client, other); - The size of the suspected entity's/person's portfolio; - The date on which the business relationship with the client started if the suspected entity/person is a client of the reporting person/entity; - The type of activity of the trading desk, if available, of the suspected entity; - Trading patterns of the suspected entity/person. For guidance, the following are examples of information that may be useful: - trading habits of the suspected entity/person in terms of use of leverage and	

short selling, and frequency of use;

- comparability of the size of the reported order/transaction with the average size of the orders submitted /transactions carried out by the suspected entity/person for the past 12 months;

- habits of the suspected entity/person in terms of the issuers whose securities it has traded or types of financial instruments traded for the past 12 months, in particular whether the reported order/transaction relates to an issuer whose securities have been traded by the suspected entity/person for the past year.

- Other entities/persons known to be involved in the suspicious activity:

  - Names;

  - Activity (eg. executing orders on behalf of clients, dealing on own account, operating a trading venue, systematic internaliser, etc.).]

SECTION 6 - DOCUMENTATION ATTACHED

[List the supporting attachments and material provided with this STOR.

Examples of such documentation are e-mails, recordings of conversations, order/transaction records, confirmations, broker reports, Powers of Attorney documents, and media comment if relevant.

When the detailed information about the orders/transactions of Section 2 of this template is provided through a separate annex, indicate the name of that annex.]

Annex XII - Draft implementing technical standards on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION IMPLEMENTING REGULATION (EU) No…/... laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information according to with Regulation (EU) No 596/2014 of the European Parliament and of the Council

of XXX

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [1], and in particular Article 17(10) thereof,

Whereas:

(1) The protection of investors requires timely public disclosure of inside information by issuers and emission allowance market participants. In order to guarantee at Union level equal access of investors to inside information, the inside information should be publicly disclosed free of charge, simultaneously and as fast as possible amongst all categories of investors throughout the Union and it should be communicated to the media which are relied upon by the public, ensuring an effective dissemination. The mere availability of inside information on a website only, even where users are provided with the possibility of being informed about the updated content of the website through subscription to a web feed, should not be considered sufficient for meeting the dissemination requirements included in this Regulation.

(2) Where emission allowance market participants already comply with equivalent inside information disclosure requirements pursuant to Regulation (EU) No 1227/2011[2], and are requested to publicly disclose the same information under that Regulation and Regulation (EU) No 596/2014, the obligations under this Regulation should be considered fulfilled by means of publication of the information in a platform for the disclosure of inside information used in the context of Regulation (EU) No 1227/2011, as long as the inside information is communicated to the media according to this Regulation.

(3) It is expected that issuers and emission allowance market participants have in place appropriate procedures and arrangements ensuring that the process for delaying the disclosure of inside information is managed effectively, including procedures

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

[2] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

dedicated to the confidentiality of the inside information. It is therefore important that the technical means for delaying the disclosure of inside information allow for the maintenance of the key information of such process, so that issuers and emission allowance market participants are able to fulfill their notification requirement to the competent authorities.

(4) The notification of the delay of the disclosure of inside information and, where required, the explanation of how all the applicable conditions for the delay were met should be provided to the competent authority in writing using secure electronic means specified by the same competent authority, so as to ensure the integrity and confidentiality of its content as well as the rapidity of the transmission.

(5) In order to allow the competent authority to identify the relevant persons within the issuer or the emission allowance market participant for the delay of disclosure of inside information, the notification should include the identity of the person who made the notification and of the person or persons who are responsible for the decision to delay the disclosure of inside information.

(6) An issuer that is a credit or a financial institution should provide the notification regarding the intention of delaying the disclosure of inside information in order to preserve the stabilty of the financial system to the competent authority in writing and, considering the sensitive nature of such information, with standards of security as to ensure the maximum confidentiality of its content.

(7) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.

(8) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[3],

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation, the following definition shall apply:

[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

"electronic means" are means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technologies, or any other electromagnetic means.

CHAPTER II

TECHNICAL MEANS FOR APPROPRIATE PUBLIC DISCLOSURE OF INSIDE INFORMATION

Article 2

Means for public disclosure of inside information

1. Issuers and emission allowance market participants shall disclose inside information using technical means that ensure:
    a. Inside information is disseminated:
        i. to as wide a public as possible on a non-discriminatory basis;
        ii. free of charge;
        iii. simultaneously throughout the Union.
    b. Inside information is communicated, directly or through a third party, to the media which are reasonably relied upon by the public to ensure its effective dissemination. That communication shall be transmitted using electronic means that ensure the completeness, integrity and confidentiality of the information is maintained during the transmission, and it shall clearly identify:
        i. that the information communicated is inside information;
        ii. the identity of the issuer or emissions allowance market participant (full legal name);
        iii. the identity of the person making the notification: name, surname, position within the issuer or emission allowance market participant;
        iv. the subject matter of the inside information;
        v. the date and time in which it is taking place.

    Issuers and emission allowance market participants shall ensure the security of receipt of such communication by remedying as soon as possible any failure or disruption in the communication of inside information.
2. Emission allowance market participants required to disclose inside information in accordance with Article 4 of Regulation (EU) No 1227/2011 may use the technical means established for the purpose of disclosing inside information under that Regulation for the disclosure of inside information under Article 17(2) of Regulation (EU) No 596/2014 insofar as the inside information required to be disclosed has substantially the same content, and provided that the technical means used ensure that the inside information is communicated to the media in accordance with paragraph 1.

Article 3

Posting of inside information on a website

The websites referred to in Article 17(1) and (9) of Regulation (EU) No 596/2014 shall comply with the following requirements:

a. they allow users to access the inside information posted on the website in a non-discriminatory manner and free of charge;
b. they allow users to locate the inside information in an easily identifiable section of the website;
c. they ensure the disclosed inside information clearly indicates date and time of disclosure and is organised in chronological order.

CHAPTER III

TECHNICAL MEANS FOR DELAYING THE PUBLIC DISCLOSURE OF INSIDE INFORMATION

Article 4

Notification of delayed disclosure of inside information and written explanation

1. For the purpose of delaying the public disclosure of inside information in accordance with the third subparagraph of Article 17(4) of Regulation (EU) No 596/2014, issuers and emission allowance market participants shall use technical means that ensure the accessibility, readability, and maintenance in a durable medium of the following information:
    a. the dates and times when:
        i. the inside information first existed within the issuer or the emission allowance market participant;
        ii. the decision to delay the disclosure of inside information was made;
        iii. the issuer or emission allowance market participant is likely to disclose the inside information;
    b. the identity of the persons within the issuer or emission allowance market participant responsible for:
        i. deciding about the start of the delay and its likely end;
        ii. ensuring the on-going monitoring of the conditions for the delay;
        iii. deciding about the public disclosure of the inside information;
        iv. providing the requested information about the delay and the written explanation to the competent authority;
    c. evidence of the initial fulfilment of the conditions referred to in Article 17(4) of Regulation (EU) No 596/2014, and of any change of this fulfilment during the delay period, including:
        i. the information barriers which have been put in place internally to prevent access to inside information by persons other than those who require it for the normal exercise of their employment, profession or duties within the issuer or emission allowance market participant, and with regard to third parties;

ii. the arrangements put in place in cases where the confidentiality is no longer ensured.

2. Issuers and emission allowance market participants shall transmit to the competent authority a written notification of a delay in the disclosure of inside information and any written explanation of such delay through a dedicated contact point within, or designated by, the competent authority, and using electronic means specified by the competent authority.

   Competent authorities shall publish on their website the electronic means referred to in the first subparagraph. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.

3. The electronic means referred to in paragraph 2 shall ensure that the notification of a delay in the disclosure of inside information includes the following information:

   a. the identity of the issuer or emission allowance market participant: full legal name;
   b. the identity of the person making the notification: name, surname, position within the issuer or emission allowance market participant;
   c. the contact details of the person making the notification: professional email address and phone number;
   d. identification of the publicly disclosed inside information that was subject to delayed disclosure: title of the disclosure statement; the reference number, when the dissemination system used assigns one; date and time of the public disclosure of the inside information;
   e. date and time of the decision to delay the disclosure of inside information;
   f. the identity of all persons with responsibilities for the decision of delaying the public disclosure of inside information.

4. In cases where the written explanation of a delay in the disclosure of inside information is provided only upon request of the competent authority in accordance with the third subparagraph of Article 17(4) of Regulation (EU) No 596/2014, the electronic means referred to in paragraph 2 shall ensure that such written explanation includes the information referred to in paragraph 3.

Article 5

Notification of intention to delay the disclosure of inside information

1. For the purpose of delaying the public disclosure of inside information in accordance with Article 17(5) of Regulation (EU) No 596/2014, an issuer that is a credit institution or a financial institution shall provide the competent authority with a notification, in writing and securely, of its intention to delay the disclosure of inside information in order to preserve the stabilty of the financial system, ensuring the confidentiality of the information, through a dedicated contact point within, or designated by, the competent authority. Where the notification is transmitted electronically, it shall be transmitted through the electronic means referred to in Article 4(2).

2. The competent authority shall communicate to the issuer its decision to consent or not the delay of the disclosure on the basis of the information provided pursuant to paragraph 1 in writing and securely, ensuring the confidentiality of the information.

3. The issuer shall use the same technical means used to provide the competent authority with the notification referred to in paragraph 1 to inform the competent authority of any new information that may affect the decision of the competent authority regarding the delay of the disclosure of the inside information.

CHAPTER IV

FINAL PROVISIONS

Article 6

Entry into force

This Regulation shall enter into force on the the twentieth day following that of its publication in *the Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

Annex XIII – Draft implementing technical standards on the format of the insider lists and format for updating the insider lists

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

of XXX

[…]

COMMISSION IMPLEMENTING REGULATION (EU) No…/... laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists according to Regulation (EU) No 596/2014 of the European Parliament and of the Council

of XXX

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of 16 April 2014 of the European Parliament and of the Council on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1] and in particular Article 18(9) thereof,

Whereas:

(1) Issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or any other persons acting on their behalf or on their account, are required to draw up insider lists and keep them up to date in accordance with a precise format.

(2) The establishment of a precise format for insider lists, as well as for updates to such lists, should facilitate the uniform application of the requirements to drawing up and update insider lists stemming from Regulation (EU) No 596/2014. It should also ensure that competent authorities are provided with the information necessary to fulfill the task of protecting the integrity of the financial markets and investigate possible market abuse.

(3) The use of standard templates for the submission of insider lists to the competent authority should also decrease the administrative burden for competent authorities, issuers, emission allowance market participants, auction platforms, auctioneers or auction monitor and those acting on their behalf or on their account.

(4) Since issuers on an SME growth market are exempted from drawing up and keeping the insider lists up to date, but should always be in the position to provide an insider list upon request of the competent authority and for the date requested, a specific template for the submission of their insider lists should be set out. To further reduce the administrative burden on these issuers, the use of electronic means that ensure the completeness, integrity and confidentiality of the information during its transmission

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

is not required. Nonetheless, the template should be transmitted in a way that ensures the completeness, confidentiality and integrity of the information.

(5) Since multiple pieces of inside information can exist within an entity at the same time, insider lists should precisely identify the specific pieces of inside information to which persons working for issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor have had access to (whether it is, inter alia, a deal, a project, a corporate or a financial event, publication of financial statements or profit warnings). To that purpose, the insider list should be divided into sections with a separate section for each piece of inside information. Each section should list all the persons having access to the same specific piece of inside information.

(6) In order to avoid repeated entries in respect of the same individuals in different sections of the insider lists, the issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or the persons acting on their behalf or on their account, may decide to draw up and keep up to date a complementary section of the insider list, referred to as the permanent insiders section, which is of a different nature than the rest of sections of the insider list, as it is not created upon the existence of a new piece of inside information. In such a case, the permanent insiders section should include only those persons who, due to the nature of their function or position, have access to all inside information within the issuer, the emission allowance market participant, the auction platform, the auctioneer or the auction monitor. The template set out in Annex I is designed in such a way to highlight when an insider has become a permanent insider and therefore is deemed to have access to all inside information at all times. The permanent insiders section should be integrated in the insider list and provided to competent authorities upon request as part of the insider list.

(7) The insider list should contain personal data that would make it possible to identify the insiders. Such information should include the date of birth, the personal address and, where applicable, the national identification number of the individuals concerned.

(8) The insider list should also contain data that can assist the competent authorities in the conduct of investigations, in order to rapidly analyse the trading behaviour of insiders, to establish connections between insiders and persons involved in suspicious trades, and to identify contacts between them at critical times. In this respect, telephone numbers are essential as they permit the competent authority to act swiftly to request, when needed, data traffic records. Moreover, such data should be provided at the outset, so that the integrity of the investigation is not compromised by the potential necessity for a competent authority to revert in the course of an investigation to the issuer, the emission allowance market participant, the auction platform, the auctioneer, the auction monitor or the insider with further requests for information.

(9) In order to ensure that the insider list can be made available to the competent authority as soon as possible upon request, the insider list should be drawn up in an electronic format and updated without delay when any of the circumstances specified in Regulation (EU) No 596/2014 for the updating of the insider list occurs. In order not to endanger an investigation by having to seek information from the persons in the insider list, the lists should be kept up to date at all times and not only upon receipt of a request from a competent authority.

(10) The formats specified in this Regulation should allow for the information included in the insider list to be kept confidential and for the rules laid down in Union legislation on the processing of personal data and the transfer of such data to be complied with.

(11) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.

(12) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2],

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definition shall apply:

"electronic means" are means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technologies, or any other electromagnetic means.

Article 2

Format for drawing up and updating the insider list

1. Issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or any person acting on their behalf or on their account, shall ensure that their insider list is divided into sections. Separate sections shall be added to the insider list upon the identification of new inside information, as defined in Article 7 of Regulation (EU) No 596/2014.

   Each section of the insider list shall only include details of individuals having access to the inside information relevant to that section.

2. The persons referred to in paragraph 1 may insert a complementary section into their insider list with the details of individuals who have access at all times to all inside information ("permanent insiders").

   The details of permanent insiders included in the complementary section referred to in the first subparagraph shall not be included in the other sections of the insider list referred to in paragraph 1.

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

3. The persons referred to in paragraph 1 shall draw up and keep the insider list up to date in an electronic format in accordance with Template 1 of Annex I.

   Where the insider list contains the complementary section referred to in Article 2(2), the persons referred to in paragraph 1 shall draw up and keep up to date that section in an electronic format and in accordance with Template 2 of Annex I.

4. The format referred to in paragraph 3 shall ensure at all times:

   a. the confidentiality of the information included by ensuring that access to the insider list is restricted to a limited number of identified persons from within the entities concerned;

   b. the accuracy of the information contained in the insider list;

   c. the access to and the retrieval of previous versions of the insider list.

5. The insider list referred to in paragraph 3 shall be submitted using the electronic means specified by the competent authority. Competent authorities shall publish on their website the electronic means referred to in first subparagraph. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.

Article 3

SME growth market issuers

An issuer whose financial instruments are admitted to trading on an SME growth market shall provide the competent authority, upon its request, with an insider list in accordance with the template in Annex II and in a format that ensures that the completeness, integrity and confidentiality of the information are maintained during the transmission.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

ANNEX I

Template 1

Insider list: section related to [Name of the deal-specific or event-based inside information]

Date and time (of creation of this section of the insider list, i.e. when this inside information was identified): [*yyyy-mm-dd; hh:mm UTC (Coordinated Universal Time)***]**

Date and time (last update): [*yyyy-mm-dd, hh:mm UTC (Coordinated Universal Time)***]**

Date of transmission to the competent authority: [*yyyy-mm-dd***]**

First name(s) of the insider	**Surname(s)** of the insider	**Birth surname(s)** of the insider (if different)	**Professional telephone number(s)** (work direct telephone line and work mobile numbers)	**Company name and address**	**Function and reason for being insider**	**Obtained** (the date and time at which a person obtained access to inside information)	**Ceased** (the date and time at which a person ceased to have access to inside information)	**Date of birth**	**National Identification Number** (if applicable)	**Personal telephone numbers** (home and personal mobile telephone numbers)	**Personal full address:** (street name; street number; city; post/zip code; country)
[Text]	[Text]	[Text]	[Numbers (no space)]	[Address of issuer/ emission allowance market participant /auction platform/auctioneer/auction monitor or third party of insider]	[Text describing role, function and reason for being on this list]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd]	[Number and/or text]	[Numbers (no space)]	[Text: detailed personal address of the insider - Street name and street number - City - Post/zip code - Country]

Template 2

Permanent insiders section of the insider list

Date and time (of creation of the permanent insiders section) [*yyyy-mm-dd, hh:mm UTC (Coordinated Universal Time)***]**

Date and time (last update): [*yyyy-mm-dd, hh:mm UTC (Coordinated Universal Time)***]**

Date of transmission to the competent authority: [*yyyy-mm-dd***]**

First name(s) of the insider	**Surname(s)** of the insider	**Birth surname(s)** of the insider (if different)	**Professional telephone number(s)** (work direct telephone line and work mobile numbers)	**Company name and address**	**Function and reason for being insider**	**Included** (the date and time at which a person was included in the permanent insider section)	**Date of birth**	**National Identification Number** (if applicable)	**Personal telephone numbers** (home and personal mobile telephone numbers)	**Personal full address** (street name; street number; city; post/zip code; country)
[Text]	[Text]	[Text]	[Numbers (no space)]	[Address of issuer/ emission allowance market participant /auction platform/auctioneer/auction monitor or third party of insider]	[Text describing role, function and reason for being on this list]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd]	[Number and/or text]	[Numbers (no space)]	[Text: detailed personal address of the insider - Street name and number - City - Post/zip code - Country]

ANNEX II

Template for the insider list to be submitted by issuers of financial instruments admitted to trading on SME growth markets

Date and time (creation): [*yyyy-mm-dd, hh:mm UTC (Coordinated Universal Time)***]**

Date of transmission to the competent authority: [*yyyy-mm-dd***]**

First name(s) of the insider	**Surname(s)** of the insider	**Birth surname(s)** of the insider (if different)	**Professional telephone number(s)** (work direct telephone line and work mobile numbers)	**Company name and address**	**Function and reason for being insider**	**Obtained** (the date and time at which a person obtained access to inside information)	**Ceased** (the date and time at which a person ceased to have access to inside information)	**National Identification Number** (if applicable) Or otherwise date of birth	**Personal full address** (street name; street number; city; post/zip code; country) (If available at the time of the request by the competent authority)	**Personal telephone numbers** (home and personal mobile telephone numbers) (If available at the time of the request by the competent authority)
[Text]	[Text]	[Text]	[Numbers (no space)]	[Address of issuer/ emission allowance market participant /auction platform /auctioneer/auction monitor or third party of insider]	[Text describing role, function and reason for being on this list]	[yyyy-mm-dd, hh:mm UTC]	[yyyy-mm-dd, hh:mm UTC]	[Number and/or text or yyyy-mm-dd for the date of birth]	[Text: detailed personal address of the insider - Street name and number - City - Post/zip code - Country]	[Numbers (no space)]

Annex XIV – Draft implementing technical standards on the format and template for notification and public disclosure of managers' transactions

EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

of XXX

[…]

COMMISSION IMPLEMENTING REGULATION (EU) No …/... laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions according to Regulation (EU) No 596/2014 of the European Parliament and of the Council

of XXX

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [1], and in particular Article 19(15) thereof,

Whereas:

(1) In order to foster efficiency in the process of notifying managers' transactions and provide comparable information to the public, uniform rules regarding how the information requested is to be notified and made public through a single template should be specified.

(2) The template should contain the information on all the transactions conducted on a particular day by persons discharging managerial responsibilities or persons closely associated with them. To provide a comprehensive view to the public, the template should allow for the presentation of the transactions on an individual basis and also in an aggregated form. The aggregated information should indicate the volume of all the transactions of the same nature on the same financial instrument that have been carried out on the same trading day and on the same trading venue, or outside any trading venue, as a single figure representing the arithmetical sum of the volume of each transaction. It should also indicate the corresponding volume-weighted average price. Transactions of different nature, such as purchases and sales, should never be aggregated nor should be netted between themselves.

(3) To simplify the process of amending an incorrect notification already notified, the template should include a field to be used in the amending notification for identifying the original notification and explaining the inaccuracy within it.

(4) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.

(5) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of

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

the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2],

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definition shall apply:

"electronic means" are means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technologies, or any other electromagnetic means.

Article 2

Format and template for the notification

1. Persons discharging managerial responsibilities and persons closely associated with them shall ensure that the the template for notifications set out in the Annex is used for the submission of the notifications of the transactions referred to in Article 19(1) of Regulation (EU) No 596/2014.
2. Persons discharging managerial responsibilities and persons closely associated with them shall ensure that electronic means are used for the transmission of the notifications referred to in paragraph 1. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission and provide certainty as to the source of the information transmitted.
3. Competent authorities shall specify and publish on their website the electronic means referred to in paragraph 2 with respect to the transmission to them.

Article 3

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

ANNEX

Template for notification and public disclosure of transactions by persons discharging managerial responsibilities and persons closely associated with them

1	**Details of the person discharging managerial responsibilities / person closely associated**	
a)	Name	*[For natural persons: the first name and the last name(s).]* *[For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable.]*
2	**Reason for the notification**	
a)	Position/status	*[For persons discharging managerial responsibilities: the position occupied within the issuer, emission allowances market participant / auction platform / auctioneer / auction monitor should be indicated e.g. CEO, CFO.]* *[For persons closely associated,* - *An indication that the notification concerns a person closely associated with a person discharging managerial responsibilities;* - *Name and position of the relevant person discharging managerial responsibilities.]*
b)	Initial notification /Amendment	*[Indication that this is an initial notification or an amendment to prior notifications. In case of amendment, explain the error that this notification is amending.]*
3	**Details of the issuer, emission allowance market participant, auction platform, auctioneer or auction monitor**	
a)	Name	*[Full name of the entity.]*
b)	LEI	*[Legal Entity Identifier code in accordance with ISO 1744 LEI code.]*
4	**Details of the transaction(s): section to be repeated for (i) each type of instrument; (ii) each type of transaction; (iii) each date; and (iv) each place where transactions have been conducted**	

<table>
<tr><td>a)</td><td>Description of the financial instrument, type of instrument

Identification code</td><td>[- Indication as to the nature of the instrument:

- a share, a debt instrument, a derivative or a financial instrument linked to a share or a debt instrument;
- an emission allowance, an auction product based on an emission allowance or a derivative relating to an emission allowance.

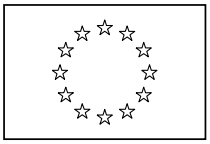
- Instrument identification code as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014.]</td></tr>
<tr><td>b)</td><td>Nature of the transaction</td><td>[Description of the transaction type using, where applicable, the type of transaction identified in Article [X] of the Commission Delegated Regulation (EU) xxxx/xx [Act adopted under Article 19(14) of Regulation (EU) No 596/2014] or a specific example set out in Article 19(7) of Regulation (EU) No 596/2014.

Pursuant to Article 19(6)(e) of Regulation (EU) No 596/2014, it shall be indicated whether the transaction is linked to the exercise of a share option programme]</td></tr>
<tr><td>c)</td><td>Price(s) and volume(s)</td><td><table><tr><td>Price(s)</td><td>Volume(s)</td></tr><tr><td></td><td></td></tr></table>
[Where more than one transaction of the same nature (purchases, sales, lendings, borrows, …) on the same financial instrument or emission allowance are executed on the same day and on the same place of transaction, prices and volumes of these transactions shall be reported in this field, in a two columns form as presented above, inserting as many lines as needed.

Using the data standards for price and quantity, including where applicable the price currency and the quantity currency, as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014.]</td></tr>
<tr><td>d)</td><td>Aggregated information</td><td>[The volumes of multiple transactions are aggregated when</td></tr>
</table>

	- Aggregated volume - Price	*these transactions:* - *relate to the same financial instrument or emission allowance;* - *are of the same nature;* - *are executed on the same day; and* - *are executed on the same place of transaction.* *Using the data standard for quantity, including where applicable the quantity currency, as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014.]* *[Price information:* *- In case of a single transaction, the price of the single transaction;* *- In case the volumes of multiple transactions are aggregated: the weighted average price of the aggregated transactions.* *Using the data standard for price, including where applicable the price currency, as defined under defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014.]*
e)	Date of the transaction	*[Date of the particular day of execution of the notified transaction.* *Using the ISO 8601 date format: YYYY-MM-DD; UTC time.]*
f)	Place of the transaction	*[Name and code to identify the MiFID trading venue, the systematic internaliser or the organised trading platform outside of the Union where the transaction was executed as defined under delegated acts adopted under Article 26 of Regulation (EU) No 600/2014, or* *if the transaction was not executed on any of the above mentioned venues, please mention "outside a trading venue".]*

Annex XV – Draft regulatory technical standards on investment recommendations



EUROPEAN COMMISSION

Brussels, XXX
[…](2015) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[1], and in particular third subparagraph of Article 20(3) thereof,

Whereas:

(1) Harmonised standards are necessary for the objective, clear and accurate presentation of information and disclosure of interests and conflicts of interest. They should be complied with by persons producing or disseminating investment recommendations or other information recommending or suggesting an investment strategy ("recommendations"). In particular, in order to ensure high standards of fairness, probity and transparency in the market, recommendations should be presented objectively and in a way that does not mislead market participants or the public.

(2) All persons who produce or disseminate recommendations should therefore have in place arrangements to ensure that information is objectively presented and interests or conflicts of interest are effectively disclosed. Moreover, additional arrangements should be made for those categories of persons who, by virtue of their nature and their activities, generally pose greater risks to market integrity and investor protection. This group would include independent analysts, investment firms, credit institutions, any person whose main business is to produce recommendations, and the natural persons working for them under a contract of employment or otherwise, as well as other

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

persons proposing investment decisions in respect of financial instruments who present themselves as having financial experience or expertise, or are perceived as such by market participants, hereinafter referred to as “experts”. Non-exhaustive indicators to be considered in relation to the identification of such experts include: the frequency with which they produce recommendations; the number of followers they have when they propose recommendations; their personal work’s history, including whether they have been professionally producing recommendations in the past; and whether their previous recommendations are or have been relayed by third parties, such as the media.

(3) The identity of the persons producing recommendations, their competent authority, if any, and the dates and times when the recommendations were completed and then disseminated should be disclosed, since they may be valuable information for investors in relation to their investment decisions.

(4) Disclosure of valuations and methodologies is useful information in order to understand recommendations, as well as to gauge the extent to which the persons producing them are consistent in the valuations and methodologies they adopt. For instance, recommendations produced by the same person and related to companies that belong to the same industry or to the same country should aim at consistently exhibiting some consistent common factors. For these reasons, independent analysts, investment firms, credit institutions, persons whose main business is to produce recommendations, and the natural persons working for them under a contract of employment or otherwise, as well as experts, should explain in the recommendations any change in the valuations and methodologies they use.

(5) The interests of persons producing recommendations, and the conflicts that those interests could entail, may influence the opinion that those persons express in their recommendations. In order to ensure that the objectivity and reliability of the information can be evaluated, there should be appropriate disclosure of any relationship and circumstance that may reasonably be expected to impair the objectivity of the information, including interests or conflicts of interest of the person producing the recommendation, or of a person belonging to the same group, concerning the financial instrument or the issuer to whom the recommendation, directly or indirectly, relates.

(6) Disclosures of interests or conflicts of interest should be specific enough as to enable the recipient of the recommendation to take an informed view of the degree and nature of the conflict of interest. Independent analysts, investment firms, credit institutions, persons whose main business is to produce recommendations, and the natural persons working for them under a contract of employment or otherwise, as well as experts, should also disclose whether they own a net long or short position above a predetermined threshold in the issued share capital of the issuer to which the recommendation relates. In this context, they should calculate the net long or short

position in accordance with the methodology for calculating positions of the regime under Regulation (EU) No 236/2012 of the European Parliament and of the Council[2].

(7) In the interest of proportionality, persons producing recommendations should be allowed to adapt their arrangements for objective presentation and for disclosure of interest or conflicts of interest within the limits set out in this Regulation, including when they produce non-written recommendations that are made using modalities such as meetings, road shows or audio or video conferences as well as radio, TV or website interviews.

(8) Recommendations may be disseminated in unaltered, altered or summarised form by a person other than the person producing them. The way in which persons who disseminate recommendations handle those recommendations may have an important impact on the evaluation of those by investors. In particular, the knowledge of the identity of the person disseminating the recommendation and the extent of alteration of the source recommendation can be a valuable piece of information for investors when considering their investment decisions.

(9) Where the persons disseminating recommendations extrapolate only some elements of a source recommendation, this could amount to a substantial alteration of the content of the source recommendation. A change in the direction of the source recommendation (e.g. by changing a "buy" recommendation into a "hold" or "sell" recommendation, or vice versa, or by changing the price target) should always be considered as a substantial alteration.

(10) The processing of personal data in the context of this Regulation should be conducted in compliance with the national laws, regulations or administrative provisions transposing Directive 95/46/EC of the European Parliament and of the Council[3].

(11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(12) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[4],

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[2] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swap (OJ L 86, 24.3.2012, p. 1).

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

[4] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

a) “expert” means a person referred to in Article 3(1)(34)(ii) of Regulation (EU) No 596/2014 who repeatedly proposes investment decisions in respect of financial instruments and who:

   i. presents himself as having financial expertise or experience; or

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

b) "group" means a group as defined in Article 2(11) of Directive 2013/34/EU.

CHAPTER II

PRODUCTION OF RECOMMENDATIONS

Article 2

Identity of producers of recommendations

1. Persons who produce investment recommendations or other information recommending or suggesting an investment strategy (“recommendations”) shall disclose clearly and prominently in all the recommendations they produce their identity and the following information about the identity of the other person(s) responsible for the production of the recommendation:

   a. the name and the job title of all the natural person(s) involved in the production of the recommendation;

   b. where the natural person(s) involved in the production of the recommendation is acting under contract of employment or otherwise for a legal person, the name of such legal person.

2. Where the person who produces recommendations is an investment firm, a credit institution, or a natural person working for them under contract of employment or otherwise, that person shall state the identity of its competent authority in the recommendation in addition to the information laid down in paragraph 1.

3. Where the person who produces recommendations is not a person referred to in paragraph 2, but is subject to self-regulatory standards or codes of conduct for the production

of recommendations, that person shall state a reference to those standards or codes in the recommendation in addition to the information laid down in paragraph 1.

Article 3

Objective presentation of recommendations

1. Persons who produce recommendations shall ensure that in the recommendation:

   a. facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information;

   b. all substantially material sources of information are clearly and prominently indicated;

   c. all sources of information are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated;

   d. all projections, forecasts and price targets are clearly and prominently labelled as such, and the material assumptions made in producing or using them are indicated;

   e. the date and time at which the production of the recommendation was completed is clearly and prominently indicated.

2. Where the disclosure of the information required in points (b) or (e) of paragraph 1 is disproportionate in relation to the length or form of the recommendation, including in the case of a non-written recommendation that is made using modalities such as meetings, road shows, audio or video conferences as well as radio, TV or website interviews, the person who produces recommendations shall state in the recommendation where the required information can be directly and easily accessed by the persons receiving the recommendation free of charge.

3. Persons who produce recommendations shall substantiate any recommendation they have produced to the competent authority upon its request.

Article 4

Additional obligations in relation to objective presentation of recommendations

1. In addition to the information laid down in Article 3, the persons referred to Article 3(1)(34)(i) of Regulation (EU) No 596/2014 and experts shall include in the recommendation the following information in a clear and prominent manner:

   a. if the recommendation has been disclosed to the issuer to which the recommendation, directly or indirectly, relates and it has been subsequently amended, a statement to this effect;

   b. a summary of any basis of valuation or methodology and the underlying assumptions used to either evaluate a financial instrument or an issuer, or to set a price target for a financial instrument. Any changes in the valuation, methodology or underlying assumptions shall be indicated and summarised;

c. an indication of the place where detailed information about the valuation or methodology and the underlying assumptions is directly and easily accessible, in the event that the person who produces recommendations has not used proprietary models;

d. an indication of the place where material information about the proprietary models used is directly and easily accessible, in the event that the person who produces recommendations has used proprietary models;

e. the meaning of any recommendation made, such as “buy”, “sell” or “hold”, and the length of time of the investment to which the recommendation relates, are adequately explained and any appropriate risk warning, which shall include a sensitivity analysis of the assumptions, is indicated;

f. a reference to the planned frequency of updates to the recommendation;

g. an indication of the relevant date and time for any price of financial instruments mentioned in the recommendation;

h. where a recommendation differs from any of their previous recommendations concerning the same financial instrument or issuer that has been disseminated during the preceding 12-month period, the change(s) and the date of that previous recommendation are indicated; and

i. a list of all their recommendations on any financial instrument or issuer that were disseminated during the preceding 12-month period, containing for each recommendation: the date of dissemination, the identity of the natural person(s) referred to in Article 2(1)(a), the price target and the relevant market price at the time of dissemination, the direction of the recommendation and the validity time period of the price target or of the recommendation.

2. Where the disclosure of the information required in points (b), (e) or (i) of paragraph 1 is disproportionate in relation to the length or form of the recommendation, including in the case of a non-written recommendation that is made using modalities such as meetings, road shows, audio or video conferences as well as radio, TV or website interviews, the person who produces recommendations shall state in the recommendation where the required information can be directly and easily accessed by the persons receiving the recommendation free of charge.

Article 5

Disclosure of interests or of conflicts of interest

1. Persons who produce recommendations shall disclose in the recommendations all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation, which may include where these persons, or any natural person working for them under a contract of employment or otherwise who was involved in producing the recommendation, have an interest or a conflict of interest concerning any financial instrument or the issuer to which the recommendation, directly or indirectly, relates.

2. Where a person referred to in paragraph 1 is a legal person, the information to be disclosed in accordance with paragraph 1 shall also include any interests or conflicts of interest of any person belonging to the same group that are:

a. accessible, or reasonably expected to be accessible, to the persons involved in the production of the recommendation; or

b. known to persons who, although not involved in the production of the recommendation, have, or could reasonably be expected to have, access to the recommendation prior to its completion.

3. Where a person referred to in paragraph 1 is a natural person, the information to be disclosed in accordance with paragraph 1 shall also include any interests or conflicts of interest of any person closely associated with him.

Article 6

Additional obligations in relation to disclosure of interests or of conflicts of interest

1. In addition to the information laid down in Article 5, a person referred to in Article 3(1)(34)(i) of Regulation (EU) No 596/2014 and an expert shall include in the recommendation the following information on its interests and conflicts of interest concerning the issuer to which the recommendation, directly or indirectly, relates:

a. if it owns a net long or short position exceeding the threshold of 0,5% of the total issued share capital of the issuer, calculated in accordance with Article 3 of Regulation (EU) No 236/2012 and with Commission Delegated Regulation (EU) No 918/2012[5], a statement to this effect specifying whether the net position is long or short;

b. if holdings exceeding 5% of its total issued share capital are held by the issuer, a statement to this effect;

c. if the person producing the recommendation, or any other person belonging to the same group with that person:

i. is a market maker or liquidity provider in the financial instruments of the issuer, a statement to this effect;
ii. has been lead manager or co-lead manager over the previous 12 months of any publicly disclosed offer of financial instruments of the issuer, a statement to this effect;
iii. is party to any other agreement with the issuer relating to the provision of investment banking services, a statement to this effect, provided that

[5] Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (OJ L 274, 9.10.2012, p. 1).

this would not entail the disclosure of any confidential commercial information and that the agreement has been in effect over the previous 12 months or has given rise during the same period to the payment of a compensation or to the promise to get compensation paid;

iv. is party to an agreement with the issuer relating to the production of the recommendation, a statement to this effect.

2. Where the person referred to in paragraph 1 is an investment firm, a credit institution, or a natural person working for them under contract of employment or otherwise, that person shall, in addition to the information laid down in paragraph 1, include the following information in the recommendation:

a. a description of the effective internal organisational and administrative arrangements and of any information barrier it has set up for the prevention and avoidance of conflicts of interest with respect to the recommendations;

b. if the remuneration of natural or legal persons working for it under a contract of employment or otherwise, and who were involved in producing the recommendation, is directly tied to investment banking transactions or other type of transactions it or any legal person part of the same group performs; or trading fees it or any legal person part of the same group receives, a statement to this effect;

c. information on the price and date of acquisition of shares where natural persons working for the person referred to in the first subparagraph under a contract of employment or otherwise, and who were involved in producing the recommendation, receive or purchase the shares of the issuer to which the recommendation, directly or indirectly, relates, prior to a public offering of such shares.

3. Where the person referred to in paragraph 1 is an investment firm, a credit institution, or a natural person working for them under contract of employment or otherwise, that person shall publish, on a quarterly basis, the proportion of all recommendations that are “buy”, “hold”, “sell” or equivalent terms over the previous 12 months, and the proportion of issuers corresponding to each of these categories to which it has supplied material investment banking services over the previous 12 months.

4. Where the disclosure of the information referred to in paragraphs 1 and 2 is disproportionate in relation to the length or form of the recommendation, including in the case of a non-written recommendation that is made using modalities such as meetings, road shows or audio or video conferences as well as radio, TV or website interviews, the person who produces recommendations shall state in the recommendation where the required information can be directly and easily accessed by the persons receiving the recommendation free of charge.

Article 7

Dissemination of recommendations by the producer

Where a person producing recommendations disseminates a recommendation it produced, it shall include in the recommendation the date and time at which the recommendation is first disseminated.

CHAPTER III

DISSEMINATION OF RECOMMENDATIONS PRODUCED BY THIRD PARTIES

Article 8

Arrangements for dissemination of recommendations

1. Persons who disseminate recommendations produced by a third party shall communicate to the persons receiving the recommendations the following information:

a. their identity, in a clear and prominent manner;

b. all relationships and circumstances that may reasonably be expected to impair the objective presentation of the recommendation, which may include where these persons have an interest or a conflict of interest concerning any financial instrument or the issuer to which the recommendation, directly or indirectly, relates;

c. the date and time at which the recommendation is first disseminated.

2. Where a person referred to in paragraph 1 is an investment firm, a credit institution, or a natural person working for them under contract of employment or otherwise, that person shall communicate to the persons receiving the recommendations the following information:

a. the identity of the relevant competent authority;

b. its own interests or indication of conflicts of interest as laid down in Articles 5 and 6(1) and (2), unless that person is acting as the disseminating channel of the recommendations produced within the group it belongs to without exercising any discretion as to the selection of the recommendation to disseminate.

Article 9

Additional arrangements for dissemination of summary or extract of recommendations

1. In addition to the information laid down in Article 8, persons who disseminate a summary or an extract of a recommendation produced by a third party shall ensure that such summary or extract:

a. is clear and not misleading;

b. is identified as a summary or extract;

c. includes a clear identification of the source recommendation.

2. The persons referred to in paragraph 1 shall also ensure that the information regarding the producer of the recommendation set out in Articles 2 to 6 is made available either directly, in the summary or in the extract itself, or through reference to the place where this information can be accessed by the persons receiving the summary or extract of the recommendation free of charge.

Article 10

Additional arrangements for dissemination of substantially altered recommendations

1. In addition to the information laid down in Article 8, persons who disseminate a recommendation produced by a third party that is substantially altered, shall ensure that the recommendation clearly indicates the substantial alteration in detail.

2. The persons referred to in paragraph 1 shall meet the requirements laid down in Articles 2 to 5, to the extent of the substantial alteration and also include in the substantially altered recommendation a reference to the place where the information regarding the producer of the source recommendation set out in Articles 2 to 6 can be accessed by the persons receiving the substantially altered recommendation free of charge.

CHAPTER IV

FINAL PROVISIONS

Article 11

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]