

ESMA DP MARKET ABUSE REGULATION

Buyback programmes and stabilisation (Article 3 of MAR)

Buyback programmes

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

We agree.

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

We agree that an aggregated figure is adequate for daily public disclosure. It would be acceptable if the reporting stabilizer would have details available to satisfy inquiries by competent authorities. Disclosure details should be identical on the RIS and the issuer's website.

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

We agree that the deadline of 7 market sessions should be retained.

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

Yes, we agree that the disclosure deadline should be the same for disclosures to the public and to the competent authority.

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

When a concerned share is traded on more than one venue, we think that the home competent authority of the issuer according to the Prospectus Directive should be the single competent authority for buy-back transaction reporting. It would be helpful if ESMA would maintain a master list by issuer for disclosure purposes. Where a share is traded also on a non-EEA venue, additional reporting requirements may apply vis a vis the venue's competent authority.

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

We do not agree that buy-backs should be restricted to being at a price which is equal to or lower than the last traded price or last current bid on the most liquid market. The best execution rule should apply. The price restriction proposed would be too complicated to apply where a share is traded on multiple venues. The price limit should be applied to the execution venue on which the shares are purchased.

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

We think that a restriction is unnecessary. The final auction price is driven by the largest orders. The proposed restriction not to enter any orders to purchase shares during the last third of the regular (fixed) time of an auction will not achieve the designed outcome.

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

Before legislating specific trigger levels, we are concerned that there needs to be a statistical review of prices/volumes of permitted buy-backs. There needs to be an appreciation of the likely impact of such a regulation. In the meantime, no new rule needs to be imposed. Whilst clarity on what is understood by “extreme low liquidity” is desired, the proposed test could produce anomalous results.

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

We do not see the need at this time to complicate the regulatory requirements. It would be difficult to highlight any example where the 25% rule has meant market disruption. See our answer to Q. 8.

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

Yes, the significant volumes on all trading venues should be included in the calculation of aggregate trading. It seems appropriate to ask issuers to specify their calculations, but they should be allowed to delegate the task to their agents while retaining final responsibility. We also note that it is unclear what is meant by “significant” volumes, using the term without further clarity will be create uncertainty.

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

We agree that it is advisable to maintain the trading and selling restrictions during buy-back and related exemptions.

Stabilisation measures

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

We agree with the specifications of duration and calculation of the stabilisation period. However with respect to stabilisation for straight bonds issuances, it would be helpful if the definition of the beginning of the offer period (defined as “the date of adequate public disclosure of the terms of the

offer of the relevant securities (i.e. including the spread to the benchmark, if any, once it has been fixed)” be extended to refer to the pre-stabilisation public notice (i.e. the stabilization period should start upon publication of the pre-stabilisation public notice).

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

Disclosure provided under the Prospectus Directive is sufficient.

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

We agree with the proposed disclosure details. We do not believe that such disclosure of stabilization should be required for offers of high yield securities which do not require a prospectus and which are not listed on a regulated market because there has not been a market failure. However, for other types of securities, we note that paragraph 38 in the discussion paper envisages that for offers that do not fall under the scope of the PD, public disclosure of the fact that stabilisation measures would be undertaken should be made "right before the opening of the offer period". We believe that there may be some uncertainty about when the offer period formally commences. As a matter of general practice, disclosure of stabilisation measures is made either simultaneously with the launch document or launch press release, or immediately following publication of the pricing notice. It would be helpful if ESMA acknowledges in guidance that this practice conforms to its expectations or clarifies explicitly the timing and process it expected.

With respect to paragraph 41, it is worth considering whether there is any substantive benefit of disclosures when stabilisation measures are not undertaken and whether references to price range for each day are helpful.

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

It is important to distinguish here between responsibility for disclosure of proposed stabilisation measures and for disclosure of the measures actually undertaken. For offers that fall under the scope of the PD, the issuer should remain responsible for the contents of the prospectus, including the disclosures required under the implementing Regulation 2004/809. For offers that fall outside the scope of the PD, responsibility for disclosure of proposed stabilisation activity could be assigned either to the issuer or to the stabilisation manager.

In our view, responsibility for disclosure of stabilisation transactions could rest with the stabilisation manager i.e. the entity/entities which is/are actually undertaking the stabilisation. However, it might be more appropriate for a stabilisation manager to be responsible for co-ordination, rather than “exclusively responsible” – e.g. stabilisation manager should not

be responsible for acts of other banks involved on the transaction; and to the extent another bank stabilises, this should not automatically render the stabilisation activities outside the safe harbour.

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

The stabilisation manager is usually be responsible for coordination of stabilisation efforts, but the disclosure obligations should be refined to be clear and simple to comply with. See response to Q. 15

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

Yes, as determined by reference to the Prospectus Directive for securities traded on RMs. Reporting with respect to offers of high yield securities should not be mandated.

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

Yes. It would be helpful if clarity is provided on the meaning of the term “securities equivalent to shares”. Is this intended to capture contingent-convertible capital instruments?

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

We do not feel that price conditions per se would be practical. . Stabilisation is currently defined under the Stabilisation Regulation inter alia as being purchases (or offers to purchase) “exclusively for supporting the market price [...] due to a selling pressure”. This already suggests that safe harbour stabilisation occurs by reference to the price at which the securities were initially issued to the market – in the case of bonds being their yield relative to the rest of the market (for example their spread over various ‘low’ risk benchmarks such treasuries or bunds).

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

With respect to the requirement that the over-allotment facility not covered by the “greenshoe option” must not exceed 5% of the original offer, it is worth noting that in the debt markets, stabilisation operates without a greenshoe. There may be circumstance where it is appropriate to over-allot more than 5% of the offer. These circumstances have been recognised by the UK regulator (please see FSA Market Watch, Issue No.14 December 2005). Market participants would benefit from guidance and clarification as to the circumstances permitting over-alloting beyond 5% in order to remain within safe harbour.

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

We believe that "refreshing the green shoe" should fall within the safe harbour for stabilisation to provide cover for volatile markets during the stabilisation period. If this is not possible, we propose that guidance indicate that refreshing the green shoe is not deemed to be market abuse merely because it falls outside the safe harbour.

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

We are concerned that the view being expressed conflates two very different types of block trades. Where a large block is traded between two parties, it might be appropriate to disallow a stabilisation exemption. Where an issuer or a large shareholder is selling a large block of shares to a large number of purchasers and where there is underwriting or a selling group, it would be appropriate to allow stabilisation under the exemption to protect existing shareholders and new purchasers alike.

Market soundings (Article 7c of MAR)

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

Generally we do agree with ESMA's proposals of standards that should apply prior to conducting a market soundings. However, we would suggest replacing the words "should include" in the fifth line of paragraph 59 with the words "should be limited to". It is also important to clarify that the sounding procedures should apply solely to the team at a third party which is acting at the request of the issuer. This is consistent with Article 7c(1)(d) which establishes that a market sounding takes place after a possible transaction has been discussed by the issuer with a sounder. For example, the sounding procedures should not apply to public side employees at investment banks (such as sales and trading teams) who have not been wall-crossed on the transaction. Such public side employees, as part of their function, may have frequent discussions with the investors and may be gauging investors' potential interests and market demand in any potential transactions. The role of such public side employees is to maintain market intelligence and feed their feedback to the private side employees. Given that such public side employees would not be in possession of inside information, there is no risk of dissemination of inside information. Banks should be able to rely in this respect on their internal Chinese Walls/information barriers. Similarly there may be other teams at the organization of the third party who may have discussions with potential investors but who are unaware of any instruction or mandate by the issuer to conduct sounding and any discussions with investors undertaken by such teams, unrelated to the mandate, should not be subject to the market sounding procedures.

Further, we do not consider that it is appropriate or practical to make the disclosing market participant responsible for ensuring that the same potential investor is not contacted by more than one syndicate member. This would be impractical given the need for prompt action and the number of active

participants. The managing book-runners will set general sounding parameters often with the issuer and/or issuer's advisor, but the syndicate members must be responsible to act reasonably. Market discipline will tend to discourage unwanted approaches by would be soundees.

With respect to paragraphs 74-76, we would propose to clarify that communications with the issuer (and member of the syndicate) regarding the type and number of investors to be sounded may take place orally and do not need to be recorded or confirmed in writing. We would also request clarification as to how the assessment of the type and number of investors relates to the appraisal of whether or not the disclosure is "improper and therefore in breach of Article [7b]".

Q24: Do you have any view on the above?

Paragraph 78 is not practical. We agree with paragraph 79 that it would not be practical or advisable to restrict the permitted time frames for market soundings. Flexibility is required given the need to accommodate changing market circumstances.

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

We are strongly in favour of Option 1 which envisions wall-crossings on an individual basis. Option 2 and 3 are not advisable or practical. Many lists of buy-side firms which do not wish to be wall-crossed would very quickly be outdated as firms change views, strategies, procedures, and personnel.

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

We are concerned that there are record-keeping requirements and requirements for standardised scripts for soundings which will not include any disclosure of inside information. In our view, either there is an intended disclosure of inside information and wall-crossing scripts are used; or there is no intention to disclose inside information and no obligations should be imposed. In the absence of a wall crossing, such requirements are burdensome and unnecessary. We propose that the buy-side should be required to advise the sounder as well as the competent authority if it has received inside information without being informed by the sell-side of its intention to wall-cross the buy-side. This should reduce substantially any risk of inside information being passed inadvertently. We also note that banks' internal policies require employees to immediately notify compliance if they believe they have inadvertently provided inside information in a non-wall crossed conversation. Using a script for non-wall-crossed soundings may also lead to confusion on the buy-side whether they have actually been wall-crossed. We do not believe that prescriptive guidance on the exact content of the script is necessary. In addition we do not agree with para 84 (a.ii) which describes a risk that the disclosing market participant may err by inadvertently disclosing inside information. This caveat would undermine the process and confuse the parties. To the extent there is a requirement for a script, such script should rather include a simple statement that the buy-side will have to consider for itself whether any conveyed info is inside information. Further, to the extent scripts for non-wall-crossings are required, we would strongly recommend

that any such scripts are adopted as an industry standard in an annual notification to investors rather than for each sounding.

With respect to 84b.iii, since there may not be a specific cleansing strategy at the time of wall-crossing, the script should inform the buy-side party regarding the anticipated time (if any) when the disclosing market participant expects the information to cease to be inside information while noting that there may be changes in circumstances which could affect cleansing. As the DP indicates, there is no obligation to agree a cleansing strategy. The sounder should not be required to disclose any further details of the cleaning strategy or arrangements with the issuer. Details of such arrangements by itself may constitute additional inside information.

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

In general, we agree with the proposals regarding sounding lists for wall-crossed soundings. The distribution of the inside information within the buy-side after sounding must be its own responsibility although there appears to be no articulation of that responsibility in the regulation. We do not see a need for a sounding list to be kept for non-wall-crossed soundings.

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

We do not consider it advisable or practical to require a disclosing market participant to keep a record of a designated person at each buy-side firm. This is a practical process which is managed between firms and which does not require regulatory guidance or rules.

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

We are concerned about the record retention requirements on the recorded tapes. While we agree that all market sounding conversations should be conducted on recorded lines, it is unclear from paragraph 90 on whether record retention requirements for 5 years are applied to recorded telephone conversations as well as other record such as documents and emails. If that was the case keeping record of tapes for a period of at least 5 years would go well beyond the current requirements under Directive 2004/39/EC (where retention rules should be in conformity with national law). The current UK requirement under COBS 11.8.10R is to retain tape-recorded conversations for 6 months. If this is not a mistake, then we strongly believe it necessary to perform a cost-benefit analysis.

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

As a general matter, we agree with the approach whereby the confirmation is provided in the form of a one-way notice to the investor recording the fact that such investor has agreed to be wall-crossed. It is too onerous to require the sounder to then obtain a written confirmation from the wall-crossed investor of their agreement to be wall-crossed. Any onus should be upon the buy-side to confirm, although a failure to confirm should not obviate the buy-side's agreement. We have the following suggestions regarding the proposals:-

- a. **Para 94 should refer to as soon as practicable” rather than “the shortest possible time” after the market soundings.**
- b. **Note that other trade associations also take a view that non-wall-crossed soundings should not have record keeping requirements.**
- c. **As noted above, it should also be made clearer with respect to the ex-post confirmation procedure, that there is no requirement imposed on the sell-side to receive any confirmation or response from the buy-side to the confirmatory email. It should be sufficient for the email to be “one-way” only.**
- d.

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

We note the recording by the sounder of the oral consent provided by the buy-side is sufficient confirmation of the agreement to be wall-crossed. We consider that such notice would be combined with a (generally verbal) confirmation from the investor that they agree to be wall crossed prior to such wall crossing taking place.

We would suggest that the onus should be upon the buy-side party which has been wall-crossed to confirm that fact to the disclosing market participant as soon as practicable after receiving the latter’s confirmation of wall-crossing. There should be no need to maintain a record of non-wall-crossed soundings. Lack of receipt of such confirmation by the sell-side should not create any breach of the sounding procedure by the sell-side.

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

We propose that para 99, second bullet, should refer to reducing time interval “as much as practicable” rather than “possible”. Any timing restrictions should not apply to non-wall-crossed soundings.

We also consider that the establishment of full Chinese walls between private side individuals is a disproportionate and unnecessary requirement, give that inside information is only shared within the private side on a need-to-know basis.

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

We strongly support para 104 which underlines the buy-side’s independent duty to form own view whether any supplied information is inside information.

Where the buy-side firm gives notice that it does not wish to be wall crossed, it will still have the obligation to determine whether it has been given inside information during any sounding. It might be more appropriate for a buy side firm to refuse all soundings so as to remove all risk of being restricted. It should also be remembered that confidential information--which not inside information --may also be conveyed during a sounding which the issuer may not wish to be disclosed or traded upon. Thus, it would be more practical for an investor to decline all soundings.

Where an investor wishes to decline all soundings, it should be the investor's responsibility to ensure that the communication to the sell-side regarding its refusal with respect to all soundings is clear, explicit and in writing

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

We do not agree that an investor will necessarily avoid trading restrictions if it disagrees that information is inside information as characterised by the sounder. Where the sounder does not agree that the information is public after reviewing the documentation/arguments asserted by the investor, the investor may still be bound by its agreement to keep confidential and not trade on the information provided whether it is inside information or sensitive, confidential information (but not inside information). At issue here is the nature of the undertaking given by the investor in accepting a sounding. If an investor takes the view that specified information is not inside or confidential information, it will have liability if its judgement is determined to be erroneous.

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

The buy-side should also inform the sounder when it considers that the sell-side has failed to characterise inside information as such before a sounding. Only in this way can the ramifications of any error be contained. In such cases the buy-side should be required to provide its evidence and arguments concerning the matter to the sounder and vice-versa. Note that, where the information conveyed by the sell-side does not itself constitute inside information, there has been no failure by the sell-side if the buy-side combines that information with other information in its possession to form inside information (puzzle effect).

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

A report to the competent authorities by the buy-side should only occur after it has informed the sell-side of the discrepancy and attempted to resolve their differing views. If it cannot be agreed that the information in question is not inside information, the a report should be made to competent authorities. Any report to the competent authorities should be made contemporaneously to the sounder.

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

We have no objection to paras 113-115.

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

Q39: What are your views on these options?

Although an early discussion around cleansing with buy-side may be helpful, we consider that a requirement for an agreement on this issue is unlikely to be workable in practice. The ability or desire to agree in advance to a cleansing strategy will need to be assessed on a case-by-case basis given the different facts and circumstances of each deal and it may not always be possible to achieve clarity at the outset. Any cleansing strategy and timing could be affected by structural changes to the deal following pre-sounding feedback. There is also a risk of “tipping off” as a result of a detailed cleansing strategy. The greater the number of investors who are approached, the greater the risk that different strategies, may be preferred which will also impact on the ability to agree a cleansing strategy.

We support Option 2 over Option 1, provided that it takes the form of a recommendation. This is appropriate because there are situations where the buy-side does not need to nail down a specific cleansing strategy. Where the buy-side has concerns, it should raise them with the sounder who should respond as is possible, given the issuer’s decisions. If more than one investor is sounded, there is a high likelihood that the soundees will have different views on any strategy that will be difficult to combine and implement. Where the only inside information is the possibility of an issuance or takeover itself, it would be helpful to have guidance that the fact that a transaction has not taken place after soundings may not constitute inside information about the company so much as market intelligence about investor appetites gleaned from soundings. In such cases, it is common to rely on the fact that the timing of the transaction is no longer specific enough to constitute inside information.

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

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

Using the numbering in Annex III, it appears that I.a., II.e., II.i.; III.n.; and III.q. would apply. We suggest that the guidance include a discussion of factors which tend to establish manipulation and factors which tend to establish no manipulation in each category.

We are concerned that there seems to be too little emphasis on intent in the summary discussion. To manipulate is to “control or influence a person or situation cleverly or unscrupulously”. Manipulation thus requires purpose or intent beyond the transaction itself and the transaction’s profit or loss i.e. an extended intent or purpose. One cannot manipulate a person or situation inadvertently. The element of an extended intent or purpose should be articulated clearly in cases of manipulation. The inference of an extended intent should also be discussed.

For these reasons we are concerned that Annex III now includes language that the definition of manipulative conduct might not exclude non-intentional conduct. This language should be removed or qualified with examples of unintentional market manipulation. Further, we propose that it be made clear in Annex III that the statutory element under which each example is given be stipulated as an element of the manipulation described. Thus, all examples in “I. False or misleading signals” would include language to the effect of “with the intent or purpose of creating false or misleading signals”.

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

We believe that the guidance around manipulation should include examples and trade patterns and should include the element of intent/purpose. The rationale for the manipulative practices should be discussed.

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

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

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

Q45: Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to

detect? Are there other indicators/signals of market that should be added to the list?
Please explain.

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

This is difficult to quantify and will ultimately be driven by a combination of factors including the structure of the platform, the market, the type of market participant and whether the trading is manual or automated.

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

We would suggest focusing on trend/pattern analysis as opposed to aiming to generate individual exceptions for surveillance of an automated trading environment.

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

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

We have no objection to due consideration of whether a given OTC proposed AMP meets the transparency requirements for AMPs.

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

Yes---we agree that AMPs be executed by EEA regulated firms and firms regulated by comparable non-EEA regulators. .

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

Yes. National authorities should have the discretion to approve AMPs where some disclosure obligations are waived, provided there is adequate safeguard that investors will not be disadvantaged while market liquidity will be enhanced or volatility reduced.

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

We have no proposal for this at this time.

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

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

We agree.

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

We agree that there are cases where the AMP executor should be allowed to be influenced by an issuer or interested parties where there are safeguards for investors.

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

Exceptions should be allowed where the executor is a regulated party and undertakes to abide by venue rules.

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

We do not oppose such a list of restrictions on an articulated reasonable basis.

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

These seem reasonable in the abstract, but it would be helpful if following consultations include a list of AMPs recognized in Member States now.

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

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

SME's may be another class which would benefit from particular AMPs.

Suspicious Transaction and Order Reports (Article 11 of MAR)

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

We agree in general. The reference in para192 to a need to report any transaction that "might constitute market abuse or attempted..." is too broad. There should be no need to downplay the problem of over-reporting as in para 192. It would be helpful to see references to specific failures to report suspicious transactions as reported by competent authorities.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

We believe there needs to be a more substantive discussion of the nature of a reasonable suspicion. There should be a practical flexibility in the concept which should not be susceptible to ex post facto second guessing.

Often suspicion builds over time through the observation of a pattern of activity, rather than from a single event. The first event in the pattern may not, by itself, trigger suspicion and it is possible that the pattern will not become apparent until the activity has repeated over a period of days or weeks. Given the proposed requirement that a firm may be held to account for not reporting the original event within two weeks we would recommend taking account of the above explanation of how patterns can slowly emerge.

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

There is never a good reason to make an unreasonable presumption. As we indicate above, a more substantive discussion of the nature of a reasonable suspicion would be helpful.

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

There are no good reasons to report an unreasonable presumption.

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

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

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

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

We agree.

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

We agree. The templates should be simple as possible.

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

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

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

We agree.

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

We agree.

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

We believe that only inside information should be required to be published. Thus, if there are changes to previously published inside information --which do not constitute inside information in themselves—there should be no duty to publish the changes.

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

We agree but suggest that SME's should be able to give references to find the posted information if asked by the public .

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

We favour a Transparency Directive-based approach to such disclosures.

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

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

We believe that the competent authority should be allowed to accept notifications and explanations by recorded telephone communications, always having the authority to request written explanations as deemed necessary.

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

We agree generally. We would note that record-keeping during the delay period should not be onerous where there has been no change in the conditions of delay.

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

We agree in general. However, where decisions to delay are tied to the occurrence of an event, we believe there should be no need to make interim decisions on publication prior to the occurrence of the event, provided that confidentiality is maintained.

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

We think the requirements are appropriate.

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

We do not believe that common templates are required in this context.

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

We agree in general. However, we suggest that it may make sense for the initial indication to the competent authority to be oral where time is of the essence. It can be by recorded line. Such should immediately be followed by a written request and explanation to the competent authority.. We suggest that it should be understood that the competent authority will have the responsibility to ensure that other relevant regulators be informed as required.

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

We agree with the suggested ESMA approach to guidance regarding legitimate interests of issuers. We agree that CESR examples are still appropriate and should be retained.

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

We do not agree with para 307 as written. Determining what market expectations are is itself subject to judgement. Market expectations which do not relate clearly and directly to public statements made by an issuer should not be considered a standard by which determinations re delay of public disclosure are made. Issuers are not responsible for managing public expectations whereas they are responsible for the statements made by themselves which may contribute to market expectations.

Insider list (Article 13 of MAR)

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

No –we consider that the proposed list of information is not proportionate. Also some of the information listed would constitute a material invasion of privacy in the hands of persons who are not in privity with the insiders listed e.g. personal email and home telephone numbers as well as date and place of birth and national insurance numbers (and equivalents). This information may be obtained at a later date if needed for an investigation by the competent authorities, although most insider lists do not result in an investigation. Thus, it would not be proportionate to require that such details be kept up to date for a 5 year period.

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

No- we consider the table to be too detailed(not proportionate) and invasive of the privacy of persons listed. See response to Q.84. We recommend that the proposal be re-considered in the context of the data Protection Act.

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

We agree.

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

No—we do not agree that electronic formats should be formulated at this stage unless there is an acknowledged flexibility of choice which includes own format. We believe that parties should be able to provide insider lists by written submissions as well as by electronic means.

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

See reply to Q. 87. Also it would be too prescriptive to specify a single format.

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

We agree but note that aggregate lists need not be required of the issuer where there is an agreed delegation to agents and advisors to keep their respective insider lists. Where an investigation requires an aggregate list , the issuer or the competent authority can create one by aggregating the individual lists.

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

We agree.

Managers' transactions (Article 14 of MAR)

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

We agree. We suggest that the issuer also disclose whether a PDMR is on its insider lists at the time that trades are conducted.

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

For baskets and indices, we suggest that the disclosure obligation should exist where the issuer constitutes 50 pct of the value of the basket/index or where the basket/index portion is equivalent to 1% of outstanding shares.

Note that a weight of 50% is the threshold applied in Germany (see the BaFin's issuer guide, item V.2.1, page 76).

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

No.

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

We agree that aggregation on a daily basis should be allowed. The average price of buys and sells would seem to be the most facile.

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

Reference to UKLA code?//

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

Investment recommendations (Article 15 of MAR)

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

In our view it is not necessary to further clarify when investment recommendations are “intended for distribution channels or for the public” and ESMA’s proposal could have the disadvantage of confusing the distinction that is made in Recital 3 of implementing Directive 2003/125/EC with “informal short-term investment recommendations originating from inside the sales and trading departments of an investment firm or credit institution expressed to their clients” – which should continue to fall outside of the scope of the Investment Recommendation regime. Such sales and trading communications, which, both as a matter of form and substance, are clearly demarcated from Investment Recommendations, are nonetheless subject to the core requirements of financial regulation in that they must be clear, fair and not misleading and must adequately address any existing conflicts of interest. As such they are not “unregulated” as is suggested in paragraph 388 of the ESMA paper. Further, they are clearly marked as not constituting independent investment research, to which the full application of the Investment Recommendation regime is applicable, and do not purport to represent a fundamental analysis of the relevant securities by an independent research specialist. Given the intended audience for such sales and trading commentary, i.e. market counterparties and professional clients we do not consider that further clarification is required from ESMA.

Q98: Do you think that there should be a threshold for what constitute “large number of persons” for the purpose of determining that an investment recommendation is intended for the public?

We do not believe that such an approach is necessary or justified. The current definition is operating adequately. In practice it would be difficult to define a threshold. We do not agree with the example of format distribution should be included. Emails and faxes should not be considered per se a method of broad dissemination or of making a broad dissemination available.

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

We agree that the requirement should apply to producers of recommendations but not to the producers of other types of communications(independent research and sales notes) as discussed in the our reply to Q. 98.

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

We agree on the basis that we are not aware of market failures in this context and as long as the distinction is preserved between investment research, non-independent research and sales notes.

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

We have reservations with the suggested approach for institutional clients. We are not aware of any market failure having occurred. We are not convinced that a new requirement is necessary. Methodology should refer to the basis upon which a recommendation is made as opposed to a numerical calibration of methodologies..

We note that research is often not based on a specific methodology such as quantitative analysis. Fundamental research often differs from technical research. It is often based on market experience and judgement based on that experience which may refer to statistics or may not. Research reports typically refer readers to their investment advisors for assistance in understanding or applying the information presented.

We would also ask that the reference in paragraph 399 to “methodologies” be amended in any proposed draft RTS to make it clear that such “details” are intended to reflect the basis upon which a recommendation is made (not necessarily to a numerical calibration).

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

We agree. We are not aware of any market failures pointing to a need for change.

Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

We favour the existing threshold of 5%. We are aware of no market failure in this area.

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

No- we do not agree. No case has been made that a need exists for change.

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

No—there appears to be no evidence of any market failure which would be addressed by this change. Disclosure of debt positions, which is currently driven by general conflicts of interest requirements, is still considered adequate.

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

We would not agree to impose bright-line thresholds. We would refer ESMA to the FCA current regime where “significant holdings” (with “significant” being determined in relation to the size of the company holding the non-equity FIs) are disclosed. See also our response to Q.105.

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

We do not see the need for further disclosure, noting much of this information is already available on research producers' websites. Adding further disclosure requirements would be confusing rather than illuminating.

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

No. We do not believe such an analysis will add value. It is likely that references to past price performance and forecasts and earlier recommendations/research will be made in new research pieces.

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

We do not agree that a change in regulation is necessary since any conflict of interest disclosure must be clear, fair, and not misleading. We do not think that there is a market failure in this area, and thus we do not agree with the suggested approach at this time. It is likely that competent authorities can deal with individual failures brought to their attention. We would highlight the difference between disclosures and disclaimers. Disclosures already provide clear, precise and comprehensive information. Disclaimers, by their nature, must be generic, but that does not make them “ineffective”.

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

We do not consider that specific rules are required in this area. Producers of written investment recommendations are unlikely to update such recommendations on a non-written basis as to do so would be selective and result in a different treatment of clients, which is already adequately regulated.

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

We do not feel there is any need to update this.

Reporting of violations (Article 29 of MAR)

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

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