



European Securities and  
Markets Authority

# Final Report

**ESMA's technical advice on possible delegated acts concerning the  
Market Abuse Regulation**



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## Acronyms used

ACER	Agency for the Cooperation of Energy Regulators
AIF	Alternative investment fund
CDS	Credit default swap
CESR	Committee of European Securities Regulators
CFD	Contract for difference
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
DA	Delegated act to be adopted by the European Commission
DMA	Direct market access
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
EFTA	European Free Trade Association
ESMA	European Securities and Markets Authority
ETS	Emission trading system
EU	European Union
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
MS	Member State
NCA	National competent authority
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
SME	Small and medium sized enterprise
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<sup>1</sup> (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<sup>2</sup> by extending its scope to new markets and trading strategies and by introducing new requirements.

The European Securities and Markets Authority (ESMA) received two formal requests (mandates) from the European Commission (Commission) to provide technical advice to assist the Commission on the possible content of the delegated acts required by some provisions of the MAR. ESMA was required to provide technical advice by no later than 8 months after the entry into force of MAR (2 July 2014).

The first mandate<sup>3</sup> was published on 21 October 2013, and it covers the following topics:

- A. the specification of the indicators of market manipulation;
- B. the establishment of a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input for the purposes of exemption with respect to the public disclosure of inside information;
- C. the specification of the competent authority for the notification of delays in the public disclosure of inside information; and
- D. the specification of the characteristics of a manager's transaction which trigger the notification duty, and specification of the circumstances under which trading during a closed period may be permitted by the issuer.

In relation to point b) above, the mandate invites ESMA to take into account the input of an external study commissioned by the Directorate-General Climate Action in the Commission (DG Clima). The external study<sup>4</sup> was published on 8 July 2014.

The second mandate<sup>5</sup> was published on 2 June 2014, and refers only to the specification of procedures to enable reporting of actual or potential infringements of MAR.

## Contents

This final report follows the Consultation Paper (CP) published by ESMA on 15 July 2014,

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<sup>1</sup> 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](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0001.01.ENG).

<sup>2</sup> Market Abuse Directive No 2003/6/EC (OJ L 96, 12.4.2003, p.16).

<sup>3</sup> Request to ESMA for technical advice on possible delegated acts concerning the regulation on market abuse:  
[http://www.esma.europa.eu/system/files/ec\\_mandate\\_to\\_esma\\_mar-l2\\_211021\\_doc.pdf](http://www.esma.europa.eu/system/files/ec_mandate_to_esma_mar-l2_211021_doc.pdf).

<sup>4</sup> [http://ec.europa.eu/clima/policies/ets/oversight/docs/ee\\_and\\_nrf\\_analysis\\_en.pdf](http://ec.europa.eu/clima/policies/ets/oversight/docs/ee_and_nrf_analysis_en.pdf).

<sup>5</sup> Request to ESMA for technical advice on possible delegated acts concerning the regulation on market abuse:  
[http://ec.europa.eu/internal\\_market/securities/docs/abuse/140528-esma-mandate\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/abuse/140528-esma-mandate_en.pdf).

and is divided into five main sections, reflecting the mandates received: (i) specification of the indicators of market manipulation; (ii) minimum thresholds for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information; (iii) determination of the competent authority for notification of delays in public disclosure of inside information; (iv) managers' transactions; and (v) reporting of infringements.

This paper also contains, for each question originally included in the CP, the summary of the market participants' responses, as well as ESMA's own comments to the responses received. In preparing this final report, ESMA has carefully analysed and considered the responses to the CP and, in some cases, the proposed approach and the technical advice have been modified in order to reflect the suggestions provided by the respondents.

### **Next Steps**

The delegated acts should be adopted by the Commission so that they enter into force 24 months after the entry into force of the MAR, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3-month period).

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## 2 Specification of the indicators of market manipulation

### 2.1 Mandate (extract)

Extract from the Commission's request for advice (mandate).

*ESMA is invited to provide its technical advice on whether any elements of the indicators listed in the Annex I need to be further clarified and whether, in light of technical developments additional indicators should be specified. The technical advice should take into account, in particular but not exclusively, the fact that new trading venues are now falling in the scope of the new Regulation, the increasing variety of instruments that fall into the definition of financial instruments, the technical developments on financial markets, the use of electronic means of trading such as algorithms and high frequency trading strategies, the interconnection of the commodities and financial markets, the MiFID II and MiFIR, the classification of emission allowances as financial instruments and the possibility of manipulation of benchmarks.*

### 2.2 Analysis

#### 2.2.1 Scope of the analysis

1. Compared to the current Market Abuse Directive (MAD), the Market Abuse Regulation (MAR) extends the scope of market manipulation in several directions. However, the general approach remains based on three pillars:
  - a) the core definitions of activities that will constitute market manipulations are set out in Article 12(1), including the new definition of the manipulation of benchmarks;
  - b) a number of illustrative behaviours that shall be considered as market manipulation are presented in Article 12(2); and
  - c) a non-exhaustive list of indicators in Annex I of MAR relating to false or misleading signals and price securing under Article 12(1)(a), and to the employment of fictitious devices or any other form of deception or contrivance under Article 12(1)(b). ESMA is invited to specify these indicators in its technical advice to the Commission.
2. These provisions reflect that a financial instrument may be manipulated not only by executing transactions on a trading venue. Indeed, manipulation or attempted manipulation of financial instruments may also occur by placing orders which may not be executed. Further, a financial instrument may be manipulated through behaviour which occurs outside a trading venue (Article 2(3) of MAR).



3. MAR further foresees market abuses taking place in an automated trading environment given that the use of electronic means of trading, such as algorithms including high frequency trading strategies, has become very present in the financial markets due to technical developments. While automated trading may have benefits, it may also entail risks of abusive behaviours. Thus, Article 12(2)(c) of MAR expressly provides for situations of market manipulation related to the use of electronic means of trading which has one of the effects referred to in Article 12(1)(a) or Article 12(1)(b) of MAR.
4. For the purpose of the technical advice, ESMA has not just reviewed the MAR provisions, but also the elements provided in previous CESR<sup>6</sup> and ESMA<sup>7</sup> guidance. ESMA has updated these elements in light of the more extensive scope of MAR taking into account the additional developments in the financial markets related in particular to automated trading. The feedback received from respondents in relation to the ESMA Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation, published on 14 November 2013 (DP) and in relation to the ESMA Consultation Paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation, published on 15 July 2014 (CP), has also been taken into account.

### 2.2.2 General approach taken

5. For the purpose of its mandate to clarify the elements of the non-exhaustive list of indicators laid down in Annex I of MAR, to take into account the technical development in financial markets and to also recognise the broad scope of MAR in terms of trading venues covered and instruments falling into the definition of financial instruments, ESMA proposed in the CP:
  - i. a list of practices: an indicative and non-exhaustive list of examples of practices that point to potential market manipulation, linking the examples to the indicators presented in Annex I of MAR; and
  - ii. a list of additional indicators: an indicative and non-exhaustive list of indicators of market manipulation that are related to one or more examples of practices previously listed.
6. Further to the CP consultation, ESMA considers it more appropriate to integrate the additional indicators in the list of examples of practices, as it strengthens the links with the MAR text as well as facilitates the use of the list. This does not affect the non-exhaustive nature of the relation between these additional indicators and the examples of practices. Moreover, it should be noted that the relation between the proposed examples of practices and the indicators presented in Annex I of MAR is non-exhaustive and that a

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<sup>6</sup> The First Set of Guidance (CESR/04/505b), published in May 2005, sets out a number of examples of type of practice that would constitute market manipulation including, amongst others, those related to false/misleading transactions, price positioning and dissemination of false and misleading information.

<sup>7</sup> ESMA published in April 2012 "Guidelines on Systems and controls in an automated trading environment for trading platforms (ESMA/2012/122), investment firms and competent authorities" which address specific issues raised by the development of automated trading.

specific practice may involve more than one type of market manipulation depending on how it is used, and so there can be some overlap. Both the examples of practices and the additional indicators should be taken into account when the potential abusive nature of transactions or orders to trade is examined by market participants and competent authorities, as they could relevantly complement the indicators already provided in the Annex I of MAR. The non-exhaustive examples and additional indicators are to be applied on a case-by-case basis in investigating whether potential market manipulation has occurred or has been attempted. In light of comments received to the CP, ESMA wishes to clarify that a proportionate approach should be followed, taking into consideration the nature and specific characteristics of the financial instruments and markets concerned.

7. It is highlighted that the examples of practices clarifying the indicators listed in Annex I of MAR and the additional indicators of market manipulation proposed therein are intended to be used as a practical tool when analysing whether or not orders to trade, transactions or behaviours may indicate a possible market abuse conduct. They contribute to, but do not replace the thorough and full analysis to be conducted in relation to any suspicious activity or behaviour. This means that in any event, market participants are expected to ultimately exercise their judgment when considering trades and orders to trade. Notably, they should give particular attention to deviations from what are usual trading practices for the financial instruments, related spot commodity contracts or auctioned products based on emission allowances and, as suggested in response to the CP, to the lack of apparent economic rationality of some practices.
8. It is further highlighted that the proposed examples and additional indicators are neither exhaustive nor determinative. Thus, they do not exclude the possibility that other situations may be considered as market manipulation. For instance, where an example or an indicator seems to require that a conduct be characterised by a manipulative intent, this does not imply that, in the absence of any intent that conduct may not fall within the scope of the definition of market manipulation. Since examples must be described briefly, they show cases that are illustrations of behaviours that point to potential market manipulation or manipulative conduct.
9. Among the examples provided, there are practices that actually might be considered legitimate under some circumstances. That would be the case for instance where, as acknowledged by Recital 42 of MAR, a person who enters into transactions (or issues orders to trade) which may be deemed to constitute market manipulation, may be able to establish that his reasons for entering into such transactions (or issuing orders to trade) were legitimate, and that the transactions and orders to trade were in conformity with an accepted practice on the market concerned. Besides, some practices, when conducted in compliance with the provisions regulating trading in own shares in buy-back programmes or stabilisation transactions, would not constitute a market abuse. Nevertheless, contrary to suggestions by some respondents to the CP to include this, ESMA considers out of the scope of its mandate to elaborate further on the circumstances when a particular practice would be legitimate.



### 2.2.3 Approach regarding the extended scope of MAR

10. MAR has a more extensive scope than the MAD. It fully applies to any financial instrument traded, admitted to trading, or for which a request for admission to trading on a regulated market (RM) or multilateral trading facility (MTF) has been made, to any financial instrument traded on an organised trading facility (OTF), to any related financial instruments traded OTC which can have an effect on the concerned underlying market, to spot commodity contracts (the price of which is based on that of a derivative, as well as spot commodity contracts to which financial instruments are referenced) and to auctioned products based on emission allowances (Article 2(1) and (2) of MAR and Recital 10). Furthermore, MAR applies to any transaction, order or behaviour concerning any financial instrument (under the scope of MAR), irrespective of whether or not such transaction, order or behaviour takes place on a trading venue (Article 2(3) of MAR and Recital 8), as well as to behaviours in relation to the manipulation of calculation of benchmarks (Articles 12(1)(d) and 2(2)(c) of MAR).
11. In relation to the two specific examples of practices relating to commodities and referred to as “movement or storage of physical commodities” and “movement of empty cargo ship”, ESMA agrees with the view of some respondents that these examples of practices better clarify the MAR Annex 1 indicator relating to dissemination of false or misleading information.

### 2.2.4 Manipulation of benchmark calculation

12. Following the information which became public in 2012 relating to the calculation of indices and in particular LIBOR, the initial MAR proposal was amended so as to encompass the manipulation of benchmarks<sup>8</sup> considering the serious impact on market confidence, the risk of significant losses for investors or the distortion of the real economy (Recital 44). Some respondents to the CP pointed out that some examples concerning benchmarks should be presented.
13. ESMA remains of the view that the manipulation of benchmarks is closely associated to the manipulation of the financial instruments or other constituents underlying the benchmark. The final advice contains examples of practices relating to manipulation of financial instruments which, as constituents of a benchmark, could indirectly reveal a manipulation of a benchmark. ESMA would like to recall that ‘benchmark’ is defined under Article 3(29) of MAR and includes a wide scope of benchmarks, including those ones with constituents which are not financial instruments. ESMA considers it to be premature at this stage to provide specific examples of practices or indicators of benchmark manipulation.

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<sup>8</sup> Article 12(1)(d) of MAR: “transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark”. It should be noted that the indicators of market manipulation listed in Annex I of MAR do not apply to this definition, but only to definitions in Article 12(1)(a) and (b).

## 2.2.5 Trading facilities services

14. Recent market practices have shown that in some cases, firms offering trading/platform facilities (e.g. trading software) may be held directly liable for market abuse in relation to the trades of their clients, irrespective of the nature of the relationship between the trading facilities providers and their clients. To illustrate this, a direct market access (DMA) provider can potentially be found liable if a client using the DMA service commits market abuse, despite the DMA provider's policies and procedures to prevent and identify market abuse. These market practices/behaviours are covered in MAR. Indeed, Recital 39 of MAR states that the prohibitions of market abuse should also cover those persons who act in collaboration to commit market abuse. This notably includes cases where persons encourage those with inside information to disclose it unlawfully or where persons develop software in collaboration with a trader for the purpose of facilitating market abuse. ESMA considers that the existing examples or indicators of market manipulation presented in this technical advice cover this situation.

## 2.2.6 Orders to trade

15. The list of indicators of manipulative behaviour found in Annex I of MAR refers to "orders to trade". ESMA believes that this is meant to encompass all types of orders as well as modifications/updates and cancellations of orders irrespective of whether or not they have been executed, irrespective of the means used to access the trading venue (membership versus DMA/Sponsored Access (SA)), to carry out a transaction or to enter an order to trade (trading venue versus OTC), and, irrespective of whether or not the order has entered into the trading venue's order-book (e.g. rejected orders which may provide useful information to the market participant submitting them). There is no reason that would justify a limitation in the interpretation of this term. Therefore, the terms "orders to trade" should be considered as having a wide meaning.

## 2.2.7 Approach regarding cross-venue and cross-product market manipulation

16. Financial instruments which are traded, admitted to trading or for which a request for admission to trading has been made on more than one trading venue, for example on a RM and on a MTF, may be targets for cross-venue market manipulation in which orders or transactions on one venue are used to influence the price in another.
17. This may occur in several different ways. For instance, transactions or orders to trade may be undertaken in one trading venue with a view to improperly influencing the price of the same financial instrument in another trading venue. Transactions may also be undertaken in an underlying financial instrument in order to influence the price of the derivative, as the price or value of the underlying financial instrument has an effect on the price or value of the derivative (or vice versa).
18. Also, financial instruments, irrespective of whether or not they are traded on the same trading venue, may be targets for cross-product market manipulation, notably where the price or value of a financial instrument depends on or has an effect on the price or value of another financial instrument (e.g. financial instruments relating to the same underlying

such as an equity share and a subscription right or a structured bond). For instance, a cross-product manipulation could encompass either the manipulation of the price of a financial instrument traded in a RM in order to influence the price of a CDS or of a contract for difference (CFD) traded OTC or vice versa.

19. In addition, it should not be neglected that such manipulative practices may be carried out outside trading venues (namely OTC), notably where OTC transactions or arrangements convey to trading venues information which affects or is likely to affect the price of a given financial instrument. For instance, false indications of interests displayed in an electronic bulletin board on a specific financial instrument that is also traded in a RM could affect or could be likely to affect its price (cross-market manipulation).
20. Moreover, orders to trade may be inserted with price-limits which serve to increase the bid or decrease the offer for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, and which therefore have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument.
21. To reflect the above cross-venue and cross-product cases, ESMA has incorporated them in the list of examples of practices of market manipulation.
22. It is highlighted that market participants (including trading venues operators) may not be in a position to determine whether or not trading or orders to trade on a specific financial instrument are connected with cross venue and/or cross product manipulation, as they only have a partial view of the market. Nevertheless, when analysing and identifying potential market abuse cases, their judgement should be based on what they do see or know, but also on all information available to them, such as public information. There might be instances where there are good reasons or certain indications for connecting some trades or orders to trade to cross venue or cross product manipulation (i.e. when a trading venue lists/trades financial instruments that are linked, like securities and derivatives on such securities, or when the same trading venue operator manages a RM and a MTF). Similarly, as post-trade transparency becomes more widely available and consolidated with MiFID II<sup>9</sup>, including derivatives, trading venues may be able in some cases to detect transactions that appear related to a potential manipulation, even if executed in different venues.
23. Further to the feed-back received to the CP, ESMA specifies that the use of publicly available information concerning transactions (namely, information on price movements in a given timeframe or news) and the reporting by market participants of suspicious behaviours to competent authorities is crucial to the success of cross-product and cross-market manipulation detection. Although market participants are not in ideal conditions to identify indications of cross product or cross venue manipulation, they have a very important role in the detection of these practices and they should not only take into account information available to them internally.

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<sup>9</sup> 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.

## 2.2.8 Approach regarding the specificities in an automated trading environment

24. Technological developments in financial markets, although present for many years, have accelerated in recent years and have had many different impacts. As indicated by IOSCO<sup>10</sup>, these developments have brought important advantages such as electronic audit trails and the amelioration of order and trade transparency, but technological innovation has also created new opportunities for committing market abuse, notably market manipulation.
25. The trading patterns typically arising in an automated environment represent a challenge in terms of detection and of measurement of manipulative behaviour despite the indicators which have been identified. These include amongst others the entering of orders to trade in order to ascertain the level of hidden orders and may be used in particular to assess what is resting on a dark platform (ping orders) and the entering of a large number of orders to trade (including as mentioned above any cancellations, modifications and updates of orders to trade) so as to create uncertainty for other participants, slowing down their process and/or to camouflage one's own strategy (quote stuffing).
26. In order to present a list of examples of practices of market manipulation linked to technological developments in financial markets, ESMA reviewed the "Guidelines on Systems and controls in an automated trading environment for trading platforms investment firms and competent authorities" (ESMA/2012/122), which address specific issues raised by the development of automated trading. ESMA has also considered the feedback from respondents to the consultation on the DP and from respondents to the consultation on the CP.
27. It is nonetheless highlighted that the non-exhaustive list of examples of practices of market manipulation in an automated environment is not intended to suggest that the same practices carried out by non-automated means would not also be abusive. As mentioned above, the analysis of the abusive nature of a transaction, order to trade or behaviour requires the exercise of judgment based on several elements.
28. Taking into account the responses to the CP, ESMA is amending in its advice the description of "phishing" in the context of a manipulative behaviour in financial markets so as to include it in the list of examples of practices.

## 2.2.9 Approach regarding some examples of practices of market manipulation

29. In the course of its work and in light of the responses to the consultation on the DP and on the CP, ESMA has acknowledged that the examples of practices of market manipulation are numerous and that they cannot all be used to clarify or complement the indicators listed in Annex I of MAR.

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<sup>10</sup> «Regulatory Issues raised by the Impact of Technological Changes on Market Integrity and Efficiency» IOSCO FR09/11 October 2011.

## 2.3 Technical advice

### **Advice on the specification of the indicators of market manipulation under Article 12(5) of MAR**

1. ESMA proposes to clarify the indicators of manipulative behaviour provided in Annex I of MAR as follows:

#### **Clarification of “orders to trade”**

2. For the purpose of indicators of manipulative behaviour presented below, any reference to “order to trade” or “orders to trade” encompasses all types of orders, including initial orders, modifications, updates and cancellations, irrespective of whether or not they have been executed, irrespective of the means used to access the trading venue or to carry out a transaction or to enter an order to trade and irrespective of whether or not the order has entered into the trading venue’s order-book.

#### **Clarification of the indicators of manipulative behaviours listed in Annex I of MAR**

3. For the purposes of clarifying the non-exhaustive list of indicators laid down in Annex I of MAR, non-exhaustive examples of practices are provided.

The examples of practices listed below shall not be considered to constitute market manipulation per se, but shall be taken into account where transactions or orders to trade are examined by market participants and competent authorities. A proportionate approach shall be followed, taking in consideration the nature and specific characteristics of the financial instruments and markets concerned. The examples may be linked to and illustrate one or more indicators of market manipulation as provided in Annex I of MAR. As a result, a specific practice may involve more than one indicator of market manipulation laid down in Annex I of MAR according to how it is used, so that there can be some overlap. Similarly, although not specifically referenced here below, other practices may be illustrative of each of the indicators included herein.

Further, as the examples of practices below are not exhaustive, market participants and competent authorities shall take into account other unspecified circumstances that are considered to be potential market manipulation in accordance with the definition in MAR.

Since examples must be described briefly, they show cases that are clearly included in the notion of market manipulation or that, in some respects, point to manipulative conduct. On the other hand, there are examples of practices that actually might be considered legitimate if, for instance, as acknowledged in Recital 42 of MAR, a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with an accepted practice on the market concerned. It is nonetheless stressed that, as highlighted by Recital 39 of MAR, the persons who act in collaboration with others to commit market abuse should also be liable for such practice

or behaviour.

For some practices indicators have been identified as they can relevantly clarify and illustrate them. These additional indicators are neither exhaustive nor determinative. They shall not be considered to constitute market manipulation per se, but shall be taken into account where transactions or orders to trade are examined. The additional indicators are linked to one or more examples of practices of market manipulation as provided above but the relations described below are not limitative.

Cross referencing in the list below includes both the relevant example of practice and the additional indicator associated to this example.

4. The practice described in paragraph 7(c) and also referred to in paragraphs 10(c), 11(e) and 12(d) is relevant in the context of the scope of MAR concerning cross-venue manipulation.
5. The practice described in paragraph 7(d) and also referred to in paragraphs 10(c), 11(f) and 12(e) is relevant taking into account that the price or value of a financial instrument may depend on or may have an effect on the price or value of another financial instrument or spot commodity contract.

***In relation to indicators of manipulative behaviour relating to false or misleading signals and to price securing (Section A of Annex I of MAR)***

6. The following practices could relevantly clarify Indicator A(a) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument, related spot commodity contract, or auctioned product based on emission allowances, in particular when those activities lead to a significant change in their prices):
  - a. Buying of positions, also by colluding parties, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, on the secondary market, after the allocation in the primary market in order to post the price to an artificial level and generate interest from other investors – usually known, for example in the equity context, as colluding in the after-market of an Initial Public Offer where colluding parties are involved. This practice may also be illustrated by the following additional indicators of market manipulation:
    - i. Unusual concentration of transactions and/or orders to trade, whether generally, or by only one person using one or different accounts, or by a limited number of persons.
    - ii. Transactions or orders to trade with no other apparent justification than to increase the price of or to increase the volume of trading, namely near to a reference point during the trading day - e.g. at the opening or near the close.
  - b. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an

auctioned product based on emission allowances prices falling below, or rising above a certain level, mainly in order to avoid negative consequences deriving from changes in the price of the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor, or a ceiling in the price pattern. This practice may also be illustrated by the following additional indicators of market manipulation:

- i. Transactions or orders to trade which have the effect, or are likely to have the effect, of increasing/decreasing/maintaining the price during the days preceding the issue, optional redemption or expiry of a related derivative or convertible.
  - ii. Transactions or orders to trade which have the effect of, or are likely to have the effect of increasing/decreasing the weighted average price of the day or of a period during the trading session.
  - iii. Transactions or orders to trade which have the effect of, or are likely to have the effect of, maintaining the price of an underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, below/above a strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date.
  - iv. Transactions on any trading venue which have the effect of, or are likely to have the effect of, modifying the price of the underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, so that it surpasses/not reaches the strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date.
  - v. Transactions which have the effect of, or are likely to have the effect of, modifying the settlement price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, when this price is used as a reference/determinant namely in the calculation of margin requirements.
- c. Entering small orders to trade in order to ascertain the level of hidden orders and particularly to assess what is resting on a dark platform – usually known as ping orders.
  - d. Executing orders to trade, or a series of orders to trade, in order to uncover orders of other participants, and then entering an order to trade to take advantage of the information obtained – usually known as phishing.
7. The following practices could relevantly clarify Indicator A(b) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, lead to significant

changes in the price of that financial instrument, related spot commodity contract, or auctioned product based on emission allowances):

- a. The practice described in paragraph 6(a), usually known, for example in the equity context, as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
  - b. Taking advantage of the significant influence of a dominant position over the supply of, or demand for, or delivery mechanisms for a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, in order to materially distort, or likely to distort, the prices at which other parties have to deliver, take delivery or defer delivery in order to satisfy their obligations – usually known as abusive squeeze.
  - c. Undertaking trading or entering orders to trade in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of the same financial instrument in another trading venue or outside a trading venue, related spot commodity contract, or an auctioned product based on emission allowances – usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue). This practice may also be illustrated by the following additional indicators of market manipulation:
    - i. Execution of a transaction, changing the bid-offer prices, when the spread between the bid and offer prices is a factor in the determination of the price of any other transaction whether or not on the same trading venue.
    - ii. The indicators described in paragraphs 6(b)(i), 6(b)(iii), 6(b)(iv) and 6(b)(v).
  - d. Undertaking trading or entering orders to trade in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue or outside a trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – usually known as cross-product manipulation (trading on a financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue). This practice may also be illustrated by the following additional indicators of market manipulation:
    - i. The indicators described in paragraphs 6(b)(i), 6(b)(iii), 6(b)(iv) 6(b)(v), and 7(c)(i).
8. The following practices could relevantly clarify Indicator A(c) of Annex I of MAR (whether transactions undertaken lead to no change in beneficial ownership of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances):

- a. Entering into arrangements for the sale or purchase of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, where there is no change in beneficial interests or market risk or where beneficial interest or market risk is transferred between parties who are acting in concert or collusion – usually known as wash trades. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Unusual repetition of a transaction among a small number of parties over a certain period of time.
  - ii. Transactions or orders to trade which modify, or are likely to modify, the valuation of a position while not decreasing/increasing the size of the position.
  - iii. The indicator described in paragraph 6(a)(i).
- b. Entering into orders to trade or engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as painting the tape. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. The indicators described in paragraphs 6(a)(i) and 8(a)(i).
- c. Transactions carried out as a result of the entering of buy and sell orders to trade at or nearly at the same time, with very similar quantity and similar price, by the same party or different but colluding parties – usually known as improper matched orders. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Transactions or orders to trade which have the effect of, or are likely to have the effect of setting a market price when the liquidity or the depth of the order book is not sufficient to fix a price within the session.
  - ii. The indicators described in paragraphs 6(a)(i), 8(a)(i) and 8(a)(ii).
- d. Transaction or series of transactions designed to conceal the ownership of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances via the breach of disclosure requirements through the holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances in the name of a colluding party (or parties). The disclosures are misleading in respect of the true underlying holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances – usually known as concealing ownership. This practice may also be illustrated by the following additional indicator of market manipulation:

i. The indicator described in paragraph 8(a)(i).

9. The following practices could relevantly clarify Indicator A(d) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken or orders cancelled include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, and might be associated with significant changes in the price of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances):

- a. The practice described in paragraph 8(b), usually known as painting the tape.
- b. The practice described in paragraph 8(c), usually known as improper matched orders.
- c. Taking of a long position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and/or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of other buyers. When the price is at an artificial high level, the long position held is sold out – usually known as pump and dump.
- d. Taking of a short position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further selling activity and/or disseminating misleading negative information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to decreasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of other sellers. When the price has fallen, the position held is closed – usually known as trash and cash.
- e. Entering large number of orders to trade and/or cancellations and/or updates to orders to trade so as to create uncertainty for other participants, slowing down their process and/or to camouflage their own strategy – usually known as quote stuffing.
- f. Entering orders to trade or a series of orders to trade, or executing transactions or series of transactions, likely to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out/open a position at a favourable price – usually known as momentum ignition. This practice may also be illustrated by the following additional indicator of market manipulation:
  - i. High ratio of cancelled orders (e.g. order to trade ratio) which may be combined with a ratio on volume (e.g. number of financial instruments per

order).

10. The following practices could relevantly clarify Indicator A(e) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed):

- a. The practice described in paragraph 6(b), usually known as creation of a floor, or a ceiling in the price pattern.
- b. The practice described in paragraph 7(c), usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue).
- c. The practice described in paragraph 7(d), usually known as cross-product manipulation (trading on a financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue).
- d. Buying or selling of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, deliberately, at the reference time of the trading session (e.g. opening, closing, settlement) in an effort to increase, to decrease or to maintain the reference price (e.g. opening price, closing price, settlement price) at a specific level – usually known as marking the close. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Entering orders representing significant volumes in the central order book of the trading system a few minutes before the price determination phase of the auction and cancelling these orders a few seconds before the order book is frozen for computing the auction price so that the theoretical opening price might look higher/lower than it otherwise would do.
  - ii. The indicators described in paragraphs 6(b)(i), 6(b)(iii), 6(b)(iv), and 6(b)(v).
  - iii. Transactions carried out or submission of orders to trade, namely near to a reference point during the trading day, which, because of their size in relation to the market, will clearly have a significant impact on the supply of or demand for or the price or value.
  - iv. Transactions or orders to trade with no other apparent justification than to increase/decrease the price or to increase the volume of trading, namely near to a reference point during the trading day - e.g. at the opening or near the close.
- e. Submitting multiple or large orders to trade often away from the touch on one side of the order book in order to execute a trade on the other side of the order book.

Once the trade has taken place, the orders with no intention to be executed will be removed - usually known as layering and spoofing. This practice may also be illustrated the following additional indicator of market manipulation:

- i. The indicator described in paragraph 9(f)(i).
- f. The practice described in paragraph 9(e), usually known as quote stuffing.
- g. The practice described in paragraph 9(f), usually known as momentum ignition.

11. The following practices could relevantly clarify Indicator A(f) of Annex I of MAR (the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, or more generally the representation of the order book available to market participants, and are removed before they are executed):

- a. Entering of orders which are withdrawn before execution, thus having the effect, or which are likely to have the effect, of giving a misleading impression that there is demand for or supply of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances at that price – usually known as placing orders with no intention of executing them. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Orders to trade inserted with such a price that they increase the bid or decrease the offer, and have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument.
  - ii. The indicator described in paragraph 9(f)(i).
- b. The practice described in paragraph 6(b), usually known as creation of a floor, or a ceiling, in the price pattern.
- c. Moving the bid-offer spread to and/or maintaining it at artificial levels, by abusing of market power – usually known as excessive bid-offer spreads. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Transactions or orders to trade which have the effect of, or are likely to have the effect of bypassing the trading safeguards of the market (e.g. price limits, volume limits, bid/offer spread parameters, etc.).
  - ii. The indicator described in paragraph 7(c)(i).
- d. Entering orders to trade which increase the bid (or decrease the offer) for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in order to increase (or decrease) its price – usually known as advancing the bid. This practice may also be illustrated by the

following additional indicator of market manipulation:

- i. The indicator described in paragraph 11(a)(i).
  - e. The practice described in paragraph 7(c), usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue).
  - f. The practice described in paragraph 7(d), usually known as cross-product manipulation (trading on a financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue).
  - g. The practice described in paragraph 10(e), usually known as layering and spoofing.
  - h. The practice described in paragraph 9(e) and usually known as quote stuffing.
  - i. The practice described in paragraph 9(f) and usually known as momentum ignition.
  - j. Posting orders to trade, to attract other market participants employing traditional trading techniques (“slow traders”), that are then rapidly revised onto less generous terms, hoping to execute profitably against the incoming flow of “slow traders” orders to trade – usually known as smoking.
12. The following practices could relevantly clarify Indicator A(g) of Annex I of MAR (the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations):
- a. The practice described in paragraph 10(d), usually known as marking the close.
  - b. The practice described in paragraph 6(a), usually known, for example in the equity context, as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
  - c. The practice described in paragraph 6(b), usually known as creation of a floor, or a ceiling in the price pattern.
  - d. The practice described in paragraph 7(c), usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue).
  - e. The practice described in paragraph 7(d), usually known as cross-product manipulation (trading on a financial instrument to improperly position the price of a

related financial instrument in another or in the same trading venue or outside a trading venue).

- f. Entering into arrangements in order to distort costs associated with a commodity contract, such as insurance or freight, with the effect of fixing the settlement price of a financial instrument or a related spot commodity contract at an abnormal or artificial price.

***In relation to indicators of manipulative behaviour relating to the employment of a fictitious device or any other form of deception or contrivance (Section B of Annex I of MAR)***

13. The following practices could relevantly clarify Indicator B(a) of Annex I of MAR (whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or by persons linked to them):

- a. Dissemination of false or misleading market information through the media, including the internet, or by any other means, which results or is likely to result in the moving of the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.
- b. Opening a position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and closing such position immediately after having publicly disclosed and having put emphasis on the long holding period of the investment – usually known as opening a position and closing it immediately after its public disclosure.
- c. The practice described in paragraph 9(c), usually known as pump and dump. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. Dissemination of news through the media related to the increasing (or decreasing) of a qualified holding before or shortly after an unusual movement of the price of a financial instrument.
  - ii. The indicator described in paragraph 10(d)(i).
- d. The practice described in paragraph 9(d), usually known as trash and cash. This practice may also be illustrated by the following additional indicators of market manipulation:
  - i. The indicators described in paragraphs 10(d)(i) and 13(c)(i).
- e. The practice described in paragraph 8(d), usually known as concealing ownership.

- f. Movement or storage of physical commodities, which might create a misleading impression as to the supply of, or demand for, or price or value of, a commodity or the deliverable into a financial instrument or a related spot commodity contract.
- g. Movement of an empty cargo ship, which might create a false or misleading impression as to the supply of, or the demand for, or the price or value of a commodity or the deliverable into a financial instrument or a related spot commodity contract.

14. The following practices could relevantly clarify Indicator B(b) of Annex I of MAR (whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate investment recommendations which are erroneous, biased, or demonstrably influenced by material interests):

- a. The practice described in paragraph 13(a). This practice may also be illustrated by the following additional indicator of market manipulation:
  - i. Entering orders to trade or transactions before or shortly after the market participant or persons publicly known as linked to that market participant produce or disseminate contrary research or investment recommendations that are made publicly available.
- b. The practice described in paragraph 9(c), usually known as pump and dump. This practice may also be illustrated by the following additional indicator of market manipulation:
  - i. The indicator described in paragraph 14(a)(i).
- c. The practice described in paragraph 9(d), usually known as trash and cash. This practice may also be illustrated by the following additional indicator of market manipulation:
  - i. The indicator described in paragraph 14(a)(i).

### **3 Minimum thresholds for the exemption of certain participants in the emission allowance market from the requirement to publicly disclose inside information**

#### **3.1 Background/Mandate**

30. MAR mandates the Commission to produce a delegated act (DA) establishing the minimum thresholds of carbon dioxide equivalent (CO<sub>2eq</sub>) and of rated thermal input for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information.
31. On 21 October 2013, the Commission mandated ESMA to provide its technical advice on this particular element of MAR, to be delivered within eight months from the entry into force of the MAR text. This mandate invites ESMA to take into account the input of the external study commissioned by the Directorate-General Climate Action of the Commission (DG Clima) in the matter.
32. As explained in the DP published on 14 November 2013, ESMA did not consult on the issue of minimum thresholds of CO<sub>2eq</sub> and rated thermal input, for the purpose of the exemption from the disclosure requirements for certain participants in the emission allowance market, given that, at the time the contractor's report, which sets out the expected outputs on the identification of possible options for the minimum thresholds and the assessment of their impact, was not available.
33. This report<sup>11</sup> was published on 8 July 2014. The analyses of the expected impacts and first stakeholder input collected for its preparation by the DG Clima consultant (Consultant) have been used for the purpose of the CP. However, the actual impacts as of MAR's entry into force in 2016 will be driven by a number of factors. The views expressed in the report represent only the views of the contractor and not those of DG Clima.

#### **3.2 Analysis**

##### **3.2.1 Introduction**

34. MAR has expanded the scope of the market abuse regime to emission allowances as defined under the new MiFID II.
35. Article 17(2) of MAR requires an emission allowance market participant (EAMP) to publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business, including aviation activities

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<sup>11</sup> [http://ec.europa.eu/clima/policies/ets/oversight/docs/ee\\_and\\_nrf\\_analysis\\_en.pdf](http://ec.europa.eu/clima/policies/ets/oversight/docs/ee_and_nrf_analysis_en.pdf).

as specified in Annex I to Directive 2003/87/EC<sup>12</sup> or installations within the meaning of Article 3(e) of that Directive which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part. Thus, this relates to an economic group of entities.

36. In relation to the type of information to be disclosed, as per Article 17 (2) of MAR such disclosure should include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations. The aim of this information is to provide the required level of transparency in order to preserve the integrity of the market. Furthermore, Recital 51 of MAR states that the information to be disclosed should concern the physical operations of the disclosing party and not own plans or strategies for trading emission allowances, auctioned products based thereon, or derivative financial instruments relating thereto.
37. An EAMP is defined in Article 3(20) of MAR as “*any person who enters into transactions, including the placing of orders to trade, in emission allowances, auctioned products based thereon, or derivatives thereof and who does not benefit from an exemption pursuant to the second subparagraph of Article 17(2)*”. This exemption excludes from the definition of EAMP those participants in the emission allowance market where the installations or aviation activities it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold (to be determined) of carbon dioxide equivalent and where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold (to be determined). Hence, reading together with the first subparagraph, the thresholds apply at a group level and relate to all the installations of an economic group of entities. Furthermore, the annual CO<sub>2eq</sub> threshold and the rated thermal input threshold are to apply cumulatively for the requirement NOT to apply. In other words, exceeding one of the two thresholds is sufficient for the disclosure obligations under Article 17(2) to apply.
38. EAMPs are therefore a specific sub-set of the participants in the emission allowance market. In other words, among the participants in the emission allowance market, only those above either of the minimum thresholds (to be set) qualify as EAMPs, and the requirement of public disclosure of inside information will apply only to them.
39. Inferring from the definition of operators, installations and aircraft operators in Directive 2003/87/EC (Article 3(e), (f) and (o))<sup>13</sup>, participants in the emission allowance market

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<sup>12</sup> 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 – <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0087>

<sup>13</sup> Article 3 of Directive 2003/87/EC:

(e) “installation” means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

f) “operator” means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated;

include companies producing CO<sub>2</sub>, the so-called emitters of emissions. Given the EEA relevance of the Directive, this includes installations located in the participating EEA/EFTA countries. Furthermore, Regulation (EU) No 1031/2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances<sup>14</sup> includes investment firms and credit institutions among the persons eligible to participate in the bids of emission allowances organised by the auction platform (primary market auction). Therefore, financial intermediaries can also be participants in the emission allowance market. Finally, participants in the emission allowance market also include traders and any other person entering into secondary transactions in emission allowances and derivatives thereof (secondary market trading). The situation today is that a number of emitters of emissions, such as energy producing companies and large industrials, have developed an active and continued presence in the emission allowance market, often through dedicated trading entities, which could qualify as professional traders (in the conventional understanding of that term). Such trading entities, which are owned or controlled or otherwise related to companies with physical operations as specified in Directive 2003/87/EC which in turn do not qualify for the exemption under the second paragraph of Article 17(2), would also satisfy the definition of an EAMP as a subset of the participants in the emission allowance market.

40. Those participants in the emission allowance markets not falling under the definition of EAMP are not subject to the inside information disclosure requirements set out in Article 17(2) as, pursuant to Article 7(4) of MAR, when their aggregate emissions and rated thermal input are at or below the minimum thresholds, the information about their physical activities does not qualify as inside information, as it is deemed not to have a significant effect on the price of emission allowances, of auctioned products based thereon or on the prices of related derivative financial instruments.
41. However, it should be noted that these persons exempted from the requirement of public disclosure of inside information, remain subject to the other market abuse prohibitions, in particular the prohibition of insider dealing in relation to any other inside information they have access to.
42. Where participants in the emission allowance market, including EAMPs, are also issuers of financial instruments, they should continue to comply with the requirements applicable to issuers of financial instrument under Article 17 of MAR.
43. The objective pursued by this exemption is, as explained in Recital 51, to impose a disclosure requirement only to those EU-ETS operators which, by virtue of their size and activity, can reasonably be expected to be able to have a significant price effect, with the intent to avoid exposing the market to reporting that is not useful and to maintain cost-efficiency of the measure by not applying it to all market participants.

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(o) "aircraft operator" means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft.

<sup>14</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:302:0001:0041:EN:PDF>.



### 3.2.2 About the thresholds

44. MAR recognises that not all non-public information about the physical operations of the market participants is relevant to the effective price formation. So, the threshold to be set is a materiality threshold.
45. However, ESMA is mindful that, in setting such a threshold, there is a risk that important information concerning physical operations in relation to emission allowances, that an investor can base its investment decision upon, will never reach the market because the exempted market participant will never have to disclose it. In other words, this threshold is an “absolute” threshold below which no information is required to be disclosed.
46. Therefore if the exempting threshold is set too high, there is a risk that the overall objective of preventing market abuse in the form of insider dealing in the emission allowance market is not met.
47. Furthermore, it should be recalled that the MAR regime requires the disclosure of information which is inside information. It means that the disclosing market participant needs to assess on a case by case basis whether the information under consideration meets the criteria of inside information. This implies that an EAMP, i.e. a non-exempted market participant, is not expected to publicly disclose any information about its physical operations. The market participant will have to properly assess the information at stake, taking into account the market circumstances and other external factors that may have a price effect on an emission allowance at the particular point in time when the information arises. Considering this, the risk of over disclosure or market noise is expected to be relatively low, provided that the disclosing market participants act appropriately.
48. ESMA acknowledges that there can be participants in the emission allowance market that will hold information about their own physical activities that if made public would not be material, i.e. would not have a price effect. It may be that participants, when in doubt, would tend towards disclosing rather than not. Thus, imposing to assess systematically whether they hold inside information is an unnecessary burden and therefore the threshold should be neither set at zero nor set too low. Furthermore, this materiality threshold is to be used to simplify the application of MAR's inside information definition and the disclosure duty in a specific context where non-public information comes not from a single issuer, as in other financial instruments, but from a large number of entities.

### 3.2.3 First stakeholder input

49. The Consultant has organised a workshop and performed fieldwork to gather first input from a range of technical experts. A total of 13 responses were received to a survey. Of these, three were submitted by industry associations on behalf of a wider population of interested firms. This first stakeholder engagement indicated that significant corporate decisions affecting the status of availability and usage of industrial facilities could have a material market impact — and as such should be above any threshold if sufficiently large-scale. However, there was consensus among those firms participating in the Consultant's fieldwork that prices in the emission allowance market are largely determined by

macroeconomic variables and policy developments. Indeed, currently investors appear to rely mainly on publically available information related to macroeconomic factors and policy developments when making decisions about buying and selling allowances.

### 3.2.4 Proposals of thresholds

50. In order to propose options for thresholds, the Consultant has explored different approaches:
- Event analysis. A number of “events” (such as the announcements of plant closures or the mothballing of a facility by EU ETS participants) which could have had an effect on aggregate emissions were identified. Price and price volatility at the time of the event were reviewed to assess whether any change in these variables was detectable. The aim is to differentiate between volume changes which do not appear to be associated with a price effect from those that do associate with a price effect.
  - Applying a similar proportion of firms captured under ACER guidance for REMIT disclosures. Under this approach, the disclosure threshold would be set such that a similar proportion of participants in the emission allowance market in the EU ETS are captured as the ones captured by the ACER guidelines for the REMIT information disclosure requirements (i.e. the proportion of power firms with power generation units exceeding 100MW), which is around 30 per cent of energy market firms.
  - Direct REMIT benchmarking. Directly linking the EU ETS threshold to the recommended REMIT threshold of 100 MW generation capacity per installation above which participants in the energy market will have to disclose inside information<sup>15</sup>.
  - Analytical referencing. Identifying from past papers by carbon market analysts concerning the drivers of carbon market prices, participants in the emission allowance market judged important enough to have an impact on the carbon price.
51. The last approach, analytical referencing, was eventually considered by the Consultant as not viable to set a threshold, due to the lack of relevant information from previous papers published by analysts on the impact caused by the actions undertaken by individual carbon producing firms.
52. On the basis of the above approaches, different figures were obtained in relation to emissions of carbon dioxide equivalent:

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<sup>15</sup> It should be recalled that the MAR threshold would not apply on a per installation basis but on a company group level basis, potentially grouping several installations.

- Using the event based approach and a statistical analysis of market impact (two different tests were applied and two interpretations of the statistical significance were used). There was not a sharp divide between events associated with price effects which are detectable in statistically significant terms, and those which are not — e.g. an event estimated to have a volume effect of 5.8 million tonnes had a detectable effect, but several larger ones did not. The resulting figures are:
  - 20 million tonnes of CO<sub>2eq</sub> a year (both tests triggered at 5% statistical significance level);
  - 6 million tonnes of CO<sub>2eq</sub> a year (both tests triggered 10% (less strict) statistical significance level);
  - 3 million tonnes of CO<sub>2eq</sub> a year (one of tests triggered 10% (less strict) statistical significance level).
- 1 million tonnes of CO<sub>2eq</sub> a year using a weighting of operators implied by REMIT.
- 0.5 million tonnes of CO<sub>2eq</sub> a year using direct REMIT benchmarking.

53. It should be noted that the price movements of emission allowances and the specific emission allowances for aviation activities appear to be aligned and correlated. In order to ensure consistency in the regime, irrespective of the nature of the activities of the emitters (i.e. installations or aviation activities), it seems appropriate that the threshold for rated thermal input is equivalent to the threshold of emission of carbon dioxide. On the basis of the calculation method used by the Consultant, but using average of emission metrics defined in the EU ETS Monitoring and Reporting Regulation<sup>16</sup> between 94,6 and 101 tCO<sub>2</sub>/TJ (0.3 and 0.36 kgCO<sub>2</sub>/kWh) for coal-fired stations, the equivalent rated thermal input figures are<sup>17</sup>:

- 20+ million tonnes of CO<sub>2eq</sub> is equivalent to around 8,110 MW rated thermal input.
- 6 million tonnes of CO<sub>2eq</sub> is equivalent to 2,430 MW rated thermal input.
- 3 million tonnes of CO<sub>2eq</sub> is equivalent to 1,220 MW rated thermal input.
- 1 million tonnes of CO<sub>2eq</sub> is equivalent to 405 MW rated thermal input.
- 0.5 million tonnes of CO<sub>2eq</sub> is equivalent to 203 MW rated thermal input.

### 3.2.5 Analysis

54. The Consultant estimated that the total number of emitting companies, around 930, would be in scope if no threshold was set, representing thus 100% of the emissions in

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<sup>16</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R0601>.

<sup>17</sup> Based on coal-powered electricity production.

2011<sup>18</sup>. Based on the output of the analyses of the Consultant, the effect of the various proposed thresholds in terms of the number of market participants affected and in terms of coverage of verified emissions are estimated as follows:

- 20+ million tonnes of CO<sub>2eq</sub> a year: 21 companies would be captured by the threshold (approximately 71% being energy producers and the rest other industrial emitters) accounting for more than 60% of the total verified emissions, and 906 companies would be exempted;
- 6 million tonnes of CO<sub>2eq</sub> a year: 70 companies would be captured by the threshold (approximately 56% being energy producers and the rest other industrial emitters) accounting for 70% of the total verified emissions, and 857 companies would be exempted;
- 3 million tonnes of CO<sub>2eq</sub> a year: 125 companies would be captured by the threshold (half being energy producers and the other half industrial emitters) accounting for slightly more than 80% of the total verified emissions, and 802 companies would be exempted;
- 1 million tonnes of CO<sub>2eq</sub> a year : 280 companies would be captured by the threshold, and 650 companies would be exempted;
- 0.5 million tonnes of CO<sub>2eq</sub> a year: 379 companies would be captured by the threshold (42% being energy producers and 58% other industrial emitters), accounting for approximately 97% of the total verified emissions, and 548 companies would be exempted.

55. From a policy perspective, ESMA is taking into account the following elements for advising on a possible threshold:

- a) The thresholds to be set are absolute thresholds: any participant below the threshold will not have to disclose anything whatsoever;
- b) Participants above the thresholds will not have to disclose on a systematic basis all information about their emissions, but only the information which is inside information: case by case assessment would have to be conducted. This notably implies that these participants must have in place the proper systems and procedures and learn how to conduct such assessment. They would also incur compliance costs associated with gathering and publishing information.
- c) According to the Consultant's findings, the participants' specific information available to the market is currently limited. Although this type of information is perceived as less relevant than macroeconomic data and policy developments by those technical experts participating in the fieldwork, it is still considered useful. Thus, a higher transparency will have the benefit to increase the general

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<sup>18</sup> Using Carbon Market Data (2011, which aggregates information at a company rather than installation level).

availability of such information to the investors, notwithstanding the fact the scale of improvement in this context is difficult to estimate.

- d) Any past event that has proved to be statistically significant (applying the commonly used 5% statistical significance level) in terms of market impact must be considered and, as a matter of policy, not be excluded due to the level of the threshold.

56. Against this background, ESMA considers that the thresholds to be set for the exemption should not be higher than 6 million tonnes a year and 2,430 MW rated thermal input as it would otherwise result in exempting companies which cannot be deemed not to hold inside information according to the event-based analysis of the Consultant.
57. Furthermore, Recital 51 requires that the disclosure requirement on EAMPs to be cost-efficient and to avoid reporting of information that would not be useful to the market. The inputs from the Consultant in these respects demonstrate that the lower the thresholds the higher the number of companies not being exempted, and thus the higher the cost impacts. In addition, the higher is the number of companies non-exempted the greater is the probability of including companies that actually do not hold information having a market impact, and thus the unnecessary reporting increases as well.
58. Taking into consideration the cost-benefit analysis conducted by the Consultant on the various options for thresholds and applying the above mentioned revised metrics for equivalence in the rated thermal input, ESMA considers on balance that it can be recommended to set the threshold for exemption at:
  - 6 million tonnes a year; and
  - 2,430 MW rated thermal input.
59. Such thresholds would fulfil the cost-efficiency objective while being admissible according to the event-based approach. They would allow excluding from the scope of the disclosure requirement those companies holding information with no significance in terms of market impact, while ensuring a sufficient coverage with respect to the verified emissions captured (70%).
60. Finally, ESMA also suggests that these thresholds are reviewed by the Commission, on a periodic basis and at least as part of the assessment report to be submitted to the co-legislators 3 years after entry into application, to assess whether they remain appropriate in light of:
  - a) the higher transparency they should have provided to the emission allowance market;
  - b) the development and maturity of this market;
  - c) the impact in terms of numbers of actors participating in this market; and

- d) whether the integration in such actors' investment decision process of firm-specific information has increased and/or impacted the price formation process.

### 3.3 Technical advice

**Advice on the minimum thresholds of carbon dioxide and rated thermal input to be established under Article 17(2) of MAR**

1. For the purposes of application of the second subparagraph of Article 17(2) of MAR:
  - a. the minimum threshold of carbon dioxide (CO<sub>2</sub>) equivalent is set at 6 million tonnes a year;
  - b. the minimum threshold of rated thermal input is set at 2,430 MW.
2. These thresholds could be reviewed as appropriate, and at least in accordance with Article 38 of MAR, to assess their functioning with regards to, inter alia:
  - a. the expected increase in transparency of the emission allowance market;
  - b. the development and maturity of the emission allowance market;
  - c. the number of participants in the emission allowance market; and
  - d. the impact on availability of firm-specific information and on price formation or investment decisions in the emission allowance market.

## **4 Determination of the competent authority for notification of delays in public disclosure of inside information**

### **4.1 Background/Mandate**

62. Pursuant to Article 17(3) of MAR, the Commission shall adopt delegated acts specifying the competent authority for the notifications of paragraphs 4 and 5 of Article 17.
63. ESMA received a mandate (See Annex I) from the Commission to provide a technical advice on this matter. In delivering such mandate, ESMA should take into account in particular, but not exclusively, the fact that according to MAR the competent authority is generally defined as the one of the Member State (MS) of the trading venue where the financial instruments have been admitted to trading or are traded, the fact that following the expansion of the scope of the market abuse framework it applies not only to financial instruments admitted to trading on regulated markets but also to financial instruments admitted to trading or traded in MTF and OTFs, the fact that only issuers who have requested or approved admission to trading or trading of their financial instruments on a trading venue are subject to the disclosure requirements and thus the possibility of delaying such disclosure and the fact that issuers falling into the scope of this obligation may have their financial instruments traded on different trading venues in different MSs. ESMA is also invited to provide its technical advice to specify the competent authority for notification of delays by emission allowance market participants (EAMPs).

### **4.2 Analysis**

64. 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 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.
65. 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 DA (Article 17(2)).
- Incorporation in MAR of the manner in which the issuer discloses inside information and of the requirement to post for 5 years that information on its website (Article 17 (1)).
- Introduction of the possibility for SME growth markets issuers to post inside information on the trading venue website instead of their own website (Article 17(9)).
- Introduction of an additional possibility of delaying public disclosure, under certain conditions, in order to preserve the stability of the financial system (Article 17(5)).
- Introduction of notification requirements to the competent authority in case of delay in disclosure of inside information (Articles 17(4) and 17(5)).

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

- An ex-post notification to the competent authority in the general cases of delays (Article 17(4)), covering both issuers of financial instruments and 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 can be used only by issuers of financial instruments which are credit institutions or financial institutions.

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

#### 4.2.1 Determination of the relevant competent authority for notification of delays by issuers of financial instruments

68. Article 22 of MAR generally defines the competent authority as the one of the MS of the trading venue where the financial instruments have been admitted to trading or are traded. For the purpose of delaying disclosure of inside information under Articles 17(4) and 17(5), there are some elements to consider in relation to the determination of the competent authority:

- Firstly, only issuers who have requested/approved admission to trading or trading of their financial instruments on a trading venue are subject to the disclosure requirements, and thus to the possibility of delaying such disclosure.

- Secondly, such issuers may have their financial instruments traded on trading venues in different MSs, be they the same type of financial instruments (e.g. shares) traded in different MSs or different types of financial instruments issued by the same issuer and traded in different MSs.

69. As a consequence, under the general definition of competent authority included in MAR Article 22, a single issuer could potentially have more than one competent authority to which it has to notify the delay under Article 17(4) and Article 17(6).
70. However, the same Article 17(4) and Article 17(6) require the notification to be provided to only one competent authority.
71. Different approaches were suggested in the DP to determine the competent authority for the purpose of notifying delays. They were summarised in the CP and their limits discussed.
72. Ultimately, to ensure that in all instances the single competent authority receiving the notification is the one with the most interests in market supervision and to avoid in all cases the exercise of discretion by the issuer, ESMA proposed in the CP a new approach whereby the competent authority for the purpose of notifications under Articles 17(4) and 17(6) is defined as the competent authority of either:
  - a) The MS where the issuer's registered office is located, provided that the issuer's equity securities are traded, with its consent, on a trading venue in the same MS. This criterion applies even if other types of financial instruments of the issuer are traded on a trading venue in a different MS.
  - b) The MS where the issuer's registered office is located, provided that (i) the issuer has no equity securities traded on a trading venue with its consent, and (ii) any of the other financial instruments of the issuer are traded, with its consent, on a trading venue in that MS. In the event that the issuer subsequently consents to the trading of its equity securities on a trading venue, point b) no longer applies.
  - c) For issuers not covered in paragraphs a) or b):
    - i. The MS where equity securities of the issuer were admitted to trading/traded on a trading venue for the first time with the issuer's consent, and are still traded.
    - ii. In case where no equity securities are admitted to trading/traded on a trading venue, the MS where any of the other financial instruments of the issuer were admitted to trading/traded on a trading venue for the first time with the issuer's consent, and are still traded. In the event that the issuer subsequently consents to the trading of its equity securities on a trading venue, point c)(ii) does not apply any longer.

73. Point c) would include all issuers incorporated in a third country (third country issuers), EU issuers whose equity securities are traded on a trading venue in a MS which is not the same MS where the issuers' registered office is located, and EU issuers that have not issued equity securities and whose financial instruments are traded on a trading venue in a MS which is not the same MS where the issuers' registered office is located.
74. By equity securities, ESMA means the class of transferable securities referred to in MiFID II (Article 4(44)(a)) as shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares.
75. Taking into account the expanded scope of the MAR in terms of financial instruments covered, ESMA considers that this approach has the merit of certainty as it defines the single authority, without any discretion left to the issuer. The approach relies on using equity securities as the primary criterion. The objective is to define the single competent authority which has the most supervisory and market monitoring interests, as most of the inside information affects primarily the shares or other equity securities of an issuer. Besides, in most cases, the outcome in terms of relevant competent authorities is expected to be the same as for those determined under Article 19(2) for the purpose of notification of managers' transactions, primarily defined as the competent authority of the MS where the issuer is registered.
76. The suggested approach has been widely supported, with the vast majority of respondents agreeing with the "identification process" defined in the draft TA. Some appreciated that in the majority of cases, i.e. under point a) and b), the designated competent authority would be the one of the MS where the issuer's registered office is located. Therefore, in this respect, the final TA remains largely unchanged with the exception of some drafting amendments aiming at clarifying the content of the advice and at keeping the wording aligned with that of MAR, namely substituting the expression "*where the issuer's registered office is located*" with "*where the issuer is registered*".
77. In the CP, ESMA sought the views of the stakeholders on a specific issue which had not yet been covered in the approach of the draft TA and relating to the particular cases, under point c) of paragraph 2 of the draft TA, where the issuer's financial instruments were admitted to trading or traded for the first time, and with the issuer's consent, simultaneously in different MSs. The majority of respondents proposed to use the "most liquid market" concept as a criterion in the sub-case of "simultaneity" under point c). Among these responses, some of them argued that the concept of "most liquid market" would be in line with the approach taken under Regulation (EU) No 600/2014 (MiFIR). Consequently, considering the fact that the draft TA should identify a single competent authority in any possible case, ESMA has introduced some amendments to cover the above mentioned situations. The final advice now includes a reference to the competent authority of the "most relevant market in terms of liquidity", as it will be defined under the implementing text of Article 26 of MiFIR.
78. ESMA also sought the input of the stakeholders on the need to determine in a different manner to that proposed for Article 17(4) of MAR, the competent authority for the purpose of Article 17(5) for delays for preserving the stability of the financial system. The

majority of respondents supported the approach of having a single procedure for the purpose of both Article 17(4) and (5) of MAR, arguing that a double procedure would over-complicate the regulatory framework. In response to the minority of responses that asked for the competent authority of the home MS to be selected in cases under Article 17(5), it should be noted that, as already said, in the vast majority of cases, especially for credit or financial institutions able to use the provision of Article 17(5), the competent authority identified by the draft TA would be the one of the home MS, i.e. the one of the MS where the institution is registered. Moreover, Article 17(6) of MAR requires the “designated” competent authority, in cases of application of Article 17(5), to consult the national central bank, the macro-prudential authority or the national authority responsible for the supervision of the credit or financial institution: the “collaboration” with supervisory authority is thus already embedded in MAR level 1.

79. Finally, it should be noted that MAR Article 17(1), paragraph 3, explains that the obligations under Article 17 apply also to issuers who have requested admission of their financial instruments to trading on a regulated market or on an MTF. The final advice has been complemented in order to explicitly cover this situation.

#### 4.2.2 Determination of the relevant competent authority for notification of delays by emission allowance market participants

80. The duty to notify delays in disclosure of inside information to the competent authority set out in Article 17(4) also applies to emission allowance market participants (EAMPs), provided that they are not exempted according to Article 17(2), paragraph two.
81. In terms of scope, it should be remembered that MAR applies both to the bid in the auction process and the transactions on secondary markets of emission allowances (Article 2(1) of MAR).
82. Article 43 of the Auctioning Regulation (EU No 1031/2010)<sup>19</sup>, which notably regulates the bidding in the auction process, requires that the competent authorities for supervising and enforcing the market abuse related provisions of that regulation are the ones designated under Article 11 of MAD i.e. the single administrative authority within a MS in charge of market abuse for financial markets.
83. In addition, one of the objectives of including emission allowances in the scope of MAR was to “make possible to attribute the market oversight competences for both spot and derivatives trading to just one category of public authorities – financial supervisors”<sup>20</sup>.
84. In the CP, ESMA explained that to ensure that a single competent authority is identified with certainty also for EAMPs, the competent authority for the purpose of the notifications

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<sup>19</sup> Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (Text with EEA relevance): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1031-20111125&from=EN>.

<sup>20</sup> Quote from EU Com FAQ on Emission allowances within the frame of MiFID and MAD review ([http://europa.eu/rapid/press-release\\_MEMO-11-719\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_MEMO-11-719_en.htm?locale=FR)).

under Article 17(4) should be the competent authority of the MS where the EAMP is registered, as under Article 19(2) of MAR, rather than the competent authority of each of the trading venues where the emission allowances are traded.

85. An EAMP could be member of several auction platforms and/or secondary markets potentially across different MSs, thus requiring notification to all competent authorities of the trading venues where the EAMP is active and this could in some cases imply multiple notifications by the EAMP. The choice of the competent authority of the MS where the EAMP is registered is instead a solution that always identifies with certainty a single competent authority, and this limits the administrative burden on EAMPs by ensuring that they do not have to make multiple and parallel notifications to several competent authorities.
86. A small group of respondents to the CP, who are participants in the emission allowance market, rejected ESMA's proposal for EAMPs. They argued that any delayed disclosure notified in accordance with REMIT should discharge the EAMP from any additional notification under MAR. They advocated that the involved competent authorities (energy regulators and financial regulators) should cooperate with ACER to exchange information between them and avoid duplicative and/or new obligations on EAMPs. It should be noted that under REMIT, market participants have to notify ACER and the relevant National Energy Regulator in case of delayed disclosure of inside information regarding their physical operations (Article 4.2 of REMIT). For this purpose a dedicated ACER notification platform has been created<sup>21</sup>.
87. This request of modification of the draft TA should be read in conjunction with the mandate ESMA received. The Commission mandate states that ESMA is requested "*to provide its technical advice to specify the competent authority for notification of delays by emission allowance market participants that are not exempted pursuant to the second subparagraph of Article 12 (2)*". In this context, competent authority means the single administrative authority designated by each MSs for the purpose of MAR, as required by MAR Article 22. Against this background, it is clear that ESMA has to identify a competent authority also for EAMPs, and cannot delegate the responsibility of receiving the notification of delays under MAR to other types of authorities, such as National Energy Regulators and ACER.
88. Besides these concerns regarding the general approach of the draft TA for EAMPs, the actual proposal presented in the CP, i.e. selection of the competent authority where the EAMP is registered has not raised any issue among respondents, nor were other possible criteria proposed. Therefore ESMA is confirming the approach proposed in the CP.

### 4.3 Technical advice

<b>Advice on the determination of the competent authority for the notifications of delays</b>
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<sup>21</sup> Link to the notification platform: <https://www.acer-remit.eu/np/art42>.

### **in public disclosure of inside information under Articles 17(4) and 17(5) of MAR**

1. For the purpose of this advice, “equity securities” mean the class of transferable securities referred to in Article 4(44)(a) of Directive 2014/65/EU.
2. For the purpose of notifications under Articles 17(4) and 17(5) of MAR, the competent authority to which an issuer of financial instruments should notify the delay in disclosure of inside information, is the competent authority of the Member State where the issuer is registered:
  - a. if and as long as the issuer has equity securities which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, on a trading venue in that Member State; or
  - b. if and as long as the issuer does not have equity securities which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, on a trading venue in any Member State, provided that the issuer has any other financial instruments which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, on a trading venue in the Member State where the issuer is registered.
3. For issuers not covered in paragraph 2, including issuers incorporated in a third country, the competent authority to which an issuer of financial instruments should notify the delay is the competent authority of the Member State where:
  - a. the issuer has equity securities which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, on a trading venue for the first time; or
  - b. the issuer has any other financial instruments which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, on a trading venue for the first time, if and as long as the issuer does not have equity securities admitted to trading or traded with its content, or for which it has requested admission to trading, on a trading venue in any Member State.

Where under point (a) or (b) of this paragraph the issuer has the relevant financial instruments which are admitted to trading or traded with its consent, or for which the issuer has requested admission to trading, for the first time simultaneously on trading venues in more than one Member State, the competent authority to which an issuer of financial instruments should notify the delay is the competent authority of the trading venue that is the most relevant market in terms of liquidity, as determined in the [implementing text] of Article 26(9)(b) of Regulation (EU) No 600/2014.

4. For the purpose of the notifications under Article 17(4), the competent authority to which an emission allowance market participant should notify the delay is the competent authority of the Member State where the emission allowance market participant is registered.

## 5 Managers' transactions: type of transactions to report and trading during a closed period

89. According to Article 19(13) and (14), the Commission should adopt delegated acts to specify:
- Types of transactions triggering the transactions notification and disclosure duties;
  - The circumstances under which trading during a closed period may be permitted by the issuer including the circumstances that would be considered as exceptional and the types of transaction that would justify the permission for trading.
90. ESMA received a mandate (see Annex II) from the Commission to provide technical advice on this matter.

### 5.1 Introduction

91. Article 19 of MAR sets out a transactions notification requirement for persons discharging managerial responsibilities within an issuer of a financial instrument ("PDMRs") as well as persons closely associated with them ("closely associated persons"). This obligation, which aims to improve the transparency of the financial markets, was already included in MAD but has been modified by MAR in a number of key domains, notably the scope.
92. Under Article 19, PDMRs and closely associated persons should 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, and the issuer itself is responsible for ensuring that the information is made public, unless national law provides that the competent authority itself makes public the information.
93. MAR has expanded the scope of the obligation to notify PDMRs and closely associated persons' transactions from that in MAD 2003/6 in two areas. Firstly, MAR has generally extended the scope of the financial instruments covered to financial instruments admitted to trading, or for which a request has been made to trade on a RM and a MTF, and those traded on an OTF or OTC. However, it should be noted that the notification and disclosure requirements of PDMRs/closely associated persons' transactions will only apply to those issuers that have requested or approved admission to trading of their financial instruments on one of the venues. Secondly, the scope of instruments falling under the obligation explicitly covers both shares and debt instruments of the said issuer, derivatives or other financial instruments linked to them, and emission allowances, related auction products or related derivatives.
94. MAR also clearly imposes a notification obligation to PDMRs and closely associated persons within an emission allowances market participant (EAMP), and PDMRs and closely associated persons within an entity referred to in Article 19(10), namely an



auction platform, an auctioneer or an auction monitor (“auction entity”). Furthermore, similarly to issuers of financial instruments, MAR requires EAMPs and auction entities to make public the information notified by the PDMRs.

95. Once the transactions executed by a PDMR or a closely associated person within a calendar year cumulatively amount to €5,000 (€20,000 if a competent authority has decided to increase this threshold in accordance with Article 19(9)), every subsequent transaction should be notified regardless of its amount. The €5,000 (€20,000) threshold should be calculated by adding the amounts of all transactions effected with no netting. The transactions executed by a PDMR or a closely associated person before the threshold is reached are not required to be notified to the relevant competent authority nor to the issuer, EAMP or auction entity.

## 5.2 Types of transactions triggering the duty to notify

96. ESMA is mandated to provide technical advice to the Commission specifying the types of transactions referred to in Article 19(1), which trigger the duty to notify.
97. PDMRs and closely associated persons must notify the issuer, the EAMP or the auction entity, and the relevant competent authority on every transaction conducted on their own account. In turn, the issuer, the EAMP or the auction entity (or the relevant competent authority, if decided so by the relevant Member State, in accordance with Article 19(3), third subparagraph) should disclose the notified information.
98. Article 19(7) already provides a non-exhaustive list of transactions to be notified, referring specifically to:
  - a) pledging or lending of financial instruments;
  - b) transactions undertaken by any person professionally arranging or executing transactions on behalf of a PDMR or a closely associated person, including where discretion is exercised;
  - c) transactions made under a life insurance policy.
99. In relation to Article 19(7)(a) requiring the reporting of lending or pledging of the financial instruments in scope in accordance to Article 19(1)(a) (shares or debt instruments of an issuer, derivatives or other financial instruments linked to them), ESMA wishes to clarify that borrowing transactions executed by a PDMR or a closely associated person need to be notified and disclosed as well.
100. As already explained in the CP, Article 19(7)(b), in conjunction with Recital 58 of MAR, clarifies that transactions executed by a third-party on behalf of the PDMR or the closely associated person, which are in the scope of Article 19 (with the exception of transactions made under a life insurance policy under Article 19(7)(c)), include transactions executed for the account of the PDMR or the closely associated person by a third party exercising discretion (for instance, when there is no instruction from the PDMR or closely associated person) as regards the investment decision of the contract. Examples of this type of

transactions would be transactions of a so-called “family office”, of a trust, or of a portfolio managed under mandate, and in general all types of investment vehicles where transactions are arranged or executed on behalf of a PDMR or a closely associated person.

### 5.2.1 General Approach

101. ESMA considers that the scope of the transactions to be covered under the empowerment of Article 19(14) is broad and cannot be limited to only the three types of transactions explicitly listed in Article 19(7). This will not only facilitate the achievement of full transparency of PDMRs and closely associated persons’ transactions, in line with Recital 58 of MAR, but also mitigate the risk of circumvention of the requirement by means of particular types of operations.
102. Therefore, although the three types of transactions referred to in Article 19(7) have to be considered individually, ESMA considers it useful to identify the broad types of transactions in scope, which are further specified and supplemented by a non-exhaustive list of particular types of transactions to be notified.

### 5.2.2 Broad type of transactions

103. Article 19(1) states that PDMRs and closely associated persons “*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 the 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 own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto.”*
104. Providing that a transaction relates to an instrument in the scope of the notification requirements (i.e. shares or debt instruments of an issuer, derivatives or other financial instruments linked to them, and emission allowances, or related auction products and derivatives), 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, MTF, OTF or OTC), is to be notified.
105. Article 19(1) refers to “every transaction” conducted on a PDMR’s or a closely associated person’s own account. Therefore ESMA considers that the transactions to be notified should include, once the €5,000 (or €20,000, if decided so by the NCA under MAR Article 19(9)) threshold is reached, any acquisition, disposal, subscription or exchange of financial instruments of an issuer or related financial instruments, irrespective of its size or significance in relation to the market of the given instrument. The term “acquisition”

also includes, among others, transactions where the PDMR or the closely associated person does not play an active role in the investment decision, such as gifts, inheritance and donations received by a PDMR or a closely associated person. Similarly, the term “disposal” should encompass any donation or gift by a PDMR or a closely associated person.

106. A number of respondents raised their concerns regarding the relevant date for notification. Article 19(2) clearly states that the notification has to be made within three working days of the transaction date. The date of the transaction is to be determined by the applicable national law. With respect to gifts, donations and inheritance, this issue is dealt with in the section dedicated to “*Gifts, inheritance, donations*”.
107. A second concern on the relevant date for notification expressed by some respondents relates to an issue embedded in MAR level 1 text. Article 19(1) requires PDMRs to notify the issuer no later than three business days after the transaction. At the same time, Article 19(3) requires the issuer to make the notification public no later than three business days after the transaction. It was therefore commented that if a PDMR passes the notification to the issuer at the very end of the third business day after the transaction, the issuer is left in a difficult position to fulfil its obligation under 19(3). While acknowledging the potential issue, ESMA considers that it does not have the power to directly amend or solve this discrepancy as it relates specifically to MAR level 1.

### 5.2.3 Non-exhaustive lists of particular types of transactions

108. To supplement the particular transactions listed in Article 19(7)(a), (b) and (c) and to specify further the broad types of transactions defined above, ESMA proposes the inclusion of a more specific list of particular types of transactions triggering notification and publication requirements, noting that these are only examples amongst other types of transactions and that this constitutes a non-exhaustive list.
109. The CP clarified that the following transactions should be reported:
  - a) In relation to conditional trades the requirement to report arises only with the occurrence of the condition, thus when the trade takes place. There is no requirement to report both the contract stipulating the condition and the trade which is executed later on, as such obligation would confuse the market, in particular when the condition does not occur and the trade is not executed (and consequently not reported).
  - b) Transactions in CFDs relating to financial instruments of the issuer should also be reported by the PDMR or the closely associated persons.
110. The two types of transactions mentioned above did not attract any comment from market participants. Therefore ESMA is retaining them as it considers that they should be taken into consideration by PDMRs or closely associated persons when submitting a notification.

111. ESMA would also like to clarify that the volume to be reported for the notification of transactions in derivatives referenced to a strike price should represent the gross amount of cash received or paid for the transaction executed, while for other derivatives whereby differences in settlement are generally made through cash payments (e.g. swaps, CFDs), the volume should represent the value in monetary terms of the transaction or contract (nominal value) multiplied by the reference price.
112. The CP also explained the approach for the notification of transactions executed in index-related instruments, baskets (or derivatives based thereto) and investment funds (i.e. UCITS/AIF) in relation to (i) the weighting criterion, and (ii) the determination of the price and volume to report.
113. In particular, the CP proposed to condition the notification requirement for these transactions to a certain minimal weight carried by the issuer's shares and/or debt instruments in the relevant index, basket, or UCITS/AIF. Indeed Article 19(1)(a), which specifies which transactions should be notified, refers to "*every transaction relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto*". In order to define whether a basket, or an index-related instrument (or a derivative based thereto), or a UCITS/AIF has to be considered a financial instrument linked to the issuer's shares or debt instruments, in the CP ESMA proposed an approach whereby the linkage between the index-related instrument, basket or UCITS/AIF and the issuer's financial instruments is represented by a minimal weight carried by the issuer's financial instruments in the composition of the index or basket.
114. ESMA considered that the appropriate weighting criterion should be set at 20%. Accordingly, not all transactions in index-related products, baskets or UCITS/AIF need to be counted for the €5,000 threshold, and reported if above such threshold, but only those where the issuer's shares and/or debt instruments represent 20% or more of the composition of the investment, at the time of the transaction. For these transactions the price to be reported should reflect the real value at the time of the transaction of the underlying instrument (share or debt) included in the index, basket or UCITS/AIF, and the volume should be proportionate to the representation of the issuer's financial instrument in the composition of the index, basket or UCITS/AIF (e.g. if a PDMR or closely associated person invests €1 million in a basket where the shares of the relevant issuer represent 25% at the time of the transaction, the volume to be reported should be €250,000).
115. Respondents to the CP supported the weighting criterion approach in relation to these transactions, although some of them asked to increase the level to 30% or 50%. 20% is the value currently used in the Netherlands, with no particular implementation problem being reported by the Dutch competent authority. Furthermore, a similar 20% weighting criterion is used under the Transparency Directive implementation for considering whether the investment needs to be included in the calculation for major shareholding notification. So, it seems a reasonable level at or above which a PDMR should inform the public of the transaction. In fact, considering the calendar-year threshold of €5,000 defined in MAR Article 19(8), a large transaction in one of these linked products, could potentially be equivalent to a relatively large transaction in the issuer shares or debt

instruments, if the latter represents a large portion of the investment composition (e.g. €100,000 invested in a UCITS/AIF where the shares of the relevant issuer represent 30% of the composition at the time of the transaction, would be equivalent to a €30,000 transaction in the shares of the issuer, much higher than the calendar-year threshold of €5,000).

116. Besides the positive comments received on the weighting criterion, the proposed list included in the CP raised a number of complaints on some of the specific types of transactions included in the TA. Generally, it was requested to exclude the transactions where the PDMR does not play an active role. According to these responses, a requirement to disclose such transactions does not serve the purpose of increasing transparency, because MAR Recitals 58 and 59 imply that transactions that have to be notified must be motivated by knowledge obtained in the PDMR's managerial function. This general concern refers in particular to the following types of transactions.

*Transactions in units/shares of UCITS and AIF*

117. Some respondents have explained that transactions in shares or debt instruments of the issuer within the assets of a UCITS/AIF are not on the PDMR's own account: it is only purchases or sales, by the PDMR, of units in a UCITS/AIF which should be caught by the scope of the notification rule, and only then when the UCITS/AIF has breached the 20% threshold. Other respondents requested to eliminate UCITS from the list of reportable transactions, as their strategy could not be affected by a single investor, and therefore the reporting of these transactions would be superfluous and not required for the purposes of MAR level 1.
118. In light of the comments received, ESMA is clarifying and amending its approach to UCITS and AIF where the fund's managers have full discretion, with no influence from the any of the fund's investors.
119. UCITS and AIF are maintained in scope when the issuer's financial instruments are above the 20% threshold, where the PDMR or the closely associated person knows, or could have the knowledge of, the composition of the UCITS/AIF at the time of the transaction (i.e. when the PDMR/closely associated person invests or divests in the fund). This means that where the investment breakdown of the UCITS/AIF is publicly known, or where the investors in the AIF can be privately made aware of the investment breakdown by the fund in accordance with the fund own rules, the UCITS/AIF would be in scope of Article 19(1) of MAR. If the PDMR/closely associated person is aware of the UCITS/AIF investment breakdown at the time of his investment/divestment in the fund, this should be compared with the 20% threshold. On the contrary, where the UCITS/AIF investment breakdown is not available to the investor, because it is not public information or the investor is not informed by the fund itself, the UCITS/AIF would not be in scope of Article 19(1) of MAR. This latter could be the case where the strategy of the fund is treated as confidential and kept secret.
120. The logic behind this approach is straightforward: if the PDMR or closely associated person could not know whether the fund is investing in the issuer's shares of debt instruments, notwithstanding the practical difficulty to fulfil the notification requirement

there would be no added value, in terms of information and transparency, in publicly disclosing this investment by the PDMR or the closely associated person.

121. In relation to UCITS it should be noted that in practice the vast majority of them will de facto be excluded because of the 20% threshold, i.e. it is very unlikely that a UCITS invests a fifth of its assets in the same issuer. Chapter VII of the UCITS Directive (Directive 2009/65/EC)<sup>22</sup> imposes strict limits on the ability of UCITS to invest a relevant portion of their assets in the same financial instrument, and just in very marginal cases the 20% threshold could be met or breached. In these cases where a UCITS breaches the 20% threshold (it could be, for instance, in cases under Articles 52(4) and 53 of the UCITS Directive), it is important, for a transparency purpose, to consider such UCITS in scope under paragraph 19(1). A large investment by a PDMR or closely associated person in a UCITS where the issuer's financial instrument represents more than 20% of the assets, could potentially be also a relatively (indirect) large investment in the issuer, and therefore it is important that the market is aware of this holding, as part of the broader picture of the PDMR or closely associated person holding in the issuer's shares, debts and linked instruments.
122. So, where a PDMR or a closely associated person invests in a UCITS/AIF whose managers have full discretion, there are two sequential and cumulative conditions for UCITS/AIF to be in scope under Article 19(1) of MAR:
  - a) First, the PDMR/closely associated person, as an investor, knows, or could have the knowledge of, the UCITS/AIF investment breakdown at the time of the transaction (i.e. at the time of the PDMR/closely associated person investment or divestment in the UCITS/AIF).
  - b) Second, if the PDMR/closely associated person knows the UCITS/AIF investment breakdown, he has to check whether the UCITS/AIF is above or below the threshold of 20%.
123. Where the composition of the UCITS/AIF's investments is not available, no notification is required.
124. Where the PDMR/closely associated person knows about the composition of the UCITS/AIF, if the UCITS/AIF is above the 20% threshold, it has to be counted in the calculation to assess whether the PDMR/closely associated person is above or below the calendar-year threshold of €5,000. Conversely, if the issuer represents 10% of the total composition of the UCITS/AIF assets, the PDMR/closely associated person's transaction would not be accounted for the calculation of the threshold of €5,000. So, assuming that the UCITS/AIF breaches the 20% threshold and the PDMR/ closely associated person

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<sup>22</sup> 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): [http://www.esma.europa.eu/system/files/L\\_302\\_32.pdf](http://www.esma.europa.eu/system/files/L_302_32.pdf).

has already reached the threshold of €5,000, or he is breaching the threshold with this UCITS/AIF transaction, such transaction will have to be reported. If the PDMR/closely associated person transaction is below the threshold of €5,000, this transaction will not have to be reported, but will just be taken into account for the calculation of the calendar-year threshold of €5,000.

125. As said at the beginning of this section, we are dealing here with situations where the UCITS/AIFs are managed with full discretion by their own managers, with no sort of influence by the fund's investors. For this reason, the composition of the UCITS/AIF that matters for the purpose of the notification is the composition at the time of the PDMR transaction in the unit/shares of the UCITS/AIF, and whether in this composition the 20% threshold is breached. Once the investment in a UCITS/AIF is made, for the purpose of notification, the PDMR would not need to notify in case of subsequent changes in the composition of the UCITS/AIF, as long as the PDMR does not carry out another transaction in the units/shares of the UCITS/AIF. For example, a PDMR buying units of an AIF will not have to count this transaction if, at this point in time, the 20% threshold is not breached. If, later, this PDMR sells those units and, at this second point in time, is aware of the AIF investment composition and that the 20% threshold is reached, the transaction will have to be counted. So every time a PDMR/closely associated person buys or sells UCITS/AIF units/shares, he needs to be aware whether the 20% threshold is breached.
126. Besides, the trading on the issuer's relevant financial instruments by the UCITS/AIF manager will not trigger a duty to notify on the PDMR/ closely associated person when he cannot influence the strategy of the fund, as these transactions are not made on his own account or on his behalf, but rather on the account of the UCITS/AIF itself.
127. In cases where the fund is not managed with full discretion by its own managers and the PDMR/closely associated person could have an influence on the investment decision of the fund in which he is investing as a client, the approach proposed by ESMA is different. This could be the case under some types of AIF that have small number of clients, and these clients could take part in the decision-making process of the AIF, and thus participate in the determination of the fund's investment composition.
128. First, at the time the PDMR/closely associated person invests or divests in this type of fund, the same requirements as the ones explained above apply (i.e. check of the fund composition, comparison with the 20% threshold, and if above consider the investment for the calendar-year threshold of €5,000, and report if needed). On top of these obligations, the transactions executed by the funds once the PDMR/closely associated person has invested in it should also be considered for the notification obligation (and this is the difference with the notification obligation for a PDMR's investment in funds whose managers have full discretion).
129. In other words, when a PDMR/closely associated person invests in this type of funds, besides the check that he has to make at the moment he invests in the fund, as long as he has money invested in such fund, also the transaction made by the fund in the issuer's shares and/or debt instruments should be considered for notification purposes. This is

because the PDMR/closely associated person has the power to influence these transactions, and if the fund invests in shares and/or debt instruments of the issuer where the PDMR works, those should be notified for a transparency purpose. For example, if the fund exposure to the issuer is 15% of the fund's investment composition at the time the PDMR invests in the fund, but after sometime this exposure is increased and reaches 20%; at that moment the holding of the PDMR should be considered for the calendar-year threshold of €5,000, and reported if needed.

130. Every time the fund invests in the PDMR's issuer, a check on the exposure in the PDMR's issuer has to be performed by the PDMR/closely associated person to assess whether the 20% threshold is reached. This approach seeks to prevent that this type of funds are used to circumvent the notification obligations under Article 19 of MAR.

#### Gifts, inheritance, donations

131. Four respondents argued that some regulators have excluded the receipt by the PDMR of gifts, inheritance and donations, presented as "passive" transactions, from the "managers' dealing" scope under the current MAD because of no added value in their reporting, while when the PDMR makes a gift or a donation, the duty to notify is triggered. A different argument presented by a separate group of four respondents is that inheritance should only trigger notification when securities are actually received and vested in the PDMR. Prior to this date, the PDMR may not be aware he is a beneficiary and thus it seems inappropriate to impose an obligation on a PDMR that may be impossible to fulfil (they argued that it is also possible that shares intended to be gifted to a PDMR will need to be sold by the estate and will therefore never actually be transferred to that individual). Finally, two other respondents asked for clarification on the meaning of "transaction by transaction" date in relation to gifts, donations and inheritance, as it is not cleared what is required. One way to address the problem, proposed by the respondent, could be that the relevant date should be the day when the financial instruments are received on the account.
132. In relation to gifts, inheritance and donations received by a PDMR/closely associated person, it should be noted that as long as these transactions are made on the PDMR's own account, they fall under scope as the text of MAR Article 19(1) refers to every transaction on the PDMR's own account. Also when a PDMR/closely associated person makes gifts and donations, i.e. being the giver/donor, these have to be considered in scope. For these types of transactions the date of the transaction has to be considered as the date of acceptance as determined by the applicable national law.

#### Fixed components of a pre-determined remuneration plan (e.g. share options):

133. One respondent said that acceptance of stock-options should be deleted and only the exercise of stock-options should be notified. Another noted that the duty to notify should be limited in scope, as any acquisition and sale that follows a non-discretionary remuneration plan should be out of scope (as the transaction will by definition never provide markets with information on the expectations of the person in question). Therefore the same respondent doubts that para. 2(b) of the draft TA should be in the scope without any exemption. In addition, it is still missing a clarification as to when a

notification becomes due with respect to derivative instruments under those plans (phantom stocks), and it is suggested that there should be no notification at all.

134. Three respondents asked to clarify that the unilateral grant of stock options, where no acceptance is required by the employee, does not require notification, and that no notification should be required also for other rights granted to employees as part of their remuneration package, such as conditional awards.
135. Finally, one respondent noted that the sale of shares stemming from stock grants was not referred to in the draft advice and suggested to explicitly include them in point 2(b) of the advice.
136. As already underlined, every transaction conducted on the own account of the PDMR is in scope, therefore remuneration plans cannot be excluded by the obligations under Article 19 of MAR. Derivative instruments embedded in this plan are also included in the scope, as derivatives are explicitly mentioned in MAR level 1 text and no exception can be made for them. In particular, it should be noted that both (i) when an option is received by the PDMR, and (ii) when an option is exercised, a notification is required.

### 5.3 Trading during a closed period

137. Article 19(11) prohibits a PDMR from conducting transactions in the relevant financial instruments during a closed period. The closed period mentioned in this article and to which ESMA's advice relates refers to the period, which lasts for 30 days before an annual or interim report is to be disclosed by the issuer "*according to the rules of the trading venue where the issuer's shares are admitted to trading or according to national law*". For sake of clarity, this would therefore include within the scope any interim reports (e.g. quarterly, half yearly) when required. Furthermore, it should be noted that the relevant date for the computation of the closed period is the date of publication of such interim and year-end reports, as required by the rules of the relevant trading venue or by the national law. In cases where an issuer is not required to publish the interim and year-end reports, the closed period provisions would not apply.
138. A number of respondents to the CP explained that it is market practice in the UK for issuers to publish a preliminary announcement of annual results (containing information prescribed by the FCA's Listing Rules) before publishing the year-end report. In some cases, where the preliminary announcement contains inside information, the issuer is obliged to make the preliminary announcement before the year-end report is published (it may not be possible to publish the year-end report at the same time as it will normally contain significantly more information than the preliminary announcement). Under the UK Model Code, the preliminary announcement triggers the end of the closed period as once the inside information has been published, there is no need to impose a prohibition on dealings. Such a practice is also common to other markets. According to the respondents, an inability to use a preliminary announcement as a trigger for the end of a closed period would mean that the 30 day prohibited period would not properly match the period prior to the release of the results to the market. In relation to this issue, MAR level 1 clearly states that a financial report triggers a close period only when it is required to be

publicly disclosed according (i) to the rules of the relevant trading venues, or (ii) to national law. It should be noted that the publication of a preliminary announcement is a practice common in other Member States other than the UK. In the example provided in the response, if the “preliminary announcement” of annual report is required either by national or trading venue rules, it would start the closing period. In this context, it should be reminded that the issuer has an obligation to disclose inside information as soon as possible, and the prohibition of insider dealing applies with no limitation and irrespective of the closed period.

139. Article 19(12) provides the issuer with the possibility to allow a PDMR to trade during a closed period under certain conditions. ESMA is mandated to specify in the technical advice the circumstances under which a PDMR could be permitted to trade during a closed period by the issuer “*either:*
- a) *on a case by case basis, in case of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares, or*
  - b) *due to the characteristics of the trading involved for dealings made under, or related to, an employee share or saving schemes, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change”.*
140. In particular, the goal is to define the circumstances that would be considered as exceptional and the types of transaction that could be permitted. It should be noted that both Article 19(11) and 19(12) refers to PDMRs only; “closely associated persons” are thus not covered by these articles.
141. The obligation for the PDMRs to refrain from insider dealing, e.g. trading in possession of inside information, prevails over any authorisation to trade granted by the issuer under 19(12).
142. Another aspect to consider relates to the need for the PDMR to demonstrate that the execution of a trade cannot wait until after the end of the closed period.
143. ESMA wishes to clarify that all transactions conducted on the own account of a PDMR are covered by the closed period prohibition defined in Article 19(11), unless Article 19(12) is applicable.
144. In the context of the closed period, following the comments received (detailed in Annex III), ESMA is amending its approach towards UCITS/AIF, in line with the logic explained in the previous paragraphs dedicated to UCITS/AIF.
145. First, as UCITS/AIF above the 20% threshold are considered covered by MAR Article 19(1)(a), a PDMR is forbidden to trade in these UCITS/AIF during a closed period when he knows, or could have knowledge of, the fund’s investment composition and that the 20% threshold is breached. Secondly, for funds whose managers have full discretion: a PDMR does not have to inform the UCITS/AIF manager of an upcoming closed period (as previously stated in the CP).



146. Article 19(11) of MAR states that a PDMR shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly. As explained by some respondents, transactions in the issuer's related instruments within the assets of a UCITS/AIF are not transaction conducted by the PDMR but by the fund manager, and therefore these transactions are not affected by the closed period. In fact, the PDMR should not affect the UCITS/AIF manager's strategy in any way and ESMA would emphasise that the prohibition of insider dealing and of unlawful disclosure of inside information (Article 14 of MAR) applies also during a closed period.
147. In the case of funds where the fund managers do not have full discretion and the clients are able to participate in the investment decisions, the closed period referred to in Article 19(11) of MAR applies to the fund itself, as it is possible for a PDMR to influence the investment decision. So, the fund manager would have to be informed, including where relevant by the PDMR, of the start of this closed period and of the relative investment restriction. The different approach for this sub-case of funds is a consequence of their different functioning, i.e. of the fact that the PDMR participates in the investment decisions of the fund, and is reflected also in the section "Types of transactions triggering the duty to notify", where these funds are treated with different requirements.
148. In relation to the next two sections, it should be noted that ESMA has not been empowered to define the assessment process an issuer should use to grant or refuse the permission of trading during the closed period, nor is ESMA empowered to identify the competent function within an issuer in charge of such decision.

### 5.3.1 In relation to transactions under exceptional circumstances

149. In line with the CP, ESMA maintains that some criteria need to be defined to specify the exceptional circumstances under which an issuer may allow a PDMR to trade during a closed period. This should be achieved without unduly widening the scope of this exemption of prohibition to trade during a closed period, in order to stay in line with the general principle on the interpretation of European legislation that an exemption included in a European legal text should be interpreted narrowly.
150. As the MAR text specifies that the issuer's permission should be given on a case by case basis, the first criteria would be that the PDMR has requested (and obtained), prior to any trading, the permission to trade. To allow the issuer to assess the individual circumstances of each single case, such request should be reasoned and motivated, including explanation of the transaction envisaged and description of the exceptional character of the circumstances.
151. The decision to grant the permission to trade should only be envisaged if the reason for requesting to transact is exceptional. By that, the reason should be understood to be not only extremely urgent but also unforeseen, compelling and whose cause is external to the PDMR.
152. Where the PDMR presents situations which are unforeseen, compelling and beyond his control, he should only be allowed to sell shares to obtain the necessary financial

resources. These situations could stem from a financial commitment that the PDMR has to fulfil, such as a legally enforceable demand (e.g. a court order), and provided that the PDMR cannot meet this commitment without selling the concerned shares. It could also stem from a situation entered into by the PDMR before the closed period has started (e.g. a tax liability) and requiring the payment of a sum to a third party that could not be fully or partly funded by the PDMR in ways other than selling issuer's shares.

153. However, it has to be noted that when the issuer grants permission of trading to the PDMR during the closed period because of exceptional circumstances, the general insider dealing provisions still apply.
154. It is also recalled that Article 19(12(a) of MAR refers to immediate sales of shares only in case of exceptional circumstances, excluding thus all other types of transaction.
155. A number of respondents asked to delete or modify the following requirement included in paragraph 4 of the TA: "*a PDMR can demonstrate that the particular transaction cannot be executed at another moment in time than during the closed period*", in particular one respondent asked that a "reasonableness" test should apply, instead of the current wording. ESMA believes that this is an essential condition to justify trading during the closed period. In fact, if this condition is not met, the PDMR should just execute the transaction before or after the closed period.

### 5.3.2 In relation to other types of transactions

156. MAR clearly lists the types of dealings that could be permitted by the issuer without requiring a case-by-case assessment, namely (i) dealing in relation to employee share or saving scheme, (ii) qualification or entitlements of shares, or (iii) dealings where the beneficial interest in the relevant security does not change.
157. The vast majority of the respondents supported the proposals ESMA made in the CP.
158. Therefore, with regards to dealings made under or related to employee share scheme, employee saving scheme, qualification or entitlements and whether they can be permitted by the issuer, ESMA still considers that certain criteria should be defined. Such criteria relate to the nature of the dealing (e.g. a purchase or sale, exercise of option or other entitlements), the timing of the dealing or of the entering of the PDMR into a particular scheme, whether the dealing and its characteristics (e.g. execution date, amount) was agreed, planned and organised a reasonable period before the closed period starts.
159. Besides, ESMA maintains its views that transactions where the beneficial interest does not change, could be undertaken at the initiative of the PDMR, provided that he has requested and obtained the permission from the issuer prior to the envisaged transaction. The PDMR's request should contain the necessary explanations and justifications. The concerned transaction should only relate to a transfer of the concerned instruments between accounts of the PDMR (e.g. between schemes), without entailing a change in the price of the instruments transferred. Considering the risks of circumvention of the prohibition, ESMA wishes to clarify that the above approach does not include transfer of



financial instruments or other transactions such as sales or purchases between the PDMR and another person, notably a legal entity fully owned by the PDMR.

160. The draft technical advice therefore takes the form of a non-exhaustive list of types of transactions that may be permitted by the issuer, the same as the one presented in the CP.
161. Some respondents suggested ESMA to allow some particular transactions during a closed period, whose criteria and conditions are set out in certain existing national rules and regulations on trading during a closed period, notably the Model Code of the UK FCA. It is recalled that the list included in the advice is not exhaustive. Therefore other types of transactions not included in the list may be permitted by the issuer, provided that they fall under Article 19(12)(b).
162. No adverse feed-back was received on the proposal made in the CP to include an additional type of transaction, namely acquisition of qualification shares by directors of a company (certain shares may be required by the company to be acquired under the rules constituting the company, i.e. by laws or statutes, in order to qualify as director of a company). For example, a company's constitution may state that a director must hold a certain number of "qualification shares" or vacate his office unless he acquires the required number of shares by a certain time period, e.g. within two months in order to ensure the director's incentives are more in line with those of its shareholders. This type of transaction is therefore maintained in the final advice.

## 5.4 Technical advice

### **Advice on the types of the transactions triggering the duty to notify under Article 19(1) of MAR**

1. In accordance with Article 19(1) of MAR, persons discharging managerial responsibilities within an issuer or an emission allowance market participant and persons closely associated with them should notify the issuer or the emission allowance market and the relevant competent authority of every transaction conducted on their own account, irrespective of the venue or place where that transaction has been conducted (i.e. on a RM, MTF, OTF or OTC) and provided that the threshold condition set out in Articles 19(8) is fulfilled, which is:
  - a. referred to in Article 19(7) of MAR; or
  - b. an acquisition, a disposal, a subscription or an exchange of shares or debt instruments of that issuer or of related derivatives or other financial instruments linked to them, or of emission allowances or related auction products or derivatives.
2. Without being exhaustive, the following list includes types of transactions that trigger the requirement referred to in the previous paragraph:

- a. Purchases and sales, including short sales, of shares or debt instruments of the concerned issuer or of related derivatives or other financial instruments linked to them, or of emission allowances or related auction products or derivatives.
- b. The acceptance and the exercise of a stock-option in case of stock options granted to managers and employees as part of their remuneration package.
- c. The sale of shares stemming from the exercise of a stock option (even in case of stock options granted to managers and employees as part of their remuneration package).
- d. Equity swaps. The following features of an equity swap should be included in the notification: description of securities, share's price and maturity/term of the contract.
- e. Transactions related to derivatives products settled in cash (such as for instance equity swaps with a cash settlement).
- f. Entering into a contract for difference on a financial instrument of the issuer.
- g. Acquisition, sale or exercise of rights, put and call options, warrants traded on a regulated market, a multilateral trading facility, an organised trading facility and/or over the counter. If rights, warrants, put and call options are exercised, the date of transaction is the date of exercise.
- h. The subscription to a capital increase.
- i. The subscription of a debt instrument issuance.
- j. Transactions on derivatives/financial instruments linked to a debt instrument, including credit default swaps.
- k. Conditional trades i.e. trades which occur on the basis of a previous contract that stipulates a condition that is now met.
- l. The (automatic and not automatic) conversion of a financial instrument into another financial instrument, e.g. exchange of convertible bonds to shares.
- m. Gifts and donations made or received, and inheritance received. The transaction date is to be considered as the date of acceptance determined by the applicable national law.
- n. Transactions executed in index-related products, baskets and derivatives based thereto, which are linked to the issuer's shares or debt instruments.
- o. Transaction executed in shares/units of investment funds (AIF and UCITS) where the clients of the fund know, or could have the knowledge of, the investment composition of the fund, and which are linked to the issuer's shares or debt

instruments.

- p. Transactions executed by managers of an AIF in which the person discharging managerial responsibilities or a person closely associated with him has invested, where the manager of the AIF does not operate under a fully discretionary mandate.
  - q. Transactions executed by a third party under an individual portfolio or asset management mandate for the benefit of the person discharging managerial responsibilities and/or person closely associated with him.
  - r. Borrowing of shares or debt instruments of the issuer or other financial instruments linked thereto.
3. With reference to items n), o) and p) in the previous paragraph, an index-related product, a basket and a share/unit of investment funds (AIF and UCITS) shall be deemed as a financial instrument linked to the issuer's shares or debt instruments only when the weight carried by the issuer's shares and/or debt financial instruments in the composition of the index, basket or investment fund is 20% or more of the total composition of the index-related product, basket or investment fund, at the time of the transaction.

**Advice on the circumstances under which trading during a closed period may be permitted by the issuer under Article 19(12) of MAR**

4. In accordance with Article 19(12) of MAR, a person discharging managerial responsibilities within an issuer may only conduct trading during a closed period as defined under Article 19(11) of MAR provided that:
- a. the issuer concerned has permitted such trading;
  - b. one of the circumstances referred to in Article 19(12) of MAR is met; and
  - c. the person discharging managerial responsibilities can demonstrate that the particular transaction cannot be executed at another moment in time than during the closed period.
5. Irrespective of the permission granted by the issuer, the person discharging managerial responsibilities within that issuer remains subject to the insider dealing prohibitions set out in MAR.

**Exceptional circumstances**

6. An issuer may allow a person discharging managerial responsibilities to proceed with immediate sales of shares of that issuer during a closed period only when the issuer is satisfied that the circumstances for such transactions are exceptional and has informed accordingly the person discharging managerial responsibilities.
7. The issuer should base the case-by-case assessment it has to conduct prior to any

trading being permitted on a reasoned and motivated written request for permission provided by the person discharging managerial responsibilities. Such request should explain the transaction envisaged demonstrating that the sale of shares is the only reasonable alternative to obtain the necessary financing, and describe the exceptional character of the particular circumstances requiring the immediate sale of shares.

8. Circumstances are considered to be exceptional when they are extremely urgent, unforeseen and compelling and where their cause is external to the person discharging managerial responsibilities who has no control over them.
9. When examining the exceptional characteristics of the circumstances, the issuer should take into account the following non-exhaustive indicators:
  - a. The extent to which the person discharging managerial responsibility is facing a financial commitment that person has to fulfil, notably a legally enforceable demand;
  - b. The extent to which the person discharging managerial responsibilities is in a situation entered into before the beginning of the closed period and requiring the payment of sum to a third party, for instance a tax liability.

#### **Other types of transactions**

10. For the purpose of applying Article 19(12)(b), an issuer should take into account the non-exhaustive list of transactions in the financial instruments referred to Article 19(1) presented in the paragraphs below.
11. Award or grant of financial instruments under an employee scheme to a person discharging managerial responsibilities when:
  - a. The employee scheme and its terms have been previously approved by the relevant instances of the issuer in accordance to national law;
  - b. The terms of the employee scheme specify:
    - i) the timing of the award or the grant;
    - ii) the amount of financial instruments awarded or granted, or the basis on which such an amount is calculated and given that no discretion can be exercised;
    - iii) the persons entitled to the award or grant include persons discharging managerial responsibilities who should not have any discretion as to the acceptance of the awarded/granted financial instruments.
12. Award of financial instruments under an employee scheme to a person discharging managerial responsibilities taking place in the closed period where a pre-planned and organised approach is followed regarding the conditions, the periodicity, the time of the award, the group of entitled persons to whom the financial instruments are granted and

the amount of financial instruments to be awarded, with the objective to create a tight framework for the award, which is free from specific circumstances to such an extent that any inside information that may exist cannot play a part at the time of the award.

13. Exercise of options or warrants and conversion of convertible bonds assigned under an employee scheme when the expiration date of these financial instruments assigned options, warrants or convertible bonds falls within a closed period, as well as sales of the shares acquired pursuant to such exercise or conversion provided that:
  - a. the person discharging managerial responsibilities notifies the issuer of his choice to exercise or convert at least 4 months before the expiration date; and
  - b. the decision of the person discharging managerial responsibilities is irrevocable; and
  - c. the person discharging managerial responsibilities has received the authorisation from the issuer prior to proceed.
14. Purchases of the issuer's financial instruments under an employee saving scheme when:
  - a. the person discharging managerial responsibilities has entered into the scheme before the closed period, except when he cannot enter into the scheme at another time due to the date of commencement of employment; and
  - b. the person discharging managerial responsibilities does not alter the conditions of his participation into the scheme or cancel his participation into the scheme during the closed period; and
  - c. the purchase operations are clearly organised under the scheme terms with no possibility for the person discharging managerial responsibilities to alter them during the closed period or are planned under the scheme to intervene at a fixed date which falls in the closed period.
15. Transfer of financial instruments by or on behalf of the person discharging managerial responsibilities when:
  - a. The person discharging managerial responsibilities, further to a reasoned and motivated written request for permission, has obtained the authorisation from the issuer prior to any trading;
  - b. the financial instruments are transferred between two accounts hold by the person discharging managerial responsibilities without a change in their price.
16. Acquisition of qualification shares of the issuer when the final date for such an acquisition, under the issuer's statute or by-law, falls during the closed period and provided that the person discharging managerial responsibilities explains to the issuer the reasons for the acquisition not taking place at another time, and the issuer is satisfied



with the provided explanation.

## 6 Reporting of infringements

### 6.1 Mandate (extract)

*ESMA is invited to provide technical advice on the following issue:*

*The specification of procedures to enable reporting of actual or potential infringements of this Regulation to competent authorities, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data (Article 32 (5) MAR).*

### 6.2 Analysis

#### 6.2.1 Scope of the analysis

164. Article 32(1) of MAR requires MSs to ensure that national competent authorities establish effective mechanisms to enable reporting of actual or potential infringements of the provisions of the Regulation, regardless of whether the reporting is related to market abuse or to any other infringement of the Regulation (e.g. insider lists).
165. The reporting of actual or potential infringements facilitates the detection and sanctioning of misconduct (Recital 74 of MAR); therefore adequate arrangements and mechanisms should be in place to enable persons to alert competent authorities regarding infringements of the Regulation. Schemes of reporting are also necessary to ensure the protection, and to respect the rights, of the person who is reporting the infringement (the “reporting person”) and of the person who allegedly committed the infringement (the “reported person”), who may both be subject to retaliation, discrimination or other types of unfair treatment.
166. Article 32(2) of MAR establishes that the mechanisms referred to in Article 32(1) include at least:
  - a. specific procedures for the receipt of reports of infringements and their follow-up, including the establishment of secure communication channels for such reports;
  - b. within their employment, appropriate protection against retaliation, discrimination or other types of unfair treatment, at a minimum, for persons working under a contract of employment who report infringements or are accused of infringements; and
  - c. protection of personal data both of the reporting person and the natural person who allegedly committed the infringement, including protection in relation to

preserving the confidentiality of their identity, at all stages of the procedure without prejudice to disclosure of information being required by national law in the context of investigations or subsequent judicial proceedings.

167. The responses to the CP were generally supportive of ESMA's approach in relation to the procedures the competent authorities should put in place to enable reporting of actual or potential infringements of this Regulation to competent authorities. Consequently, ESMA only marginally amended the text of the technical advice.
168. ESMA would support the implementing act, to be adopted by the Commission pursuant to Article 32(5), to take the form of a directive. This would provide the necessary flexibility to MSs to implement the specific arrangements and measures identified in the TA while, at the same time, ensuring compliance by the competent authorities with the principles set out in other national legislations, notably with respect to the protection of personal data and the protection of employees vis-à-vis their employer. The use of a directive would also respond to those concerns, expressed by a few respondents to the CP, that the new MAR reporting regime with EU-wide harmonised procedures would impact or even contradict current national reporting regime in place.
169. Following the comments received, ESMA saw merits in clarifying the advice in relation to the communication channels by:
- a. introducing an additional requirement for ensuring that reports addressed through the communication channels are effectively received by the dedicated resources within the authority. The following sentence has been added to paragraph 8 of the advice: *"The communication channels should be designed and set up in a way as to avoid notification being addressed to non-dedicated resources."*
  - b. requiring competent authorities to clearly publicised on their website whether the phone lines to be used for reporting of infringement are recorded or not. The following amendments (in bold) have been introduced in paragraph 11 of the advice: *"The website should **clearly indicate the means and process for contacting** the dedicated resources, **the phone lines, including whether they are recorded or unrecorded phone lines, the secure and confidential email and post addresses, as well as the rules applicable in case of reporting, notably the rules regarding the confidentiality regime."***
170. In relation to the protection of employees, the CP proposal to include a general protection measure relating to liability of the person who reported in good faith an infringement to the competent authority, which is similar to provisions in other European legislations, notably in the field of money laundering<sup>23</sup>, received support from the respondents. ESMA maintains this clause in its final advice in addition to the measures competent authorities should have in place to protect confidentiality and the identity vis-à-vis the employer of the reporting person and/or the reported person. Furthermore, based on a comment

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<sup>23</sup> See Article 26 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

received, ESMA saw merits in adding another measure aiming at preventing the employer to inquire with the CA about the employee's identity or on the existence of a report made by an employee. A new paragraph 25 has been added to the advice.

171. Despite reiterated calls by a few respondents to the CP for further explanations about the meaning of "persons working under a contract of employment" and requests for defining them widely (including contractual employees, temporary employees, trainees, consultants, interns), ESMA remains of the view that it is not helpful to provide such explanations nor to determine a (non-exhaustive) list of persons under contract of employment as the key element to consider is the legal existence of such a contract rather than its specific terms, notably with respect to duration. Besides, these explanations would not be relevant to gain access to the reporting mechanism, as related to in Article 32(2)(b).
172. Further to the CP public consultation, the following have been identified as examples of retaliation, discrimination or other unfair treatments: dismissal, punitive transfers, harassment, reduction or loss of duties, status, benefits, salary or working hours, withholding of promotions, trainings, and threats of such action as well as ostracism and bullying at work.
173. With respect to whether priority should be given to internal reporting within firms, some respondents provided the following arguments, not mentioned in the CP, to support a requirement to use first internal reporting mechanisms within the employer before accessing external reporting to competent authorities: internal reporting is faster and more effective, the necessary safeguards for the reporting person are already in place in internal reporting procedures and the employer is not deprived from the possibility to deal with the matter internally and act on its own discretion.
174. ESMA remains convinced that the approach in the CP is valid: the requirement to mandate internal reporting before accessing external reporting might adversely affect external reporting to competent authorities in a non-trivial number of cases, due to the high risk of subsequent internal retaliation and discrimination, especially in those situations where reported persons play a central role within the employer or where the infringements are relevant enough to significantly affect the annual results of the employer. Furthermore, the MAR text does not contain any indication leading to the conclusion of a precedence to be given to internal reporting.
175. However, ESMA wishes to clarify that although reporting internally first is not required it is not forbidden either: nothing would prevent an employee to first report internally.
176. As explained in the CP, ESMA recognises that internal reporting mechanisms within the employers facilitate the success of notification regimes. However, due to the fact that internal retaliation and discrimination constitute relevant disincentives to notifying infringements, ESMA remains of the view that the advice should not include any specific provision related to such internal reporting. Besides, given that the reporting regime envisaged by MAR is very open, as there is no definition of whistle-blower or whistleblowing activities, the scope of any measure would need to cover any company, regardless of whether it is a financial institution or not. ESMA would also like to remind

that in accordance with Article 32(3) of MAR, MSs should require employers carrying out activities that are regulated by financial services regulation to have in place appropriate internal procedures for their employees to report infringements but this provision is not covered in the mandate to prepare implementing acts. Furthermore, ESMA has confined its advice to arrangements on the protection of the reporting and reported persons at competent authority level, noting though that further legal protection of employees is also a matter for, general, labour or employment law.

177. ESMA also believes that it is not appropriate to elaborate on the conditions that permit having access to the status of reporting person under Article 32 and on the on-going conditions that should be fulfilled in order not to lose such status, as MAR offers unconditional access to gain the “reporting person” status. This is without prejudice to the right of a MS to establish more restrictive conditions if a MS decides, according to Article 32(4), to provide for financial incentives to persons who offer salient information about potential infringements.
178. Besides, it remains clear that the reporting regime is without prejudice to any report made on an anonymous basis to competent authorities. An anonymous report may be evaluated by competent authorities to determine whether it offers enough circumstantial evidence of the infringement. However, ESMA would like to underline that an anonymous report would not benefit from the protections under this regime even when they have been received through the procedures established under Article 32(1) for the reporting of infringements.
179. ESMA continues to believe that notifications should be based on a reasonable suspicion and therefore competent authorities could encourage reporting persons to provide supporting intelligence and supporting information of the infringement; among others, where, following Article 31(1)(e), the person was involved in the infringement or, following Article 32(4), the MS establishes financial incentives for reporting persons.
180. As to procedures for protection of the reporting and of the reported persons, ESMA considers that, as suggested by some respondents, extending the use of the secure communication channels and the confidentiality requirements to the communication between the firm subject to the infringement report and the competent authority is neither covered in the level 1 empowerment nor appropriate, considering in particular the professional secrecy provision applying under MAR to competent authorities and their staffs.
181. With regards to the protection of personal data obtained under Article 32 of MAR, ESMA would like to remind that competent authorities should act in accordance with their national laws, regulations or administrative provisions transposing Directive 95/46/EC and any requirements of future EU legislation(s) in the matter, as well as in accordance with Article 28 and 29 of MAR, including in cases of exchange of information. In line with most of the respondents to the CP, ESMA considers it unnecessary to include additional requirements in the technical advice on this matter beyond the specific measures aiming at protecting the identity of the reporting and reported persons.

## 6.3 Technical advice

### Advice on the procedures for reporting of infringements under Article 32(1) of MAR

#### Procedures for the receipt of reports of infringements and their follow-up

1. Competent authorities should have in place procedures for the receipt of reports of infringements provided by MAR that allow for any natural or legal person to report. Such procedures should promote and not deter reporting.

#### Communication channels

2. The procedures of a competent authority should include independent and autonomous communication channels for reporting of infringements.
3. The communication channels should provide contacts with dedicated resources entitled to provide any interested person with information on the procedures, receive notifications and maintain contact with the reporting person when the latter has identified himself.
4. The communication channels for reporting infringements include the following modalities of notification: written notification, recorded or unrecorded telephone conversation and physical meeting.
5. In the case of written notifications, the competent authorities should promptly acknowledge the correct receipt of the written notification to the address indicated by the reporting person, unless the reporting person explicitly requested otherwise.
6. In the case of notifications through telephone calls, the content of the oral notification should be properly recorded in a durable and retrievable form that ensures protection of personal data. Taking into account national law and considering whether a recorded telephone line is used for the oral notification, this could take the form of audio recording of the conversation, or by requesting the reporting person to follow up with a written notification or to sign minutes of the conversation prepared by the competent authority.
7. A person may ask for a physical meeting with the dedicated resources for reporting an infringement. Such a meeting should be recorded in a durable and retrievable form. In case of written minutes of the meeting, they should be signed by the reporting person and the dedicated resources.
8. Communication channels should ensure a high level of security and durable evidences to allow for further investigations and confidentiality. The communication channels should be designed and set up in a way as to avoid notification being addressed to non-dedicated resources.
9. Where the reporting person contacts a person within the competent authority by other means than the communication channels for reporting of infringements described in the previous paragraphs, the person contacted within the competent authority should report the notification received to the dedicated resources only. Such notification should be

recorded by either the dedicated resources or the person who received the notification in a durable and retrievable form, such as a written notification or minutes of the conversation signed by the reporting person.

10. A competent authority should clearly communicate to a reporting person that:

- a. reporting persons may be asked by the competent authority to clarify the information they have already provided to the competent authority;
- b. reporting persons may be asked to provide additional information but are not required to search for such information if not available to them;
- c. due to statutory or other restrictions, only a limited feed-back about the outcome of the provision and investigation of the information reported can be provided to the reporting person.

#### Competent authorities' websites

11. The website of a competent authority should contain a section where the communication channels and modalities for reporting and follow up are described. This specific section should be easily identifiable and accessible. The website should clearly indicate the means and process for contacting the dedicated resources, the phone lines, including whether they are recorded or unrecorded phone lines, the secure and confidential email and postal addresses, as well as the rules applicable in case of reporting, notably the rules regarding the confidentiality regime.

#### **Procedures for protection of the reporting and of the reported persons**

12. Competent authorities should have in place procedures for the protection of reporting and reported persons. Such procedures should ensure that the identity of every reporting and reported person is protected according to the provisions of Article 32 of MAR. A competent authority should treat information from and regarding such persons sensitively and appropriately.

13. Competent authorities should manage reporting and reported persons' personal data in compliance with Articles 28 and 29 of MAR and in accordance with the provisions of Directive 95/46/EC. They shall not disclose to any person the identity of the reporting and the reported person unless paragraph 19 is applicable.

#### Procedures for protection of the reporting persons

14. Recording of the reporting persons' names, email, contact details and any other personal data transmitted by the reporting persons should be maintained in a confidential and secure system within the competent authority. Access to the system should be subject to internal restrictions.

15. When passing the information provided by a reporting person from the dedicated resources to another unit within the competent authority in charge of subsequent analysis

and follow up, the duty of professional secrecy is applicable to all staff of the competent authority and the confidentiality of the identity of the reporting person is recalled.

16. Any further onward transmission within the competent authority or to other competent authorities of the existence of the notification, of its content and of the identity of the reporting person should be made on a need-to-know basis, only for the purpose of further analysis, action or proceedings in respect of the information reported, and to the extent that the information provided is necessary for a complete evaluation.
17. Transmission within the competent authority or to other authorities different from those referred to in the previous paragraph shall be effected so as to ensure that the anonymity of the reporting person (for instance, by assigning a code), and no references should be made to circumstances that would univocally allow the identity of the reporting person to be deduced.
18. Once a competent authority opens an investigation or an inquiry, persons responsible for the investigation or the inquiry or subsequent enforcement activities should not mention the circumstance of the notification received by the reporting person in any external letter, report, published document or act, unless mandatory by applicable national law.
19. The reporting person should be informed that confidentiality may not be ensured in the following circumstances:
  - d. where the disclosure of identity is required by the law, notably in the context of subsequent judicial proceedings (e.g. when the public prosecutor requests this piece of information); or
  - e. where the nature of subsequent enquiries, investigations and proceedings may allow the employer or other persons to accurately assume the reporting person's identity, although the competent authorities will take all necessary steps to prevent this happening; or
  - f. in exceptional cases and in accordance with national law where the competent authority has no other option than to disclose the reporting person's identity to the employer being investigated to proceed further with its investigation; in such circumstance the competent authority should inform the reporting person prior to doing so.
20. When investigations end without sufficient evidence of infringements, the competent authority should ensure full protection of the identity of the reporting person.

#### Procedures for protection of the reported persons

21. The identity of reported persons should be protected at least in the same manner as for persons that are under non-public investigations of the competent authority. In addition, where possible, paragraphs 14, 15, 16, 17, 18 and 20 of this Advice apply also for the protection of the identity of the reported persons.

22. The reported person should be aware that confidentiality may not be ensured in the circumstances indicated in paragraph 19.

### **Regular review of the procedures**

23. A competent authority should review regularly and, at least, every two years the procedures referred to in Article 32(1), in particular by taking into account the experience of other competent authorities.

### **General measures for the protection of persons under contract of employment**

24. The reporting in good faith to the competent authority should not constitute a breach by the reporting person of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the reporting person in liability of any kind related to such reporting.

25. A competent authority should neither comment on the existence of a report with an employer inquiring whether a report has been sent by one or more of its employees, nor provide any information to this employer would such a report having been received.



## **7 Annexes**

### **7.1 Annex I - Commission mandates to provide technical advice**

- Mandate published on 21 October 2013:

[http://www.esma.europa.eu/system/files/ec\\_mandate\\_to\\_esma\\_mar-l2\\_211021\\_doc.pdf](http://www.esma.europa.eu/system/files/ec_mandate_to_esma_mar-l2_211021_doc.pdf).

- Mandate published on 2 June 2014, related to “Reporting of infringements” only:

[http://ec.europa.eu/internal\\_market/securities/docs/abuse/140528-esma-mandate\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/abuse/140528-esma-mandate_en.pdf).

## 7.2 Annex II - Opinion of the Securities and Markets Stakeholder Group (Extracts)

<http://www.esma.europa.eu/system/files/2014-smsg-047.pdf><sup>24</sup>

The Securities and Markets Stakeholder Group (SMSG) did not provide any comment or opinion on the minimum thresholds of carbon dioxide and rated thermal input to be established under Article 17(2) of MAR for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information.

### 7.2.1 Specification of indicators of market manipulation under Article 12(5) of MAR

#### “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 indicators 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

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<sup>24</sup> Full 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.

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.”

## **7.2.2 Determination of the competent authority for notification of delays in public disclosure of inside information under Articles 17(4) and 17(5) of MAR**

### **“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 MSs, 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 MS where the issuer's registered office is located. The proposed approach seems efficient and supportive of market monitoring.”

### 7.2.3 Managers' transactions (type of transactions to report and trading during closed period) under Article 19 of MAR

#### “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 MSG has already pointed out in its response to ESMA's DP on MAR (cf. ESMA/2014/MSG011) 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 MSG 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 MSG 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 MSG has already asked ESMA to clarify the temporal scope of the closed period (cf. ESMA/2014/MSG011). 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. MSG 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”.

#### 7.2.4 Procedures for reporting of infringements under Article 32(1) of MAR

##### “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."

## 7.3 Annex III - Feedback on the consultation paper

### 7.3.1 Specification of the indicators of market manipulation under Article 12(5) of MAR

**Q1: Do you agree that the proposed examples of practices and the indicators relating to these practices clarify the indicators of manipulative behaviours listed in Annex I of MAR?**

1. The vast majority of the respondents generally agree that the proposed examples of practices and the indicators relating to these practices clarify the indicators or manipulative behaviours listed in Annex I of MAR.
2. A number of respondents indicated that the list has too many examples and is too detailed, making it unclear/repetitive/confusing, they are concerned that the current list is too extensive, duplicative and lacks precision and sufficient context that should be considered when making a determination whether a practice is permissible or impermissible.
3. Some of them pointed out that there is the risk that market manipulation done in slightly another manner or way could be regarded outside the scope of the regulation. They are worried about the impact that such detailed list will assist, for instance, courts in their decision concerning specific behaviour and there is the risk that the discussion will be focused on the details instead of the abusive behaviour. They propose to shorten the list, stating that some of the practices can be done by using cross-product strategies or acting on different venues and that OTC transactions can also be used to manipulate the market.
4. Several respondents questioned the usefulness of the related indicators, and are concerned about the practical implications of these related indicators. They consider that market participants will rely greatly on the indicators and examples to interpret and implement MAR, and in their opinion it is unclear if and how market participants should integrate the related indicators when calibrating their automated surveillance systems. They believe it will be difficult to find a monitoring framework to properly detect the different indicators, and to program effective monitoring metrics given the current broad and subjective wording, such as for example “unusual repetition of a transaction among a small number of parties over a certain period of time”, which would result in the overwhelming majority of alerts generated by surveillance systems being “false positives” that nevertheless require analysis.
5. It was also suggested to integrate the “related indicators”, as referred to in the CP, into the examples of practices.
6. A small number of respondents found that the examples should include an element of intent, in order to indicate market manipulation, and asked ESMA to expressly detail it. They also pointed out that there is a significant risk that these descriptions may become overly prescriptive and have the effect of appearing to prohibit practices that may be

considered legitimate in certain circumstances, or that legitimate trading practices may fall within the list of examples. They suggest putting more emphasis on the fact that these are only examples, not cases of market abuse per se, and therefore the purpose of the transactions and/or orders, and the legitimacy of their commercial rationale, must be at the centre of any analysis to establish cases of potential market abuse.

7. In particular, a few respondents request that ESMA specify when a practice is not abusive or when it is legitimate. One presented some specific concerns on legitimate behaviours, and suggested changing the example usually known as colluding in the after-market of an Initial Public Offer”, in order to take into account the fact that “Initial Public Offer” is a term associated only with equities. While another made two suggestions: one modifying the “creation of a floor in the price pattern” in order to take into account the case where the manipulation aims to prevent an upwards price change and another suggesting to move the 9.2 and 9.3 examples (“movement or storage of physical commodities” & “movement of an empty cargo ship”) to the category of “dissemination of false and misleading information”. Lastly, one respondent provided some specific remarks regarding benchmarks highlighting the profile of benchmarks that they believe are more prone to manipulation than others.

#### **ESMA’s response:**

8. The list of examples presented is intended to provide indications of behaviours to be taken into consideration when analysing if a specific situation may constitute a possible market abuse conduct.
9. As stated the list is neither exhaustive nor determinative. Market participants will have to exercise judgment when analysing a specific conduct or behaviour and particular attention shall be given to deviations from what is usual on the trading characteristics of the financial instruments and the markets. A proportionate approach should be followed to take into account nature and characteristics of the market of a particular financial instrument.
10. In relation to the concerns expressed on the list being too extensive and detailed, in fact there is the risk that the result could be that market manipulation done in slightly another manner or way could be regarded outside the scope of the regulation. Nevertheless, ESMA was invited to provide its technical advice in order to clarify the elements of the indicators listed in the Annex I of MAR and to provide, if necessary, in light of technical developments, additional indicators. ESMA has nonetheless modified the manner in which the practices are presented to facilitate their usage. Specifically, instead of repeating the practices under each MAR Annex I indicator for which they are relevant, ESMA has presented each practice once and then has referred back to that description in the case of each MAR Annex I indicator for which it is relevant. Furthermore, to reinforce their link with the indicators listed in Annex I of MAR, the so-called “related indicators” initially listed under paragraph 13 of the draft advice in the CP are presented in the final advice under each practice to which they can be of relevance and renamed into additional indicators. To avoid repetition of the description of the additional indicators relevant to several practices, a cross-reference approach has also been adopted.

11. It is important to clarify that these practices should not be considered to constitute market manipulation per se, but they should be taken into account when analysing trading activity, and the lists should be used as a practical tool to be used by competent authorities and market participants to analyse on a case by case basis whether market manipulation has occurred. ESMA recalls the need for exercising judgement when analysing a specific approach, to take into account the suggestions made in some replies. ESMA's goal is not to delete some of the behaviours proposed but just to improve the presentation of the list, as those examples are, in its view, appropriate and none of the respondents considered that the list had inappropriate indicators.
12. Concerning "intent", even situations that were not committed with intent are under the scope of market manipulation of MAR. ESMA already highlighted in the CP that "*Where an example seems to require that a conduct is characterised by a manipulative intent, this does not imply that, in the absence of the intent that conduct might not fall within the scope of the definition of market manipulation*". This is also stated in Recital (23) of Directive 2014/57/EU on criminal sanctions (Market Abuse Directive).
13. On the other concerns expressed, ESMA is aware of the fact that the examples/indicators listed might capture legitimate activities. Nevertheless, ESMA's mandate is not to point out legitimate examples of behaviours. As acknowledged by recital (42) of MAR, "a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned." Furthermore, MAR also provides for a safe harbour for practices relating to trading in own shares in buyback programmes or to stabilisation transactions, provided certain particular conditions are fulfilled.
14. ESMA has taken into account certain specific suggestions:
  - a. The practice known as the "creation of a floor in the price pattern" has been changed to reflect that it can also lead to the creation of a ceiling;
  - b. The practices known as "movement or storage of physical commodities" and "movement of an empty cargo ship" have been moved to the category of indicators "dissemination of false and misleading information";
  - c. The practice known as "colluding in the after-market of an Initial Public Offer" has been modified to take into account that IPO is a term associated with equities.

**Q2: Do you think that the non-exhaustive list of indicators of market manipulation proposed in the CP are appropriate considering the extended scope of MAR in terms of instruments covered? If not, could you suggest any specific indicator?**

15. Almost all respondents (23 in 27) consider the proposed non-exhaustive list of indicators of market manipulation as appropriate, considering the extended scope of MAR in terms of instruments covered.



16. Nevertheless, 11 respondents presented suggestions on the list of indicators.
17. Some concerns were also expressed in replies to this question, as in those to Q1, on the long and detailed list presented. The full concerns and ESMA's response are reported above under Question 1.
18. As is the case under Q1, some respondents are of the opinion that the intent of the person(s) engaged in market manipulation should be an important consideration and ask ESMA to expressly detail it. The full concerns and ESMA's response are reported above under Question 1.
19. There were also expressed concerns related to commodities and legitimate reasons or behaviours concerning such products.
20. Comments on the lack of examples concerning benchmarks were also pointed out (1 respondent).

**ESMA's response:**

21. As stated above, the list of examples presented are intended to provide indications of behaviours to be taken into consideration when analysing if a specific situation may constitute a possible market abuse conduct.
22. It is also recalled that the list is neither exhaustive nor determinative. Market participants will have to exercise judgment when analysing a specific conduct or behaviour and particular attention shall be given to deviations from what is usual on the trading characteristics of the financial instruments and the markets. A proportionate approach should be followed to take into account nature and characteristics of the market of a particular financial instrument, without excluding that other examples of practices not specified in the technical advice can be relevant.
23. In relation to the concerns expressed on the list being too extensive and detailed, see ESMA's response to Q1.
24. Concerning "intent", see ESMA's response to Q1.
25. On the concerns relating to legitimate reasons or behaviours, see also ESMA's response to Q1.
26. ESMA would like to recall that the list already points out some examples specific to the commodities markets (for instance, practices listed in 11(6) and 11(7) of ESMA's advice).
27. Concerning benchmarks, although some respondents suggested the inclusion of specific examples, no specific and concrete proposals were included in the responses, in particular in relation to benchmarks which are not composed by financial instruments but are based on other input from market participants. ESMA is however providing examples of practices and indicators that can be of relevance in the context of benchmark manipulation. The final advice contains a list of examples of behaviours related to

financial instruments that may be used indirectly to manipulate benchmarks, as the manipulation of benchmarks is closely associated to the manipulation of the financial instruments or other constituents underlying the benchmarks. Going beyond the list clearly relating to manipulative activities referred to Article 12(1)(a) and (b) but only indirectly to benchmark manipulation set out in Article 12(1)(d) is perceived as premature at this stage, in light of the recently adopted and not yet applied regime for benchmark manipulation. It should also be noted that the global new EU regime relating to benchmark is still to be finalised.

**Q3: Do you consider that the practice known as “Phishing” should be included in the list of examples of practices set out in the draft technical advice?**

28. Almost all respondents (26 in 29) do not consider that the practice known as “phishing”, as described in the CP<sup>25</sup>, should be included in the list of examples of practices set out in the technical advice. There is unanimity among these respondents on the fact that such a practice is a fraudulent behaviour, that is unacceptable, but per se it is not a market abuse practice (it can be used in connection with market abuse). Only two respondents consider that the described practice should be included in the examples.

**ESMA’s response:**

29. In the CP, “phishing” was understood as “the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication”.
30. ESMA agrees with the respondents that such a practice as described in the CP shall not be included in the list of examples of practices set out in the technical advice. Nevertheless, as it was pointed out by some respondents and the SMSG, high frequency traders (but not only) can exploit a “phishing” practice that consists in posting small orders, with a limited financial impact for the firm itself, at sensible levels only to get an acknowledgement of a trade before the information is received by all market participants through market data, and then sending an order to take position and advantage of the information. Thus, such kind of “phishing” practice, with a description different from the one described in the CP, should be considered in the list of examples of practices set out in the technical advice.
31. For this purpose, “phishing” could be described as follows: executing orders to trade or a series of orders to trade, in order to uncover orders of other participants, and then entering an order to trade to take advantage of the information obtained. This behaviour is usually associated to high frequency trading, allowing to explore the differences between private and public data flows but, as all the others behaviours, can be used by other market participants.

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<sup>25</sup> 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.

**Q4: Do you support the reference to OTC transactions in the context of cross product manipulation (i.e. where the same financial instrument is traded on a trading venue and OTC) and inter-trading venue manipulation (i.e. where a financial instrument traded on a trading venue is related to a different OTC financial instrument)?**

32. All the 24 respondents, except two, supported the reference to OTC transactions in the context of cross product and cross trading venue manipulation. They justified the support with the interrelation of the prices on exchange and on OTC markets: the price for which financial instruments are traded in one market can materially impact the price on another. Thus, OTC trading may be manipulative where it is engaged in for the purpose of manipulating prices of the same or related instruments traded on trading venues. One of the respondents even gave an example of a manipulative behaviour: bidding a small volume at higher price on exchange while negotiating large OTC sales (the bid price gives a false signal to the buyer in the OTC transaction). Some added that, as the new MAR covers OTC transactions, there is no legislative basis for excluding OTC transactions.
33. One of the respondents understood that there is no peculiar need to refer to OTC transactions in the context of cross-product and inter-trading venue manipulation. Another supported the ESMA approach only where the OTC trades are visible on an electronic platform or arranged through intermediaries, being thus against the reference in all other cases, except when one of the parties in the transaction publishes the transaction or provides its price as input to a reference price administrator.
34. Two of the respondents also suggested the inclusion of a reference to hedging as a legitimate behaviour, like the hedging in an OTC derivative transaction via underlying instruments or via futures in a trading venue.

**ESMA's response:**

35. Regarding the position of the unique respondent which does not support the reference in specific circumstances, it can be argued that with the entry into force of MiFIR, there will be public information of almost all OTC trades. In any case, even without public information and with no intervention of financial intermediaries, the OTC trades could impact trading venues where the related hedging transactions are executed.
36. With regard to the reference to hedging as a legitimate behaviour (hedging in an OTC derivative transaction via underlying instruments or via futures in a trading venue), ESMA would like to remind that the mandate received is not to identify legitimate behaviours. Furthermore, the transactions done for hedging purposes are not exempted from the market manipulation regime: in fact, transactions done with legitimate objectives can be executed in an improper way.

### 7.3.2 Minimum thresholds of carbon dioxide and rated thermal input to be established under Article 17(2) of MAR

**Q5: If you do not agree with the suggested thresholds, what would you consider to be appropriate thresholds of CO2 emissions and rated thermal input below which individual information would have no impact on investors' decisions? Please substantiate.**

37. Out of the almost 20 respondents, only one supported the thresholds proposed in the CP whereas all the others, essentially representatives of energy market participants and industrial emitters, globally opposed to the proposed thresholds, considered them to be too low, and requested elements of the CP and even of MAR Level 1 to be clarified.
38. Clarifications have been requested on the entities in scope and the confusing of the term “companies” in the CP:
- The CP uses the word “companies” which creates a lack of clarity and uncertainty, whereas it is considered that the threshold should apply to EAMPs, i.e. the legal person active in the market, on the basis of the MAR level 1 definition of EAMPs which relates to legal entities only (i.e. persons who enter into transactions in emission allowances, auctioned products based thereon or derivatives thereof), not to a group of companies.
  - It is argued that disclosure obligation can only rest on EAMPs with physical operations. Therefore, there has been a disagreement with the following CP statement *"such trading entities, which are owned or controlled or otherwise related to companies with physical operations as specified in Directive 2003/87/EC which in turn do not qualify for the exemption under the second paragraph of Article 17(2), would also satisfy the definition of an EAMP as a sub-set of the participants in the emission allowance markets."* (CP p. 24, N° 31 in fine).
39. Further clarifications are also sought with regard to the installations to consider for the thresholds:
- whether the thresholds apply to a single installation, or to a single legal entity and all of its installation, or to an economic group of legal entities under common control and all its installations;
  - whether in the EAMP calculations the installations, pursuant to Article 3(e) of Directive 2003/87, to be taken into account are the ones located in EU MSs and also in participating EEA/EFTA countries having joined the ETS.
40. With regard to the way the two thresholds apply, a number of respondents asked ESMA to clarify or confirm that the 2 thresholds apply cumulatively (and not alternatively), mentioning that level 1 text in Article 17(2) 2nd subparagraph uses the term “and” and this means both thresholds must be breached to be in scope.

41. In relation to the scope of the information to be disclosed and the term “important firm specific information”, some respondents argued that ESMA is adding confusion when referring in paragraph 37 of the CP to “important firm specific information” and this should be deleted. It is clear from the level 1 text that Article 17(2) and Recital 51 explicitly refers to information related to the physical operations of the installations (or activities). They do not understand what additional inside information, which is “important firm specific information” and not related to physical operations, could be inside information. In their understanding, even for an EAMP above the threshold, the disclosure obligation applies only to the extent that any information qualifies as “inside information”, which by nature requires a case-by-case assessment, i.e. taking into account the size of the installation and the incident/event, both related to the current situation in the market.
42. It is also suggested that the advice restates the content of Recital 51 of MAR whereby participants above the threshold do not need to disclose changes in emissions due to own plans or strategies for trading.
43. Furthermore, arguments were put forward to exempt industrial emitters from reporting, by setting the threshold at a higher level.
44. The main argument is based on Recital 51 of the MAR which states that the requirement to publicly disclose information in the emission allowance market should be limited “to only those EU ETS operators which, by virtue of their size and activity, can reasonably be expected to be able to have a significant impact on the price of emission allowances.” The focus on minimum thresholds, therefore, does not reflect recital 51 as it completely neglects the important criterion of an operator’s activity in the market. Industrial emitters usually run several facilities with rather low emission levels at unit level but when cumulated would breach the thresholds. These units are normally operating independently the one from the other. So, industrial emitters would be obliged to establish complex and costly systems and incur a high administrative burden to assess whether the information related to one of the unit would characterise, on a case by case basis, as inside information while in fact it will hardly do. Besides, this would contradict the cost-efficiency criteria that the reporting obligation should meet as stated in Recital 51. They also put forward that being obliged to disclose under MAR would imply disclosing business confidential information to the market, including thus competitors and creating competition law concerns and risks. It is suggested that, would MAR disclosure be unavoidable, then it should be anonymised.
45. Some respondents considered that industrial emitters will never have an impact on the price of emission allowances. As most industrial emitters are subject to carbon leakage provision under the ETS Directive, they receive a high proportion of their necessary emission allowances through free allocation and therefore do not participate in the auctioning or trading market like energy utilities, which do not receive any free allocation. In contrary to industrial emitters energy utilities have to cover their full demand of emission allowances through participation in auctions and other ETS market places. Consequently, only a change in the energy utility demand for allowances might have under certain conditions an effect on prices in the emission allowance market. Only energy utilities should therefore count towards exceeding the thresholds.



46. Others also proposed to exempt EAMP who trade allowances in order to reduce risks associated with their commercial or industrial activity from the reporting obligation (similar to the exemption from the clearing obligation for non-financial counterparties under EMIR). This is justified as such activities are unlikely to have a significant price effect.
47. As consequence, there is a strong and quasi-unanimous call for setting the thresholds at a higher level although there are mixed views among the respondents on what should be these levels:
  - 20 million CO<sub>2eq</sub> and 5,000 MW,
  - 20 million CO<sub>2eq</sub> and 3,500 MW,
  - 30 million CO<sub>2eq</sub> and 9,000 MW, or
  - 6 million CO<sub>2eq</sub> and 2,500/3,000 MW.
48. A couple of respondents also suggested to set thresholds at installation level, either in addition to the 2 higher level threshold or instead of these 2 absolute thresholds, as way to limit non-meaningful information to be assessed in light of the disclosure requirements.
49. Another important concern raised by many respondents relates to the methods for calculating equivalence between the CO<sub>2eq</sub> threshold and the rated thermal input threshold which is considered to be wrongly calculated.
50. It is believed that the average emission metrics used in the Consultant's report are misapplied, notably because the conversion factor is not considering the different types of fuels and is based on old data. It is also argued that the rated thermal input has been misinterpreted as corresponding to the "capacity" under ACER guidance.
51. The appropriate average emission metrics are in the range of 0.2 to 0.35 kg CO<sub>2</sub> per kWh. Such average emission metrics would equate 6 MT CO<sub>2eq</sub> emissions with rated thermal input of minimum 2,500MW (instead of 1,050MW) or 2,500/3,000 MW according to 1 respondent.

#### **ESMA's Response:**

52. In MAR, the co-legislators have empowered the Commission to specify the levels of a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input, and ESMA was mandated by the Commission to provide a technical advice on the matter. When setting the minimum thresholds, it would appear necessary to take into account among other considerations, the expected total number of exempt and non-exempt entities and the share of total emissions of companies captured by the threshold. The aim of the Consultant's Report was to provide a first estimate of their magnitude and act as input for further consultation. Apart from the emission metrics for the calculation of the rated thermal input threshold in the Report, which may have been inaccurate, ESMA does not consider that the Consultant's Report, or the economic analysis therein, and in turn the CO<sub>2eq</sub> threshold recommended by ESMA have fundamental flaws.

53. More appropriate emission metrics for the calculation of the rated thermal input are the emission factors from the ETS Monitoring and Reporting Regulation. While this affects the results, it does not change the methodology used by the consultants. Using average of these emission factors (between 94.6 and 101 tCO<sub>2</sub>/TJ, or between 0.3 and 0.36 when converted into kgCO<sub>2</sub>/kWh) for coal-fired stations, the rated thermal input figure equivalent to the 6-million tCO<sub>2eq</sub> threshold is around 2,430 MW. The advice has been modified accordingly.
54. According to the wording of Article 17(2) of MAR, thresholds apply at a group level and relate to all the installations of an economic group of entities. Applying the thresholds at a single entity or even installation level would allow adjusting the activities of respective single entities to be below the reporting threshold and be prone to circumventing MAR requirements. Similarly, it would allow adjusting activities of the group to circumvent the MAR requirements for trading entities related to the entities with physical operations under the EU ETS. Although MAR refers to *emission allowance market participants*, ESMA does not consider that using the term *companies* changes the substance for the purpose of this CP.
55. There may be some trading entities that will be covered by the EAMP definition and the consequential duties. ESMA agrees that the disclosure obligation can only rest on participants, including such trading entities, with a link to physical operations. In this respect, it does not agree that the CP is inaccurate on this point.
56. Such as the EU ETS Directive is of EEA relevance, installations located both in the EU MSs and EEA/EFTA countries and activities carried out in the EU MSs and in EEA/EFTA countries should count towards the EAMP calculations.
57. Level 1 text in second subparagraph of Article 17(2) states the obligation set in the first subparagraph "... shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent **and**, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold" (emphasis added). This subparagraph clearly uses the term "and" for the disclosure requirement NOT to apply. This means that both thresholds must be satisfied (not exceeded) in order for the participant to be exempted from the requirement. In other words, exceeding one of the two thresholds is sufficient for the requirement to apply.
58. In paragraph 37 of the CP, when using the expression "important firm specific information", the intention was to refer only to information concerning physical operations. This is purely an issue of wording.
59. The content of Recital 51 does not state that participants do not need to disclose changes in emissions due to own plans or strategies for trading, but only that they do not need to disclose own plans or strategies for trading.
60. It should also be noted that the Level 1 text does not distinguish between industrial and energy emitters.

61. Concerning the cost of complying with the disclosure requirements, these considerations were carefully assessed in the Consultant's Report. Linking business decisions with the impact on the volume of emissions would be somewhat analogous to understanding the earnings impact of business decisions. With the introduction of the new policy, industrial companies would need to allocate resources, including for understanding the rules. However, ESMA is mindful that not covering important changes in industrial emitters' demand for allowances would contradict the aim of public, effective and timely disclosure of inside information concerning the emission allowance market as stated both in article 17(2) and recital 51.
62. In case the requirements of Article 17(4) for the possibility to delay the publication of inside information apply, delaying disclosure of inside information remains a possibility.
63. The method of allocation of allowances (free allocation or auctioning) does not affect the balance and in turn the price in the emission allowance market. It is the potential demand for emission allowances, and hence related physical operations, of emitters that matters.

**Q6: In your opinion, what types of entity-specific, non-public information held by individual market participants are most relevant for price formation or investment decisions in the emission allowance market?**

64. Only one respondent believed that relevant corporate information in the emission rights market is not different from information for other listed securities and financial instruments, whereas the others are of the opinion that there is little or no relevant entity specific information that is not already published under REMIT or collected by competent authorities.
65. A vast majority of respondents considered entity-specific, non-public information is of little, if not of no relevance for price formation or investment decisions in the emission allowance market. There is a broad agreement that, in the emission allowance market, prices are mainly influenced by macro-economic information, EU MSs' policy decisions and the overall demand. A few of them said that due to the size of the emission allowance market, entity specific information will not affect the price formation in the emission allowance market. In addition, one also has to distinguish between entity specific information on industrial installations and entity specific information on power plants as only entity specific information on plants that are not industrial ones can have under very rarely circumstances an effect on price formation in the market.
66. Furthermore, almost half of the respondents said that there is no entity specific, non-public information relevant for price formation or investment decisions that are not already required to be disclosed under REMIT. Planned and unplanned shutdowns of production, transmission, storage and other facilities do not have a significant effect on price formation in the emissions market, as very few installations are large enough, in particular among industrial emitters, to impact the wider market. As these large installations are power plants, any entity-specific, non-public information meeting the definition of Article 7(1)(c) MAR is already subject to the Article 4 REMIT public disclosure requirement. So, industrial emitters outside the power generation sector hold little or no non-public information that would be relevant for price formation, unless they

decide to leave Europe. Among these respondents, 3 also highlighted the much more important impact of the non-thermal production units (such as nuclear facilities which are CO<sub>2</sub> neutral) in case of unavailability and replacement by CO<sub>2</sub> generating thermal units and regretted that these installations do not seem to be covered by the EAMP definition.

67. A few others indicated that relevant information (changes planned in the nature or functioning, or an extension, of the installation; or planned or effective changes to the capacity, activity level and operation of an installation) is already collected, at the end of the year, by the authorities at national and EU level in accordance with Article 7 of Directive No 2003/87/EC as amended by Directive No 2009/29/EC and Guidance Document 7 of Article 7 of the revised ETS Directive and Article 24 of the Community-wide Implementation Measures (CIMs). They therefore questioned the need to introduce further disclosure under MAR which would double the burden on ETS participants.
68. Some, mainly industrial emitters expressed concerns about the risks associated with disclosure of business sensitive information and call for “anonymisation”. They questioned the type of information specified under Art 17(2) of MAR that would need to be disclosed (“capacity and utilisation of installations, including planned or unplanned availability of such installations”). They argued that (i) the information is strictly business sensitive and (ii) if disclosed publicly, it could raise anti-trust concerns. Competitors could draw conclusions on the installation’s mode of operation and industrial manufacturers would face great risks in that intra- and extra-EU competitors would gain access to information about their production performance. If a competitor now adapted his production pattern according to this information, this could be classified as “signalling” under antitrust regulations.
69. Therefore, to limit these risks, they suggest that (i) if industrial emitters need to disclose insider information, it should only be done in an anonymised way (including via an independent institution collecting the information and publishing projections of the future emissions), and, (ii) the advice does not mention the wording about “utilisation capacity...”
70. Finally, a few of them also requested that further guidance is given as to how to conduct the case by case assessment of the information under consideration with respect to the criteria of inside information.

#### **ESMA’s Response:**

71. ESMA understands the argument that information that already falls within the scope of REMIT should continue to be published under the REMIT regime. However, it should be noted that this information may also fall within the scope of MAR. ESMA is required to develop draft Technical Standards defining the channels for appropriate disclosure of inside information. The interplay between REMIT and MAR requirements in the context of disclosure of inside information will be covered in the ESMA final report accompanying the draft technical standards. Moreover, there could be information not in the scope of the REMIT disclosure requirements that is in the scope of the MAR inside information disclosure requirement, and this would have to be properly disclosed. Otherwise, there is

a risk that the overall objective of preventing market abuse and increasing transparency in the emissions market is not met.

72. In relation to the collection of relevant information under Directive 2003/EC/87 mentioned by a few respondents, although some reporting takes place in accordance with such Directive and provides the Commission with information, it needs to be noted that it is not a real time information and has a different nature and purpose than the information required to be disclosed under MAR Article 17. It is also not necessarily publicly disclosed.
73. Concerning the comment on non-thermal power production units (such as nuclear plants), in practice, undertakings operating such installations are also likely to be covered as they typically have a diversified "fuel-mix" and are also related to thermal productions units. Moreover this is mainly about power plants, which would in any case already be covered by REMIT.

### 7.3.3 Determination of the competent authority for notification of delays in public disclosure of inside information under Articles 17(4) and 17(5) of MAR

#### **Q7: Do you agree with the proposals for determining the competent authority to whom issuers of financial instruments and emission allowance market participants should notify delays in disclosure of inside information?**

74. There was a quasi-unanimous support from the respondents to the proposals for determining the competent authority to which issuers of financial instruments and emission allowance market participants (EAMPs) should notify delays in disclosure of inside information.
75. In relation to issuers of financial instruments, one of the supportive respondents asked for new provisions to be made, allowing the regulated market to demand and receive information about the decision of delay of the publication of an inside information, in order to facilitate an intensive surveillance of the trading in the instrument(s) and giving the marketplace an indication of possible leaks of information. Another respondent explained its concerns about any proposals that facilitate the delay in public disclosure of inside information because it is always in the best interests of market integrity for material information to be disclosed publicly as soon as practicable. The same respondent also added that the determination of the relevant competent authority should be made on the basis of the place of issue of the security and not as a strategic decision of the issuer.
76. In relation to EAMPs, 4 respondents asked that any delayed disclosure under REMIT should release the EAMP from any additional notification under MAR and that the involved competent authorities (energy regulators and financial regulators) should cooperate with ACER to exchange information between them and avoid duplicative and/or new obligations on EAMPs. Under REMIT, market participants have to notify ACER and the relevant National Energy Regulator in case of delayed disclosure of inside



information regarding their physical operations (article 4.2 of REMIT) and a dedicated ACER notification platform has been created for these purposes<sup>26</sup>.

77. Moreover, 1 respondent wonders whether for EEA countries, the same process would apply as under REMIT: a nominated MS is used for this purpose on an interim basis until the EEA-Agreement has been adapted for MAR. Besides, this respondent is also seeking confirmation from ESMA that commodity markets do not have issuers, arguing that for commodity financial instruments the underlying is never specific to a market participant, but is specific to the segment of the relevant commodity market.
78. Finally, a respondent supportive of the draft TA expressed its approval for a mechanism to inform in addition the authority of the most relevant market in terms of liquidity when it is different from the authority to which the notification of the delay is made.

### **ESMA's Response:**

79. The clear support to this section of the CP, including the approval by the SMSG, indicates that no general amendment is needed to the Advice. The proposals by the respondents reported in relation to issuers do not fall under the empowerment and therefore cannot be taken into consideration. In fact the empowerment refers to the identification of a competent authority, and ESMA cannot require the notification to be sent also to the relevant regulated markets, or to any other trading venues, as this would also not be in line with MAR level 1.
80. As for the concern for EAMPs, it should be reminded that ESMA is required "*to provide its technical advice to specify the competent authority for notification of delays by emission allowance market participants that are not exempted pursuant to the second subparagraph of Article 12 (2)*" (see Commission Mandate). In this context, competent authority means the single administrative authority designated by each MS for the purpose of MAR (see Article 22 of MAR). ESMA has no option other than to define a competent authority for EAMPs. The selection of the competent authority of the MS where an EAMP's registered office is located received no opposition by respondents, and it is still considered the most appropriate. Furthermore, it should be reminded that the timing for notification to the authorities differs in MAR and REMIT. In the latter, the delay and the explanation should be notified without delay (ex-ante), whereas under MAR the notification duty triggers once the inside information has been published following the period of delay (ex-post).
81. In relation to the query on commodity financial instruments and related issuers, it should be noted that the obligation to disclose inside information under MAR Article 17 applies to any issuer of financial instruments. In this context, MAR level 1 provides a definition of inside information for commodity derivatives, in MAR Article 7(1) point (b). The definition of "issuer of financial instruments" in relation to derivative contracts may be further

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<sup>26</sup> <https://www.acer-remit.eu/np/art42>.

explained in the future, but at this stage this specific issue is outside of ESMA's mandate for the technical advice related to Article 17(3) of MAR.

82. Finally, ESMA acknowledges the support, expressed by a respondent, for a mechanism to inform the authority of the most relevant market in terms of liquidity when it is different from the authority to which the notification of the delay is made by a EAMP, and would further consider this suggestion in the preparation of the implementing technical standards on cooperation under MAR.

**Q8: Under point c) of paragraph 2 of the draft technical advice, in cases in which the issuer's financial instruments were admitted to trading or traded simultaneously in different MSs, which criteria should ESMA take into consideration to determine the relevant competent authority?**

83. Just a small number of market participants provided a response to this question. A small majority supported the most liquid markets approach, two of them mentioning the consistency with MiFID II, one referring to "greatest trading volume", and another one proposing that if it was not determined by liquidity then it should be done by shareholder distribution in the different MSs. A second group of respondents proposed the MS where the financial instrument was first admitted to trading. It should be noted that the question refers to admission to trading simultaneously in different MSs, thus this solution is not applicable. Another small group of responses referred to the home competent authority under TD/PD, or the MSs where the issuer' register office is located. Finally, a respondent suggested that the criterion should be where the majority of raised capital is issued to avoid regulatory arbitrage.

**ESMA's Response:**

84. Considering the marginal type of subcase that this question concerns, and appreciating the preference for the most liquid market as defined in MiFID II, ESMA decided to follow the feed-back received and add this subcase in the final Technical Advice, making reference definition of most liquid market under MiFID II.

**Q9: Do you consider it would be appropriate to determine in a different manner the competent authority for the purpose of Article 17(5) of MAR, where the delay has the scope of preserving the stability of the financial system? If so, should the competent authority be determined according to mechanism set out in Article 19(2) of MAR or in another way?**

85. Just a small number of market participants provided a response to this question. The majority of them suggested that the same approach should be used, also to avoid unnecessary complexity. Almost all of the remaining respondents indicated that the competent authority under 17(5) should be the competent authority of the home MS, as referred in Article 19(2) of MAR. The reason for this support is that in an event of bankruptcy of a credit institution, or other major events, it will probably mainly affect the home MS, and therefore the relevant competent authority should be linked to the country responsible for regulation of the credit institution. A respondent added that if the credit or financial institution is not registered in a MS then that disclosure should be made to the



competent authority of the MS which provides lead prudential oversight of the financial institution. Finally, one respondent argued that the banking supervisory authority is best placed to decide when sensitive inside information can be withheld from the public.

**ESMA's response:**

86. The analysis of these responses needs to take into account the banking supervisory framework in Europe, the role of the Single Supervisory Mechanism within it, and how the draft Technical Advice presented in the CP would interact with such framework. First of all it should be noted that, according to the draft Technical Advice, the outcome of the determination of the relevant competent authority would be most of the time the competent authority of the home MS, i.e. where the issuer is registered. This would be even more likely for credit or financial institutions for which the disclosure of the inside information would have a systemic impact (as explained in MAR Recital 52), and thus the delay is needed to preserve the stability of the financial system (MAR Article 17(5)). In fact, most, if not all, major credit/financial institutions in the EU have equities securities admitted to trading (or traded) in the MS where their registered office is located, and therefore they would fall under para 2(a) of the draft Technical Advice, and the competent authority of the home MS would be selected. For the remote cases where the competent authority of the home MS would not be selected, it should be noted that MAR Article 17(6) provides for the national central bank, or the macro-prudential authority or the national authority responsible for the supervision of the issuer to be consulted, as appropriate, by the designated competent authority under MAR before deciding to consent or not to the delay. ESMA would emphasise that the competent authority selected by the procedure proposed in the draft Technical Advice has to be a designated administrative competent authority for the purpose of MAR, in accordance with MAR Article 22, and thus the proposal to elect the “banking supervisory authority” is not applicable, although in some MSs the MAR competent authority may coincide with the banking supervisory authority due to the national organisation of the financial supervision. So, ESMA maintains the same approach in the final Technical Advice.

**7.3.4 Managers' transactions (type of transactions to report and trading during closed period) under Article 19 of MAR**

**Q10: Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?**

87. This question attracted the interest of a large number of responses (39, plus 2 responses of no use). The vast majority of them were expressing concerns about some specific types of transactions listed in the draft advice. The issues raised can be summarised as follows:
88. Transactions where the PDMR does not play an active role: 18 respondents argued that a requirement to disclose such transactions does not serve the purpose of increasing transparency, as MAR Recitals 58 and 59 imply that transactions that have to be notified must be motivated by knowledge obtained in the PDMR's managerial function. Plus,

considering the low threshold, markets would be flooded with a multitude of transactions without any signalling value. These “passive transactions” can be divided in subgroups.

89. Investment funds (AIF, UCITS) and fully discretionary management: an argument put forward against the inclusion of such transactions, is that transactions in those schemes are not in the PDMR’s own account. A general argument in this respect, is that the “own account” test is the same test as that one which is currently set out in the MAD regime, and regulators have interpreted the reference to “own account” in the MAD regime as excluding those transactions for which the PDMR has not given any instructions or consent or otherwise had any control over. Accordingly, it is suggested that para. 1 of the Technical Advice should refer to the “own account” requirement and clarify its meaning. Others respondents have explained that transactions in shares or debt instruments of the issuer within the assets of the AIF or UCITS are not on the PDMR’s own account. It is only purchases or sales, by the PDMR, of units in the AIF or UCITS which should be caught by the scope of this rule, and only then when the AIF or UCITS have breached the 20% threshold. There should, thus, be no need for the PDMR to contact the fund manager as it is suggested in the last sentence of paragraph 115. In relation to para. 115, it was also argued, that notification from a PDMR to a fund manager during close period:
- would increase the number of occasions fund managers are made aware of circumstances giving rise to potential “inside information”;
  - would extend the number of “insiders”; and
  - could significantly affect the ability of certain “discretionary” fund managers to conduct their normal day to day trading activities.
90. Another respondent would be in favour that a PDMR is required to disclose transactions in shares or units of an AIF or UCITS: (i) when the fund has an exposure to the relevant issuer and the PDMR’s share of the fund results in a de facto acquisition or disposal of securities in excess of the relevant €5,000 annual threshold; or (ii) when the PDMR has exceeded his/her annual threshold elsewhere. Such transactions can be said to be a transaction conducted by and on behalf of the PDMR for the purposes of the MAR Level 1 text. In such situations, an investment manager could give the PDMR a positive or negative response as to whether the fund has an exposure to the PDMR’s company and, if the PDMR has not yet exceeded its transactional threshold for the annual period, provide details as to the proportion of the fund the relevant securities/derivatives represent. This would likely have to be subject to a non-disclosure agreement in order to protect the investment manager from dissemination of commercially sensitive information. Finally, a different respondent noted that these schemes are subject to certain legal investment restrictions (especially UCITS), so it is very unlikely an investment fund to hold over 20% of its portfolio invested in shares of the same issuer.
91. Gifts, inheritance, donations: four respondents and the SMSG argued that some regulators have excluded these passive transactions under MAD because of no added value in their reporting, while when the PDMR makes a gift or a donation, this should trigger the duty to notify. A different argument presented by a separate group of four

respondents is that inheritance should only trigger notification when securities are actually received and vested in the PDMR. Prior to this date, the PDMR may not be aware he is a beneficiary and thus it seems inappropriate to impose an obligation on a PDMR that may be impossible to fulfil (it is also possible that shares intended to be gifted to a PDMR will need to be sold by the estate and will therefore never actually be transferred to that individual). Finally, in relation to these types of transactions, two other respondents asked clarification on what is meant by “transaction by transaction” date in relation to gifts, donations and inheritance, as it is not cleared what is required. One way to address the problem could be that the relevant date should be the day when the financial instruments are received on the account.

92. Fixed components of a pre-determined remuneration plan (e.g. share options): one respondent said that acceptance of stock-options should be deleted and only the exercise of stock-options should be notified. Another noted that duty to notify should be limited in scope, as any acquisition and sale that follows a non-discretionary remuneration plan should be out of scope (the transaction will by definition never provide markets with information on the expectations of the person in question). Therefore the same respondent doubts that para. 2)b) should be in the scope without any exemption. If a stock based salary plan is pre-determined there is also no need to ban “trading” in the closed period. In addition to that, it is still missing a clarification as to when a notification becomes due with respect to derivative instruments under those plans (phantom stocks), and it is suggested that there should be no notification at all.
93. Three respondents asked to clarify that the unilateral grant of stock options, where no acceptance is required by the employee, does not require notification, and this should apply to other rights granted to employees as part of their remuneration package, such as conditional awards.
94. Finally, one respondent noted that both (i) “the acceptance and the exercise” of stock options (par. 2, lett. b) and (ii) the sale of shares stemming from the exercise (lett. c) should be notified. At the same time there is no explicit reference to the sale of shares stemming from stock grant (even if it may be implicit from lett. a)). In order to avoid the duplication of communications attaining the same financial instruments and the overflow of information to the market without any significant signal, ESMA should consider modifying lett. b) in the following way: “The sale of shares stemming from stock grants to managers and employees as part of their remuneration package”.
95. Relevant date: one respondent said its understanding is that the trigger for the 3-days legal notification term should be the transaction settlement date, and asked for confirmation.
96. Clarification on borrowing: 2 respondents asked to clarify that borrowing transactions should need to be notified and disclosed only if they are related to the respective financial instruments.
97. Preliminary results and closed periods: one respondent explained that it is market practice in the UK for issuers to publish a preliminary announcement of annual results (containing information prescribed by the FCA’s Listing Rules) before publishing the year-

end report. In some cases, where the preliminary announcement contains inside information, the issuer is obliged to make the preliminary announcement before the year-end report is published (it may not be possible to publish the year-end report at the same time as it will normally contain significantly more information than the preliminary announcement). Under the Model Code, the preliminary announcement triggers the end of the closed period as once the inside information has been published, there is no need to impose a prohibition on dealings. An inability to use a preliminary announcement as a trigger for the end of a closed period would mean that the 30 day prohibited period would not properly match the period prior to the release of the results to the market. This would not, therefore, reflect the purpose of the closed period.

98. On para 91: 2 respondents asked for the redrafting of para. 91 of the CP because article 19(7) contains no wording to indicate that the special situations in the article are only a non-exhaustive list of special transactions, quite the opposite, the article is very detailed and specific about which transactions should be added to those in article 19(1). Furthermore, the delegation of power to the Commission in 19(14) does not support a broad interpretation.

**ESMA's response:**

99. In light of the comments received, ESMA is clarifying and amending its approach to UCITS/AIF where the fund managers have full discretion, with no influence from the fund investors.
100. UCITS and AIF are maintained in scope when they are above the 20% threshold, if the PDMR or the closely associated person knows, or could have the knowledge of, the composition of the UCITS/AIF at the time of the transaction, i.e. of the PDMR/closely associated person's investment or divestment in the fund. This means that where the investment breakdown of the UCITS/AIF is publicly known, or where the investors in the AIF can be privately made aware of the investment breakdown by the fund in accordance with the fund own rule, the UCITS/AIF would be in scope of Article 19(1) of MAR. If the PDMR/closely associated person is aware of the UCITS/AIF investment breakdown at the time of his investment/divestment in the fund, this should be checked against the 20% threshold. On the contrary, where the UCITS/AIF investment breakdown is not available to the investor, because it is not public information or the investor is not informed by the fund itself, the UCITS/AIF would not be in scope of Article 19(1) of MAR. This latter could be the case where the strategy of the fund is treated as confidential and kept secret.
101. The logic behind this approach is straightforward: if the PDMR or closely associated person could not know whether the fund is investing in the issuer's shares of debt instruments, there would be no added value, in terms of information and transparency, in publicly disclosing this investment by the PDMR or the closely associated person.
102. In relation to UCITS it should be noted that in practice the vast majority of them will be de facto excluded because of the 20% threshold, i.e. it is very unlikely that a UCITS invests

a fifth of its assets in the same issuer. Chapter VII of the UCITS Directive (Directive 2009/65/EC)<sup>27</sup> imposes strict limits on the ability of UCITS to invest relevant portions of their assets in the same financial instrument, and just in very marginal cases the 20% threshold could be met or breached. In these cases where a UCITS breaches the 20% threshold (it could be, for instance, in cases under Articles 52(4) and 53 of the UCITS Directive), it is important, for a transparency purpose, to consider such UCITS in scope under paragraph 19(1). A large investment by a PDMR or closely associated person in a UCITS where the issuer's financial instrument represents more than 20% of the assets, could potentially be also a relatively (indirect) large investment in the issuer. It is therefore important that the market is aware of this holding, as part of the broader picture of the PDMR or closely associated person holding in the issuer's shares, debts and linked instruments.

103. Where the PDMR/closely associated person is not in a position to know the composition of the UCITS/AIF's investments, no notification is needed.
104. We are dealing here with situations where the UCITS/AIF are managed with full discretion by their own managers, with no possibility of influence by the fund's investors. For this reason, the composition of the UCITS/AIF that matters for the purpose of the notification, is the composition at the time of the PDMR transaction in the unit/shares of the UCITS/AIF, and whether in this composition the 20% threshold is breached. Once the investment in a UCITS/AIF is made, for the purpose of notification, the PDMR would not need to make further notifications in case of subsequent changes in the composition of the UCITS/AIF as long as the PDMR does not carry out another transaction in the units/shares of the UCITS/AIF.
105. For example, a PDMR buying units of an AIF will not have to count this transaction if at this point in time the 20% threshold is not breached; if, later, this PDMR sells those units, and at this second point in time is aware of the AIF's investment composition and the 20% threshold is reached, the transaction will have to be counted. So every time a PDMR/closely associated person buys or sells UCITS/AIF units/shares, he needs to be aware whether the 20% threshold is breached.
106. Besides, the trading on the issuer's relevant financial instruments by the UCITS/AIF manager will not trigger a duty to notify on the PDMR/ closely associated person when it is not possible for the PDMR/ closely associated person to influence the investment decisions of the fund, as these transactions are not made on his own account or on his behalf, but rather on the account of the UCITS/AIF itself. They therefore do not fall within scope of Article 19 (1) or Article 19 (7)(b).

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<sup>27</sup> 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): [http://www.esma.europa.eu/system/files/L\\_302\\_32.pdf](http://www.esma.europa.eu/system/files/L_302_32.pdf).

107. In cases where the fund is not managed with full discretion by its own managers and the PDMR/closely associated person has an influence on the investment decision of the fund in which he is investing as a client, the approach proposed by ESMA is different. This could be the case under some types of AIF that have small number of clients, and these clients are able to part in the decision-making process of the AIF, and thus participate in the determination of the of the fund's investment composition.
108. First, at the time the PDMR/closely associated person invests or divests in this type of funds, the same requirements as the ones explained above apply (i.e. check of the fund composition, comparison with the 20% threshold, and if above consider the investment for the calendar-year threshold of €5,000 and report if needed). On top of these obligations, the transactions executed by the funds once the PDMR/closely associated person has invested in it should also be considered for the notification obligation (and this is the difference with the notification obligation for PDMR's investment in funds whose managers have full discretion).
109. In other words, when a PDMR/closely associated person invest in this type of funds, besides the check that he has to make at the moment he invests in the fund, as long as he has money invested in such fund, also the transaction made by the fund in the issuer's shares and/or debt instruments should be considered for notification purposes. This is because the PDMR/closely associated person has the power to influence these transactions, and if the fund invests in shares and/or debt instruments of the issuer where the PDMR works, those should be notified for a transparency purpose. For example, if a PDMR invests in this type of funds, and at the moment of the PDMR's investment the fund's exposure to the issuer is 15% of the fund's investment composition, and after sometimes it reached 20%, at that moment the holding of the PDMR should be considered for the calendar-year threshold of €5,000, and reported if needed. Every time the fund invests in the PDMR's issuer, a check of the 20% threshold has to be made by the PDMR/closely associated person. This approach tries to prevent that this type of funds are used to circumvent the notification obligations under Article 19 of MAR.
110. In the context of the closed period, following the comments received, ESMA is also amending its approach towards UCITS/AIF, in line with the logic explained in the previous paragraphs.
111. First, as UCITS/AIF above the 20% threshold are considered covered by MAR Article 19(1)(a), a PDMR is forbidden to trade in these UCITS/AIF during a closed period when he has knowledge of the fund's investment composition and the 20% threshold is breached. Secondly, for funds managed with full discretion: a PDMR does not have to inform the UCITS/AIF manager of an upcoming closed period (as previously stated in the CP). As explained by some respondents, transactions in the issuer's related instruments within the assets of a UCITS/AIF are not transaction conducted by the PDMR but by the fund manager, and therefore these transactions are not affected by the closed period. In fact, the PDMR should not affect the UCITS/AIF manager's strategy in any way and it is clear that prohibition of insider dealing and of unlawful disclosure of inside information (Article 14 of MAR) applies also during a closed period.

112. In the case of funds where the fund's managers do not act with full discretion and the clients are able to participate in the investment decision, the closed period applies to the fund itself, as the PDMR can influence the investment decision. So, the fund manager would have to be informed, including where relevant by the PDMR, of the start of this closed period and of the relative investment restriction. The different approach for this sub-case of funds is a consequence of their different functioning, i.e. of the fact that the PDMR participates in the investment's decisions of the fund.
113. In relation to gifts, inheritance and donations, it should be noted that as long as these transactions are made on the PDMR's own account, they fall under scope, as the text of MAR Article 19(1) refers to every transaction on the PDMR's own account. As long as these transactions are directed to the own account of the PDMR (or closely associated person), they cannot be excluded. For these types of transactions the date of the transaction is the date of acceptance as determined by the applicable national law.
114. In relation to fixed components of a pre-determined remuneration plan, it should be noted that every transaction in the own account of the PDMR is in scope, including the ones on derivative instruments. In particular both when an option is received by the PDMR and when an option is exercised a notification is required.
115. In relation to the relevant date for the notification, triggering the three days period, this should not be understood as the settlement date, but rather the date of execution of transaction. In relation to borrowing transactions, paragraph 2(r) of the technical advice specifies that it is the borrowing of shares or debt instruments of the issuer or other financial instruments linked thereto to be in scope.
116. In relation to the start of the closing period and preliminary announcement of annual results, MAR level 1 clearly states that a financial report triggers a closed period only when it is required to be publicly disclosed according (i) to the rules of the relevant trading venues, or (ii) to national law. In the example provided in the response, if the "preliminary announcement" of annual report is required either by national or trading venue rules, it would start the closed period.
117. Finally, in response to the concerns regarding para. 91 of the CP, it should be noted that the empowerment in Article 19(14) of MAR refers to Article 19(1), and that Article 19(7) specifies some specific types of transactions that are to be considered included in article 19(1). Article 19(7) states the "transactions that must be notified shall also include" the three specific cases listed thereafter, and it is therefore clear that these are not the only transactions in scope under Article 19(1). Being ESMA requested to specify the types of transactions referred to in Article 19(1), it has to add other types of transactions to the ones already listed in Article 19(7).

**Q11: Under paragraph 3 of the draft technical advice, do you consider the use of a "weighting approach" in relation to indices and baskets appropriate or alternatively, should the use of such approach be discarded? Please provide an explanation.**



118. The responses to this question are nearly all in favour of the approach proposed of a 20% weighting of the issuer's financial instruments. Of the 29 responses, two declined to reply, two were against the proposal as being too difficult for the PDMR to implement, although one of them added that it could review its view if the level was raised much higher. The remaining were supportive respondents.
119. Among them, three are in favour of higher thresholds at a level between 30% and 50%, three supported excluding UCITS altogether.

**ESMA's response:**

120. The general approach of having a threshold is retained as the comments are supportive. The threshold has to be set at a meaningful and workable level. 20% is the value currently used in the Netherlands, and it seems a reasonable level at or above which a PDMR should inform the public of the transaction. Furthermore, a similar 20% weighting criterion is used under the Transparency Directive implementation for considering whether the investment needs to be included in the calculation for major shareholding notification.

**Q12: Do you support the ESMA approach to circumstances under which trading during a closed period may be permitted by the issuer? If not, please provide an explanation.**

121. The majority of replies are favourable to the approach proposed by ESMA although there are numerous comments. Nine replies were favourable with no particular remarks. Six indicated that they are generally in favour of the approach although with the following specific remarks: (i) an exception to the ban on trading is needed for share options at a price set outside the closed period; (ii) clarification on when trading is not permitted in paragraph 4; (iii) paragraph 109 is not in line with the UK Model Code in that it implies that only the publication of the full annual report would end a closed period and not a preliminary announcement of annual results so since the preliminary financial data publication is in fact more sensitive than the publication of final financial numbers it could be used as the trigger for the closed period; and (iv) any investment decision not made by the PDMR should not be in the scope of the ban.
122. Four replies did not clearly state if they were favourable or not to the approach, but made nevertheless a number of comments: (i) clarification when trading is permitted as the terms are perceived difficult to understand in paragraphs 4, 7, 8, and 13 of the draft advice; (ii) any predetermined purchase or sale where the PDMR is passive should be excluded from the ban on trading; and (iii) condition for trades to be included in the list of transactions that might be permitted on a case by case basis by the issuer; no need to specify that a PDMR should have to demonstrate that the particular transaction cannot be executed at another moment in time than during the closed period (para. 4 of the advice).
123. Four replies were not in favour of the approach proposed for the following reasons: (i) any exception to ban which is equivalent to those set out in the UK Model Code needs to be linked to the period prior to the publication of results in order to provide the right market protections; (ii) considering the UK practice of publishing preliminary financial



results, ESMA's approach could result in the preliminary and final results needing to be published at the same time; and (iii) ESMA should expand the list of permitted transactions to those in the UK Model Code in line with the Annex to Listing rule 9 of the UK FCA Listing Rules. They are also opposed to the extension of the ban to discretionary mandates.

### **ESMA's response:**

124. The new approach of ESMA in relation to UCITS/AIF and closed periods, which has been explained in our comments to Question 10, meets most of the requests of the respondents. The concerns regarding the starting date of the closed period vis-à-vis the UK current regime have also been responded to under Question 10. In relation to the specific requirement of para. 4 of the TA that "*a PDMR can demonstrate that the particular transaction cannot be executed at another moment in time than during the closed period*", this is an essential condition to justify trading during the closed period. In fact, if this condition is not met, the PDMR should just execute the transaction before or after the closed period.

### **Q13: Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate, do you foresee any issue with the proposed approach regarding the disclosure of such transactions or the need to ensure that the closed period prohibition is respected?**

125. The vast majority of the replies do not agree with the assumption that the prohibition of trading during the closed window includes trading under a full discretionary portfolio management contract and foresee difficulties regarding the disclosure requirement and the need to ensure compliance.
126. The replies from the investment management industry include reference to specific difficulties: the fund managers will not be able to provide transparency on T+3; the proposed approach would raise issues of fairness to the other investors in the fund; it could result in excluding PDMRs from investing in EU UCITS/AIF that are unwilling to incur the costs and risks arising from the disclosure requirement associated with their investors who are PDMRs; the approach is not in line with level 1, indeed Article 19(7) refers not to discretionary portfolio management, but to situations in which the broker has an element of discretion as to how or where an order from a PDMR is executed; the term "indirectly" cannot apply to situations where the PDMR has no influence; that according to MiFID II, a portfolio manager would be dealing on its own account when executing deals on behalf of a client not on the account of the client; article 3(1)(28) is drafted such that it is clear that it does not refer to portfolio managers exercising discretion on behalf of a PDMR, but to a PDMR exercising discretion in the process of an intermediary executing a trade for the PDMR; a fund, especially a UCITS, cannot make investment decisions based on circumstances relating to one unit holder as it is suggested by the last sentence in paragraph 15 of the CP.
127. Other concerns or suggestions expressed by the respondents are: the approach proposed is not workable for a fully discretionary portfolio management mandate as the PDMR does not make any investment decision and that this will result in PDMRs not

being able to use discretionary fund management; exceptions for dealing during the closed period do not fully reflect level 1; when a PDMR can prove that a discretionary management mandate has been given, the prohibition during the closed period should not apply; requiring UCITS/AIF to inform PDMRs of each transaction in an instrument of the issuer would result in very high administrative costs and in the refusal by UCITS/AIF of investments by PDMRs of issuers in whose instruments the UCITS/AIF may wish to invest; includes paragraph 114 of the CP in the TA; discretionary portfolio management is difficult to define and thus raises the question of the responsibility for any breach – i.e. the PDMR could be responsible for an error by the portfolio manager; instead of prohibiting the trading during the closed period, to prohibit the PDMR from having any discussion with the portfolio manager regarding the closed period thus ensuring that the transactions by the asset manager are wholly discretionary; the weighting approach for indices and baskets, while helpful, does not solve all the issues such as for PDMRs of companies whose securities form a significant proportion of certain indices and who would be excluded from investing in certain tracker products.

**ESMA's response:**

128. The new approach of the draft advice for UCITS/AIF, explained in ESMA's response to question 10, takes on board most of the comments provided to question 13. For the concern in relation to the notification by issuers under Article 19(3) of MAR, it should be noted that this is an issue relating exclusively to MAR level 1, and ESMA has no possibility to intervene at that level.

**Q14: Do you consider the transactions included in the non-exhaustive list of transactions appropriate to justify the permission for trading during a closed period under Article 19(12)(b)?**

129. Thirteen of the twenty replies supported the approach proposed in the non-exhaustive list of transactions with no additional comments. Five respondents made the following comments and/or suggested new wording but did not clearly state if they agreed or not with the list: exceptional circumstances should be defined by reference to compelling circumstances which would unduly impact the PDMR and which cannot be avoided until after the closed period; in addition to the list provided, PDMRs should be allowed to trade during a closed period in the context of the free-of-charge capital increase approved for the implementation of an eventual scrip dividend programme (four types of transactions that should be allowed in this context were specified in this response); reference was made to the list of exceptions contained in the UK Model Code and to the need to include them in the TA: undertakings to take up rights (or other pre-emptive offers (e.g. an open offer), the sale of nil paid rights in order to fund the balance of entitlements under rights issues, undertakings to accept a takeover offer, employee share schemes, and gifts to spouses or civil partners.
130. With respect to transactions made where the beneficiary interest in the relevant security does not change, the SMSG considers that ESMA has adopted a too strict interpretation. In particular, the SMSG proposes that the prohibition to trade does not apply to a transfer of securities to an entity fully owned by a PDMR.



### ESMA's response:

131. Since the majority of the respondents agreed with the list provided, this is not amended. It is also reminded that the list is not exhaustive and does not preclude other types of transactions not mentioned in the advice to be permitted by the issuer.
132. In relation to the SMSG proposal, considering the risks of circumvention of the prohibition, ESMA wishes to clarify that the transfer of financial instruments or other transactions, such as sales or purchases, between the PDMR and another (legal) person, including a legal entity fully owned by the PDMR, are not excluded from the prohibition of trading during a closed period under Article 19(11) of MAR.

### 7.3.5 Procedures for reporting of infringements under Article 32(1) of MAR

**Q15: Do you agree with the analyses and the procedures proposed in the draft technical advice? Which best practices from existing national, European or international legislation or guidance could be useful for the protection of the reporting persons under the market abuse regime?**

133. The majority of the respondents generally agreed with the ESMA analysis and the procedures proposed, although most of them provided additional comments to improve or complement them.
134. The SMSG was very supportive of ESMA approach. The SMSG also wished to highlight that the protection of employees should become a matter of practice. Raising employees' awareness of respective rules and procedures, ensuring effective training, for instance based on real-life examples, and technical conditions (proper IT systems) for assisting in detection are important features. Besides, some SMSG members were of the view that the persons responsible for reporting and for the identification of suspicious transactions should have unlimited access to information within the company.
135. A few respondents disagreed with ESMA's approach considering that the new reporting regime with EU-wide harmonised procedures will impact or even contradict some current national reporting regimes in place, so the level 2 should rather introduce a policy and a principle approach, leaving national competent authorities with discretion to implement the measures in a flexible way.
136. A number of respondents have highlighted the issue of the inclusion of the 'firm/financial institution' within the reporting mechanism. Some of them opposed to ESMA proposal in paragraph 140 of the CP<sup>28</sup>, and they required that the priority must be given to internal reporting before external reporting to a competent authority. They argued that internal reporting is faster and more effective, the necessary safeguards are already in place in

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<sup>28</sup> Paragraph 140 of the CP: "ESMA believes that the requirement to mandate internal reporting before accessing external reporting might adversely affect external reporting to competent authorities in a non-trivial number of cases due to the high risk of subsequent internal retaliation and discrimination, especially in those situations where the reported persons play a central role within the employer or where the infringements are relevant enough to significantly affect the annual results of the employer."

internal reporting procedures and the employer is thus not deprived from the possibility to deal with the matter internally and act on his own discretion. A couple of others asked the internal reporting to be encouraged at least, without preventing or conditioning external reporting.

137. Some respondents criticised the confidentiality on the identity of the reported person, as firms would not be able to take appropriate measures and conduct internal investigations. Reported persons should be also aware of the identity of the reporting person on the ground of “fairness” of the disciplinary process that could be conducted against the reported persons. It was therefore suggested to widen paragraph 19 of the draft Advice that describes the circumstances where confidentiality regarding the reporting person could not be guaranteed.
138. It was also proposed to extend the confidentiality protection to the employer/legal entity where the infringement took place and to oblige the reporting persons to keep confidential the reporting made and its content, otherwise running the risk of being detrimental to the competent authority pending investigation, the reported person or the employer.
139. It was commented that the TA should further focus on the issue of data security in the transmission of information to another authority. In particular, additional measures (e.g. specific assurances; limitation of the information to be transmitted) should be deployed when the information sent to a third country authority not offering the same level of data security, both in relation to the transmission and once it reaches the second authority, in order to maintain confidentiality.
140. A respondent considered that unrecorded conversations should not be allowed and that the relevant paragraph of the draft advice in the CP is modified accordingly. Another suggested that the reporting person is informed, in advance to the report being made, about the recording arrangements.
141. Some of the responses received to this question relate to topics covered by other questions from the CP and are thus covered in the relevant sections of the feed-back statement:
- Advocating for a wide definition of “person under contract of employment” (see Q18);
  - Protection from liability for breach of disclosure restriction when the person reports in good faith (See Q19).

#### **ESMA’s Response:**

142. On the interaction and potential overlap with the current national regimes and the request to instead adopt a policy and principle based approach, ESMA notes that the implementing act the Commission needs to adopt can take the form of a directive, rather than a regulation. We consider that a directive would be better suited with respect to the regime for reporting of infringements as it would enable to implement the specific

arrangements and measures identified in the TA while, at the same time, ensuring compliance by the competent authorities with the principles set out in other legislations, in particular the ones relating to protection of personal data. A directive would offer the necessary flexibility to MSs to consider during the transposition process the existing national regimes and adapt them where needed so as to avoid conflict of laws.

143. With respect to whether priority should be given to the internal reporting, within firms, over the reporting to the competent authorities, ESMA considers that the approach in the CP remains valid, particularly in light of the level 1 text which is not hinting at any precedence of internal reporting. However, ESMA wishes to clarify that although reporting internally first is not required, it is not forbidden either.
144. On the criticisms received regarding the confidentiality, ESMA is of the view that divulging the identity of the reporting or reported person, as a matter of principle, to the employer of the reporting person or the identity of the reporting person to the reported person on the ground of that person's right to a fair trial and right to access to his/her personal data would go against the MAR objective to protect the identity of the reporting persons, and would breach the principle of the protection of personal data, unless this occurs under the circumstances already listed and described in the CP. Besides, it should also be noted that Article 13(1)(g) of the Data Protection Directive (Directive 95/46/EC)<sup>29</sup> allows MSs to restrict the right of access to personal data for safeguarding the protection of the data subject or of the rights and freedoms of others.
145. With regards to the secure data transmission and maintenance of confidentiality in case of exchange of information relating to notifications received under Article 32, ESMA would like to indicate that such an exchange will have to be made in accordance with the provisions governing cooperation and exchange of information under MAR and its implementing text, and in compliance with Articles 28 and 29 of MAR on data protection and disclosure of personal data to third countries.
146. In relation to the recording of phone lines, in the absence of explicit empowerment under MAR, ESMA considers it not appropriate to impose a mandatory audio-recording of all reports transmitted through telephone calls, as requested by only one respondent. Nevertheless competent authorities need to ensure that such oral notifications are recorded. ESMA also clarifies in the final TA that the competent authority needs to specify when a phone line used for reporting is audio-recorded.

**Q16: Do you think there are other elements to be developed in relation to specific procedures for the receipt of reports of infringements under MAR and their follow-up, including the establishment of secure communication channels for such reports?**

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<sup>29</sup> 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: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML> .

147. The respondents are globally satisfied with the proposed specific procedures for the receipt of reports of infringements under MAR and their follow-up, including the establishment of secure communication channels for such reports. Additional requirements were proposed as well as practical suggestions were made for complementing the procedures.
148. It was thus suggested that the use of secure communication channels is extended to the communication between the firm subject to the infringement report and the competent authority and that the confidentiality requirements also cover the information provided to the competent authority by the firm subject to the infringement report, including the prohibition to transmit it to the reporting person.
149. The practical suggestions related to (i) the offer by competent authority of a secured on-line system on its website for reporting; (ii) the assignment of the codes to the reporting and reported persons at the entry point of the process to ensuring the protection of the confidentiality all through the chain of the investigations by simply communicating the codes within the competent authority, and (iii) measures to ensure that the reports are addressed to well identified, specialised and responsible staff within the competent authority (well-publicised dedicated phone number and not an operator or an answerphone; written reports not to be opened by administrative staff or by the post-room of the competent authority; restricted access to the dedicated email box).

#### **ESMA's Response:**

150. The extension of the use of secure communication channels and of the confidentiality requirements to the communication between the firm subject to the infringement report and the competent authority both refer to the situation where, once a reporting person contacted the competent authority, the firm provides more information. ESMA is of the view that the mandate only concerns reporting and reported persons. As to the handling of the information exchanged with the firm concerned by the infringement, it should be conducted in accordance with the usual rules of the competent authority for inquiring and investigating, under the overall requirement for professional secrecy applicable to competent authority and competent authority staff under article 27 of MAR.
151. ESMA considers that the other practical suggestions appear mostly reasonable but too granular and specific to be mandatorily prescribed as arrangements in the TA.
152. However, the principle that reports should be only addressed to the dedicated staff has been further stressed in the TA.

**Q17: Do you see any other provision, measure or procedure currently in place under national laws of Member States that could complement the procedures proposed in the draft technical advice for the reporting of infringements of market abuse to competent authorities in order to increase the protection of personal data, especially in relation to:**

- **compliance with data retention periods and notification requirements for data processing;**
- **protection of the rights related to data processing;**

- **security aspects of the data processing operation; and**
- **conditions for the management of reporting mechanisms (including limitations of cross-border data transfer)?**

153. The majority of the few respondents does not see the need for additional measures to be added to the TA, on the ground that the existing (and upcoming) EU texts and the relevant domestic laws and regulations in the field of data protection are adequate, well established and can be relied upon.
154. One respondent provided a description of relevant national measures and procedures applying with regards to protection of personal data (need of a prior authorisation, the authorised scope for processing personal data, record keeping requirements in terms of duration, inspections to be regularly conducted, existence of enforcement actions, the need to have appropriate technical and organisational security measures).
155. In relation to the cross-border transfer of data referred to in paragraph 17 of the draft advice in the CP, there were some comments and requests for clarification on:
- The meaning of “other competent authorities”;
  - Explanation of the circumstances;
  - The need to ensure that the transfer of data respects the EU Data Protection Directive and that the receiving authority, in particular if in a third country, has equivalent or adequate protection.
156. With respect to data retention, it has been suggested to add to the TA the following arrangements:
- a maximum data retention period, such as “as long as the investigation and subsequent proceedings last”; and
  - records relating to unfounded report to be promptly destroyed after the competent authority investigation.
157. It was also indicated that the data storage should be in the EU or in a country with similar overall data protection laws.
158. Finally, Para 10(c) of the draft advice in the CP says that only a limited feed-back about the outcome of the provision of the information could be provided to the reporting person. It has been suggested that the limited feed-back is provided only once the publication of the “sanction” decision (as of Article 34 of MAR) takes place in view of the interests of the reported person, and of the involved employer/legal entity.

#### **ESMA’s Response:**

159. In line with most of the respondents’ views, ESMA considers that no specific additional measures are needed in the TA in relation to the protection of personal data for the

purpose of reporting of infringements under Article 32 of MAR. Competent authorities must comply with the rules laid down in EU legislation on the processing of personal data and the transfer of such data, as well as with the relevant transpositions into national legal systems. Although this pertains to the MAR requirements on cooperation and exchange of information, ESMA would like to recall that any transfer of personal data to a third country, if and when necessary, should be made in compliance with Article 29 of MAR, to a third country authority performing similar functions to those of the competent authority and subject to equivalent professional secrecy, as required under Article 26(3) of MAR.

160. Furthermore, with respect to the data retention period, it should be noted that the Article 28 of MAR on data protection states that “*personal data shall be retained for a maximum period of five years*”. This 5-year period is also in line with the duration of the other record keeping requirements established under the MAR: in Articles 11(8) on market soundings and 18(5) on insider lists. Therefore ESMA considers that personal data relating to a report made under Article 32 should be kept by the competent authority in accordance with Article 28 of MAR and for the period necessary for the performance of its tasks.
161. Consequently, the final technical advice clearly references the relevant provision of MAR dealing with data protection.
162. With regards to the limited feed-back to the reporting person about the outcome of the provision of the information, ESMA considers that it would be too limitative to provide it only once the publication of the decision under Article 34 of MAR takes place. Nonetheless it is clear in the Advice the feed-back which can be provided is indeed limited.

**Q18: In the context of “the protection of employees working under contract of employment”, among the following common forms of unfair treatment - namely dismissal, punitive, transfers, harassments, reduction or loss of duties, status, benefits, salary or working hours, withholding of promotions, trainings, and threats of such actions - which are the most important forms of unfair treatment in case of reporting of infringements of market abuse to a competent authority? Which protection mechanisms against such unfair treatments would you consider effective (e.g. mechanisms for fair procedures and remedies including appropriate rights of defense)? Are you aware of any other aspects that could be relevant in this context? Please specify.**

163. From the limited number of responses received, the general feed-back is that there should not be an attempt to prioritise the forms of unfair treatment and that protection measures should cover all of them, even though dismissal or termination of employment is perceived by some respondents as the most material concern for the employees.
164. The following forms of unfair treatment were also identified: ostracism, bullying at work.
165. It has also been suggested that the definition of “person under contract of employment” should be wide, including short term contracts, interns as well as persons outside the

traditional employee relationship such as consultants. It was also proposed that the TA provides a list of possible “reporters” considered as persons under a contract of employment, who can legitimately report under the TA framework.

166. Two pieces of legislation were referred to as being of interest for the protection of employees:
- Public Interest Disclosure Act 1998 and the Employment Rights Act 1996;
  - At European level, the Employment Equality Framework Directive and the underlying Directives.
167. Half of the respondents considered that additional separate procedures pursuant to the MAR reporting of infringements regime are not needed, as national laws or firms’ internal policies already in place are sufficient to ensure employees protection against unfair treatment.
168. However, some respondents made additional suggestions in relation to the legal protection of employees:
- It should include a prohibition on retaliatory actions and a dispute resolution mechanism.
  - The protection mechanism should also include a right to compensation for damages as a way to deter employers from unfair treatment of the “whistle-blowers”.
  - Better protection against retaliation or discrimination by the employer would be ensured by reversing the burden of proof onto the employer.
  - The employer’s organisation, at the initiative of the top management, should have a zero-tolerance policy towards retaliation of reporting and reported persons as well as persons cooperating in the internal and/or external investigation.
  - Training should be provided to the employees on the rules for reporting and the consequences as well as on the usefulness of reporting.
169. A few respondents suggested the technical advice to be complemented as follows:
- Competent authorities should offer the technical means for allowing anonymous reporting of breaches;
  - Employers should be prohibited from inquiring about the identity of the persons reporting to the competent authority as done for employers in the public sector in at least one MS. One respondent considered that it should be rather stipulated in the internal policies of the employers carrying out activities regulated by financial services regulations as a result of a clear requirement under Article 32(3) of MAR for employers.



### ESMA's Response:

170. In relation to the definition of “person under contract of employment”, ESMA would like to stress that the important element is the existence of a contract, valid under national law, between the employer and the employee, irrespective of the terms which should be defined in that contract, in particular with respect to the duration of the employment. So, the TA will neither provide further explanation nor a list of persons deemed to be under contract of employment.
171. With regard to anonymous reporting, ESMA is not amending the final report and its advice. We would like first to restate that the reporting regime under Article 32 is without prejudice of anonymous reporting, including through the communication channels it sets out, and that there could be no protection for the “anonymous reporting person”. Furthermore, it should be highlighted that the draft TA presented in the CP<sup>30</sup> already acknowledged that the communication channels set out for reporting under Article 32 can be used for anonymous reporting.
172. Most of the additional suggestions provided in relation to the legal protection of employees refer to internal arrangements within the employer or to requirements to be established under general, labour or employment, laws. The TA section on protection of the reporting and reported persons only refers to arrangements at competent authorities' level, as ESMA considers it out its remit to elaborate in its advice beyond this level. These suggestions are therefore not reflected in the final TA.
173. However, ESMA considers that it would be within the L1 empowerment to introduce a requirement for competent authorities to avoid responding to requests for information from an employer regarding a whistleblowing case. Such requests could include information regarding the existence of a report or the identity of the reporting employee. Such a measure would complement the objectives of the TA of protecting the confidentiality of the reporting person. A new paragraph 25 has therefore been introduced in the TA.

**Q19: Are you aware of any particular provision, measure or procedure currently in place under national laws of Member States or best practices that could effectively complement the mechanism of the competent authorities and the waiver of liability for reporting proposed in the draft technical advice, in order to increase the protection of employees working under a contract of employment? If yes, please provide examples.**

174. The majority of the respondents are supportive of the proposed TA provision on the liability for breach of a disclosure restriction when the person reports in good faith. A couple of them suggested also making explicit in the TA that reports made by employees in bad faith should not benefit from the protection from liability. However, the

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<sup>30</sup> See paragraph 3 of the draft TA on “reporting of infringements” included in the CP.

legal soundness of such a provision could be argued in the absence of mandatory legal obligation to report to the competent authority.

175. Another suggested that, without questioning the non-liability of the reporting person for breach of the disclosure restriction, the competent authority, in the course of the investigation, would request again to the employer the evidence submitted in the whistle-blower report so that this employer can be aware of the type of information, including sensitive information, that has left the organisation (e.g. business secrets, personal data of employees and clients).
176. ESMA has been also asked to consider the cross border effect of the protection provision (using the examples of an EU employee reporting on a Swiss incorporated entity).
177. It has been suggested that the secure reporting mechanisms established for reporting suspected terrorist or general criminal matters could also be used for MAR reporting purposes, thus requiring the national law enforcement authorities and the competent authority to work cohesively to ensure exchange of information.

**ESMA's Response:**

178. ESMA considers that there is sufficient legal basis for including in the TA a provision on the non-liability of the reporting person for breach of disclosure restriction when reporting in good faith. The MAR level 1 text provides for a right for person to report infringements and for a protection when this right is exercised. Furthermore, ESMA considers the current drafting of the non-liability provision satisfactory and sufficiently clear, in particular with regard to the reporting in good faith as a condition for benefiting from the protection and the implications in case of non-fulfilment. Explicitly expanding the advice to describe the consequences of reporting in bad faith would introduce an unnecessary deterrent dimension to the provision which is primarily a protective measure to pursue the objective of MAR to promote reporting of infringements.
179. Without entering into the analysis of the particular example highlighted by a respondent, ESMA's understanding of the protection to be afforded to the reporting person is that it is provided irrespective of the nationality of that person.
180. ESMA considers inappropriate to use the secure reporting mechanisms established for reporting suspected terrorist or general criminal matters for MAR reporting purposes, considering the role that administrative sanctions play in the MAR context.