European Securities and Markets Authority

Date: 11 April 2018
ESMA70-145-442

OPINION

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA)

Of 11 April 2018

Relating to the intended Accepted Market Practice on liquidity contracts notified by the Autorité des marchés financiers

1 Legal basis

1. Article 13 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (MAR)[1] provides that a national competent authority (NCA) may establish an accepted market practice (AMP). The relevant provision of MAR is supplemented by the Commission Delegated Regulation (EU) 2016/908 of 26 February 2016[2] (RTS on AMPs) that further specifies the requirements listed in Article 13(2) of MAR that a NCA should take into account before deciding whether or not to establish an AMP.

2. As required under Article 13(3) of MAR, a NCA intending to establish an AMP must notify ESMA and other NCAs of its intention at least three months before the AMP is intended to take effect.

3. According to Article 13(4) of MAR, ESMA shall, within 2 months from the receipt of the notification made by a NCA, issue an opinion on the intended AMP and publish it on its website. This opinion shall assess (a) the compatibility of the intended AMP with Article 13(2) of MAR and the RTS on AMPs and (b) whether the establishment of the AMP would not threaten the market confidence in the Union's financial market.

[1] OJ L 173, 12.6.2014, p. 1.
[2] Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance; OJ L 153, 10.6.2016, p. 3–12.

4. In accordance with Article 13(5) of MAR, where the opinion issued by ESMA is negative, the notifying NCA is required to publish on its website a notice setting out in full its reasons for establishing the AMP, within 24 hours of establishing that AMP.

5. The Board of Supervisors adopts this opinion in accordance with Article 44(1) of the Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[3]. This opinion is addressed to the Autorité des marchés financiers (AMF).

2 Background and Procedure

6. MAR determines a harmonised framework prohibiting market manipulation. This encompasses a prohibition on entering into a transaction, placing an order to trade or engaging in behaviour which gives, or is likely to give, a false or misleading signal as to the supply of, demand for, or price of, an instrument falling within the scope of MAR, or which secures, or is likely to secure, the price of such an instrument. However, MAR also provides an exception to the general prohibition of market manipulation. To benefit from that exception, the concerned person needs to establish that the transaction conducted, the order placed or the behaviour engaged in has been carried out for legitimate reasons and in accordance with a market practice formally accepted by a NCA, referred to as AMP.

7. The protections and safeguards foreseen in MAR by the co-legislators with respect to activities falling within an AMP have been envisaged precisely because those activities (placing orders or conducting transactions) could, in themselves, constitute market manipulation. The mechanisms for doing so could be either by affecting the price formation process, by giving false or misleading signals as to the supply of, demand for, or price of the financial instrument or by securing the price at an abnormal or artificial level. Furthermore, market manipulation is one of the most serious types of misconduct in financial markets and one of the two types (together with insider trading) for which a criminal regime has been established in the EU through the Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse Directive[4].

8. This is the reason why it is particularly important to have scrutiny at EU level on these intended AMPs. Such scrutiny is exercised by ESMA through the issuance of the relevant opinions on practices that could be potentially manipulative but that are accepted and authorised to pursue the benefit they bring to market structure, operation or robustness.

[3] OJ L 331, 24.11.2010, p. 84.
[4] OJL 173, 12.6.2014, p. 179-189.

9. During the summer of 2016, five NCAs, including the AMF, notified ESMA of their intention to maintain or replace their AMPs relating to a practice known as liquidity contracts established under the regime stemming from Directive 2003/6/EC[5] (MAD) in accordance with the new regime set out in MAR. Globally, such practices consist in an issuer entering into an agreement with a financial intermediary that is entrusted with the task of enhancing the liquidity of the issuer's shares.

10. In this context, ESMA has developed a common approach in establishing AMPs on liquidity contracts and the safeguards to be provided by those AMPs with respect to market integrity and confidence. The outcome of this convergence activity has been to identify a common understanding for the establishment of the AMPs on liquidity contracts that NCAs should take into account when assessing a proposed AMP. These agreed points of convergence were made public on 25 April 2017 in the form of an ESMA opinion (ESMA70-145-76) hereinafter referred to as the "ESMA Opinion on liquidity contracts".

11. In the present case, the French AMF notified ESMA on 12 February 2018 of its intention to establish an AMP relating to liquidity contracts, which aims at replacing the existing AMP on liquidity contracts previously established by the AMF in March 2005 under MAD. As indicated above, the pre-existing MAD AMP was notified on 1 July 2016 in accordance with Article 13(11) of MAR and subsequently followed by a notification from the AMF made on 5 August 2016 under Article 11(2) of the RTS on AMPs that some significant amendments would be introduced.

12. In particular, the AMF highlights the importance of this practice for the French financial markets, where more than 400 issuers are currently using the MAD AMP, and the impact of these liquidity contracts on the stability of the French stock markets. AMF also underlines the workload that the new regulatory framework will require from the industry. As a result, the AMF indicates that they have introduced some elements of flexibility compared to the points of convergence included in the ESMA Opinion on liquidity contracts.

13. The risks for market integrity with the notified practice are recognised by the AMF in its submission as the practice could affect the price formation process and potentially lead to misleading signals or artificial price setting. Hence, it is important for ESMA to analyse the proposed AMP with a view to avoid, to the extent possible, that the distortions referred to above take place.

14. The present opinion is based on the information provided by the AMF. NCAs were duly notified of the proposed AMP as requested by Article 13(3) of MAR.

[5] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive); OJ L 173, 12.6.2014, p. 179–189.

3 Opinion

3.1 Rationale of the ESMA Opinion

15. The AMP notified by the AMF refers to liquidity contracts by which an investment firm or a credit institution (financial intermediary) quotes in the equity market on behalf of the issuer. The practice would be available for all issuers who have requested admission to trading or approved the trading of their shares on French trading venues, namely the regulated market (RM) Euronext Paris or the multilateral trading facility (MTF) Alternext Paris. ESMA notes that the issuers of shares on the other French MTF, Marché Libre, cannot benefit from this AMP as, further to AMF's clarifications, under French Commercial Law, the issuers traded in this venue are not allowed to buy-back their own shares under the framework of a liquidity contract. The practice would have to be performed by the financial intermediary on the French trading venue of which it is a member and where the concerned share is admitted to trading or traded with the issuer's consent.

16. The sole objective declared by the AMF of the proposed practice is to enhance the liquidity of a particular share and to ensure that it is traded regularly. In that respect, the goal would ultimately benefit investors, including retail investors active on these trading venues as the likelihood of finding a counterparty for entering into or exiting a position in that share would increase.

17. As already explained in detail in the opinion issued by ESMA on 16 December 2016 on the intended AMP on liquidity contracts notified by the Spanish Comisión Nacional del Mercado de Valores (ESMA/2016/1663), other mechanisms exist in EU markets to enhance the liquidity of financial instruments (e.g. market making or liquidity provision under a contract with a venue). The main difference between such classical mechanisms and an AMP on liquidity contracts is that the issuer of the shares initiates the practice, determines when and for how long to put it in place, defines the size of the resources (in cash and shares) that will be devoted to it and, more importantly, provides those funds and shares on its own account.

18. ESMA considers that, since those liquidity contracts are prompted and fully funded by the issuer of the share, the interests of the issuer may collide with the interests of the market as a whole and particularly with the investors' interests. Therefore, such practices require the maximum extent of precautions to ensure that the risks to market integrity that they could pose, notably in terms of effects on the price formation process and the perception of the liquidity of the issuer's share, are as contained as possible.

19. In light of the above, the main risks in ESMA's view are the following:

    a. the possibility of the issuer instructing the financial intermediary to act in sensitive periods for the issuer (around publication of results, in the wake of key announcements or secondary offerings, during buy back or stabilisation periods, while a takeover is pending acceptance, etc.);

b. the possibility of the issuer or the financial intermediary favouring one-sided quoting (for instance, buying only or buying in bigger quantities than selling), ultimately creating an imbalance and moving (typically up) the price of the share;

c. the possibility of quoting practices that would have a distorting effect on prices (by placing orders at a better price than what would result from independent parties);

d. the possibility of acquiring a dominant position in the market, with the associated distortive results that it would create;

e. the lack of transparency of the contract, in a manner that would prevent the overall market to assess how much liquidity is being "added" by the contract compared to the one that would be "naturally" present in the market;

f. the possibility of an adverse incentive for the financial intermediary to increase trading in order to increase its remuneration under the contract.

20. In the assessment of the compatibility of the proposed AMP with the criteria of Article 13(2) of MAR, ESMA has also considered the mechanisms described by the AMF to mitigate the above-mentioned risks.

21. In the context of this assessment, ESMA has also considered in its assessment the extent to which the agreed points of convergence set out in the ESMA Opinion on liquidity contracts are taken into account in the intended AMP.

3.2 Assessment of the criteria and requirements laid down in MAR and the RTS on AMPs

On the notification received

22. ESMA finds that the AMF's notification of 12 February 2018 provided the information required under Article 13(3) of MAR and Article 10 of the RTS on AMPs (See annex). According to the AMF, this proposal has been made further to an extensive consultation (more than two years) with relevant domestic bodies, including French associations of financial intermediaries and issuers and should be taking into account the framework introduced by MAR and the ESMA Opinion on liquidity contracts.

On the identification of elements related to the ESMA Opinion on liquidity contracts

23. ESMA appreciates that the AMF made reference to the conditions and limits set out in the ESMA Opinion on liquidity contracts in the proposed AMP: the financial instruments in scope of the AMP and the need to take into account their liquidity in light of the objective of enhancing liquidity, the written form of the contract, the trading venues where the liquidity contracts can be performed, the trading conditions for the

performance of the AMP (presence in the order book, price and volume limits, trading during auctions and possibility to use block trades) and the limits to the resources that can be allocated to its performance.

24. ESMA notes in particular that, even though all issuers on French trading venues within the scope may benefit from the proposed AMP, the practice makes a distinction between three categories of shares defined according to their level of liquidity ("highly liquid", "liquid" and "illiquid" shares) by applying differentiated conditions and restrictions.

25. In that respect, ESMA notes that the notification still refers to the categories of "liquid" and "illiquid" shares as defined by Article 22 of Commission Regulation (EC) 1287/2006. While Article 13 of MAR does not include any reference to these issues, ESMA notes that the determination of liquid markets for equity instruments in the aforementioned Regulation has been substituted by MiFIR and Commission Delegated Regulation 2017/567, which changes the criteria for the identification of liquid markets. AMF has confirmed that their final decision should make reference to the new regulatory framework.

26. ESMA has also identified the following two elements departing from the agreed points of convergence:

    a. For illiquid shares only, the proposed AMP allows the financial intermediary performing the liquidity contract to submit orders that reduce the best bid-ask spread. That implicitly derogates from the price conditions set out in the ESMA Opinion on liquidity contracts for all three categories of shares with a view to limit the price impact of the orders transmitted in the execution of the liquidity contract[6].

    b. For illiquid shares, the proposal does not follow the maximum 1 Million Euro limit in terms of resources that can be devoted to a liquidity contract on illiquid contracts[7].

27. ESMA notes that the departure from the points of convergence included in the ESMA Opinion on liquidity contracts may create a risk of unlevel playing field.

Article 13(2)(a) of MAR (further specified by Article 3 of the RTS on AMPs): Transparency and disclosure to the public

On the disclosure to the public

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[6] ESMA opinion (ESMA70-145-76): for buy orders, is not higher than the higher between the last independent trade and the highest independent bid order in the book; for sell orders, is not lower than the lower between the last independent trade and the lowest ask order in the book.

[7] ESMA opinion (ESMA70-145-76): 500% of the average daily trading volume or 1% of the outstanding issued shares of the issuer at the time of entering into the liquidity contract.

28. The proposed AMP imposes transparency requirements towards the public relating to the liquidity contract prior and periodically during its performance as well as when it ceases to be performed. Disclosure is ensured by the issuer entering into the liquidity contract through press releases detailing the information about the contract to be performed or posting of reports on its own website. As to the content of the information required to be publicly disclosed under the proposed AMP, ESMA notes that it is in line with the contents specified in Article 3(1) of the RTS on AMPs.

29. The proposed AMP includes limits to the resources allocated for the performance of the contract and the prices and volumes quoted in normal market conditions. They differ based on the categories of shares and, notwithstanding the divergences identified above, are considered broadly in line with the points of convergence of the ESMA Opinion on liquidity contracts. However, the proposed AMP also foresees so-called "transitional measures" that allow, for a period of two years:

    a. an issuer of shares falling into the "liquid" or "illiquid" categories to not apply any limits to the resources allocated to the performance of a liquidity contract on its shares;

    b. the financial intermediary performing a liquidity contract on shares falling into any of the three liquidity categories to carry out transactions without having to comply with the price and volume restrictions otherwise applicable under the proposed AMP.

30. In both cases, the use of these "waivers" needs to be recorded and justified (demonstrating that they are necessary and not detrimental to the orderly functioning of the market).

31. ESMA also notes that the AMP introduces an obligation for the issuer benefitting from the waiver, and therefore, increasing the resources devoted to the liquidity contract, to publish this circumstance as soon as possible.

32. However, there is no reference to such type of publicity in case the financial intermediary decides to benefit from the waiver.

33. ESMA understands that the only source of information available, i.e. the half-yearly reports, would not be suitable for this purpose. Even if market participants cross-check the half-yearly reports against market data to find out whether the financial intermediaries fulfilled the limits in terms of prices and volumes, such analysis could prove to be difficult as the data reported is aggregated on a daily basis, in particular since not only sophisticated investors would be operating on the shares covered by the AMP. This may ultimately have an impact on the confidence of the market participants in the proper operations of the liquidity contracts.

34. Moreover, ESMA understands that it might not be possible to report ex ante to the market about the use of the waiver by the financial intermediary, because it is dependent on unpredictable market conditions.

35. In ESMA's view there should be at least an immediate ex post reporting obligation to the market to enable other market participants to interpret the prices and volumes traded on a given day correctly and more specifically whether the prices and volumes offered/traded by financial intermediaries under the AMP were within the limits or not.

Conclusion

36. ESMA is of the view that, in cases where no use is made of the waivers by the financial intermediary, market participants will obtain sufficient information at the various stages of the life cycle of a liquidity contract and particularly during its performance with the half-yearly reports including daily aggregated figures detailing the transactions carried out under the liquidity contract.

37. ESMA also considers that where the issuer allocates more resources to the liquidity contract there would be sufficient information about this circumstance for other market participants.

38. With respect to the lack of publication obligations in case a financial intermediary does not comply with the AMP's price and volume restrictions, ESMA acknowledges the impossibility to report ex ante about the use of the waiver, since it is subject to market conditions.

39. However, given that market participants would have learnt about the liquidity contract and the limits, the absence of a requirement to inform the public of the use of the waivers means that market participants would not be properly informed, as they would assume that the liquidity contract operates within the price and volume limits set out in the AMP.

40. Such lack of disclosure is considered as non-compliant with Article 13(2)(a) of MAR and Article 3(1)(b)(ii) of the RTS on AMPs.

41. ESMA suggests introducing immediate ex-post information to enable the other market participants to interpret the prices and volumes traded on a given day correctly and more specifically whether the prices and volumes offered/traded by financial intermediaries under the AMP were within the limits or not.

On the transparency towards the regulator

42. With respect to the information to be provided to the AMF, the proposed AMP requires the issuer entering into a liquidity contract to submit the written contract entered into with the financial intermediary before the liquidity contract starts.

43. Furthermore, the proposed AMP explicitly requires the issuer benefiting from the liquidity contract to provide specific monthly reports to the AMF to ensure that, pursuant to Article 3(2)(b) of the RTS on AMPs, it has periodic information regarding the details of the transactions executed under the liquidity contract.

44. With regard to the "transitional measures", there is no prior obligation to notify them in case a financial intermediary decides to avail itself of the waiver since the use of the waiver is based on market conditions. However, AMF has confirmed that:

    a. the financial intermediary is obliged to provide the AMF with a summary statement of the recourse to the waiver and the additional documentation upon request from the AMF;

    b. close monitoring will be implemented in order to analyse the impact of the entry into application of the new regulatory framework. To this end, the final regulatory framework applicable to liquidity contracts will specify that financial intermediaries making use of the waiver shall transmit on a regular basis to the AMF detailed information and statistics on the use of waivers on a regular basis. This monitoring will not be limited to the use of the waivers by the issuers and the performers of the liquidity contract; and

    c. on-site inspections will be carried out during the transition period on the implementation of the new regulatory framework applicable to liquidity contracts. These inspections will focus on the use of waivers, and ESMA will be duly informed of the results of the monitoring.

45. Despite ESMA acknowledges AMF's efforts to address the risks that the waivers may entail through these reporting obligations, close monitoring and on-site inspections, those additional requirements do not change the assessment under Article 3(2)(a) of the RTS, i.e. that the information to be provided *before* the market practice is performed would be incomplete.

46. ESMA also understands that reporting requirements under Article 26 of MiFIR provide highly detailed information together with other existing monitoring tools for the surveillance of orders submitted to the Euronext central order book. For example, the AMF is able to identify orders issued by the financial intermediary, and determine whether a transaction results from the execution of a passive or aggressive order. Such capacity should be read together with their capacity to access any document and data in any form, including the public information to be provided by the issuer.

Conclusion

47. ESMA notes that Article 3(2)(a) establishes the obligation of NCAs to ensure that, before a market practice is performed as an AMP, the arrangements or contracts between the counterparties are disclosed to them. Whereas in principle, this requirement might be fulfilled by depositing the contract before the AMF, in case the

financial intermediary avails itself of the waiver, the performance of the contract would be subject to a fundamental change. Nothing in the notification suggests that the contracts deposited before AMF would contain the alternative price and/or volume conditions that would be applicable in that case.

48. ESMA acknowledges that in case of making use of the waiver the additional monitoring and reporting obligations would partially address the lack of transparency of the initial notification.

49. Nonetheless, according to the AMF's notification, making use of the waiver does not exclude the financial intermediary from being covered by the AMP. Therefore, ESMA concludes that the information provided under Article 3(2)(a) of the RTS on AMPs before a market practice is performed as an AMP would be incomplete, since in case of making use of the waiver the AMP operates without any alternative price and/or volume limits that should be considered by AMF.

Article 13(2)(b) of MAR (further specified by Article 4 of the RTS on AMPs): the market practice ensures a high degree of safeguards to the operations of the market forces and the proper interplay of the forces of supply and demand

50. In ESMA's opinion, the need for the performance of the liquidity contract to appoint a single financial intermediary which is a supervised person under letters (a) or (b) of Article 1 of the RTS on AMP and a member of the relevant trading venue is an important requirement for the proper performance of the contract as well as for its monitoring by the AMF. ESMA agrees with the AMF that the supervised person is subject to strict compliance requirements under MiFID II and MiFIR. In particular, the requirements relating to record keeping rules notably of orders and transactions, internal organisation and procedures, control systems, management of conflict of interests, internal audit and human and technical resources are relevant in light of Article 4(1)(c) to (f) and 4(3)(b) of the RTS on AMPs. Furthermore, these elements are supplemented in the proposed AMP with the requirement for the financial intermediary to open specific accounts in the name of the issuer. The securities account and the corresponding cash account must be used only for the purpose of the performance of the liquidity contract and register all the transactions carried out.

51. The proposed AMP also prohibits the issuer to instruct the financial intermediary in its activity under the liquidity contract. This is supplemented by the requirement for the financial intermediary to have an internal organisation ensuring that the employees in charge of the execution of the contract are prohibited from executing other transactions in the issuer's shares outside the liquidity contract. ESMA considers these measures as favouring the independence of the financial intermediary performing the liquidity contract from the issuer benefitting from it.

52. In particular, the AMF has confirmed that the individual in charge of the liquidity contract within the financial intermediary would not execute any other clients' orders or proprietary trading in the shares covered by the liquidity contract. As a

consequence, ESMA understands that the requirement to consider whether orders are entered separately and individually without aggregating orders from several clients under Article 4(1)(c) of the RTS on AMPs is fulfilled.

53. However, the notification also foresees that liquidity contracts are generally part of a package of services offered by an investment firm to an issuer. From that perspective, the notification only mentions that "the issuer shall submit a copy of the contract to the AMF before its performance to the market", where the remuneration of the performer of the liquidity contract should be reflected.

54. Despite the fact that the notification does not specify whether each contract should be subject to specific monitoring to ensure that the conditions set out in Article 4(3)(a) of the RTS on AMPs are met, AMF has confirmed this, clarifying that due to the sheer number of contracts to be analysed, where this is not possible to be done on an ex ante basis it will be done ex post.

55. ESMA notes that the notification does not refer to any specific monitoring of the remuneration derived from other services provided by the same investment firm or credit institution. ESMA considers that the independence from the influence of the beneficiary of the AMP could be compromised through other related contracts and therefore, recommends AMF to analyse this specific parameter to ensure that the requirement in Article 4(3)(a) of the RTS on AMPs is met.

56. In line with Article 4(2) of the RTS on AMPs, the proposed AMP is imposing an ex ante list of trading conditions and restrictions for the performance of liquidity contracts, including price and volume limits, but does not make any explicit reference to limits on positions.

57. ESMA understands that the lack of limits on positions is implicitly addressed through the maximum amount of cash and securities that can be allocated to the liquidity contract and the requirement for the financial intermediary to maintain a credit balance between the shares and the cash on the liquidity contract accounts as important measures to limit the possibility to acquire a dominant position, so Article 4(2) can be considered as met as regards position limits.

58. ESMA notes that the conditions on prices and volumes under normal conditions are different according to the categories of shares and almost fully aligned with those specified in the ESMA Opinion on liquidity contracts.

59. However, the proposed AMP also foresees that, for a period of two years, any financial intermediary performing a liquidity contract under the AMP may avail itself of a waiver from the price and volume restrictions otherwise applicable under the proposed AMP.

60. ESMA notes in this respect that there are neither pre-requisites for the financial intermediaries to avail themselves of the waiver, neither alternative price or volume limits in case of use of the waiver nor limits in terms of time span where intermediaries

could benefit from the exemption. This means that, in an extreme situation, virtually all the financial intermediaries benefitting from the AMP could exclude themselves from any price and volume limits over the two-year transitional period.

61. Moreover, issuers might also disregard the limits on the amount of resources allocated to the liquidity without any pre-requisites or limits making theoretically possible that, under the proposed AMP, for all shares covered (400+), all issuers and financial intermediaries simultaneously avail themselves of the waiver. In that case, all the liquidity contracts would be operating without any restrictions in terms of resources available, prices and volumes.

62. ESMA understands that:

    a. in case a financial intermediary operates outside of the boundaries of the AMP this does not amount to undertaking market manipulation;

    b. the use of the waiver has to be subject to (undefined) market conditions; and

    c. the allocation of additional resources to the liquidity contract is subject to the approval of the General Shareholder Meeting of the issuer, making it subject not only to additional requirements in terms of publicity but also reduces the risk of unilateral decisions of the issuer's Management Board (Article L225-209 of the French Code du Commerce).

63. However, in ESMA's view, those circumstances (no pre-requisites to avail themselves of the waiver, no time limits in their use or limitations [other than the two-year transitional period], the possible coexistence of the waiver on the side of the issuer and the financial intermediary and the lack of alternative limits in terms of prices and volumes) determine that, when used, such waivers might permit distortive activity on the side of the financial intermediaries, notwithstanding the points made above.

64. ESMA highlights that the notification only addresses the risks that the proposed AMP poses to orderly operation of market forces and the proper interplay of the forces of supply and demand through a generic reference: "*during this transitional period, the AMF will ensure that the use of the waivers is justified and does not compromise the orderly functioning of the market*".

65. On a separate point, Article 4 of the RTS on AMPs introduces the obligation for NCAs to assess the extent to which the market practice establishes an ex ante list of conditions for its performance as an AMP. Article 6 of the RTS on AMPs also indicates that NCAs should specifically assess whether an AMP foresees its suspension or restriction over auction phases (Article 6(1)(d) and 6(2)(a)). The ESMA Opinion on liquidity contracts did not ban the participation of financial intermediaries in auctions but considered that orders submitted during any auction phase should be placed at a price that would not impact the final price of the auction.

66. The notification provided by the AMF acknowledges the possibility to submit orders during (opening, closing or intra-day) auctions at a price that can impact the auction price, only mentioning that such impact cannot be “significant”.

67. ESMA acknowledges however that the trading venues in which the AMP would take place have introduced a randomisation of the auction period making market manipulation more difficult.

68. In addition to that, the AMF has confirmed that financial intermediaries may only introduce orders during auctions when such submission seems necessary for providing liquidity to market participants, in particular where there is an imbalance between buying and selling interests. Such situation may occur for liquid and illiquid shares. Along with this line, financial intermediaries should abstain from intervening during the call phase when it appears that the order book is well-filled and balanced.

Conclusion

69. ESMA considers that several conditions set out by AMF in their proposal address the risks potentially posed by the liquidity contracts covered by the AMP [such as the requirement to be a supervised person and a member of the relevant trading venue to undertake the liquidity contract, the obligation to open specific accounts in the name of the issuer or the trading limitations on the individuals in charge of liquidity contracts]. As a consequence, those parts are considered as compliant with Article 13(2)(b) of MAR.

70. However, there are other elements that are not compliant with Article 13(2)(b) of MAR. Regarding the activity of financial intermediaries benefitting from the waiver, ESMA reiterates the comments made before acknowledging the close monitoring of financial intermediaries benefitting from the waiver (regular reporting to AMF and on-site inspections) that, together with other monitoring capacities of AMF mentioned above, partially address the concerns of the impact that the activity under the waiver may have. The same reasoning would apply for issuers making use of the waiver.

71. However, even if ESMA acknowledges that when a financial intermediary operates outside of the limits set out by the AMP this does not necessarily mean undertaking market manipulation, it is difficult to identify sufficient safeguards to ensure that the price formation process could not be affected, as specified by Article 13(2)(b) of MAR.

72. Consequently, ESMA considers that the lack of identification of market conditions under which financial intermediaries and issuers may benefit from the waiver together with the lack of alternative limits in terms of resources, prices and volumes do not meet the requirement in Article 13(2)(b) of MAR of ensuring a high degree of safeguards to the operation of the market forces and the proper interplay of the forces of supply and demand.

73. Finally, despite the participation in auctions does not fully align with the ESMA Opinion on liquidity contracts, ESMA does not find evidence whereby the capacity of financial intermediaries to participate in auctions would affect the proper operation of market forces and the interplay of supply and demand, as required by Article 13(2)(b) of MAR and Article 4(2) of the RTS on AMPs.

Article 13(2)(c) of MAR (further specified by Article 5 of the RTS on AMPs): the market practice has a positive impact on market liquidity and efficiency

74. The sole objective declared by the AMF of the proposed practice is to enhance the liquidity of a particular share and to ensure that it is traded regularly. In that respect, the goal would ultimately benefit investors, including retail investors active on the relevant trading venues as the likelihood of finding a counterparty for entering into or exiting a position in that share would increase.

75. In its notification, the AMF considers that the performance of a liquidity contract under the proposed AMP may improve the regularity of trading and decrease the bid-offer spreads and may decrease the price volatility without hindering the underlying market trend.

76. If properly implemented, namely in accordance with the trading conditions and restrictions enshrined in the ESMA Opinion on liquidity contracts (volume and price limits, trading at closing auction in a way as not to impact the final closing price, and the limits to the resources allocated), it could be considered that such a liquidity contract would facilitate the interaction between the demand and the supply, with a limited impact on parameters like volume weighted average price or daily closing price.

77. However, as noted above, the proposed AMP includes the possibility for the issuer to use a waiver to the allocated resource limits and for the financial intermediaries to use waivers to price and volume limits. As elaborated above, under the proposed AMP it would be theoretically possible for all issuers (400+) and all financial intermediaries to avail themselves simultaneously of the waiver and then all the liquidity contracts would be operating without restrictions in terms of resources available, prices and volumes.

<u>Conclusion</u>

78. The lack of identification of conditions under which financial intermediaries and issuers may benefit from the waiver determines that it is theoretically possible for all issuers (400+) and all financial intermediaries to avail themselves simultaneously of the waiver. From that perspective, ESMA is of the view that the nature of the waivers does not permit to sufficiently assess the possible impacts that the activity of the financial intermediaries may have on market liquidity and efficiency. Therefore, the AMP notified by the AMF would not be compliant with Article 13(2)(c) of MAR and Article 5 of the RTS on AMPs.

Article 13(2)(d) of MAR (further specified by Article 6 of the RTS on AMPs): the market practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice

79. The AMP would be available for all issuers who have requested admission to trading or approved the trading of their shares on French trading venues, namely the regulated market (RM) Euronext Paris or the multilateral trading facility (MTF) Alternext Paris.

80. ESMA notes that the issuers of shares on the other French MTF, Marché Libre, cannot benefit from this AMP as, under French Commercial Law, these issuers are not allowed to buy-back their own shares under the framework of a liquidity contract.

81. Therefore, the orders to be introduced and transactions to be carried out for the performance of the liquidity contract will have to comply with the trading rules of the venue and be subject to the trading venue monitoring, including a real time monitoring of orders by the operator of the trading venue. That requirement, together with the pre- and post-trade transparency requirements set out by MiFIR contributes to the capacity of market participants to adequately evaluate prices and orders entered into the order book, as required by Article 6(1)(b) of the RTS on AMPs.

82. ESMA considers that the determination of the ex-ante list of situations when the execution of the liquidity contract must be suspended (when stabilisation activity is conducted and when a takeover bid occurs) is an important feature of the proposed AMP as it avoids to coincide with sensitive processes and periods for the issuer. However, ESMA notes that the issuer is free to decide whether to suspend the liquidity contract during a share buyback programme execution and no justification is provided in this respect.

83. In ESMA's view, such requirements, should reduce the risks of distortive price effects of the AMP even though they do not exactly reflect the relevant conditions and limits set out in the ESMA Opinion on liquidity contracts.

84. Furthermore, the above mentioned conditions and restrictions taken together with the requirement for the financial intermediary, confirmed by the AMF, to intervene in a way that does not hinder the market trend and to adjust the liquidity contract performance so as to maintain a balance between the buying and selling activity are considered as mitigating the risk of creating imbalance through one-side quoting, and overall, in line with Article 6(1)(a) of the RTS on AMPs, reduce the effect of the practice on the price formation process in the concerned trading venue.

85. However, the above conclusion needs to be reconsidered in relation to the following elements of the AMP:

    a. Firstly, in case of using the possibility granted to issuers and financial intermediaries to avail themselves of the waiver, the core element of the AMP [i.e. an “*ex ante list of trading conditions*, including *limits as regard to prices and volumes* and *limits on positions”* under Article 4(2) of the RTS on AMPs] would no longer exist and therefore, the price formation process might be compromised.

b. Moreover, the price formation process (and the capacity to evaluate prices and orders) might also be affected by the incapacity of other market participants to know whether the prices and volumes offered/traded by financial intermediaries under the AMP are within the limits set out by the ESMA opinion or not.

c. Notwithstanding the already mentioned AMF’s monitoring activity on both issuers and financial intermediaries, ESMA notes that there could be a substantial time delay between that monitoring activity and the date/s in which the AMP operated without limits in terms of volumes, prices and/or resources. However, ESMA acknowledges that these concerns are partially addressed through AMF’s regular market monitoring activity on a T+1 basis, taking advantage of the capacities mentioned above (reporting requirements under Article 26 of MiFIR, order identification, determination transactions originated from passive or aggressive orders and capacity to access any document and data).

Conclusion

86. ESMA considers that the following elements described in the proposal adequately address the potential impact on the proper functioning of the market: the obligation to comply with the trading rules of the venue and be subject to the trading venue monitoring, the determination of a number of situations where the provision of liquidity must be suspended and the requirement to financial intermediary to intervene in a way that does not hinder the market trend. As a consequence, those elements are considered compliant with Article 13(2)(d) of MAR and Article 6 of the RTS on AMPs.

87. However, the waivers that can be used during the transitional period open the possibility of quoting practices that might have a distorting effect on prices, in particular in a context where the proposed AMP is not considering any other price restriction when the waiver is used. As a consequence, the waivers in the notified AMP would not meet the requirements set out in 13(2)(d) of MAR as specified by Article 6 of the RTS on AMPs.

Article 13(2)(e) of MAR (further specified by Article 7 of the RTS on AMPs): the market practice does not create risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the Union

88. As already mentioned, the proposed AMP covers only shares admitted or traded on a French trading venue and requires the liquidity contract to be performed only on the French trading venue where the concerned shares are traded. These are considered

as measures that are greatly reducing the risks for the integrity of other related markets in the EU.

89. With respect to the integrity of the French markets, the proposed AMP contains measures and mechanisms to address the risks for market integrity as required in Article 7(a), (d) and (f) which have been described and analysed in other sections of this Opinion.

90. In particular, ESMA notes that the AMF will have regular access to transactions carried out under the liquidity contract as described above in the section on the level of transparency to the market and considers it in line with Article 7(a) of the RTS on AMPs. That access taken together with the AMF's power to suspend the performance of a liquidity contract in case of irregularities or suspicion of abuse are seen as an additional safeguard with regard to market integrity.

91. ESMA notes that, in line with Article 7(c) of the RTS on AMPs, the proposed AMP requires that the financial intermediary is remunerated by a fixed-amount while allowing a variable amount to also be included. ESMA notes that any such variable component must be capped to a maximum of 15% of the overall remuneration and according to the AMF notification should be designed in such a way so as to not prejudice the integrity or the orderly functioning of the market or to give rise to conflicts of interest.

92. The remuneration mechanism and its level must be described in the written contract that must be provided to the AMF before the performance of the contract starts. Given the sheer number of contracts subject to the AMP, ESMA understands that it might not be possible to proceed with an ex-ante assessment of each liquidity contract entered into but AMF will systematically proceed to their ex post analysis.

93. ESMA understands that the risks relating to the performance of the liquidity contract, such as the number of trades carried out or the volumes traded, are partially addressed through the fact that the financial intermediary's remuneration is "all inclusive" and paid once a year, so the financial intermediary would not have any incentive to increase the volumes or the number of trades.

94. ESMA reiterates the points made above about package of services and recommends AMF that the ex-post analysis covers this aspect.

95. Overall, ESMA considers that these requirements provide safeguards to the creation of incentives leading to behaviours prejudicial to market integrity or orderly functioning of the market.

96. The proposed AMP requires the financial intermediary performing a liquidity contract to have an internal organisation and internal arrangements ensuring the separation of both, the activity related to and the assets dedicated to the performance of the liquidity contract from the other activities of the firms and related assets. Furthermore it

requires that the financial intermediary to be a supervised entity subject to the requirements set out in Article 16(8) and (9) of MiFID II. These conditions together with the already mentioned requirements to act independently from the issuer as well as the prohibitions for the issuer to instruct the financial intermediary in the execution of the contract and to transmit any decision to trade except in the situations leading to the suspension of the performance of the liquidity contract are in line with points (d) and (f) of Article 7 of the RTS on AMPs and are elements considered as relevant to ensure the separation of assets and limit the risk of improper performance of the proposed AMP.

97. ESMA also observes that the elements described in the proposed AMP, including the content of the written contract to be entered into by the financial intermediary and the issuer, ensure a clear definition of their respective responsibilities as required under Article 7(e) of the RTS on AMPs.

98. However, ESMA notes that the notification received from the AMF does not include any specific analysis of nor elements of information in the description about the reporting process between the parties involved in the liquidity contract (Article 7(g) of the RTS on AMPs). However, the AMF confirmed that such elements will be included in their final decision as one of the parameters that have to appear in the contract to be deposited before the AMF. ESMA therefore concludes that this requirement is fulfilled.

99. A very important element to address the risks for market integrity is in ESMA's view that, in line with Article 7(b) of the RTS on AMPs, the proposed AMP establishes an ex-ante safeguard to ensure that the resources to be allocated exclusively to the performance of a liquidity contract under the proposed AMP are proportionate and commensurate to its objectives while taking into account the liquidity of the shares covered by the intended AMP. In this respect, ESMA notes that the maximum amounts of cash and shares to be allocated for the performance of liquidity contracts depending on the categories of shares (highly liquid, liquid and illiquid) are exactly the limits specified in the ESMA Opinion on liquidity contracts in all instances but one.

100. ESMA observes that for illiquid shares, the limit included in the proposed AMP does not include the resource cap of maximum 1 Million Euro that was included in the ESMA Opinion on Liquidity Contracts, without an explanation being provided for that.

101. ESMA is also concerned by the possibility offered in the proposed AMP to issuers of liquid or illiquid shares to derogate, during a period of two years, from the limits to the resources to be allocated to the performance of the liquidity contracts and refers on this point to the concerns expressed above.

102. ESMA understands that AMF will undertake specific monitoring activity to avoid that the transitional period does not provide unlimited flexibility to the entities involved in the liquidity contract: the monitoring activity to be undertaken both for issuers and financial intermediaries making use of the waiver and the fact that each use of the

waiver must be documented should ensure in all cases that such use is relevant and proportionate to the market conditions.

103. Even though ESMA warns about the substantial time delay that may exist between that monitoring activity and the date/s in which the AMP operated without limits in terms of resources, it is considered that the requirement in Article 7(b) of the RTS on AMPs is fulfilled.

Conclusion

104. ESMA considers that the elements described in the proposal adequately address the requirements in Article 7(a), (c), (d), (e), (f) and (g) of the RTS on AMPs. Regarding the remuneration of the liquidity contract, ESMA recommends AMF to take into account any other services that can be offered in a package to the issuer.

105. As a consequence, these elements are considered as compliant with Article 13(2)(e) of MAR.

106. Since the proposed AMP foresees the possibility of issuers to allocate additional resources to the liquidity contract, it is not possible to ensure that the resources allocated will be proportionate and commensurate in all cases and the possibility of such waiver cannot be considered as compliant with Article 7(b) of the RTS on AMPs and therefore with Article 13(2)(e) of MAR.

107. ESMA also considers that the ex-post analysis of the liquidity contracts only ensures that the resources allocated would be commensurate and therefore fulfil Article 7(b) of the RTS on AMPs under normal market conditions, i.e. when the issuers have not made use of the waiver.

Article 13(2)(f) of MAR (further specified by Article 8 of the RTS on AMPs): the outcome of any investigation of the relevant market practice by any competent authority or by another authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse, or codes of conduct, irrespective of whether it concerns the relevant market or directly or indirectly related markets within the Union

108. ESMA has no evidence, information or indication on the outcome of any investigation that may question the AMP to be established.

Article 13(2)(g) of MAR (further specified by Article 9 of the RTS on AMPs): the structural characteristics of the relevant market, inter alia, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail-investor participation in the relevant market

109. The French trading venues where the proposed AMP could be performed are markets where the participation of retail investors may be significant. ESMA agrees

that the proposed AMP could have a positive impact on retail investors' interests by increasing the probability of these retail investors to find a counterparty in low liquidity shares. Furthermore, ESMA notes that block trades are only permitted under the AMP in specific circumstances, (i.e. to rebalance the cash and shares accounts) and those trades can only take place under the rules of the trading venues which are subject to MiFID II/MiFIR provisions.

Conclusion

110. In ESMA's view, except for the potential use of the waivers by issuers and financial intermediaries, the safeguards and conditions imposed by the proposed AMP, including the differentiation introduced based on the liquidity of the shares in scope of the intended AMP are measures that, if properly implemented, should avoid increasing the risks borne by the investors as required by Article 13(2)(g) of MAR.

3.3 Conclusion

111. Taking into account the above detailed analysis, ESMA considers that the proposed AMP is compatible with Article 13(2) of MAR and with the RTS on AMPs, and contains various mechanisms to limit the threat to market confidence with respect to liquidity contracts operating under normal market conditions, which do not benefit from the waivers.

112. However, ESMA is of the opinion that the two-year transitional period during which issuers and financial intermediaries may benefit from waivers in terms of resources allocated, prices and volumes does not ensure compliance of the proposed AMP on liquidity contracts with Article 13(2) of MAR and with the RTS on AMPs since:

a. the issuer of shares falling into the "liquid" or "illiquid" categories could allocate further resources to the performance of a liquidity contract on its shares without any limits; and

b. the financial intermediary performing a liquidity contract would be able to carry out transactions without any price and/or volume restrictions.

113. Those waivers would have the following impact on Article 13(2) of MAR:

a. In case a financial intermediary has availed itself of the waiver, the lack of immediate ex-post information to the other market participants, who would have learnt about the liquidity contract and the limits set out in the AMP, means that the AMP would be non-compliant with Article 13(2)(a) of MAR as specified by Article 3(1)(b)(ii) of the RTS on AMPs.

b. Since there would be no reference to any alternative price and volume limits in case of making use of the waiver in the information provided to the AMF that information would be incomplete under Article 13(2)(a) of MAR, as specified by Article 3(2)(a) of the RTS on AMPs.

c. The lack of identification of market conditions under which financial intermediaries and issuers may benefit from the waiver together with the lack of alternative limits in terms of resources, prices and volumes would not meet the requirement in Article 13(2)(b) of MAR of ensuring a high degree of safeguards to the operation of the market forces and the proper interplay of the forces of supply and demand. Similarly, it would be in breach of Article 13(2)(d) of MAR as specified by Article 6 of the RTS on AMPs.

d. The lack of identification of market conditions under which financial intermediaries and issuers may benefit from the waiver determines that theoretically all issuers (400+) and all financial intermediaries would be able to avail themselves simultaneously of the waiver. In that case, all the liquidity contracts would be operating without restrictions in terms of resources available, prices and volumes. In this respect, the proposed AMP would not sufficiently assess the possible impacts that the use of these waivers may have on the elements mentioned in Article 5 of the RTS on AMPs and therefore would not be compliant with Article 13(2)(c) of MAR.

114. ESMA understands that operating out of the boundaries imposed by an AMP does not automatically amount to undertaking market manipulation. Additionally, ESMA acknowledges AMF's efforts to address the risks that those waivers may entail such as the obligation of issuers and financial intermediaries benefitting from the waiver to document the circumstances that led them to make use of the waiver for an ex post monitoring, and the close monitoring and on-site inspections to be implemented on financial intermediaries making use of the waiver.

115. Overall, ESMA nonetheless considers the current application of the waivers as non-MAR compliant and is inviting the AMF to reconsider this part of the AMP.

Annex I

Notification of the AMF received by ESMA on 12 February 2018

Liquidity contracts for shares which are admitted to trading on Euronext Paris or Alternext Paris

I. Important introductory statement

In accordance with Article 13(3) of Regulation (EU) N°596/2014 of the European Parliament and of the Counsel of 16 April 2014 on market abuse and with article 2(2) of the Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing MAR laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance, the AMF notifies ESMA of the accepted market practice on liquidity contracts.

This AMP on liquidity contracts is intended to replace the AMP notified to ESMA on 01/07/16. It has been approved by the College of the AMF at its meeting of 23 January 2017. France has extensive experience of share liquidity contracts since this mechanism has been implemented for over ten years. It is currently an important feature of the French financial ecosystem and a large number of French issuers use this mechanism on Euronext Paris (Regulated market) or Alternext Paris (MTF) to enhance the liquidity of their shares, and in certain circumstances to reduce market volatility, without hindering the market trend. Currently, more than 400 French issuers have entered into a liquidity contract. It should be also pointed out that, liquidity contracts are generally part of a package of services offered by an investment firm to an issuer such as: assistance in the context of an IPO, market monitoring and financial research. Accordingly, modifying and strengthening the regulatory framework with regard to liquidity contracts requires a very careful approach as it may have a huge impact on the stability of the French stock markets, in particular in relation with shares issued by mid and small capitalized issuers. Furthermore, there is no doubt that the new regulatory framework will require a significant workload for the industry, namely issuers and investment firms performing liquidity contracts. The new regulatory framework which is described hereafter has been discussed for over two years with the industry. It takes into consideration the feedback from several consultations conducted by the AMF with professionals and issuers associations. Furthermore, it has been presented to the AMF "Markets and Exchanges", and "Issuers" consultative commissions. These consultations highlighted the need to handle the modifications to this part of the regulation carefully; hence some requirements stemming from the non-binding opinion of ESMA will be gradually implemented. Against this background, the AMF intends to implement a transitional period of two years during which certain conditions may be waived if the entity in charge of the performance of the liquidity contract or the issuer can justify the use of the waiver and demonstrate that such use is not detrimental to the orderly functioning of the market. During this transitional period, the AMF will ensure that the use of waivers is justified and does not compromise the orderly functioning of the market.

II. Description of the AMP

Purpose of the AMP

The purpose of the liquidity contract is to enhance liquidity and regular trading in shares that are admitted to trading on Euronext Paris (Regulated Market) or that are traded on Alternext Paris (Multilateral Trading Facility). The liquidity contract may improve the regularity of the trading and decrease the bid-offer spreads and may decrease the daily price volatility without hindering the underlying market trend.

Proposed date of establishment of the AMP

The AMF envisages establishing the AMP once ESMA issues an opinion assessing its compatibility with MAR and supplementing Regulation (EU) No 596/2014.

In order to facilitate a smooth transition to the entry into application of the new regulatory framework, it should apply on the 1st January 2019.

Types of persons who may perform the AMP and who may benefit from the performance of the AMP

The liquidity contract shall be performed by an investment firm or credit institution authorised under Directive 2013/36/EU of the European Parliament and of the Council (performer of the liquidity contract[8]).

The performer of a liquidity contract shall be a member of the trading venue where the contract is to be performed.

Any issuer whose shares are listed on Euronext Paris or traded on Alternext Paris may enter into a liquidity contract provided that the General shareholders' meeting has given its authorisation in accordance with Article L.225-209 of the French Commercial Law. It is further pointed out that French Commercial Law prohibits a company to hold more than 10% of its own share capital.

The performer of the liquidity contract shall :

- perform the liquidity contract on Euronext Paris or Alternext Paris;
- register the trades carried out under the contract on the issuer's behalf in two separate accounts opened in the name of the issuer. These accounts are used solely for the purpose of such contract: a securities account and a corresponding cash account;
- intervene in the market independently from the issuer. The issuer shall not provide any instruction to the performer of the liquidity contract concerning the activity under the contract and shall not transmit, directly or indirectly, any decision to trade except in the situations leading to a suspension of the performance of the contract.

To maintain its independence, the liquidity contract performer shall adopt an internal organisation that ensures the independence of the employees responsible for the decision making regarding orders and trades under the liquidity contract. For that purpose, the employee, in charge of the execution of the contract, shall not execute, outside the contract, any order on the shares of the issuer.

The performer of the liquidity contract shall keep records of the orders submitted to the central order book of the trading venue and of the transactions that have been carried out for at least five years.

The issuer may only entrust the performance of its liquidity contract to a single entity.

Form of the contract

The liquidity contract shall be entered into in written form. The issuer shall submit a copy of the contract to the AMF before its performance on the market.

The liquidity contract shall contain the following information:

- identification of the share in the scope of the contract;
- identification of the contracting parties;
- expected date for the commencement of the trades;
- amount of shares or/and cash allocated by the issuer to the performance of the contract;
- provisions which are implemented by both parties to the contract in order to maintain the independence of the performer of the liquidity contract;
- remuneration of the performer of the liquidity contract.

[8] These entities possess the compliance and audit resources necessary to be able to monitor and ensure compliance at all times with the conditions set for the AMP.

The remuneration of the performer of the liquidity is a fixed amount. It may include a variable amount if it does not exceed 15% of the total remuneration and does not induce conduct detrimental to the integrity of the market or disorderly functioning of the market. The AMF may request any further information to the issuer or to the performer of the liquidity contract.
Limits to the resources to be allocated by the issuer to the performance of the liquidity contract
The cash or shares allocated by an issuer to a liquidity contract are proportionate and adapted to the objectives of the contract and take into account the market liquidity of the relevant share. Accordingly, the maximum amount of cash and the maximum number of shares allocated by the issuer to the performance of the liquidity contract have to be considered upon three categories of shares: (i) highly liquid shares: liquid shares in accordance with Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID and included in the underlying basket of the CAC40 index; (ii) liquid shares : liquid shares in accordance with Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID and which are not included in the underlying basket of the CAC40 index; (iii) illiquid shares: shares with are not liquid under the definition of the Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID. They shall not exceed: - for highly liquid shares within the meaning of (i), more than 100% of the average daily transaction volume observed on the trading venue referred to in Article 2 during the previous 30 trading days without exceeding a ceiling of 50 million euros; - for liquid shares within the meaning of (ii), more than 200% of the average daily transaction volume observed on the trading venue during the previous 30 trading days without exceeding a ceiling of 20 million euros; - for illiquid shares within the meaning of (iii), more than 500% of the average daily transaction volume observed on the trading venue during the previous 30 trading days or 1% of the market capitalization of the issuer. These limits are assessed on the basis of market data at the date of signature of the contract and are reviewed when the contract expires and is renewed, and if necessary during the period. When the resources allocated to the liquidity contract have to be reduced, the readjustment may be carried out within a period not exceeding 6 months following its renewal. The resources allocated by an issuer are intended exclusively for the implementation of the liquidity contract. The cash and securities in the liquidity account should always have a credit balance. For a period of two years from the date of application of the Decision, the issuer may derogate from the provisions mentioned above if the liquidity agreement relates to illiquid or liquid shares and subject to the following conditions: - the issuer documents the justification for considering that the use of the waiver is necessary for the proper implementation of the liquidity contract; - The issuer informs the AMF in advance and informs the public of the use of the waiver. The two-year transitional period will be used by the AMF to monitor the implementation of liquidity contracts and assess whether the thresholds set by the regulatory framework are properly calibrated.
Trading conditions under the liquidity contract
1) Obligation to place both buy and sell orders Taking into account the need to maintain a provision of securities and cash in the liquidity account and the requirement to maintain a credit balance of shares and cash, the performer of the liquidity contract ensures submitting buy and sell orders under normal market conditions in order to be present simultaneously on both sides of the order book. **2) Volume restrictions**

Beyond a threshold of € 20,000 on cumulative trades during the same trading day, the liquidity contract shall not buy or sell on a trading day more than a certain percentage of the average daily turnover traded on the market. This percentage is capped as follows:

- For highly liquid shares, the volume of trades under the contract should not exceed 5% of the average daily turnover on the market in the previous 30 trading sessions.
- For liquid shares, the volume of trades under the contract should not exceed 15% of the average daily turnover on the market in the previous 30 trading sessions.
- For illiquid shares, the volume of trades should not exceed 25% of the average daily turnover in the previous 30 trading sessions.

Each of the thresholds shall be calculated by taking into account all the trades carried out under the liquidity contract on the buy side and on the sell side.

3) Price Restrictions

The performer of the liquidity contract shall place orders with a limited price impact and shall fulfil the following conditions:

- Buy orders shall be placed at a price not higher than the higher between the last independent trade and the highest independent bid in the order book.
- Sell orders shall be placed at a price not lower than the lower between the last independent trade and the lowest independent offer in the order book.

When it relates to a non-liquid share[9], the performer of the liquidity contract may submit an order that reduces the bid-offer spread between the best price offer at the time of purchase and sale.

4) Trading during auction periods

The performance of the liquidity contract during auction periods shall be conducted with exceptional care. Accordingly, the performer of the liquidity contract ensures that the price limit of orders issued during the auction determination period does not impact significantly the auction price. With regard to shares solely traded through auctions (without any continuous trading phase), the same principle applies.

5) Block trades

Block trades in shares under the execution of a liquidity contract are allowed under the exceptional condition where the investment firm has to maintain a sufficient provision of cash or shares when the split between shares and cash is no longer well balanced and may hinder the performance of the liquidity contract (the performance of the liquidity contract requires a balance between shares and cash in the accounts of the investment firm; imbalance may hinder the performance of the liquidity contract). In such a case, the volume restriction does not apply.

The performer of a liquidity contract shall not carry out block trades for any other purpose.

6) Transitional measures

For a period of two years from the date of application of the Decision implementing the new provisions governing liquidity contracts, the performer of the liquidity contract may derogate from the provisions in relation with volume restrictions and price restrictions, subject to the following conditions:

(i) the performer of the liquidity contract shall document, for each trading day, the justification which led to consider that the use of the waiver was necessary and did not impair the orderly functioning of the market;

(ii) the performer of the liquidity contract shall promptly provide the AMF with a summary statement of the recourse to the waiver and the documentation referred to in (i).

The two-year transitional period will be used by the AMF to monitor the implementation of liquidity contracts and assess whether the thresholds set by the new regulatory framework are properly calibrated.

[9] When an independent order, because of its size or price limit, causes a sudden and large price change, the difference between the best price bid and the best price offer increases in the same proportions. When it concerns a liquid share, the variation is generally quickly corrected because market participants quickly reissue orders that reconstitute the order book. However, when it concerns an illiquid action, the reconstitution of the order book is more laborious.

Situations leading to a suspension of the liquidity contract
The execution of the liquidity contract shall be suspended in the following cases : - When a public offer for shares is carried out, namely when stabilisation measures are performed in accordance with Article 5 of MAR, - When a takeover bid involves the shares of the issuer, namely when the issuer is the target of a takeover bid or when the issuer is the initiator of a takeover bid and exchanges its own stocks against the shares of the target. When the issuer carries out a share buyback programme in accordance with Article 5 of MAR, the AMF recommends issuers to take into account, for the calculation of the limit of 25% of the daily volume, the total number of the trades carried out on their own shares on the regulated market or the MTF concerned, including those benefiting from a waiver under Articles 5 and 13 of MAR. Issuers that have entered into a liquidity contract may choose to suspend it temporarily during the implementation of a buyback program.
Transparency and disclosure to the public
According to supplementing regulation 2016/908, information shall be publicly disclosed before the performance of the liquidity contract, on a regular basis when the liquidity contract is performed and when the liquidity contract ceases to be performed. Consequently, the issuer shall publish: - Before the liquidity contract is performed: o identity of the investment firm in charge of the performance of the liquidity contract; o list of the shares concerned; o identification of the trading venue on which the liquidity contract will be performed; o date of performance of the liquidity contract; o amounts of cash and of the number of financial instruments allocated to the performance of the liquidity contract; o situations leading to a temporary suspension or termination of the liquidity contract. Any modification related to this information shall be disclosed as soon as possible to the public. - On a 6 month basis, when the liquidity contract is performed: o daily aggregated information, detailing the transactions carried out under the liquidity contract : date of the transactions, number of transactions, number of shares bought and sold, amount of cash corresponding to the shares bought and sold; o amount of cash and number of shares available on the liquidity contract accounts: - When the liquidity contract ceases to be performed: o fact that the performance of the liquidity contract has ceased ; o description of how the AMP has been performed; o reasons or causes for ceasing the performance of the AMP.
Rationale for why the practice would constitute market manipulation
The improvement of liquidity under a liquidity contract involves entering transactions and placing orders to trade which potentially may be construed as market manipulation, as it: (i) may give misleading signals as to the supply of, demand for a share; (ii) may lead to an artificial price of a share. In order to ensure that transactions carried out and orders placed under the liquidity contract have been carried out for legitimate reasons, conditions and requirements are set up under which liquidity contracts may be established as an AMP. Non-compliance with the conditions and restrictions presented above could potentially lead to misleading signals concerning the supply of and demand for or the price of the share and be seen as market manipulation.

III. Assessment

ASSESSMENT

List of criteria taken into account	Conclusion of the competent authority and rationale:
(a) Level of transparency provided to the market	An issuer entering into a liquidity contract shall publish before its performance a press release with detailed information, namely the identity of the entity in charge of the performance of the liquidity contract, the amount of cash or shares granted by the issuer to the contract, the shares concerned and the trading venue on which the liquidity contract is to be performed, the date of performance of the liquidity contract, the situations that lead to a temporary suspension or a termination of the contract. Any modification to the information published by the issuer before the performance of the liquidity contract shall be disclosed as soon as possible. On a six-month basis and when the termination of the contract occurs, the issuer shall publish a report on the implementation of the contract. The report shall include aggregated figures about each trade of the liquidity contract, namely the number of buy and sell transactions, the number and amount of shares bought and sold on the market, the resources available for the performance of the liquidity contract. Reports shall be posted on the issuer's web site. In addition, the issuer shall submit to the AMF : - a copy of the liquidity contract before its performance on the market; - on a monthly basis, a report detailing the trades carried out on the market under the liquidity contract.
(b) Degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand	In order to provide enhanced safeguards to the market, the liquidity contract shall be performed by an investment firm, including credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council (performer of the liquidity contract). The entity shall be a member of the trading venue where the transactions are carried out. The transactions performed under the liquidity contract are registered on the securities and cash accounts opened in the name of the issuer and solely used for the purpose of such contract. The performer of the liquidity contract shall keep the records of orders and transactions for at least five years. The liquidity contract is subject to trading conditions that include price and volume limits and limits to the resources to be allocated by the issuer to the performance of the liquidity contract. Levels of restriction and resources depend on the segment of liquidity of the shares. The liquidity contract shall not inhibit the interaction of supply and demand. Trades carried out by the performer of the liquidity contract shall react to orders, which, considering the volumes and size of the market, create an imbalance between supply and demand. Liquidity contracts may help in the interaction of supply and demand since they aim to ensure regular quotations for an otherwise illiquid share and to avoid price fluctuations that do not correspond to market trend.

(c) Impact on market liquidity and efficiency	The objective of the liquidity contract is to improve liquidity and efficiency of the market without hindering the underlying trend of the market. Such purpose shall be achieved by decreasing the bid-offer spreads. It also may decrease daily price volatility of the share. The implementation of the contract is aimed to favour the ability of investors to act in the market and find counterparty without hindering the underlying market trend. Finally, it may increase the daily number of trades and turnover.
(d) The trading mechanism of the relevant market and the possibility for market participants to react properly and in a timely manner to the new market situation created by that practice.	The transactions under the liquidity contract shall be executed on a French Regulated market or Multilateral trading facility (Euronext Paris or Alternext Paris). The performer of the liquidity contract shall be a member of the trading venue concerned and shall comply with the market's rules. Beyond a threshold of € 20,000 on cumulative trades during the same trading day, the liquidity contract shall not buy or sell on a trading day more than a certain percentage of the average daily turnover traded on the market. This percentage is capped as follows: - For highly liquid shares (i.e.: liquid shares in accordance with Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID and included in the underlying basket of the CAC40 index), trades under the contract should not exceed 5% of the average daily turnover on the market in the previous 30 trading sessions; - For liquid shares (i.e.: liquid shares in accordance with Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID and which are not included in the underlying basket of the CAC40 index), trades under the contract should not exceed 15% of the average daily turnover on the market in the previous 30 trading sessions; - For illiquid shares (i.e.: shares with are not liquid under the definition of the Article 22 of the Commission Regulation (EC) N°1287/2006 implementing MiFID), trades should not exceed 25% of the daily turnover. Each of the thresholds shall be calculated by taking into account all the trades carried out under the liquidity contract on the buy side and on the sell side. The performance of the liquidity contract during auction periods shall be conducted with exceptional care and shall not issue orders during the auction determination periods where the order has a significant price impact on the auction price. Moreover, the performer of the liquidity contract shall place orders with a limited price impact and shall fulfil the following conditions: - Buy orders shall be placed at a price not higher than the higher between the last independent trade and the highest independent bid in the order book; - Sell orders shall be placed at a price not lower than the lower between the last independent trade and the lowest independent offer in the order book.

	Where a non-liquid share is concerned, the performer of the liquidity contract may submit an order that reduces the bid-offer spread between the best price offer at the time of purchase and sale. For a period of two years from the date of application of the Decision implementing the new provisions governing liquidity contracts, the performer of the liquidity contract may derogate from the provisions mentioned above, subject to the following conditions: (i) the performer of the liquidity contract shall document, for each trading day, the justification which led to consider that the us e of the waiver was necessary and did not impair the orderly functioning of the market; (ii) the performer of the liquidity contract shall promptly provide, at the request of the AMF, with a summary statement of the recourse to the waiver and the documentation referred to in (i). The two-year transitional period will be used to monitor the implementation of liquidity contracts and assess whether the thresholds set by the new regulatory framework are properly calibrated.
(e) Risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instruments within the Union.	An issuer entering into a liquidity contract shall notify the AMF and submit a copy of the contract. The performer of the liquidity contract shall have the appropriate means and organisation in order to ensure the independence of the person in charge of the liquidity contract. The cash or financial resources allocated by an issuer to the implementation of a liquidity contract are proportionate and adapted to the objectives of the contract and take into account the market liquidity of the relevant share. They shall not exceed: - for illiquid shares more than 500% of the average daily transaction volume observed on the trading venue during the previous 30 trading days or 1% of the market capitalization of the issuer, without exceeding a ceiling of 1 million euros; - for liquid shares, more than 200% of the average daily transaction volume observed on the trading venue during the previous 30 trading days without exceed a ceiling of 20 million euros; - for highly liquid shares, more than 100% of the average daily transaction volume observed on the trading venue referred to in Article 2 during the previous 30 trading days without exceeding a ceiling of 50 million euros. These limits are assessed on the basis of market data at the date of signature of the contract and are reviewed when the contract expires and is renewed. When the resources allocated to the liquidity contract must be reduced, the readjustment may be carried out within a period not exceeding 6 months following its renewal. The resources allocated by an issuer are intended exclusively for the implementation of the liquidity contract. The cash and securities in the liquidity account shall always have a credit balance.

	For a period of two years from the date of application of the Decision, the issuer may derogate from the provisions mentioned above if the liquidity agreement relates to non-liquid or liquid within the meaning of part (d) and subject to the following conditions: - the issuer documents the justification for considering that the use of the waiver is necessary for the proper implementation of the liquidity contract; - the issuer informs the AMF in advance and informs the public of the use of the waiver. In addition, the performance of the liquidity contract shall be suspended when the shares are subject to stabilisation measures and when a takeover bid occurs. Finally, the performance of the liquidity contract may be suspended during a share buy-back programme. Alternatively, the issuer should take into account, for the purpose of calculating the 25% daily volume limit of the buy-back programme, all trades made on their own shares on the regulated market or the MTF, including those benefiting from derogation under Articles 5 and 13 of MAR.
(f) Outcome of any investigation of the relevant market practice by any competent authority or other authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse or codes of conduct, irrespective of whether – it concerns, directly or indirectly, – the relevant market or related markets within the Union.	There have been no adverse results of any investigation that might question this practice. In particular, the AMF has gathered no evidence that the current practice may have had any detrimental impact on the orderly functioning of the market.
(g) Structural characteristics of the relevant market, inter alia, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail investors' participation in the relevant market.	The accepted market practice shall concern shares that are traded on French regulated markets or MTFs where retail investor's involvement may be significant. The market practice may enable retail investors to buy and sell within reasonable market conditions. This practice is therefore favourable to retail investors as it increases the possibility to find a counterpart in the market.