ISDA Safe, Efficient Markets

27 January 2014

ISDA input for Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

On behalf of our members, the International Swaps and Derivatives Association ('ISDA') appreciates the opportunity to contribute to the discussion on European Securities and Markets Authority's (ESMA) policy orientations on possible implementing measures under the Market Abuse Regulation (MAR). We hope our comments will be helpful in developing proportionate rules to deal with the issues of concern. We have aimed to provide as much detail and constructive feedback to the questions posed in the document as possible at this point in time. There are some questions that we choose not to answer, in which case we write 'No comment.' We hope to continue further dialogue with the regulatory community and policy makers and welcome the opportunity to discuss in depth the responses provided in this document.

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General Remarks not relating to a specific question

We agree that the Regulation and its implementing measures should ensure an effective implementation of the rules on market abuse and insider dealing. At the same time, we believe that any Level 2 legislation should not go beyond the mandate provided by the Regulation and should avoid over prescriptive or unduly burdensome requirements. Implementing measures should also take into account the specificities of different instruments and market participants, while ensuring a level playing field.

We would also like to make a general comment that a counterparty to a OTC derivative transaction is not an "issuer of a financial instrument" as per the definition provided in the Market Abuse Regulation, Article 5, paragraph 16. The concept of 'issuer' is applicable neither to OTC derivatives markets in general nor to commodity markets in particular.

Feedback per question

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?

Yes.

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?

Yes, aggregated figures on a daily basis would be sufficient for the public disclosure of buy back measures. We would accept if the reporting stabiliser had details accessible to competent authorities for their inquiries.

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

We agree to keep it.

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

Yes.

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?

In case of trading on multiple venues, the competent authority (CA) should be determined based on the Prospectus Directive, ie home competent authority of the issuer. ESMA's centralised list by issuer would be useful for disclosures.

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?

No, it would be to complex to introduce in case of listings on multiple venues. We believe that best execution should apply instead.

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?

No comment.

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.

We believe that no new requirements should be introduced. Instead, we would favour an impact assessment including an analysis of data on prices and volumes of permitted buy-backs.

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 would not support making the rules more complex. Please see the answer to Q8.

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?

We agree, but regarding issuers, they should be allowed to delegate the calculations.

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.

Yes.

Stabilisation measures

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

Yes.

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

The disclosure provided for under the Prospectus Directive is sufficient.

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

Yes.

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?

We think that the stabilisation manager should be responsible, as this is a part of his role. The stabilisation agent is acting on behalf of the issuer and therefore should be accountable to him/her.

The disclosure rules should be clarified and made simple to comply with.

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?

Please see the response to Q15.

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 per the Prospectus Directive.

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?

We agree.

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?

No, this would not be practicable.

Capping prices should not be part of the conditions because changes in interest rates or credit spreads can affect the prices.

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

Yes.

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 consider that that 'refreshing the green shoe' should be within the safe harbour for the situation of volatile markets during the stabilisation.

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

There should be a clarification made on the meaning of 'block trades.' The stabilisation exemption might not be appropriate to *bilateral* large trades. The exemption would be appropriate in the situation where an issuer or a shareholder sells a large block of securities to many buyers and where there is an underwriting or a selling group. It would protect shareholders.

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?

In general yes, but we do not think that the disclosing market participant should be liable for making sure that a potential investor is not approached by several syndicate members. This would not be a practicable rule in the context of the need for quick action and the number of active participants. The syndicate members ought to be liable for acting responsibly.

Q24: Do you have any view on the above?

We concur on the issue of not restricting the hours in which market sounding can take place, given that financial instruments can be traded in different time zones.

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

We believe that Option 1 is preferable because it is up-to-date, as related to transactions. Regarding Option 3, maintaining a record of the buy side's general wishes would impose an additional burden without providing broader or more up to date information.

Concerning Option 2, the categorisation based on firms may be not detailed enough. Within a single firm, at a given point of time, one may find both persons that wish and people that do not wish to receive market soundings. These are for instance active managers and securities lending desks respectively. Therefore there should be some form of optionality for receiving market soundings by various individuals or teams within one company.

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

In general we support the idea of scripts, as a certain degree of standardisation could facilitate compliance. However, we would like to express several points of concern.

We would caution against requiring too much information to be included in scripts, and therefore imposing an unnecessary burden and reducing the effectiveness of disclosures. Buy side firms may nevertheless value inclusion of the information on cleansing and expected timing, as it is important for the decision of whether or not to accept wall-crossing.

We are worried about the application of the recordkeeping requirements and scripts to the situations where there is no disclosure of inside information. We believe that it would be costly without bringing any benefit.

We believe that the potential investor should be obliged to inform the disclosing market participant and the competent authority if he/she thinks that the sounder disclosed the inside information contrary to what was said by the sounder initially. This would increase the protection against inappropriate disclosure of inside information.

Regarding paragraph 84.a.ii., the inclusion of the statement that 'there is the risk that inside information may be inadvertently disclosed and therefore result in a wall-crossing' may confuse and discourage the investor from accepting the sounding . When a script is used, it may be therefore preferable to include the statement that the investor would need to determine on its own whether any inside information is disclosed.

Given there is no requirement to agree on a cleansing strategy, paragraph 84.b.iii should also include the information that there may not be one at the time of wall-crossing.

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

We agree that the disclosing market participant should keep the information on the firms and individuals sounded, but not on the individuals *subsequently* wall crossed, given that the disclosing participant may not have a possibility to obtain the information on the distribution of inside information within the firm sounded. We would welcome a clarification of this point in technical standards.

We would like to note here as well that record keeping requirements are not necessary in the case of soundings where there is no disclosure of inside information.

Regarding emission allowances, there is little chance that a market sounding would result in disclosure of inside information, given that their prices are principally impacted by economic conditions and public policy. Therefore the costs of sounding lists would outweigh their benefits. Similarly, requiring written confirmations after the sounding took place would provide information that is out of date and impose an unnecessary burden on market participants.

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

No comment.

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

Article 7c of the Regulation does not forbid market soundings via channels other than recorded calls. The proposed rules should clarify that other means of communication for market soundings are allowed, including e-mails, conference calls and in person meetings. Therefore, we believe that the requirement should be to keep the information showing the date and details of the information provided, as a record of the conversation may not always exist.

We would suggest further investigation into the matter of the feasibility of the requirement to keep the records over 5 years and as to whether it should apply to documents and e-mails. We note that under Directive 2004/39/EC retention rules should be in conformity with national law, which may require shorter retention periods.

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

We support the British Bankers' Association's (BBA) position:

‘Whereas obtaining a written confirmation from the wall-crossed investor of their agreement to be wall-crossed may be considered too onerous, we agree that a one-way notice provided to the investor which records the fact that the investor has agreed to be wall-crossed would be workable. This is on the basis that it does not need to be issued to the investor prior to inside information being provided, which we think would be impractical in fast moving markets. This would be combined with a confirmation (generally verbal) from the investor that they agree to be wall crossed prior to being wall crossed.’

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 support the BBA position:

‘The recording of the oral consent should amount to sufficient confirmation of the agreement to be wall-crossed. The sell-side should be able to rely on this oral consent. If a subsequent written confirmation is required from the buy-side, this could leave the sell-side in a difficult position if the buy-side does not provide it.’

We would like to reiterate here that the record keeping requirements seem unnecessary in the case of soundings where there is no disclosure of inside information.

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

Concerning paragraph 99, we would suggest replacing the word ‘possible’ by ‘practicable.’

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

It appears that the obligation to retain the details of all assessments done, independently of whether a wall-crossing has taken place, would result in a substantial additional workload without bringing any benefits. The additional transparency would only be useful where there is a disagreement between the buy-side firm and the disclosing market participant as to whether a wall-crossing occurred. This could allow for easy clarification as to the reasons for the differences of opinions, when needed.

We would also like to note that ensuring that issuers are aware of their duties is essential for the regime to operate effectively and to reduce the chances of market abuse being performed.

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

Dialogue between the buy side and the sell side is necessary in such situations.

We would welcome further clarifications on the type of information that the buy side is to provide or the buy side have to record.

We would also like to note that the buy side will not necessarily avoid restrictions when disagreeing that inside information has been passed on. This may be the case when the sounder does not accept the difference of opinions. Moreover the soundee will be held liable if he/she is wrong and the inside information was actually passed on.

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?

We think that the buy side should inform the sell-side, and relevant evidence and arguments should be exchanged.

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?

Should the final rule require the soundee to inform the competent authority, it ought to be only in the case where an agreement with the sounder has been sought and has not been found. The sounder should be informed about the report at the same point of time as the competent authority.

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

Regarding the suggestion that follow-up calls made by the buy-side ought to be done on recorded telephone lines, we do not believe that the Regulation imposes record-keeping obligations on the buy-side firms.

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

No comment.

Q39: What are your views on these options?

There should also be a possibility of not having a specific cleansing strategy agreed in advance; therefore we would prefer that Option 2 is applied on a basis of a *recommendation* only. There are several reasons for this.

First, this is because neither of the two options (ie systematic cleansing strategy and strategy on case by case basis) is certain to work in practice each time. More specifically: a *systematic cleansing strategy* appears unlikely to work in each and every case. A discussion of, or agreement on, the cleansing strategy on *a case-by-case basis* is not always realistic because:

- transactions with prior wall-crossing are generally time-critical so that there is limited room for discussions on that procedural point; and
- if more than just one investor is approached, there is a high risk that different buy-side contacts will prefer different strategies that are difficult to combine and therefore hard if not impossible to implement.

We would also like to highlight additional concerns about feasibility of having a strategy each time:

- the characteristics or timing of the transaction may change as a result of the market sounding, which could impact on the cleansing strategy and its timing;
- agreeing a detailed cleansing strategy prior to wall crossing also carries the inherent risk of tipping off.

Furthermore, regarding who should be responsible for leading discussions on cleansing, we believe that Option 2 is acceptable, and Option 1 is not, as the timing and nature of cleansing is not possible for the buy-side firm to dictate. The buy side firm should not be responsible for leading the discussions, although it should be engaged.

Moreover, if cleansing strategy is applicable in a given situation, it should be clear (for both the disclosing market participant and the buy side) what a cleansing strategy is. Cleansing, for instance, could be defined as the provision of details of when and how the information will cease to be considered inside information.

When inside information concerns only the possibility of an issuance or takeover, we would welcome guidance to the effect that if the transaction does not eventually happen, this fact does not, in of itself constitute inside information.

In general, we think that information may cease to be inside information for reasons other than cleansing or public announcement and this ought to be reflected in ESMA's Level 2 measures as well.

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

General comments

Whilst the list of examples is helpful in providing guidance, similar to the evidentiary provisions in the UK Financial Conduct Authority's (FCA) Code of Market Conduct ('Descriptions of behaviour that amount to market abuse'), such a list runs the risk of being overly prescriptive. Consequently, we would prefer the focus to be on indicators or factors suggesting market manipulation as set out in Annex IV, provided these are clearly worded providing certainty over permissible and impermissible behaviour.

In this regard, whilst references to 'legitimate purposes' and related concepts in the Annex III examples are helpful, we would welcome further comment from ESMA on what it considers as examples of 'legitimate behaviour', beyond those factors mentioned (activity within the buyback and stabilisation 'safe harbours', 'legitimate arbitrage').

Examples of behaviour or purposes widely seen as 'legitimate' include: activities of market makers; transactions pursuant to prior legal or regulatory obligations owed to a third party; and transactions that are executed in such a way that they take into account the need for a market to operate fairly and efficiently. Allowance must be made for transactions that are common practice and subject to the rules of the relevant trading platform that may otherwise fall within the examples provided in Annex III, such as agency cross transactions. Similarly, indicators of what ESMA considers to be illegitimate behaviour would also be welcome.

In addition, irrespective of whether conduct may fall within one of the examples of behaviour listed, other balancing and/or overriding factors could mean that market manipulation should not be considered to have taken place. For example, if the behaviour does not have a market impact or an impact on the relevant counterpart, or the behaviour is adequately disclosed and, where applicable, consented to by the market or the relevant counterpart prior to the behaviour taking place. Further, although absence of intent in of itself is not determinative of whether market manipulation has taken place, such absence should be a balancing factor taken into consideration when determining if market manipulation has taken place. The notion of extended intent should also be introduced.

In relation to "person who acts in collaboration with others" as referred to in recital (18a) of MAR, it should be made clear that there is an element of intent, knowledge or recklessness for such persons to be liable for market manipulation, given the potential breadth of this concept. For example, direct market access (DMA) providers could potentially be found liable if a client using their DMA service commits market abuse even if the DMA provider had appropriate policies, controls and surveillance in place to prevent and identify market abuse. It should be made clear that in such circumstances, "collaboration" will not be established.

Moreover, we would like to suggest that in each point of Annex III (points a to q), the category of market manipulation is mentioned, eg: all points in "I. False or misleading signals" would mention a phrase like "with the intent or purpose of creating false or misleading signals".

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

As a general comment, in considering practices related to manipulation of benchmarks, we would encourage ESMA to take into consideration the July 2013 IOSCO Principles for Financial Benchmarks, as well as the September 2012 UK Wheatley Review and the November 2012 Principles for Financial Benchmarks produced by the Global Financial Markets Association.

Regarding the specific question Q40, we respond using the numbering in Annex III of this DP: I.a.; II.e.; II.i.; III.n.; III.q.

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 there is no need to add any further examples of practices as it largely repeats existing CESR guidance, however the guidance on manipulation ought to offer trade patterns as well the notion of intent or purpose. Further explanations as to why a given practice is manipulative should be provided to ensure that there is sufficient context available when making a determination. This would prevent that legitimate activity being inadvertently caught by the examples.

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

No comment.

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

No comment.

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

General comments

As mentioned above, these indicators/signals are helpful in a general sense but it should be made clear in any Level 2 implementing measures that they are merely indicative and not determinative and what circumstances may be relied on as establishing that orders/transactions are for a legitimate purpose.

In this vein, we note signals (a), (b), (c), and (e), are extremely broad and require clarification that they may indeed have a legitimate purpose.

Drafting providing certainty as to the outcome/effect of factors would also be welcome and in this respect we consider this could be achieved by deleting the words "or are likely to have the effect" in signals (g), (h), (i), (j), (k), (l), (o) and (q). A consequence of including those words in the indicators is that it considerably changes the evidential onus so that it rests with the firm/persons subject to investigation to prove either or both that the purpose was legitimate regardless of effect or no such effect was likely. With regard to the latter point, we note it is typically extremely difficult to prove a negative.

In addition to general remarks made above on the need to include the element of intent, we would like to specify that for instance signals (f) and (g) ought to refer to intent in order to indicate market manipulation, in the same way the activity in Annex III (d) has the element of effort and the indicator in Annex IV (d) includes the condition of 'no other apparent justification'.

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.

No comment.

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 define in a quantitative way and will eventually depend on a number 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?

A trend or pattern analysis would be preferable rather than an attempt to generate individual exceptions for observation of an automated trading environment.

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

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

Regarding the application of AMP rules, we agree that appropriate consideration should be given to all transactions included in the scope of MAR, including OTC derivatives transactions, as being subject to the relevant reporting and transparency rules (eg. under EMIR, MiFID/R and the Transparency Directive).

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

We consider that all market participants, including those exempt from MiFID and those not subject to MiFID should be also allowed to perform or execute an AMP provided that they are acting in conformity with the relevant rules and appropriately supervised.

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

We believe that competent authorities should have the power to approve an AMP in the situations where certain disclosure obligations are not applied, and if it is ensured that an investor will not be at a disadvantage when market liquidity or volatility change.

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

No comment.

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?

No comment.

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

Yes.

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

No comment.

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

Where there are safeguards for investors, we believe that in some instances competent authorities should be allowed to accept AMPs where the actions of the firms executing the AMP may be influenced or informed by the issuer or other interested parties.

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

Yes, if appropriately designed.

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?

Yes. A list of AMP recognised by each national competent authority would be useful.

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

No comment.

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?

Yes: small and medium enterprises (SMEs).

Suspicious Transaction and Order Reports (STR) (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?

In general yes, but the requirement in paragraph 192 to report any transaction that might amount to market abuse or an attempt of abuse is too broad.

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

We believe that reporting every two weeks could result in over reporting, jeopardise the accuracy of reports and make the verification of the validity of reports difficult for regulators. This seems to conflict with the requirements on the accurate content of STRs (Section V.4.).

Furthermore, 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 description 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.

Moreover we would welcome further clarifications on the notion of reasonable suspicion.

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?

We agree, however, our members' approach is that unless there are facts that take the relevant fact pattern outside the realms of 'suspicious activity' firms are minded to submit an STR.

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

No comment.

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?

Our opinion is that trading venues should introduce automated surveillance systems as they have a broader view of the market than a market participant would have and so are well placed to discover market manipulation, collusion etc.

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.

Yes, as this will allow eg. gathering and analysing the evidence for a market manipulation investigations. However there should be some optionality allowed depending on volumes and complexity.

If firms subject to STR obligation are going to be required to implement automated surveillance then it is critical that regulation obliges other parties to provide the market data which is vital to the success of such monitoring.

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?

No comment.

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

Yes.

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. Please note that such a template should be sufficiently simple to enable timely reporting.

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"?

We agree with the record keeping requirement.

However, 'near-misses' are not defined and it would therefore result in onerous and misleading reporting.

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.

Yes.

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.

This solution seems reasonable.

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.

Yes, but only if changes do constitute inside information in themselves.

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

Yes.

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?

Concerning the question as to which competent authority should be notified, we believe that the Transparency Directive based approach is the most appropriate option. Under this procedure, the competent authority receiving the notification will remain the same. Adopting the Prospectus Directive approach would in most cases lead to similar results as the Transparency Directive approach. However, the Transparency Directive approach would have the benefit of centralising the supervision of ongoing disclosure (regular and ad hoc).

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?

We believe that the market participant should notify delays to its national competent authority. Regulators would then exchange information. This is a solution applied in other pieces of financial regulation, for instance MiFID.

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 consider that the notification ought to simply refer to the fact that there was a delay and additional clarifications could be provided on request from the CA. A written e-mail notification, using a template, would be practicable. Notifications and explanations via recorded telephone lines should also be allowed (these could always be followed by written explanations if requested the competent authority).

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.

In general, yes. In practice, procedures should already exist as issuers are required to establish: if they have inside information (they should create a prohibited period in dealing terms when they do); whether to announce immediately or delay; and when to announce (or that they no longer have inside information). However, currently it may be less formally arranged than suggested in the discussion paper.

We would like to warn against too onerous record keeping requirements, especially in situations where there was no change of reasons for and circumstances of delaying.

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.

This seems reasonable; however the information to provide should not be in a form of a rigid template.

It is probably possible to determine when an issuer has inside information. However, we would suggest taking into account that fact that the ‘date and time’ can sometimes be determined only up to a certain degree of ‘preciseness’. For instance, in the case of an M&A transaction the information does not just ‘suddenly’ appear.

In situations where decisions to delay depend on an event taking place or not, there should be no requirement to make interim decisions on publications before the event takes place, as long as confidentiality is ensured.

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

No.

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

It could probably facilitate the processing of notifications, for both the issuer and competent authority, however it should not be too rigid and preclude a flexibility that may be necessary to ensure accurate disclosure.

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

The approach seems correct.

However, initial indication to the authority in a verbal way, followed by written information, should be permissible.

The authority would have the responsibility to share information with other authorities as appropriate.

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.

Yes, CESR examples are still appropriate. It would be useful to specifically add an M&A transaction in the course of negotiation.

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

Point VI.3.2. reminds market participants what the inside information is (results that materially differ) and gives two classic examples. It also recalls the need to announce. We would welcome further guidance and examples of situations that do or do not mislead the public. We recognise however, that such a list of examples should not be exhaustive.

In particular, we believe that it should be clarified that market expectations taken into account are only those that refer clearly and directly to public statements made by an issuer. An issuer has no responsibility to manage public expectations.

Insider list (Article 13 of MAR)

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

We believe that many of such details (eg certain personal contact details) are costly, may bring certain risks, are irrelevant for the purpose of establishing the identity of the person and may eventually be obtained later if needed for an investigation. Therefore it would not be justified to require recordkeeping of such information for 5 years.

The rules on keeping lists up to date should be carefully crafted.

The rules should not be in a conflict with personal data protection rules in the EU Member States and third countries.

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

We believe that a harmonised format may be helpful, but it risks being over prescriptive. Please also see the response to question 84.

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

Yes.

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

We believe that, at this stage, market participants should be allowed to use own written or electronic format.

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…)?

Please see our answers to Q 85 and 87.

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

Yes, but we believe that aggregated lists should not be required in the case of delegation to third parties. In general, an aggregated list can be created by aggregation of 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 fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

Yes.

Managers' transactions (Article 14 of MAR)

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

Yes. It would be preferable that the issuer also informs if a PDMR is on its insider lists at the moment of the transaction.

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?

No comment.

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 concur with allowing aggregation on a daily basis. The average price of buys and sells could be appropriate.

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?

No comment.

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

No comment.

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"?

We would welcome a clarification of the difference between an 'investment recommendation' and other types of communication that are not tailored to any particular client, do not include a new investment strategy and are not written by a research professional.

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?

No comment.

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

We agree with regard to recommendations, as opposed to other types of communications (please see Q97).

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?

Yes.

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 support the provision of more information as long as it is principles based. We believe that, while developing draft RTS, ESMA should clarify that 'methodologies' refer to the basis upon which a recommendation is made and not to a numerical calibration, eg in paragraph 399.

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?

Yes.

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 find that it is not necessary to introduce additional major shareholding disclosure obligations, given that these are already covered by the Transparency Directive. Moreover 2004 MiFID provides a suitable mechanism to manage and disclose conflicts of interests.

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. Please see Q 105.

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?

We note that relevant requirements have been already introduced by the 2012 Regulation on CDS and Short Selling.

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

We would welcome a solution where 'significant holdings' are defined based on the size of the firm holding 'non-equities' financial instruments (like in the current FCA regime), as opposed to non-calibrated and over-simplified thresholds.

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

A list of previous disclosures could be useful if it concerned specific, price related, investment banking recommendations to clients. However, it would not be relevant for general market views shared with counterparties. Moreover, such information is already largely available on researchers' websites and additional requirements would be confusing without giving any new information.

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?

We are concerned that such an additional requirement would not add any value.

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

We believe that additional detail on positions would quickly become out of date given that new transactions can take place immediately afterwards.

In the case of professional and eligible investors the relevant disclaimer ought to be sufficient to warn about the potential conflict of interest.

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

We agree that there may be no efficient way to impose further rules for recommendations made to institutional clients, given that such non-written recommendations may be continuous, frequent or regular, and included in a brief conversation. Recommendations made to private clients are already covered by strict provisions on detailed documentation of conversations.

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

No comment.

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?*

No comment.

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?

No comment.