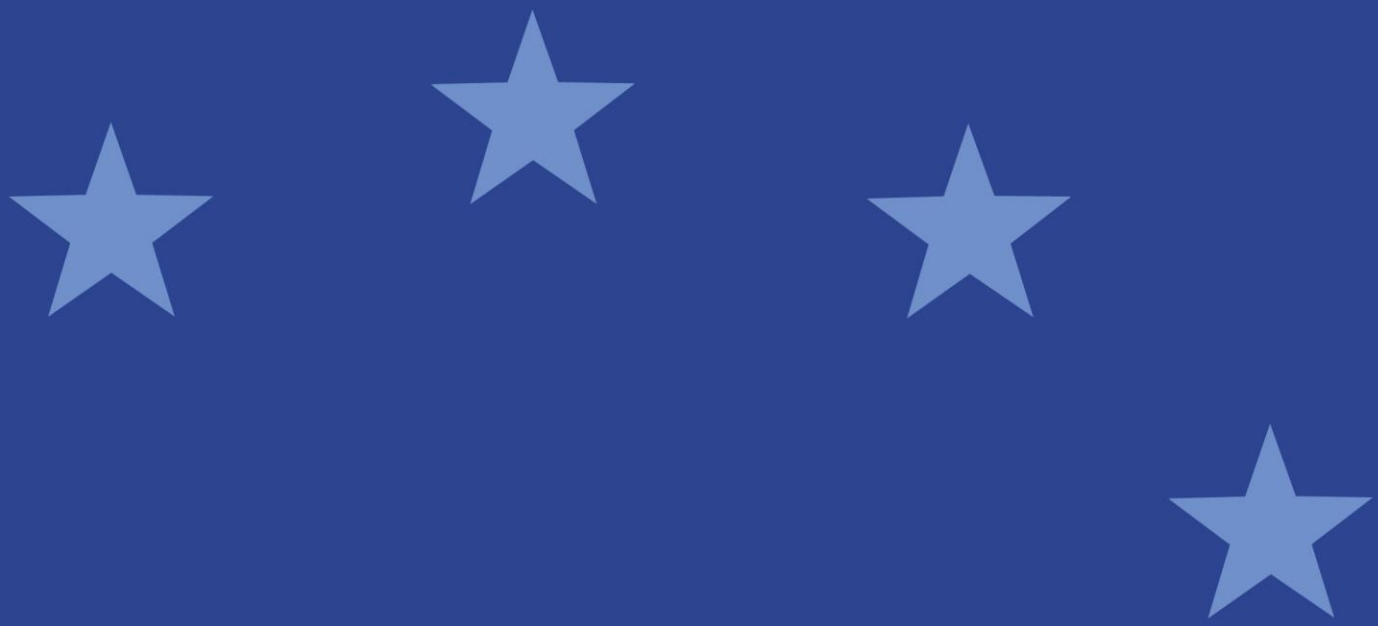
esma European Securities and Markets Authority

Consultation Paper

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



11 July 2014 | ESMA/2014/808

European Securities and Markets Authority

Date: 11 July 2014
ESMA/2014/808

Responding to this paper

The European Securities and Markets Authority (ESMA) invites comments on all matters set out in this consultation paper and, in particular, on the specific questions listed in Annex I. Comments are most helpful if they:

- indicate the number of the question to which the comment relates;
- respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives ESMA should consider.

Comments should reach us by Wednesday 15 October 2014.

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

Publication of responses

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

Data protection

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

Who should read this paper?

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

Contents

Acronyms used

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

I. Executive Summary

Reasons for publication

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

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

(i) Technical advice to the European Commission,

(ii) ESMA technical standards, and

(iii) Guidelines.

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

The purpose of this consultation is to seek comments on the technical advice that ESMA proposes to give to the European Commission on a number of possible delegated acts concerning the Regulation as listed in the Commission requests for advice. These delegated acts should then be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

Background

ESMA has received two separate formal requests (mandates) from the European Commission for technical advice on possible delegated acts concerning MAR.

The first mandate[4] was published on the 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;

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

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

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

[4] 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

c) the specification of the competent authority for the notification with respect to the public disclosure of inside information;

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 European Commission (DG Clima) in the matter. When the DP was prepared the external study was not available yet, and thus this topic was not covered in the DP. The external study[5] has been published on the 8 of July 2014, and ESMA is now consulting on the potential level of thresholds through the CP.

The second mandate[6] was published on the 2 June 2014, and refers only to the specification of procedures to enable reporting of actual or potential infringements of MAR. Although the mandate was not finalised by the time the DP was published, this topic was already covered in the DP.

Contents

The CP 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.

ESMA, starting from the various policy options and orientations included in the DP, has developed in detail the specifications required by the mandates. ESMA has carefully analysed and considered the responses to the DP, which notably provided useful insight into market best practices. The interested parties also had the opportunity to provide their comments on ESMA's proposals at an open hearing held on 15 January 2014.

Each section of the CP summarises the relevant provisions, their objectives and contains a proposal of draft technical advice that ESMA will deliver to the European Commission.

Next steps

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

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

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[5] http://ec.europa.eu/clima/policies/ets/oversight/docs/ee_and_nrf_analysis_en.pdf

[6] 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

II. Specification of the indicators of market manipulation

II.I. Background/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.

II.II. Analysis

Scope of the analysis

1. The Market Abuse Regulation (MAR) foresees the activities that will constitute market manipulation and behaviours that should be considered as market manipulation, and draws up a non-exhaustive list of indicators related to false or misleading signals and to price securing and indicators related to the employment of fictitious devices or any other form of deception or contrivance (Article 12(1) to Article 12(3) and Annex I of MAR). 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 consist in placing orders which may not be executed. Further, a financial instrument may be manipulated through behaviour which occurs outside a trading venue (Article 2(3) of MAR).

2. 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. If 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.

3. In addition to the MAR provisions, ESMA has also reviewed the elements provided in previous CESR[7] and ESMA[8] guidance and updated them in light of the more extensive scope of MAR taking into ac-

[7] First Set of Guidance (CESR/04/505b) which was published in May 2005 and sets out a number of examples of type of practice that it considered would constitute market manipulation including amongst others those related to false/misleading transactions, price positioning and dissemination of false and misleading information.

count the additional developments in the financial markets related in particular to automated trading and the feedback received from respondents in relation to ESMA Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation, published on 14 November 2013 (DP).

General approach taken

4. 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 technical development on 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 has drawn up (i) an indicative and non-exhaustive list of examples of practices that could be considered as market manipulation, linking the examples to the indicators presented in Annex I of MAR, and (ii) an indicative and non-exhaustive list of indicators of market manipulation that are related to one or more examples of practices previously listed. It should be noted that the relation between these indicators and the examples of practices is not limitative. The elements of both lists 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 MAR. The non-exhaustive lists of examples and related indicators are to be evaluated on a case by case basis in determining whether market manipulation has occurred.

5. It is highlighted that the examples of practices clarifying the indicators listed in Annex I of MAR and the list of related 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 product based on emission allowances.

6. It is further highlighted that the proposed examples and related 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 characterized 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 clearly included in the notion of market manipulation or that, in some respects, provide signals of manipulative conduct. On the other hand, there are examples of practices that actually might be deemed licit if, for instance, they are justified by legitimate reasons or are in compliance with laws and regulations (for example, because in conformity with the rules of the relevant trading venue; buy-back programmes and stabilization; legitimate arbitrage). As acknowledged by Recital 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

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[8] 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.

and orders to trade were in conformity with accepted practice on the market concerned. Moreover, it should be noted that a specific practice may involve more than one type of market manipulation according to how it is used, and so there can be some overlap.

Approach regarding the extended scope of MAR

7. MAR has a more extensive scope than the Market Abuse Directive (MAD) in that it fully applies to any financial instrument traded, admitted to trading, or for which a request for admission to trading on a RM or MTF has been made, any financial instrument traded on an OTF, OTC derivatives such as CDS and contracts for difference, spot commodity contracts (the price of which is based on that of a derivative, as well as spot commodity contracts to which financial instruments are referenced) and auctioned products based on emission allowances (Article 2(1) and (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).

Manipulation of benchmark calculation

8. 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[9] considering the serious impact on market confidence, the risk of significant losses for investors or the distortion of the real economy (Recital 44). In general, and as pointed out by the majority of respondents to the consultation on the DP, the manipulation of benchmarks is closely associated to the manipulation of the financial instruments or other constituents underlying the benchmark. With that in mind, ESMA considered that, at this stage, it was neither relevant nor helpful to provide specific examples of practices or signals of benchmark manipulations. ESMA would like to recall that 'benchmark' is defined under Article 3(29) of MAR.

Trading facilities services

9. 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, and as remarked by a respondent to the consultation on the DP , 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. At this stage, ESMA has considered that the existing examples or indicators of market manipulation presented in this technical advice cover this situation.

Orders to trade

[9] 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*".

10. 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.

Approach regarding cross-venue and cross-product market manipulation

11. 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.

12. 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 the other way around).

13. 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 CFD traded OTC or vice-versa.

14. 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).

15. 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.

16. To reflect the above cross-venue and cross-product cases, ESMA has incorporated them in the list of examples of practices of market manipulation.

17. 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. 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, 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.

Approach regarding the specificities in an automated trading environment

18. 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[10], 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.

19. 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, updates to 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).

20. 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 (ESMA/2012/122), investment firms and competent authorities" 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.

21. 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.

Approach regarding some examples of practices of market manipulation

22. In the course of its work and in light of the responses to the consultation on the DP, 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.

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

II.III. Draft technical advice

Draft advice on the specification of the indicators of market manipulation

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 necessarily be deemed in themselves to constitute market manipulation but shall be taken into account where transactions or orders to trade are examined by market participants and competent authorities. They 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 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.

   The examples of practices below are not exhaustive, thus not excluding the possibility that other situations may be classified as 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, provide signals of manipulative conduct. On the other hand, there are examples of practices that actually might be deemed licit if, for instance, they are determined by legitimate reasons or are in compliance with laws and regulations (for example, because in conformity with the rules of the relevant trading venue; buy-back programmes and stabilization; legitimate arbitrage). As acknowledged by Recital 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. 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.

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

4. 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):
    1. 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 as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
    2. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.

5. 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):
    1. 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 as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
    2. 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.
    3. 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).
    4. 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 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 example is relevant in the context of the extended scope of MAR and 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.

6. 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):
    1. Entering into arrangements for the sale or purchase of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion – usually known as wash trades.
    2. 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.
    3. 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 the similar price, by the same party or different but colluding parties – usually known as improper matched orders.
    4. 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.

7. 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):
    1. 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.
    2. 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 the similar price, by the same party or different but colluding parties – usually known as improper matched orders.
    3. Taking of a long position in a financial instrument, related spot commodity con-tract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out – usually known as pump and dump.
    4. Taking of a short position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further

selling activity and /or disseminating misleading negative information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to decreasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others sellers. When the price has fallen, the position held is closed– usually known as trash and cash.

5. 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.
6. Entering orders to trade or a series of orders to trade, whether or not they are executed, intended to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out/open a position at a favourable price – usually known as momentum ignition.

8. 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):
    1. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.
    2. 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).
    3. 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 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 example is relevant in the context of the extended scope of MAR and 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.
    4. 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.
    5. 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.
    6. 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.

7. Entering orders to trade or a series of orders to trade, 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.

9. 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):
    1. 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.
    2. 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. This example is relevant in the context of the extended scope of MAR
    3. 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. This example is notably relevant in the context of the extended scope of MAR.
    4. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.
    5. 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.
    6. 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.
    7. 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 example is relevant in the context of the extended scope of MAR concerning the inter-linkages between trading venues.
    8. 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 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 example is relevant in the context of the extended scope of MAR

and 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.

9. 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.
10. 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.
11. Entering orders to trade or a series of orders to trade, 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.
12. 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.

10. 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):
    1. 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.
    2. 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 as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
    3. Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.
    4. 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 example is relevant in the context of the extended scope of MAR concerning the inter-linkages between trading venues.
    5. 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 trad-

ing 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 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 example is relevant in the context of the extended scope of MAR and 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.

6. 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)

11. 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):
    1. 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.
    2. Opening a position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and closing it immediately after having publicly disclosed it putting emphasis on the long holding period of the investment – usually known as opening a position and closing it immediately after its public disclosure.
    3. Taking of a long position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out – usually known as pump and dump.
    4. Taking of a short position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further selling activity and /or disseminating misleading negative information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to decreasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others sellers. When the price has fallen, the position held is closed– usually known as trash and cash.
    5. 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.

12. 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 interest):
    1. 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.
    2. Taking of a long position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out – usually known as pump and dump.
    3. Taking of a short position in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further selling activity and /or disseminating misleading negative information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances with a view to decreasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others sellers. When the price has fallen, the position held is closed– usually known as trash and cash.

Related indicators of market manipulation

13. The following non-exhaustive indicators of market manipulation are related to the examples of practices and can relevantly clarify them, thus specifying further the indicators of Annex I of MAR. They shall not necessarily be deemed in themselves to constitute market manipulation but shall be taken into account where transactions or orders to trade are examined. The following indicators are linked to one or more examples of practices of market manipulation as provided above but the relations described below are not limitative.

    a) Unusual concentration of transactions and/or orders to trade in a particular financial instrument, related spot commodity contract, or an auctioned product based on emission allowances. This indicator can be relevant for the purpose of, namely, examples described in paragraphs 4(1) or 6(1) or for an additional practice known as ping orders (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).

    b) Unusual repetition of a transaction among a small number of parties over a certain period of time. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 6(1), 6(2), 6(3) or 6(4).

c) Unusual concentration of transactions and/or orders to trade with only one person, or with different accounts of one person or with a limited number of persons. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(1), 6(1), 6(2) or 6(3).

d) Transactions or orders to trade with no other apparent justification than to increase/decrease the price of or to increase the volume of trading in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, namely near to a reference point during the trading day - e.g. at the opening or near the close. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(1) or 8(4).

e) High ratio of cancelled orders (e.g. order to trade ratio) which may be combined with a ratio on volume (e.g. number of financial instruments per order). This indicator can be relevant for the purpose of, namely, practices described in paragraphs 7(6), 8(5), 9(1), or 9(11).

f) Transactions carried out or submission of orders to trade, namely near to a reference point during the trading day, which, because of their size in relation to the market of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, will clearly have a significant impact on the supply of or demand for or the price or value of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 5(2) or 8(4).

g) Transactions or orders to trade which have the effect, or are likely to have the effect, of increasing/decreasing/maintaining the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances during the days preceding the issue, optional redemption or expiry of a related derivative or convertible. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(2), 5(3), 5(4) or 8(4).

h) Orders to trade inserted with such a price that they increase the bid or decrease the offer for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, and have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 9(1) or 9(6).

i) Transactions or orders to trade which modify, or are likely to modify, the valuation of a position while not decreasing/increasing the size of the position. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 6(1) or 6(3).

j) Transactions or orders to trade which have the effect of, or are likely to have the effect of increasing/decreasing the weighted average price of the day or of a period during the trading session. This indicator can be relevant for the purpose of, namely, practice described in paragraph 4(2).

k) Transactions or orders to trade which have the effect of, or are likely to have the effect of setting a market price when the liquidity of the financial instrument or the depth of the order book, related spot commodity contract, or an auctioned product based on emission allowances is not sufficient to fix a price within the session. This indicator can be relevant for the purpose of, namely, practice described in paragraph 6(3).

l) Transactions or orders to trade which have the effect of, or are likely to have the effect of bypassing the trading safeguards of the market (e.g. price limits, volume limits, bid/offer spread parameters, etc.). This indicator can be relevant for the purpose of, namely, practice described in paragraph 9(5).

m) Execution of a transaction, changing the bid-offer prices, when such spread is a factor in the determination of the price of any other transaction whether or not on the same trading venue. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 5(3) or 5(4) or 9(5).

n) Entering orders representing significant volumes in the central order book of the trading system a few minutes before the price determination phase of the auction and cancelling these orders a few seconds before the order book is frozen for computing the auction price so that the theoretical opening price might look higher/lower than it otherwise would do. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 8(4), 11(3) and 11(4).

o) Transactions or orders to trade which have the effect of, or are likely to have the effect of, maintaining the price of an underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, below/above a strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(2), 5(2), 5(3), 5(4) or 8(4).

p) Transactions on any trading venue which have the effect of, or are likely to have the effect of, modifying the price of the underlying financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, so that it surpasses/not reaches the strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(2), 5(2), 5(3), 5(4) or 8(4).

q) Transactions which have the effect of, or are likely to have the effect of, modifying the settlement price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, when this price is used as a reference/determinant namely in the calculation of margin requirements. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(2), 5(2), 5(3), 5(4) or 8(4).

r) 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. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 12(10, 12(2) or 12(3).

s) Dissemination of news through the media that has the effect of increasing (or decreasing) a qualified holding before or shortly after an unusual movement of the price of a financial instrument. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 11(3) or 11(4).

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?

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?

Q3: Do you consider that the practice known as "Phishing[11]" should be included in the list of examples of practices set out in the draft technical advice?

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)?

[11] 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.

III. 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.I. Background/Mandate (extract)

23. MAR mandates the European Commission to produce a delegated act (DA) establishing the minimum thresholds of carbon dioxide (CO2) equivalent 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.

24. 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 external study commissioned by the Directorate-General Climate Action of the European Commission (DG Clima) in the matter.

25. As explained in its Discussion Paper of 14 November 2013, ESMA has not yet consulted on the issue of minimum thresholds of CO2 equivalent and rated thermal input to be determined for the purpose of the exemption of certain participants in the emission allowance market from the disclosure requirements. At the time, the contractor's report, the expected outputs on the identification of possible options for the above mentioned minimum thresholds and the assessment of their impacts were not available.

26. This report[12] has been published on the 8 of July 2014. The analyses performed and first stakeholder input collected for its preparation by the DG Clima consultant (Consultant) have been used for the purpose this Consultation Paper. The views expressed in the report represent only the views of the contractors and not those of DG Clima.

III.I. Analysis

Introduction

27. MAR has expanded the scope of the market abuse regime to emission allowances as defined under the new MiFID.

28. 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 as specified in Annex I to Directive 2003/87/EC or installations within the meaning of Article 3(e) of that Directive[13] 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. With regard to installations, such disclosure should include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations. 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

[12] http://ec.europa.eu/clima/policies/ets/oversight/docs/ee_and_nrf_analysis_en.pdf
[13] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02003L0087-20090625

emission allowances, auctioned products based thereon, or derivative financial instruments relating thereto.

29. 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 allowances market that in the preceding year have had emissions not exceed 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).

30. 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 the minimum thresholds (to be set) qualify as EAMPs, and the requirement of public disclosure of inside information will apply only to them.

31. Inferring from the definition of operators, installations and aircraft operators in Directive 2003/87/EC (Art. 3(e), (f) and (o))[14], participants in the emission allowance market include companies producing CO2, the so-called emitters of emission. Furthermore, Regulation (EU) No 1031/2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances[15] 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 emission, 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 paragraphs of Article 17(2), would also satisfy the definition of an EAMP as a sub-set of the participants in the emission allowance market.

32. 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.

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[14] 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;
(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.

[15] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:302:0001:0041:EN:PDF

33. 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.

34. 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.

35. 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.

About the thresholds

36. 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.

37. However, ESMA is mindful that, in setting such a threshold, there is a risk that important firm specific information, that an investor can based 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.

38. 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.

39. 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 every 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 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.

40. 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.

First stakeholder input

41. 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 allowance.

Proposals of thresholds

42. In order to propose options for thresholds, the Consultant has explored different approaches:

    a) *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.

    b) *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 companies 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.

    c) *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[16].

    d) *Analytical referencing*: Identifying from past papers by carbon market analysts concerning the drivers of carbon market prices, companies or installations judged important enough to have an impact on the carbon price.

43. The last approach, analytical referencing, was eventually considered by the Consultant as not viable to set a threshold due to a lack of relevant information in the past papers by analysts about the impact of actions taken by individual carbon producing firms.

44. On the basis of the above approaches, different figures were obtained in relation to emissions of carbon dioxide equivalent:
    a. 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

[16] It should be noted that the MAR threshold would not apply on per installation basis but on a company level basis, potentially grouping several installations.

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 CO2 a year (both tests triggered at 5% statistical significance level);
- 6 million tonnes of CO2 a year (both tests triggered 10% (less strict) statistical significance level)
- 3 million tonnes of CO2 a year (one of tests triggered 10% (less strict) statistical significance level)

b. 1 million tonnes CO2 a year using a weighting of operators implied by REMIT.
c. 0.5 million tonnes CO2 a year using direct REMIT benchmarking.

45. Although it remains to be seen for the future, considering that the price movements of emission allowances and the specific emission allowances for aviation activities appears to be aligned and correlated, and in order to ensure consistency in the regime irrespective of the nature of the activities of the emitters, it seems appropriate that the threshold for rated thermal input is equivalent to the threshold of emission of carbon dioxide. On the basis of calculation method used by the Consultant, the equivalent rated thermal input figures are[17]:
    a. 20+ million tonnes of CO2 is equivalent to around 3,500 MW rated thermal input.
    b. 6 million tonnes is equivalent to 1,050 MW rated thermal input.
    c. 3 million tonnes is equivalent to 530 MW rated thermal input.
    d. 1 million tonnes CO2 is equivalent to 175 MW rated thermal input.
    e. 0.5 million tonnes CO2 is equivalent to 88 MW rated thermal input.

Analysis

46. The Consultant estimated to around 930 the total number of emitting companies that would be in scope if no threshold was set, representing thus 100% of the emissions in 2011[18]. 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:
    a. 20+ million tonnes of CO2 a year: 21 companies would be captured by the threshold (approximately 71% being energy producer and the rest other industrial emitters) accounting for more than 60% of the total verified emissions, and 906 companies would be exempted;

    b. 6 million tonnes a year: 70 companies would be captured by the threshold (approximately 56% being energy producer and the rest other industrial emitters) accounting for 70% of the total verified emissions, and 857 companies would be exempted;

    c. 3 million tonnes a year: 125 companies would be captured by the threshold (half being energy producer and the other half industrial emitters) accounting for slightly more than 80% of the total verified emissions, and 802 companies would be exempted;
    d. 1 million tonnes a year : 280 companies would be captured by the threshold, and 650 companies would be exempted

[17] Based on coal-powered electricity production.
[18] Using Carbon Market Data (2011, which aggregates information at a company rather than installation level).

e. 0.5 million tonnes CO2 a year: 379 companies would be captured by the threshold (42% being energy producer and 58% other industrial emitters) accounting for approximately 97% of the total verified emissions, and 548 companies would be exempted.

47. 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 emission, 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 Consultants 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 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.

48. 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 1,050 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.

49. 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.

50. Taking into consideration the cost-benefit conducted by the Consultant on the various options for thresholds, ESMA considers on balance that it can be recommended to set the threshold for exemption at:
    a. 6 million tonnes a year; and
    b. 1,050 MW rated thermal input.

51. 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%).

52. Finally, ESMA also suggests that these thresholds are reviewed on a periodic basis by the Commission to assess whether they remain appropriate in light of

    a. the higher transparency they should have provided to the emission allowances 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.

III.II. Draft technical advice

Draft 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 exemption provided for in the second subparagraph of Article 17(2) (according to the third subparagraph of Article 17(2)) with respect to the obligation of the emission allowances market participants to disclose inside information,
    a) a minimum threshold of carbon dioxide (CO2) equivalent can be set at 6 million tonnes a year;
    b) a minimum threshold of rated thermal input of 1,050 MW.

2. These thresholds should be reviewed periodically to assess their appropriateness with regards to, inter alia:
    a) the expected increase in transparency of the emission allowances market;
    b) the development and maturity of the emission allowance market;
    c) the numbers of participants in the emission allowance market;
    d) the impact on availability of firm-specific information and on price formation or investment decisions in the emission allowance market.

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.

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?

IV. Determination of the competent authority for notification of delays in public disclosure of inside information

IV.I. Background/Mandate (extract)

53. Pursuant to Article 17(3) of MAR, the Commission shall adopt delegated acts in accordance specifying the competent authority for the notifications of paragraphs 4 and 5 of that Article.

54. ESMA received a mandate (See Annex II) from the Commission to provide a technical advice on this matter. In doing so, 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 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 Member States. ESMA is invited to provide its technical advice to specify the competent authority for notification of delays by emission allowance market participants.

IV.II. Analysis

Introduction

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

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

- Expansion of the scope to issuers of financial instruments traded only on a MTF or an OTF, provided that these issuers have requested admission to trading on a MTF or have approved trading on a MTF or an OTF.
- Expansion of the scope to emission allowances market participants (EAMPs), unless they are exempted on the basis of thresholds to be determined in an EU Commission delegated act (Article 17(2)).
- Incorporation in MAR of the manner in which the issuer 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)).

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

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

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

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

59. Article 22 of MAR generally defined 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:

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

- Second, such issuers may have their financial instruments traded on trading venues in different MSs, be they the same type of 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.

60. As a consequence, under the general definition of competent authority included in MAR Article 22, a single issuer could potentially have more than one relevant competent authority to which it has to notify the delay under Article 17(4) and Article 17(6).

61. However, the same Article 17(4) and Article 17(6) require the notification to be provided to only one competent authority. Different approaches have been suggested in the DP to determine the competent authority for the purpose of notifying delays. The first three options below do not distinguish be-

tween different types of trading venues, applying the same approach to RM/MTF/OTF, whereas the fourth option proposes a method for RM and a different approach for MTF/OTF:

A. MiFID Transaction Reporting based approach: the competent authority of the most relevant market in terms of liquidity as it would be defined under up-coming MiFIR:

B. Prospectus Directive (PD) based approach:
   i. For issuers of non-equity securities (unit denomination ≥ €1,000), they can choose among the competent authorities of (i) the MS where their registered office is located; (ii) the MS where their securities are admitted to trading on a RM/MTF/OTF; (iii) the MS where their securities are offered to the public;
   ii. For Community issuers of securities not covered by option 1, the competent authority is the one of the MS where the issuer has its registered office;
   iii. For 3rd country issuers not covered by option 1, they can choose among the competent authorities of (i) the MS where their securities offered to the public after the entry into force of PD; (ii) the MS where the first application for admission to trading on a RM/MTF/OTF is made.

C. Transparency Directive (TD) based approach:
   i. For issuers of debt securities (unit denomination ≤ €1,000) or of shares, the competent authority of the MS where a Community issuer is registered; for third country issuers of this category, the competent authority of the MS where the financial instruments are intended to be offered to the public for the first time or where the first application for admission to trading is or was made;
   ii. For all other issuers, the competent authority of the MS chosen by the issuer from among: (i) the MS in which the issuer has its registered office, and (ii) those MSs which have admitted its financial instruments to trading on a RM/MTF/OTF on their territory.

D. Hybrid approach:
   i. For financial instruments traded on a RM, the competent authority is based on where the issuer is liable in terms of information, either be in terms of information relating the offer of financial instrument (PD) or in terms of regulated information (TD);
   ii. For financial instruments traded only on MTF or OTF, the competent authority is the one of the MTF/OTF where the financial instrument was first traded with the consent of the issuer.

62. The respondents to the DP almost evenly supported either the TD or the PD based approach arguing they would be simpler and clearer, while a small minority supported the MIFID approach and hardly anyone did support the fourth hybrid approach.

63. Using the MiFID approach would put the focus on the market monitoring aspect. The relevant authority would have the exhaustive picture of the transactions conducted on the instruments of an issuer and would be able to exercise some judgment as to the delay. However, it may happen that the issuer has not approved the admission/trading on a venue in the MS of the competent authority of the most relevant market in terms of liquidity, and that authority would not have any competence under other directives/regulations about other information that the issuer has to publish. The fact that the most relevant market in terms of liquidity may vary over time, changing the relevant competent authority, was also mentioned by the respondents as a limitation of the MiFID based approach.

64. The PD based approach, extended to issuers whose financial instruments are only admitted/traded on a MTF or an OTF, presents two broad issues:

- First, in some circumstances[19] this approach leaves a degree of discretion to the issuer regarding which competent authority should be selected as the relevant one. As a consequence of the issuer's discretion, there would be a need to appropriately inform about the election of the relevant competent authority. ESMA considers that within the context of Articles 17(4) and 17(6), no discretion should be left to the issuers as this would introduce an additional element of complexity.

- Second, under the PD based approach, in cases where an issuer's financial instruments are admitted to trading/traded on a trading venue located in a MS that is different from the MS where the issuer has its registered office, the issuer could be in a position to elect as relevant competent authority the one of the MS where the register office is located. In such cases the competent authority in charge of the surveillance of the relevant trading venue would not be informed of the delay, and therefore, in order to properly inform the competent authority of the trading venue, the setting-up of a timely information-exchange mechanism between the competent authorities would be needed.

65. The TD based approach, although not fully overlapping with the PD based approach, incorporates the same two flaws described in the previous paragraph.

66. Furthermore, a hypothetical approach purely based on the location of the trading venue where the issuer's financial instruments are traded/admitted to trading, would not allow for the determination of the single competent authority where the issuer's financial instruments are traded on more than one trading venue located across different MSs. A way to mitigate this issue could be to select the one competent authority of the MS of the trading venue where, for the first time, the issuer requested admission to trading or approved trading of any of its financial instruments.

67. 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 proposes an approach whereby the competent authority for the purpose of notifications under Articles 17(4) and 17(6) is defined as the competent authority of:

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 issuers 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) and b):

[19] Only for issuers of non-equity securities with a unit denomination ≥ €EUR 1000

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.

Point c) would include all issuers incorporated in a third country (3rd 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.

68. 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.

69. Taking into account the expanded scope of the MAR in terms of financial instrument covered, ESMA considers that this approach has the merit of certainty as it defines the single authority, without any discretion left to the issuer. By using equity securities as a primary criterion in the approach, 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.

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

70. The duty to notify delays in disclosure of inside information to the competent authority set out in Article 17(4) also applies to emission allowances market participants (EAMPs), provided that they are not exempted according to Article 17(2) paragraph two.

71. 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).

72. Article 43 of the Auctioning Regulation, 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.

73. 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*"[20].

74. A first approach would be to determine the competent authority receiving the notification of delay as the competent authority of the MS where the EAMP has its registered office. However, this may lead to situations where a competent authority in one MS would receive notification of delays on emission allowances from a market participant registered in that MS, whereas the concerned emission allowances are actually traded on a trading venue in another MS.

75. This approach was supported by half of the dozen respondents to the DP, arguing that this would be consistent with the provision of other financial directives (e.g. MiFID) and indicating that it would be the authority's duty to share that information with the other authorities interested in the matter, notably with the one of the trading venue where the concerned emission allowances are traded. This approach would therefore need the setting-up of a timely information-exchange mechanism.

76. Alternatively, the determination of the CA for notification of delays could be based on the trading venue where the emission allowances are traded. In the case of auction bid, this would also allow a financial supervisor to be the competent authority designated. Indeed, Article 35 of the Auctioning Regulation requires an auction platform to be a RM under MiFID and therefore the competent authority of that auction platform is the one defined under MiFID for that RM. However, even though the market operator of an auction platform under the Auctioning Regulation is very likely to also operate a secondary market of emission allowances and related products, there can be situations where only a secondary market is operated in a particular MS. Furthermore, an EAMP can well be a member of different auction platforms and/or secondary markets. Therefore, this market participant would be trading emission allowances and/or related products on different venues across Europe and would potentially have to notify several competent authorities.

77. On balance, ESMA considers that, to ensure that a competent authority is identified with certainty, the competent authority for the purpose of the notifications under Article 17(4) should be the competent authority of the MS where the EAMP has its registered office, as for the purpose of notification of managers' transactions under Article 19(2).

78. ESMA will examine whether, within the provisions on cooperation enshrined in articles 24 and 25 of MAR, there is a need to establish 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 is done) of the fact that a delay took place. This would allow the authority that concentrates all the transaction reports under Article 26.1 paragraph 2 of MiFIR to be aware of the existence of a delay, which can be very useful information for the purposes of insider trading surveillance.

[20] 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).

IV.III. Draft technical advice

Draft advice specifying the competent authority for the notifications of paragraphs 4 and 5 of article 17 of MAR.

1. For the purpose of this advice, equity securities means the class of transferable securities referred to in Article 4(44)(a) of MiFID II.

2. For the purpose of the notifications under Articles 17(4) and 17(5) of MAR, the competent authority to which an issuer of financial instruments should notify the delay is determined as follow:

    a) The competent authority of the Member States where the issuer's registered office is located, if and as long as the issuer's equity securities are admitted to trading or traded on a trading venue in the same Member State with the issuer's consent.

    b) As long as an issuer does not have equity securities admitted to trading or traded on a trading venue with its consent, the competent authority of the Member State where the issuer's registered office is located, provided that any of the issuer's financial instruments are admitted to trading or traded on a trading venue in that Member State with its content.

    c) For issuers not mentioned in paragraph a) and b), including issuers incorporated in a third country, the competent authority of the Member State:

        i. where equity securities of the issuer were admitted to trading or traded on a trading venue for the first time with its consent, and are still traded; or
        ii. where any of the financial instruments of the issuer were admitted to trading/traded on a trading venue for the first time with its consent, and are still traded, if and as long as the issuer does not have equity securities admitted to trading or traded on a trading venue in a Member State.

3. 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 States where the registered office of the emission allowances market participant is located.

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

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?

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?

V. Managers' transactions

V.I. Background/Mandate (extract)

79. 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.

80. ESMA received a mandate (See Annex II) from the Commission to provide a technical advice on this matter.

V.II. Introduction

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

82. 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.

83. 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 transactions should be notified regardless of its amount. The €5,000 (€20,000) threshold should be calculated by summing 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 or EAMP.

84. 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. However, it should be noted that the notification and disclosure requirements of PDMRs/closely associated persons' transactions will only apply to those issuers that have requested or approved admission to trading/trading of their financial instruments on one of the venues. 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.

85. 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 EAMP and auction entities to make public the information notified by the PDMRs.

V.III. Types of transactions triggering the duty to notify

86. ESMA is mandated to provide a technical advice to the Commission for specifying the types of transactions referred to in Article 19(1), which trigger the duty to notify.

87. PDMRs and closely associated persons must notify the issuer, the EAMP or the auction entity, and the relevant competent authority about every transaction conducted on their behalf. In turn, the issuer, the EAMP or the auction entity (or the relevant competent authority) should disclose the notified information.

88. 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, including where discretion is exercised;

    c) transactions made under a life insurance policy.

89. In relation to article 19(7)(a) requiring the reporting of lending or pledging, ESMA wishes to clarify that borrowing transactions executed by a PDMR or a closely associated person need to be notified and disclosed as well.

90. Besides, contrary to many respondents’ comments that were asking for the notification requirement not to apply to transactions executed by a third party on behalf of a PDMR or a closely associated person where there is no discretion exercised by that PDMR or closely associated person, 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 (with the exception of transaction 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 full discretion (meaning that there is no instruction whatsoever from the PDMR or closely associated person) as regards the investment strategy of the contract.

General Approach

91. 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.

92. Therefore, although the three types of transactions referred to in Article 19(7) have to be considered individually, ESMA considers it useful to begin by identifying 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.

Broad type of transactions

93. 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."*

94. 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, on a MTF, on an OTF or OTC) is to be notified.

95. Article 19(1) refers to "every transaction" conducted on a PDMR or a closely associated person's own account. Therefore ESMA considers that the transactions to be notified should include, once the 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, inheritances 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.

96. Market participants responding to the DP broadly agreed with these proposals which were presented in the DP.

97. However, some of them asked for the following clarification on the timing of the disclosure. Article 19(2) clearly states that the notification has to be made within three working days of the transaction date. Consequently, ESMA does not agree with those respondents arguing that the timing for notification should only start when there is effective knowledge of the transaction by the PDMR or the closely associated person. The date of the transaction is to be determined by the applicable laws of the national state. This should apply also with respect to gift, donation and inheritance.

Non-exhaustive list of particular types of transactions

98. To supplement the particular transactions listed in Article 19(7)(a), (b) and (c) and to specify further the broad types of transaction 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 this constitutes a non-exhaustive list.

99. The initial list suggested in the DP was broadly supported by the respondents to the public consultation, with a few suggestions aiming at further clarifications. Notably, ESMA considers it useful to add some examples of types of particular transactions in relation to debt instruments. Furthermore, it has been clarified that automatic conversions of financial instruments and exercise of warrants are within the scope of reportable transactions.

100. In relation to the conditional trades mentioned in the initial list within the DP, ESMA wishes to clarify that 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).

101. Additionally, ESMA considers that transactions in contract for difference relating to financial instruments of the issuer should also be reported by the PDMR or the closely associated persons.

102. Finally, for the notification of transactions in derivatives, several approaches could apply to determine the volume of the transactions to be reported:

- the nominal amount of underlying instruments that the transaction in the concerned derivative contract represents;
- a more complex Delta-adjusted approach; or
- the gross amount received or paid expressed in monetary value.

For sake of simplicity while providing relevant information, ESMA considers that the volume should represent the gross amount of cash received or paid for the transaction executed.

Transactions in index-related instruments or baskets of financial instruments

103. ESMA suggested in the DP that transactions executed in index-related instruments or baskets (or derivatives based thereto) are within the scope of transactions to be notified and proposed to condition the requirement to a certain minimal weight carried by the issuer's financial instruments in the relevant index or basket. 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) has to be considered a financial instrument linked to the issuer's shares or debt instruments, ESMA has adopted an approach whereby the linkage between the index-related instrument or basket 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.

104. Views have been expressed that the legal interpretation of the MAR text on related instruments does not allow for a linkage to be defined on the basis of weighting approach. The consequences would be that any PDMR transaction in a basket or an index-related instrument (or a derivative based thereto) would need to be reported and that, furthermore, the scope of the linked instruments will be extremely large and difficult to identify as it could be argued that all instruments are linked because correlated to some extent. The use of a weighting approach instead seems proportionate as it would reduce the administrative burden borne by the PDMR and also ensure that competent authorities are not

overloaded with a large number of notifications relating to transactions with no relevant link to the shares or debt instruments of an issuer. This type of notifications would increase the workload within the authorities while providing no material information from a supervisory perspective.

105. In responding to the DP on the minimal weight, commentators proposed different weights, included between 20% and 50% of the index/basket. Some respondents referred to the FCA's rule in DTR 5.3.3(2)(c), according to which transactions have to be notified only where the shares in the basket represent 1% or more of the class in issue, or 20% or more of the aggregate value of the securities in the basket or index.

106. ESMA remains of the opinion that where the representation of a share and/or debt instrument of an issuer in the composition of an index or basket is below a certain weighting criterion, the index-related instrument or basket, or a derivative based thereto, cannot qualify as a linked instrument under Article 19(1). ESMA considers that the appropriate weighting criterion should be set at 20%. Therefore, not all transactions in index-related products or baskets need to be reported, but only those relating to indices or baskets where the above composition weighting criterion applicable to the underlying share and/or debt instrument is met, at the time of the transaction.

107. As a consequence, ESMA considers that the price to be reported for such transaction should reflect the real value of the underlying instrument (share or debt) included in the index or basket and be proportionate to the representation of the issuer's financial instrument representation in that index or basket. An alternative approach consisting in reporting the unit price of the transaction in the relevant derivative on index or basket and the volume as the gross amount paid or received expressed in monetary value might be too simplistic and misleading in relation to the assessment to be made as to whether the €5,000 (€20,000) cumulative threshold triggering the notification duty is reached.

Transactions in units/shares of investment funds

108. In reaction to a response to the DP, ESMA considers that the transactions executed by a PDMR or a closely associated person in the shares/units of an investment fund (UCITS and AIFM) need also to be reported, provided that the financial instruments of the issuer are represented in the composition of the concerned fund at the time of the transactions. A similar approach as the one for basket/index would apply in relation to the weighting criterion and the determination of the price and volume to report.

V.IV. Trading during a closed period

109. Article 19(11) prohibits a PDMR to conduct transactions during a closed period. The closed period mentioned in this article 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. So, both the announcement of such date(s), and the potential publication of key results prior to the first publication of the required report (including an unaudited report where applicable) do not trigger a closed period. Finally, in cases where an issuer is not required to publish the interim and year-end reports, the closed period provisions would not apply.

110. 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 a technical advice the circumstances under which a PDMR could be permitted to trade during a closed period by the issuer: "*either (i) on a case by case basis, in case of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares, or (ii) due to the characteristics of the trading involved for dealings made under, or related to, an employee's share or saving schemes, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change*". In particular, the goal is to define the circumstances that would be considered as exceptional and the types of transaction that could be permitted.

111. 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.

112. 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).

113. 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.

114. ESMA wishes to clarify that, following a transparency purpose, all transactions conducted on an account of a PDMR are covered by the closed period prohibition defined in Article 19(11), unless Article 19(12) is applicable. Therefore also transactions executed in the context of a (full) discretionary asset/portfolio management mandate, i.e. where a PDMR has no possibility whatsoever to influence the asset/portfolio manager and to make any investment decision, are covered by the prohibition of trading during a closed period. To ensure that the closed period prohibition is complied with in such a case, a PDMR should inform his asset/portfolio managers that they are prohibited to invest in financial instruments linked to the relevant issuer's shares or debt instruments during the closed period.

115. Unless national law or trading rules imposes the publication of the exact dates of the announcements and in order to find the right balance between the prohibition to trade during this period and the asset/portfolio manager's independence principle, ESMA believes that a PDMR should proactively inform asset/portfolio managers of the start of every single closed period as soon as he becomes aware of the date. Such an approach could operate in the case of discretionary management of individual portfolio of PDMRs, although ESMA is aware that this approach might create higher risks of market abuse by asset/portfolio managers who will get the signals from the PDRMs about potential inside information. This approach raises also concerns with respect to collective asset management, particularly UCITS where the funds operate on the basis of a pre-defined mandate aiming at collectively invest in financial instruments with no possibility for any of the fund holder to individually instruct the fund manager about the investment to conduct or not, but nonetheless it is less restrictive than the following alternative approach.

116. This more radical approach would require that the relevant asset/portfolio management contract includes a clause specifying that the asset/portfolio managers are prohibited from investing in financial instruments linked to the relevant issuer's shares or debt instruments altogether, i.e. for the full duration of the contract and not just during the closing period.

117. Where the dates of announcements pursuant to Article 19(11) are publicly known, the "asset/portfolio managers" would have to not only conduct a proper monitoring in respect of closed periods but would also have to abstain trading in the shares or debt securities of the concerned issuers.

118. 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.

In relation to transactions under exceptional circumstances

119. Considering the support the principles set out in the DP received from a large majority of the respondents, 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.

120. 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 motivated, including explanation of the transaction envisaged and description of the exceptional character of the circumstances.

121. 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.

122. 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.

123. 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.

124. To the market participant asking whether a charge or pledge for share during the closed period would be permitted under exceptional circumstances it is recalled that Article 19(12a) of MAR refers to immediate sales of shares only in case of exceptional circumstances, excluding thus all other types of transaction.

In relation to other types of transactions

125. 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's share or saving scheme, (ii) qualification or entitlements of shares or (iii) dealings where the beneficial interest in the relevant security does not change.

126. The vast majority of the respondents supported ESMA proposals made in the DP.

127. Therefore, with regards to dealings made under or related to employee's share scheme, employee's 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.

128. 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 be motivated. 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 instrument or other transaction such as sale or purchase between the PDMR and another person, notably a legal entity fully owned by the PDMR.

129. The draft technical advice therefore takes the form of a non-exhaustive list of types of transactions that may be permitted by the issuer, which includes the examples already presented in the DP.

130. It should be noted that some respondents to the DP proposed to reduce the 4 month period referred in the example relating to the expiration during the closed period of assigned options, warrant or convertible bonds under an employee's scheme. ESMA believes that 4 months is an appropriate period and should not be reduced.

131. Furthermore, 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.

132. In this respect, ESMA is clarifying in the draft advice some elements of the examples presented in the DP as well as proposing an additional type of transaction. The latter relates to the 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.

V.V. Draft technical advice

Draft advice on:

Types of the transactions triggering the duty to notify

1) In accordance with Article 19(1) of MAR, a person discharging managerial responsibilities within an issuer and a closely associated person should notify the issuer and the relevant competent authority of every transaction, irrespective of the venue or place where that trans-

action has been conducted (i.e. on a RM, on a MTF, on an OTF or OTC) and provided that the threshold condition set out in Articles 19(8) and 19(9) are 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 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) Gift and donation made or received as well as inheritance.
n) Transactions executed by a third party under a (fully) discretionary portfolio or asset management mandate.
o) Transactions executed in index-related products, baskets and derivatives based thereto, or in shares/units of investment funds (AIFM and UCITS), provided that they are linked to the issuer's shares or debt instruments.
p) Borrowing of shares or debt instruments of the issuer or other financial instruments linked thereto.

3) With reference to item o) in the previous paragraph, an index-related product, a basket and a share/unit of investment funds (AIFM 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.

Circumstances under which trading during a closed period may be permitted by the issuer

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 provided that:

- the concerned issuer has permitted such trading;
- one of the circumstances referred to in Article 19(12) of MAR is met;
- the person discharging managerial responsibility 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 responsibility 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 PDMR.

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 sales 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 :

- The extent to which the person discharging managerial responsibility is facing a financial commitment that person has to fulfil, notably a legally enforceable demand;
- The extent to which the person discharging managerial responsibility 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 articles below.

11) Award or grant of financial instruments under an employees' scheme to a PDMR when:

a) The employee's 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 employees' 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 that no discretion can be exercise;
   iii) the persons entitled to the award or grant includes persons discharging managerial responsibilities who should not have any discretion as to the acceptance of the awarded/granted financial instruments.

c) Not awarding or granting the financial instruments would be likely to indicate that the issuer is in a closed period.

12) Award of financial instruments under an employee's scheme to a PDMR taking place in the closed period under the condition of a "consistent course of action" 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 assigned convertible bonds assigned under an employee's 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 its choice to exercise or convert at least 4 month before the expiration date;
   b) the decision of the person discharging managerial responsibilities is irrevocable;
   c) the person discharging managerial responsibilities has received the authorisation from the issuer prior to proceed.

14) Purchases of the issuer's financial instrument under a employees' saving scheme when:
   a) the person discharging managerial responsibilities has entered into the scheme before the closed period, except when it cannot enter into the scheme at another time due to the date of commencement of employment;
   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
   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 taken at the initiative of the person discharging managerial responsibilities when:
   a) The person discharging managerial responsibility, 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 responsibility 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 responsibility explains to the issuer the reasons for the acquisition not taking place at another time.

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

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.

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.

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?

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)?

VI. Reporting of infringements

VI.I. Background/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).

VI.II. Analysis

133. Article 32(1) of MAR requires MSs to ensure that 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).

134. 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.

135. 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 investigation or subsequent judicial proceedings.

136. The DP did not envisage any measure in relation to point (b), with the exception of the measures CAs should have in place to protect confidentiality and the identity vis-à-vis the employer of the reporting person and/or the reported person. However, ESMA is seeking views on this topic also. ESMA is interested in views on the forms of retaliation, discrimination or other types of unfair treatment, that

employees reporting infringements can be victims of within their employment and on which mechanisms would be effective to protect them from such actions. Such mechanisms already exist in the national laws of some Member States[21], in European[22] and international best practice guidelines[23]. ESMA is also considering including 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 provision in other European legislations, notably in the field of money laundering (see Article 26 of the Anti-Money Laundering Directive 2005/60/EC).

137. Several respondents to the DP highlighted the relevance of internal reporting within the employer and the need of regulating these mechanisms as well. Among other things, it has been stressed the importance of: informing employees about internally available procedures, requiring internal reporting before or at the same time as the external reporting to competent authorities, accentuating the role of the compliance function, reassuring employees of the absence of internal discrimination, and looking at regulatory experiences already in place at EU level and in several MSs as well.

138. Although ESMA recognises that such mechanisms facilitate the success of notification regimes, due to the fact that internal retaliation and discrimination constitute relevant disincentives to notifying infringements, it does not currently propose any specific provision related to this. Besides, being the reporting regime envisaged by MAR very open as no definition of whistle-blower or whistleblowing activities is present, the scope of any measure would need to cover any company, regardless of whether it is a financial institutions or not.

139. Furthermore, requiring mandatory internal reporting before accessing external reporting to competent authorities could be envisaged by mechanisms under letter a). As highlighted in some responses to the DP, such a requirement would stimulate proactive reactions by employers and would be helpful when the entity has sufficient dimension and an adequate culture in dealing with such internal reporting, as it is, or it should be, in the case envisaged by Article 32(3) of MAR. In accordance with this Article, MSs should require that employers who carry out activities that are regulated by financial services regulation have in place appropriate internal procedures for their employees to report infringements. It should be noted that this provision is not covered in the mandate to prepare implementing acts.

140. 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 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.

141. Several respondents invited ESMA to provide better indications on the conditions that permit having access to the status of whistle-blower and on the on-going conditions that should be fulfilled in order

[21] For example the UK Public Interest Disclosure Act 1998 and Luxemburg's Law of 13 February 2011 relating to the fight against corruption

[22] For example the Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime of the Article 29 Data Protection Working Party under Directive 95/46/EC and the Communication from Vice-President Šefčovič to the Commission on Guidelines on Whistleblowing (SEC[2012] 679 final).

[23] For example Transparency International report on "Whistleblowing in Europe; legal protections for whistleblowers in the EU" (2013); International Chamber of Commerce "ICC Guidelines on Whistleblowing prepared by the ICC Commission on Anti-Corruption".

not to lose such status once afforded. However MAR offers unconditional access to gain such status. Therefore, it does not seem appropriate to elaborate these conditions at Level 2. 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.

142. Similarly, ESMA holds the view that it is not helpful to provide further explanations about the meaning of "persons working under a contract of employment" (whether this expression includes contractual employees, temporary employees, trainees, employees of external companies, consultants, interns, etc.) because these explanations would not be relevant to gain access to the reporting mechanism, as related to in Article 32(2)(b).

143. 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 but it 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.

144. ESMA believes that notifications should be based on a reasonable suspicion and therefore competent authorities should encourage reporting persons to provide hard 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 Member State establishes financial incentives for reporting persons.

145. Following comments received, the procedures outlined in the DP have been modified in several respects. As to the procedures for the receipt of reports of infringements and their follow-up, the revised advice: (i) allows the possibility that a reporting person be a legal entity, (ii) requires competent authorities to provide a prompt receipt as feedback in case of written notification, and (iii) requires competent authorities to promote their procedures on their websites.

146. As to procedures for protection for the reporting and for the reported persons, the revised advice (i) robustly reinforces the protection of the reporting person's identity because of the higher risks that this person bears compared to other persons that typically competent authorities deal with during investigations and proceedings, and (ii) mandates competent authorities to regularly review their mechanism to enable reporting of infringements under Article 32(1).

VI.III. Draft technical advice

Draft advice on the procedures referred to in Article 32(1)

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 meeting can be recorded in a durable and retrievable form, or written minutes of the meeting should be signed by the reporting person.

8. Communication channels should ensure a high level of security and durable evidences to allow for further investigations and confidentiality.

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. Such notification should be recorded 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 indicate: how to contact the dedicated resources, phone lines, including recorded and unrecorded phone lines, secure and confidential email and post 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 protection of the reporting and the 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 accordance with the EU Data Protection Directive, and 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 and contact details should be maintained in a confidential and secure system within the competent authority. Access to the system should be subject to internal restriction.

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 competent authorities other than 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's in any external let-

ter, 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:

    a. 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);

    b. 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

    c. 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 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 measure for the protection of persons under contract of employment

24. The reporting in good faith to the competent authority shall 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.

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?

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

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 transferral)?**

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 defence)? Are you aware of any other aspects that could be relevant in this context? Please specify.

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.

Annex I

Summary of questions

Specification of the indicators of market manipulation

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?

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?

Q3: Do you consider that the practice known as "Phishing[24]" should be included in the list of examples of practices set out in the draft technical advice?

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)?

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

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.

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?

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

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

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?

[24] 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.

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?

Managers' transactions

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

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.

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.

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?

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)?

Reporting of infringements

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?

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

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 transferral)?

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 defence)? Are you aware of any other aspects that could be relevant in this context? Please specify.

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.

Annex II

European Commission's mandate to provide technical advice

- Mandate published on the 21 October 2013:

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

- Mandate published on the 2 June 2014:

  http://ec.europa.eu/internal_market/securities/docs/abuse/140528-esma-mandate_en.pdf