15 October 2014

ISDA input for ESMA's Consultation Papers on 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) implementing measures under the Market Abuse Regulation (MAR), including the Consultation Paper on Draft technical standards (CP on TS) and the CP on draft technical advice on possible delegated acts (DA). We have aimed to provide as much constructive feedback as possible at this point in time. There are some questions that we choose not to answer, in which case we write 'No comment'.

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

In general, we agree that the Regulation and its implementing measures should ensure an adequate 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, unduly burdensome or ineffective requirements for instance in relation to indicators of market manipulation, buy-backs and suspicious transactions reporting (in particular regarding automated surveillance). Implementing measures should also take into account the specificities of different instruments and market participants in many instances. Moreover legal certainty of the rules should be ensured (eg for market manipulation indicators, especially regarding specifications of legitimate behaviour and intent).

Another important issue for us is the coordination with other pieces of legislation and relevant implementation measures and practices, including the interface between MAR and the market abuse regime for European power and gas under Regulation on wholesale energy market integrity and transparency (REMIT), as well as monitoring of overlap and potential conflict between MAR and the Markets in financial instruments directive and regulation package (MiFID 2) as well as

European Market Infrastructure Regulation (EMIR), eg regarding suspicious transactions reporting.

Furthermore the proposed rules on the emission allowances markets participants (EAMP) thresholds would require several clarifications and corrections.

With regard to REMIT, effort should be made to avoid imposing disclosure requirements for inside information via MAR which effectively duplicate existing requirements already in place under REMIT.

We would also like to make a general comment that we firmly believe contracts which are financial instruments as described in Sections C(4) to C(10) of Annex I to MiFID2 (derivatives) do not have an 'issuer' for the purposes of MAR whether they are entered into on or outside a trading venue. A person who is a counterparty to the contract (or enters into the contract as an agent for a counterparty to the contract), a central counterparty that clears that contract or the operator of a trading venue on which that contract is traded is not the issuer of the contract for the purposes of MAR. Similarly, emissions allowances as described in Section C (11) of MiFID2 do not have an 'issuer' for the purposes of MAR. We are responding to this consultation paper with that point in mind.

PART 1 - TS

Response to the Consultation Paper on Draft technical standards on the Market Abuse Regulation

Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

Buy-backs undertaken through derivatives

We do not support ESMA's statement that buy-backs with associated instruments such as derivatives do not fall under the safe harbour (the consultation paper Paragraph 9 and draft regulatory technical standards (RTS) Recital 2 and 3).

Under the current MAD 1 regime (Art 8), the Commission MAD implementing Regulation (2273/2003) states that trading in own shares in buy-back programmes may be carried out through 'derivatives financial instruments' and also specifies what price limitation the issuer should comply with to fall under the safe harbour (Regulation 2272/2003, Recital 8 and Article 5(1)). Given the wording of Article 5(1) of MAR is for all intents and purposes identical to the wording in Article 8 MAD 1 as concerns buy-backs, there is no textual nor discernible policy rationale presented for the exclusion of derivative financial instruments from the benefit of the buy-backs safe harbour.

We consider the phrase 'trading in own shares' to encompass trading in derivative financial instruments as in many cases these instruments will grant the issuer the right to purchase or take delivery of their own shares. There is still a change of ownership in the underlying shares with the issuer as the ultimate purchaser and thus there is no substantive difference in the economics or market impact of an issuer undertaking a buy-back through a derivative financial instrument and solely effecting the buy-back via a direct purchase of the issuer's shares. In addition, trading in derivatives on own hares within buy back programmes may play a very important role of hedging, eg reducing exposure to adverse share price movements and managing market risk with a view to achieving the best outcome for shareholders.

ESMA's justification for the exclusion of derivatives is that the Level 1 text only uses the word 'shares' and not 'associated instruments' (as a comparison with the stabilisation section which specifically references 'associated instruments'), however, this is also the case under MAD 1. We do not agree with ESMA's interpretation of the Level 1 text and we do not think that MAR excludes buy-back programmes which include the purchase of own shares undertaken through derivatives (just by virtue of the text being silent on the derivative element).

Therefore, we believe that as long as the purpose, disclosure, price and volume requirements are complied with, trading in own shares in buy-back programmes even when undertaken through derivatives (both OTC and venue traded) should fall under the MAR safe harbour.

Consequently, we would suggest that the draft RTS Recitals 2 and 3 are removed and replaced by Recital 8 of the Regulation (2273/2003): 'Trading in own shares in 'buy-back' programmes may be carried out through derivative financial instrument'.

Moreover, in draft RTS Art 4. 2. second paragraph shall be added (as per Art 5.1 paragraph 3 of Regulation 2273/2003): 'Where the issuer carries out the purchase of own shares through derivative financial instruments, the exercise price of those derivative financial instruments shall not be above the higher of the price of the last independent trade and the highest current independent bid.'

OTC trades

In paragraph 22 of the consultation paper ESMA suggests that only buy-back transactions carried out on a trading venue where the shares are admitted to trading or traded should benefit from the safe harbour. We do not think there is any legal basis that would allow ESMA to restrict the scope of the exemption and exclude OTC trading from the safe harbour. As long as the purpose, disclosure, price and volume requirements are complied with, trading in own shares in buy-back programmes should fall under the safe harbour whether the transactions have been carried out on a trading venue or not. Therefore draft RTS Article 4.1. should be modified to cover OTC trading.

Volume limit for buy-backs

We support maintaining the current regime of 50%. Although infrequently used, we believe it is sensible to retain the 50% rule for stocks with low liquidity. If buy-backs were to be conducted in illiquid stocks a higher threshold would be necessary for these stocks and therefore we believe it is important for MAR to be able to cater for these situations. Therefore Article 4.3 of draft RTS should reflect Art 5.3 of Regulation 2273/2003.

Per venue volume limit

We do not support ESMA's proposal (in paragraph 28) with regards to the calculation of average daily volumes and think issuers should be allowed to use an aggregated calculation. Limiting the calculation per venue where a purchase is planned will restrict issuers to benefit from market fragmentation and restrict firms to comply with their best execution obligations. Whereas an aggregated calculation is consistent with the Level 1 text and enables issuers to benefit from post-MiFID market fragmentation and achieve the best result for shareholders in terms of price and speed of completing a buyback programme.

Disclosure to competent authorities

We do not support ESMA's proposal that in case of multiple listings buy-back transactions should be reported to more than one competent authority across Europe. We do not think the Level 1 text precludes firms from sending the reports to a single competent authority.

Article 5(3) of MAR states that issuers should report to the competent authority of the trading venue on which the shares have been admitted to trading or the trading venue on which the shares are traded. We do not believe that the Level 1 text suggests that issuers have to report to the competent authority of *each* trading venue.

In addition, our understanding is that Article 16(4) of MAR on the reporting of suspicious transactions and orders already requires competent authorities to have in place mechanisms to exchange information amongst them.

The single competent authority could be determined on the basis of the issuer's home Member State or the home state of the venue on which the share was first traded, eg for third country issuers. This would avoid duplication of firms' reporting to several competent authorities.

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

No comment.

Market soundings

Q3: Do you agree with ESMA"s revised proposals for the standards that should apply prior to conducting a market sounding?

No comment.

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

No comment.

Q5: Do you agree with these proposals regarding sounding lists?

No comment.

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

No comment.

Q7: Do you agree with these proposals regarding recorded communications?

No comment.

Q8: Do you agree with these proposals regarding DMPs" internal processes and controls?

No comment.

Accepted Market Practices (AMP)

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

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 (TD). Therefore it might be considered whether the language of the relevant drat RTS and its Annex I should be reviewed, in particular where it includes vocabulary relevant only to venue traded securities.

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

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. This approach is consistent with the Level 1 text as the identity and status of the person performing an AMP are not among the criteria listed in Articles 13.2., 13.3. and 13.4. Consequently, this issue should remain outside the scope of the TS.

Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

We agree.

Q12: Do you agree with ESMA"s clarification on the timing of STOR reporting?

STOR submission moment

We agree with ESMA's clarification that STORs should be submitted without delay once *reasonable suspicion has been formed,* and *not once* the actual suspected *breach happened*. Therefore we strongly support the language of Art 7.1 of the draft RTS ('the STORs are submitted without delay *once reasonable suspicion* of actual or attempted market abuse *is formed'*).

However, we are concerned that the relevant Recital 3 does not fully reflect the approach taken in the Art 7.1. The first sentence of the Recital, indeed correctly reflects Art 7.1 ('[…] as soon as possible *once a reasonable suspicion is formed'*), but the last sentence of the Recital does not ('[…] should be submitted within two weeks *of the actual suspected breach'*). We strongly recommend that this should be amended, as we are suggesting below.

Two weeks

Moreover, we believe that two weeks may not be enough to produce a good quality report in every circumstance, depending on the complexity of the transaction and the incident that is subject to the report. Preparation of a STOR is not a mechanical process where boxes can be ticked within a specific time period. It requires analysis and high quality is important. We believe that allowing for sufficient time to prepare the STOR would be necessary for firms to comply with the Art 8.2. of the draft RTS, which requires that the person submitting STOR should complete as many information fields as possible in a clear and accurate manner, with a number of fields being obligatory.

We are convinced that the current system works and that the requirement that STORs should be submitted without delay (MAR Level 1), or as soon as possible (RTS Recital 3), once reasonable suspicion has been formed (RTS Art 7.1.) is sufficient and robust enough to ensure timely reporting. Moreover, Art. 9.2 of draft RTS facilitates reporting without delay by providing flexibility for markets participants on how they can contact the regulator to provide initial information.

We do not think this two week limitation should be included in Recitals (Recital 3 of the draft RTS in Annex VI of the CP), even though only qualified as 'general' and 'indicative'. We are concerned that in practice this would create a strong artificial and impracticable expectation from the competent authorities to receive all reports within two weeks since reasonable suspicion has

been formed. In addition, this would encourage 'defensive reporting', ie making reports where there are no reasonable grounds for suspecting that a transaction constitutes market abuse.

Submission moment and two weeks – recital mark up suggestion

To conclude, we would strongly suggest that the last sentence of Recital 3 should be amended as follows or removed as a potential repetition of the first sentence.

'Suspicious transaction and order reports should be submitted to the relevant competent authority as soon as possible once a reasonable suspicion is formed in relation to a trading behaviour. […] Generally and indicatively, suspicious transaction and order reports should be submitted ~~within two weeks of the actual suspected breach~~ *as soon as possible once a reasonable suspicion is formed*.'

Phone

Regarding the reporting by phone, we are concerned that paragraph 189 of ESMA's consultation is confusing and not necessary. We therefore suggest that such language is not maintained in any further considerations.

The paragraph is confusing because its language ('STOR can be reported by telephone') suggests that the *actual STOR (not initial information)* can be reported via telephone. This would potentially raise uncertainty on the details of such *a STOR telephone procedure* and would be in contradiction with Art 8.1. of draft RTS, which requires that STOR is submitted using the form in Annex I of the RTS, and with Art 9.1. of draft RTS, which requires STOR to be submitted electronically and in a secure manner.

This paragraph is redundant, because Art 9.2. of the draft RTS already provides sufficient flexibility for markets participants on how they can contact regulator to provide initial information, which we understand would include telephone.

Furthermore, the language of paragraph 189 is confusing because it suggests that 'In order to facilitate timely submission, STOR can be reported via phone […]'. This could add confusion that this is a requirement to ensure submitting STOR 'without delay'.

Q13: Do you agree with ESMA's position on automated surveillance?

Automated surveillance systems

We do not agree with ESMA's position on automated surveillance. We would encourage instead the development of rules that target outcomes (in this case, effective surveillance), and not processes. In particular, we welcome the recognition of the 'human analysis,' but we do not agree with the ESMA proposal for a *mandatory* automated surveillance system.

We think that an effective surveillance method greatly depends on the type and size of the organisations and therefore automated surveillance should not be mandatory for all market participants. In addition, the level of automation should be allowed to vary depending on *the type*

of financial instruments and activities undertaken, as surveillance systems might not always be appropriate, feasible or effective in every circumstance.

There are cases where only human analysis can bring a suspicion of a transaction in breach of the market abuse regulation. For instance, for OTC derivatives cross-markets analysis is needed. Venue traded instruments and transactions on underlying instruments also need to be taken into account for any suspicion to be raised. We believe that this can be effectively carried out only by a front office expert and not by an automated surveillance system. Moreover, where derivatives markets may be accessed by telephone trading, the process to analyse data would be manual and qualitative, not automated. For instance this can be observed on the London Metal Exchange, where commodities derivatives are traded, electronically, by floor and via telephone. This means that in order to ensure adequate surveillance different approaches are required for each execution mechanism. Similarly an automatic system would not ensure an effective surveillance when analysis needs to take into account both unexecuted and executed orders.

Moreover, we would like to underline that Level 1 of MAR does not foresee a mandatory automated surveillance system.

Furthermore, market participants should have room to design the systems that best ensure effective surveillance and apply automated systems only in cases, where such a system will be efficient and will bring additional benefits as compared to human analysis.

Therefore, we would welcome the ESMA's RTS to specify that firms should establish and maintain appropriate automated surveillance systems 'where appropriate and necessary' to conduct effective monitoring of orders and transactions (see article 5(1) and Recital 1 of the proposed ESMA's RTS). Please see the mark-up suggested below.

Range of trading activities

Moreover, we strongly disagree with the last sentence of the Article 5.1. of the relevant RTS ('The automated system shall cover the full range of trading activities undertaken by the concerned person.') and the corresponding paragraph 196 of ESMA's explanation ('In any event, the automated system should cover the full range of trading activities undertaken by the firm[…]'). This is in contradiction with the scope of the MAR Level 1 text, as it does not include 'the full range of trading activities undertaken by the concerned person.' For instance, certain long term contracts of physical delivery of oil and gas are not covered by MAR.

Therefore we suggest removing the last sentence of the Art 5.1. of the relevant RTS. Please see the mark up suggested below.

'Off the shelf' systems

Furthermore we strongly disagree with the suggestion that a surveillance system can be taken 'off the shelf' (second sentence in paragraph 196). We believe that such off the shelf solution will always have to be adapted to the different business characteristics and is not as easily implemented as ESMA seem to suggest. In our opinion, there is no such an off the shelf solution that could ensure effective surveillance. Human intervention and manual review are needed.

Mark up suggestion – automated systems and range of activities

Article 5, Monitoring and Detection

1. Persons referred to in Article 16(1) and (2) of Regulation (EU) 596/2014 shall establish and maintain appropriate automated surveillance systems *where appropriate and necessary* to conduct effective monitoring of orders and transactions, including through the generation of alerts. Those persons shall explain to their competent authority, if requested, the extent to which the level of automation of their system is appropriate for and proportionate to the scale, size and nature of their business activity. ~~The automated system shall cover the full range of trading activities undertaken by the concerned person.~~

Recital 1, second sentence:

This requires a minimum level of granularity in the surveillance approaches which involve, to be effective, both automated monitoring systems, *where appropriate and necessary*, and human inputs from appropriately trained staff.

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

Reporting requirements under MAR (especially suspicious transactions reporting) should be harmonised where possible and appropriate with other European reporting regimes (e.g. EMIR, MiFID, REMIT) as this will aid efficient reporting across products covered by various regulations.

In particular we would like to take note that MAR requirements should be aligned with MiFID 2. As discussed in the MiFID 2 Discussion Paper on implementing measures, the purpose of transaction reporting under Article 26 MiFIR is to detect and investigate potential instances of market abuse and to monitor the fair and orderly functioning of markets and firm activities (ESMA Discussion Paper on MiFID 2 Section 8.1. http://www.esma.europa.eu/system/files/2014-548_discussion_paper_mifid-mifir.pdf and ISDA response to the above consultation http://www2.isda.org/mifid/).

Furthermore, we would like to reiterate several general concerns as mentioned in the recent MIFID 2 consultations responses, which are also pertinent for the MAR consultation paper:

- Sufficient flexibility should be built into the reporting fields to allow reporting for the full range of financial instruments in scope. In this respect, ISDA notes that a number of fields appear to have been designed with transferrable securities in mind and so would be 'not applicable' for derivatives transactions. Considerable thought should be given to mandating values for any field and flexibility to allow for realities of market evolution be catered for in any decisions. Endorsement by ESMA of ISDA best practices and ISDA taxonomies will aid clarity for ISDA members in populating fields consistently so that comparison of data sets is meaningful.
- Firms should not have to report in STORs any redundant data which can be referenced using a relevant identifier from a 'golden source' of information. For example:

- If a legal entity identifier (LEI) is used to identify a counterparty, then other information about the counterparty should not need to be reported to the extent that ESMA and national competent authorities (NCAs or CAs) can source this information from the 'golden source' of information held about that counterparty.
- Similarly, we do not think it is necessary for the national ID number to be included in the STORs as personal data such as the name, date of birth etc is already included in the STORs and is sufficient.
- ESMA will hold instrument reference data for each financial instrument which has been given an instrument identifier. Therefore, only the instrument identifier should be required on STORs as all other reference data can be sourced from the 'golden source' at ESMA.

Regarding the proposals made in the MAR Consultation Paper we would like to welcome the suggestion of the inclusion of the free text where derivatives are concerned. We would also support the flexibility in the template where some fields can be left blank if information is not available or cannot be obtained on a reasonable effort basis at a given point of time.

We would also like to provide several particular comments on the template to report a STOR (Annex 1 of the relevant RTS). Certain suggested additional elements to be reported for OTC derivatives might not be relevant or would require a clarification. As mentioned above, other regulations and the current market practice should equally be taken into account.

- For instance, the 'type' of derivative should refer to a globally recognised and used industry standard. For this reason we would welcome ESMA endorsement of the ISDA taxonomy as a Unique Product Identifier (UPI), as we suggested for MiFIR, EMIR and REMIT reporting regimes.
- We would also welcome a clarification on the following elements requested: margin, up-front payment and nominal size/value of underlying security. In providing this clarity, ISDA would welcome indication how these fields are linked to the relevant reporting fields under EMIR and MiFID/R. The reporting requirements should be coordinated across the regulations.
- Regarding the field 'transaction terms', we believe that certain examples are not relevant for OTC derivatives (eg. tick moves). We would suggest referring to and using EMIR reporting fields.
- With regards to derivatives where the underlying is a basket or an index, we would suggest ESMA to follow the identification which will be required under the transaction reporting requirements under MIFIR.

We remain available to discuss the mark up of the proposed template.

Furthermore, it might be considered if the language of the relevant drat RTS should be reviewed, in particular as to whether it includes vocabulary applicable to asset classes other than venue traded securities, eg OTC derivatives.

Q15: Do you have any additional views on templates?

In relation to the content and the layout of the template, we would like to strongly support ESMA's view that an 'STOR should provide clearly presented and accurate information, sufficient to enable a competent authority to promptly assess the validly of the suspicion […]' (paragraph 204). In this context, we would like to suggest reordering of the sections of the STOR template, in particular:

1) Section 2

2) Section 3

3) Section 1 and 5 (these sections should come together as the information included in section 1 is linked to the information included in the section 5)

4) Section 4

5) Section 6

Q16: Do you have any views on ESMA"s clarification regarding "near misses"?

We are concerned that a near misses requirement as currently drafted would impose complexity and IT development costs on reporting parties without improving the surveillance regime of suspicious transactions and orders as the element of subjectivity in the reporting of events will not be removed. Moreover, the absence of a clear definition of near misses also creates legal uncertainty as to what has to be reported. It would result in onerous and misleading reporting. We would therefore suggest that that Article 10(2)(b) of the proposed Delegated Regulation is modified.

In particular, we agree that near misses need to be carefully defined as to not to include a too large population. We welcome ESMA's paragraph 214 of the CP which states that 'near-misses' should include cases where it has been *considered seriously* whether to submit a report or not. We would suggest the draft RTS to clearly reflect this and to only include transaction or orders which were *'reasonably suspected' to be suspicious or which were 'seriously considered to be suspicious' but following examination were not submitted*.

Art 10.2.b. of the relevant RTS:

'details of transactions and orders which were identified as potentially suspicious, and which were reasonably suspected to be suspicious or which were seriously considered to be suspicious, but following examination were subsequently not submitted, including a summary of the reasons for not submitting a STOR;'

Moreover, we would prefer the term 'near-misses' to be replaced by words 'potentially suspicious orders and transactions' in any potential explanatory or analytical language accompanying RTS if published in the future. The language should be based on the wording used in Level 1 and 2. This would avoid confusion and legal uncertainty in the application of the Level 1 and 2 texts.

Technical means for public disclosure of inside information and delays:

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

Our responses to this question concern only Article 17.2 regarding emission allowances markets participants.

We would not agree. We believe that the regime of the TD should not apply to the instruments not covered by the TD. This is not required by MAR to cover other instruments with the TD regime.

We are strongly opposed to any requirement to demonstrate 'active dissemination' of inside information. At present, many firms distribute inside information via their websites or ad-hoc transparency platforms for REMIT purposes. The publication of inside information for REMIT purposes is already very transparent and fast because in practice, new publications are instantaneously (or near-instantaneously) picked up (and in this way disseminated) by: web crawling programmes; free-access platforms run by transmission system operators (TSOs), exchanges or other bodies; and news providers such as Bloomberg and Reuters. We believe that these mechanisms ensure immediate, effective and equal access to complete information for all market participants. As such, any additional requirement to publish similar information elsewhere will be very onerous for market participants, and could actually be potentially misleading if published in different ways, while being of minimal benefit to price formation.

Moreover, we would like to highlight that neither 'active distribution' nor 'dissemination' (as referred under CP paragraph 234) are requirements under Article 17 of MAR, which only speaks about 'disclosure'. Moreover, the only references to the TD in MAR concern: i) the disclosure via Officially Appointed Mechanism (OAM) for regulated markets (RM) instruments (Article 17(1)); and ii) the determination of the competent national authority for the notification of manager's transaction.

From the perspective of energy companies, the phrase 'public disclosure' in Article 17 of MAR mirrors the requirement of Article 4 of REMIT where 'market participants should publicly disclose' inside information. We believe that the correct approach is to harmonise the relevant information disclosure requirements to the regime being developed under REMIT, at least for products not covered by the TD. Agency for the Cooperation of Energy Regulators (ACER) already provides guidelines on technical means of the disclosure. We think that it would be a disproportionate administrative burden to require one party to report the same information under two different administrative procedures. Moreover, we believe that this would be in contradiction with the Recital 51 of MAR which aims at avoiding the duplication of procedures for EAMPs.

Regarding the language, we support the proposed rules for emission allowances. We believe that inside information should be disclosed in a language accepted by the competent authority of the home Member State as well as English. We consider that the publication of the information in English is relatively much more important for 'fast access and complete, correct and timely assessment of the information by the public' than the introduction of duplicative, unnecessary and potentially misleading parallel to REMIT reporting regime under MAR.

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

We are convinced that potential investors in emission allowances and related derivatives products have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards.

To reiterate the points made above on the feasibility of the REMIT disclosure system, all this information is currently published on company websites or free-access platforms run by TSOs, exchanges or other bodies.

We strongly believe that ESMA should effectively monitor and closely cooperate with energy regulators and market participants working on the implementation of REMIT to ensure that access to this information remains easy for all EAMPs, other than energy companies covered by REMIT.

Appropriate application of the REMIT regime would be much more effective for fast, efficient, full and equal access to information rather than establishment of a parallel reporting regime under MAR.

Moreover, mandating the publication of information already published under REMIT, would lead to the duplication of disclosures and counter Recital 51of MAR.

We very strongly support the approach based on Recital 51 of MAR, which states:

'Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011 [REMIT], the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content'.

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

The practical implication of the information disclosure regime proposed by ESMA in the situation at question is double reporting, to which we are strongly opposed. We would like to reiterate here the importance of Recital 51.

Q20: Do you agree with ESMA"s proposals regarding the format and content of the notification?

In general we agree. However, the TS should not make the provision of an explanation to the national competent authority mandatory. By stating that 'Member States may provide that a

record of such an explanation is to be provided only upon the request of the competent authority' Article 17.4 of the Level 1 text leaves this matter to the exclusive discretion of Member States. The current draft of the TS might be read as consistent with such interpretation, but this is not entirely clear. We would welcome more clarity about the need for further national legislation or guidance on this point.

Q21: Do you agree with the proposed records to be kept?

We agree.

Insider lists

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

We would not support the proposal, in particular regarding the inclusion of personal details such as national identification numbers (eg passport numbers), birth place, surname of birth, home address, mobile numbers and personal e-mail addresses in the insider list.

The inclusion of personal details in the insider list seems disproportionate and inadequate to the task of protecting the integrity of financial market as this information could be rapidly made available upon request. In particular, we would like to underline the there is a need to clearly distinguish between the requirements to keep a list that enables identification of the relevant person and then the subsequent ability to identify an individual to a regulator by an issuer. We do not think the detail needed for the later should or needs to be kept on an insider list as a matter of course. It does however need to be available to a regulator on request.

Providing the provision of the proposed amount of personal details of employees in insider lists would raise privacy concerns under the EC Data Protection Directive (1995/46) and consequently legal uncertainties and compliance risks.

Moreover, individuals acting with the intent of executing insider trading or market manipulation would easily be able to circumvent these controls; therefore we are questioning the value of this information for an effective detecting of manipulative behaviour.

Furthermore, we believe that the initial aim of the proposals was to simplify and ease the burden on the companies, and the detailed requirements on insider lists may challenge the realisation of this objective, without effectively helping with detection of market abuse.

Q23: Do you agree with the two approaches regarding the format of insider lists?

No comment.

Managers' transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

No comment.

Q25: Do you agree with the content to be required in the notification?

We welcome the requirement to use the data standard defined under MiFIR implementing texts as well as international standards such as the Legal Entity Identifier if applicable and available.

However, we believe the template proposed by ESMA requires too granular information to be provided and we do not think the inclusion of the national ID number will add any information to the information already required to be included (ie, name, address, telephone number etc).

Investment recommendations

We support the AFME response on this section.

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

PART 2 – DA

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

Specification of the indicators of market manipulation

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

VERY STRONG SUPPORT FOR THE BBA WORDING SUGGESTIONS

We would very strongly support BBA suggestions regarding the specification of the indicators of market manipulation. Should ESMA however decide to retain the examples and related indicators in the Level 2 text, then we would like to make the following remarks.

INTRODUCTORY AND SUMMARISING REMARKS

In general, we welcome ESMA draft advice on the specification of the indicators of market manipulation, in particular, the recognition of legitimate reasons of practices and the explanation of the interaction between the examples and indicators. We also welcome the analytical section, where it explains that the examples and indicators are merely indicative and not determinative and we would welcome these remarks to be included in the draft delegated acts as well (mark up suggested). Similarly, we support the ESMA comments that 'The non-exhaustive lists of examples and related indicators are to be evaluated on a case by case basis in determining whether market manipulation has occurred. […] They contribute to but do not replace the thorough and full analysis to be conducted in relation to any suspicious activity or behaviour.' We provide mark up for points 3 and 13 to reflect the 'case by case basis' issue in the draft delegated acts advice.

However, we would prefer the focus to be on the indicators (as set out in point 13 of the draft technical advice on pages 19-21) and improving the clarity of their wording, rather than the focus to be on examples (points 4-12).

Whilst the list of examples in points 4-12 could be 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'), we are concerned that the current list is too extensive, duplicative and lacks precision and sufficient context that should be considered when making a determination whether a practice is permissible or impermissible.

Moreover, we believe that there is no particular need to add any further examples or indicators.

To the extent that the examples in points 4-12 will be kept, and regarding the indicators in point 13, we would like to strongly underline the importance of the legal clarity of drafting, providing

certainty over permissible and impermissible behaviour. Market participants will rely greatly on the indicators and examples to interpret and implement MAR. Currently the language is very broad and general. A number of clarifications would be needed, inter alia to make the delegated acts follow the CESR guidelines closer, where appropriate, especially in relation to the element of intent, which was included in the CESR guidelines for most of the cases.

We strongly believe that the legal precision and clarity will be of utmost importance if these examples and indicators are included in a pan-European piece of law that is directly applicable in 28 Member States, as compared to these examples and indicators being previously included in CESR guidelines, which were not a piece of law and were further scrutinised by national regulators.

In particular, we believe that any Level 2 implementing measures should:

- Clarify that 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;
- Avoid unnecessary repetition.
- Clarify that these indicators (and examples)
    - Are merely indicative (like explained in the ESMA Analysis, page 8, point 4) and not determinative (like explained in the ESMA Analysis, page 8, point 6);
    - Should be evaluated on a case by case basis in determining whether market manipulation has occurred; and
    - Do not replace the thorough and full analysis of any suspicious activity or behaviour;
- Provide legal certainty as to the outcome/effect;
- Specify what circumstances may be relied on as establishing that orders/transactions are for a legitimate purpose;
- Take into account other balancing and/or overriding factors, eg impact on the market;
- In relation to 'person who acts in collaboration with others' as referred to in Recital 39 of MAR, clarify that there is an element of intent, knowledge or recklessness for such persons to be liable for market manipulation;
- Support effective monitoring and surveillance.

We provide detailed explanations and mark up suggestions below.

DETAILED REMARKS ON EXAMPLES (draft advice on delegated act points 3-12)

Regarding the examples in points 4-12 and the introductory point 3 we would like to make the following particular comments. Some of these comments also apply to point 13.

Repetition, relevance and clarity

ESMA's proposed non-exhaustive list is very long and very repetitive. This repetition detracts from highlighting the aims and intent which are important factors that should be taken into consideration when transactions or orders to trade are being examined. Repetitions should be deleted (especially where their inclusion is tangential).

We believe that in some cases examples are not relevant to the point in head (though they may be indicative of market abuse) and this detracts from the clarity of the example. This concerns the following instances.

- Regarding point 4.1. and 4.2., these examples could indicate market abuse but they need to tie back to the indicator 4 by referring to significant portion of the daily volume (mark up provided). Moreover, the definition in point 4.1. appears circular.
- For the examples for the point 5, we are suggesting changes to link them better to the indicator (regarding significant volumes and significant changes in price), except for point 5.2., which is not relevant to the potential abuse in the head of point 5.
- On 6.1., we provide a suggestion for a clarification of the purpose.
- On indicator 7, for examples 1, 2 and 6, we suggest changes to link them better to the indicator (regarding a significant proportion of the daily volume of transactions). We would question the relevance of examples 3 and 4 to the indicator. We would also like to ask why there is a difference of wording between 7.6 and 8.7/9.11.
- Concerning indicator 8, we would question the relevance of points 1, 2 and 3.
- Concerning indicator 9, we would question the relevance of points 2-3 and 7-8. Example 2 could be potentially market abuse, but we are wondering about the relevance here. On example 3, we think this is neither relevant nor practical (the waterline of the ship would be self evident of an empty or full cargo ship). We also add one specification for example 6.
- Regarding indicator 10, we would challenge the relevance of examples 2-6, and suggest one specification for example 1.

Please note that we are not providing mark-up for all examples and remarks made.

Not exhaustive, indicative and not determinative

Regarding the point 3, we very much welcome the reference to the non-exhaustive character of examples and that 'the examples of practices […] shall not necessarily be deemed in themselves to constitute market manipulation'. However, we would welcome the delegated acts to further clarify that that these examples are merely indicative and not determinative. We provide mark up for point 3 (and 13).

Legitimate purpose

- Whilst references to 'legitimate purposes' and related concepts in the point 3 of the draft technical advice (page 3) are helpful, we would welcome further language from ESMA on what it considers as examples of 'legitimate behaviour', beyond those factors mentioned (eg. activity within the buyback and stabilisation 'safe harbours' and 'legitimate arbitrage').

  Examples of behaviour or purposes widely seen as *'legitimate'* should also 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 points 4-12 of the draft technical advice, such as agency cross transactions. We note that ESMA refers to such situations (only in point 3 and not in point 13); however there may be a need to double check the appropriateness of the wording, including legal review, and consequently removal of potential repetitions in the drafting as presented below.

  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.

  We are suggesting mark up in this respect for point 3 (and 13).

- Similarly, indicators of what ESMA considers to be illegitimate behaviour would also be welcome.
- Furthermore, it could also be helpful for the advice to stipulate when each particular practice is not abusive behaviour, for example, at least by stating in general for each example that the practice is not manipulative behaviour if conducted for legitimate reasons

  To give some examples why clarity is needed we would like to refer to point 4 and 5. Point 4 relates to orders to trade given or transactions undertaking representing a significant proportion of daily volume in the relevant financial instrument. One might ask why is holding a significant percentage of volume an indicator of manipulative behaviour. Similarly, point 5 relates to orders to trade given or transactions undertaken by persons with a significant buying or selling position. Another question could be as to why is holding a significant position in itself an indicator of manipulative behaviour.

To give further examples, the language on 'quote stuffing', 'momentum ignition' and 'ping orders' does not clarify exactly what is necessarily abusive about the practice or behaviour, or at what point a practice goes from being proper to improper

We are not providing any language modifications in this respect at this stage, but we believe that a mark up of the examples given should be considered, for instance, based on the BBA suggestions.

Intent

While there appears to be a pattern of improper intent throughout the examples given, the requirement for improper intent is not always stipulated. We are suggesting mark up in this respect.

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.

In relation to 'person who acts in collaboration with others' as referred to in Recital (39 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. We are providing mark up only to the introductory parts not to the particular examples, ie point 3 (and the beginning of point 13).

Moreover, we would like to suggest that in each sub-point of points 4-12 , the category of market manipulation is mentioned, eg: all points in 'False or misleading signals' would mention a phrase like 'with the *intent* or purpose of creating false or misleading signals'. We are not providing mark-up in this respect at this stage.

High frequency trading

There appear to be some example practices relating to manipulative behaviour in respect of high frequency trading, such as 'smoking' and 'ping orders' which appear to require further clarification as to what is exactly is the manipulative behaviour. We believe that a mark up of the examples given should be proposed and considered.

Likely

We would also suggest addressing the inclusion of the element of 'likeliness' and therefore we would prefer it to be removed from the examples. For more detailed explanation please see the below part on the related indicators. We just to enumerate the concerned examples: 8.7 and 9.11 (where are not providing any mark up suggestions at this stage) as well as 5.2., 11.1 and 12.1 (where we are suggesting deletions).

Monitoring & surveillance

As the example practices are required to be taken into account where transactions or orders to trade are examined by market participants and competent authorities, given that they are currently drafted in such a broad nature, this could lead to ineffective monitoring and surveillance efforts in detecting actual abusive behaviour as one may end up having to monitor for all cases that meet such a description. Just to reiterate some examples to highlight the broad language: point 5 (2) – persons with a significant buying or selling position in a financial instrument likely to distort […]; and point 9 (1) – entering of orders which are withdrawn before execution, thus having the effect, or which are likely to have the effect of giving a misleading impression that there is demand for or supply of a financial instrument.

EXAMPLES – mark up suggestion

Please note that the suggested mark up does not necessarily address all the issues that would need to be considered to ensure legal clarity in the Level 2 piece of law.

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

3. For the purposes of clarifying the indicative, non-determinative and non-exhaustive list of indicators laid down in Annex I of MAR, non-exhaustive examples of practices are provided.
The non-exhaustive lists of examples are to be evaluated on a case by case basis in determining whether market manipulation has occurred. They do not replace the full and thorough analysis to be conducted in relation to any suspicious activity or behaviour.
The examples of practices listed below shall not necessarily be deemed in themselves to constitute market manipulation but shall be taken into account where transactions or orders to trade are examined by market participants and competent authorities. They may be linked to and illustrate one or more indicators of market manipulation as provided in Annex I of MAR. As a result, a specific practice may involve more than one indicator of market manipulation according to how it is used, so that there can be some overlap. Similarly, although not specifically referenced here below, other practices may be illustrative of each of the indicators included herein.

Where an example or an indicator seems to require that a conduct be characterized by a manipulative intent, this does not imply that, in the absence of any intent that conduct may not fall within the scope of the definition of market manipulation.

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 examples of practices below are not exhaustive, not determinative and indicative, thus not excluding the possibility that other situations may be classified as market manipulation in accordance with the definition in MAR.

Since examples must be described briefly, they show cases that are clearly included in the notion of market manipulation or that, in some respects, provide signals of manipulative conduct. On the other hand, there are examples of practices that actually might be deemed licit if, for in-stance, they are determined by legitimate reasons or are in compliance with laws and regulations (for example, because in conformity with the rules of the relevant trading venue; buy-back programmes and stabilization; legitimate arbitrage).

There are numerous other circumstances that may be relied on as establishing that orders or transactions are for a legitimate purpose.

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 points 4-12, such as agency cross transactions.

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.

Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour

As acknowledged by Recital 42 of MAR, a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned. It is nonetheless stressed that as highlighted by Recital 39 of MAR, the persons who act in collaboration with others to commit market abuse should also be liable for such practice or behaviour.

Regarding a "person who acts in collaboration with others" as referred to in recital (18a) of MAR, 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 should not 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. In such circumstances, "collaboration" will not be established.

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

4. The following practices could relevantly clarify Indicator A(a) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument, related spot commodity contract, or auctioned product based on emission allowances, in particular when those activities lead to a significant change in their prices):

> 1. Buying of positions, that represent a significant proportion of the daily volume of the relevant instrument, (also by colluding parties), with the intent or purpose of potential market manipulation, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, on the secondary market, after the allocation in the primary market in order to post the price to an artificial level and generate interest from other investors – usually known as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
> 2. Transactions or orders to trade, that represent a significant proportion of the daily volume of the relevant instrument, with the intent or purpose of potential market manipulation, carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.

5. The following practices could relevantly clarify Indicator A(b) of Annex I of MAR (the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, lead to significant changes in the price of that financial instrument, related spot commodity contract, or auctioned product based on emission allowances):

1. Significant ~~B~~ buying of positions, also by colluding parties, with the intent or purpose of potential market manipulation, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, on the secondary market, after the allocation in the primary market with the intention of leading to significant changes in the price of the financial instrument , a related spot commodity contract, or an auctioned product based on emission allowances ~~in order to post~~ which moves the price to an artificial level and generates interest from other investors – usually known as colluding in the after-market of an Initial Public Offer where colluding parties are involved.
2. Taking advantage, with the intent or purpose of potential market manipulation, of the significant influence of a dominant position over the supply of, or demand for, or delivery mechanisms for a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, in order to materially distort, ~~or likely to distort~~, the prices at which other parties have to deliver, take delivery or defer delivery in order to satisfy their obligations – usually known as abusive squeeze.
3. Undertaking trading or entering orders to trade, in significant volume, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of the same financial instrument in another trading venue or outside a trading venue, related spot commodity contract, or an auctioned product based on emission allowances– usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue).
4. Undertaking a significant volume of trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue or outside a trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – usually known as cross-product manipulation (trading on financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue). This example is relevant in the context of the extended scope of MAR and taking into account that the price or value of a financial instrument may depend on or may have an effect on the price or value of another financial instrument or spot commodity contract. Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour.

6. The following practices could relevantly clarify Indicator A(c) of Annex I of MAR (whether transactions undertaken lead to no change in beneficial ownership of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances):

1. Entering into arrangements for the sale or purchase of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, with the intent or purpose of potential market manipulation, where there is no change in beneficial interests or market risk or where the transfer of

beneficial interest or market risk is only between parties who are acting in concert or collusion with the view of misleading the market as too the occurrence of legitimate trading activity – usually known as wash trades.

2. Engaging in a transaction or series of transactions which are shown on a public display facility, with the intent or purpose of potential market manipulation, to give the impression of activity or price movement in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as painting the tape.

3. Transactions carried out as a result of the entering of buy and sell orders to trade at or nearly at the same time, with very similar quantity and the similar price, by the same party or different but colluding parties, with the intent or purpose of potential market manipulation, – usually known as improper matched orders.

4. Transaction or series of transactions, with the intent or purpose of potential market manipulation, designed to conceal the ownership of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances via the breach of disclosure requirements through the holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances in the name of a colluding party (or parties).The disclosures are misleading in respect of the true underlying holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances – usually known as concealing ownership.

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

1. Engaging in a transaction or series of transactions which are shown on a public dis-play facility and are a significant proportion of the daily volume of transactions, with the intent or purpose of potential market manipulation, to give the impression of activity or price movement in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as painting the tape.

2. Transactions carried out as a result of the entering of buy and sell orders to trade at or nearly at the same time, with very similar quantity and the similar price, by the same party or different but colluding parties, which represent a significant proportion of daily volume, with the intent or purpose of potential market manipulation, – usually known as improper matched orders.

3. Taking of a long position, with the intent or purpose of potential market manipulation, in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, with the intent or purpose of potential market manipulation, with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out, with the intent or purpose of potential market manipulation – usually known as pump and dump.

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

5. Entering large number of orders to trade and/or cancellations and/or updates to orders to trade, with the intent or purpose of potential market manipulation, so as to create uncertainty for other participants, slowing down their process and/or to camouflage their own strategy – usually known as quote stuffing.

6. Entering orders to trade or a series of orders to trade which represent a significant proportion of daily volume, whether or not they are executed, with the intent or purpose of potential market manipulation, intended to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out/open a position at a favourable price – usually known as momentum ignition.

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

1. Transactions or orders to trade, with the intent or purpose of potential market manipulation, carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.

2. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of the same financial instrument in another trading venue or outside a trading venue, related spot commodity contract, or an auctioned product based on emission allowances– usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue).

3. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest)with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue or outside a trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – usually known as cross-product manipulation (trading on financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue,). This example is relevant in the context of the extended scope of MAR and taking into account that the price or value of a financial instrument may depend on or may have an effect on the price or value of another financial

instrument or spot commodity contract. Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour

4. Buying or selling, with the intent or purpose of potential market manipulation, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, deliberately, at the reference time of the trading session (e.g. opening, closing, settlement) in an effort to increase, to decrease or to maintain the reference price (e.g. opening price, closing price, settlement price) at a specific level – usually known as marking the close.

5. Submitting multiple or large orders to trade, with the intent or purpose of potential market manipulation, often away from the touch on one side of the order book in order to execute a trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed will be removed, with the intent or purpose of potential market manipulation - usually known as layering and spoofing.

6. Entering large number of orders to trade and/or cancellations and/or updates to orders to trade, with the intent or purpose of potential market manipulation, so as to create uncertainty for other participants, slowing down their process and/or to camouflage their own strategy – usually known as quote stuffing.

7. Entering orders to trade or a series of orders to trade, executing transactions or series of transactions, with the intent or purpose of potential market manipulation, likely to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out/open a position at a favourable price – usually known as momentum ignition.

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

1. Entering of orders, with the intent or purpose of potential market manipulation, which are withdrawn before execution, thus having the effect, ~~or which are likely to have the effect~~, of giving a misleading impression that there is demand for or supply of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances at that price – usually known as placing orders with no intention of executing them.

2. Movement or storage of physical commodities, with the intent or purpose of potential market manipulation, which might create a misleading impression as to the supply of, or demand for, or price or value of, a commodity or the deliverable into a financial instrument or a related spot commodity contract. This ex-ample is relevant in the context of the extended scope of MAR

3. Movement of an empty cargo ship, with the intent or purpose of potential market manipulation, which might create a false or misleading impression as to the supply of, or the demand for, or the price or value of a commodity or the deliverable into a financial instrument or a related spot commodity contract. This example is notably relevant in the context of the extended scope of MAR.

4. Transactions or orders to trade, with the intent or purpose of potential market manipulation, carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.

5. Moving the bid-offer spread to and/or maintaining it at artificial levels, by abusing of market power, with the intent or purpose of potential market manipulation – usually known as excessive bid-offer spreads.
6. Entering orders to trade, with the intent or purpose of potential market manipulation, which improperly increase the bid (or decrease the offer) for a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in order to increase (or decrease) its price – usually known as advancing the bid.
7. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest)with a view to improperly influencing the price of the same financial instrument in another trading venue or outside a trading venue, related spot commodity contract, or an auctioned product based on emission allowances– usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue). This example is relevant in the context of the extended scope of MAR concerning the inter-linkages between trading venues.
8. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest)with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue or outside a trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – usually known as cross-product manipulation (trading on financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue). This example is relevant in the context of the extended scope of MAR and taking into account that the price or value of a financial instrument may depend on or may have an effect on the price or value of another financial instrument or spot commodity contract. Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour.
9. Submitting multiple or large orders to trade, with the intent or purpose of potential market manipulation, often away from the touch on one side of the order book in order to execute a trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed will be removed, with the intent or purpose of potential market manipulation - usually known as layering and spoofing.
10. Entering large number of orders to trade and/or cancellations and/or updates to orders to trade, with the intent or purpose of potential market manipulation, so as to create uncertainty for other participants, slowing down their process and/or to camouflage their own strategy – usually known as quote stuffing.
11. Entering orders to trade or a series of orders to trade, executing transactions or series of transactions, with the intent or purpose of potential market manipulation, likely to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out/open a position at a favourable price – usually known as momentum ignition.
12. Posting orders to trade, with the intent or purpose of potential market manipulation, to attract other market participants employing traditional trading techniques ("slow traders"), that are then rapidly revised onto less generous terms, hoping to execute profitably against the incoming flow of "slow traders'" orders to trade – usually known as smoking.

10. The following practices could relevantly clarify Indicator A(g) of Annex I of MAR (the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations):

1. Buying or selling, with the intent or purpose of potential market manipulation, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, deliberately, at the reference time of the trading session (e.g. opening, closing, settlement) in an effort to increase, to decrease or to maintain the reference price (e.g. opening price, closing price, settlement price) at a specific artificial level – usually known as marking the close.

2. Buying of positions, also by colluding parties, with the intent or purpose of potential market manipulation, of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, on the secondary market, after the allocation in the primary market in order to post the price to an artificial level and generate interest from other investors – usually known as colluding in the after-market of an Initial Public Offer where colluding parties are involved.

3. Transactions or orders to trade, with the intent or purpose of potential market manipulation, carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances – usually known as creation of a floor in the price pattern.

4. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of the same financial instrument in another trading venue or outside a trading venue, related spot commodity contract, or an auctioned product based on emission allowances– usually known as inter-trading venues manipulation (trading on one trading venue or outside a trading venue to improperly position the price of a financial instrument in another trading venue or outside a trading venue). This example is relevant in the context of the extended scope of MAR concerning the inter-linkages between trading venues.

5. Undertaking trading or entering orders to trade, with the intent or purpose of potential market manipulation, in one trading venue or outside a trading venue (including entering indications of interest) with a view to improperly influencing the price of a related financial instrument in another or in the same trading venue or outside a trading venue, related spot commodity contract, or a related auctioned product based on emission allowances – usually known as cross-product manipulation (trading on financial instrument to improperly position the price of a related financial instrument in another or in the same trading venue or outside a trading venue). This example is relevant in the context of the extended scope of MAR and taking into account that the price or value of a financial instrument may depend on or may have an effect on the price or value of another financial instrument or spot commodity contract. Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour.

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

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

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

1. Dissemination of false or misleading market information, with the intent or purpose of potential market manipulation, through the media, including the internet, or by any other means, which results ~~or is likely to result~~ in the moving of the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.

2. Opening a position, with the intent or purpose of potential market manipulation, in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and closing it immediately after having publicly disclosed it putting emphasis on the long holding period of the investment – usually known as opening a position and closing it immediately after its public disclosure.

3. Taking of a long position, with the intent or purpose of potential market manipulation, in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, with the intent or purpose of potential market manipulation, with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out, with the intent or purpose of potential market manipulation – usually known as pump and dump.

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

5. Transaction or series of transactions, with the intent or purpose of potential market manipulation, designed to conceal the ownership of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances via the breach of disclosure requirements through the holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances in the name of a colluding party (or parties).The disclosures are misleading in respect of the true underlying holding of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances – usually known as concealing ownership.

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

1. Dissemination of false or misleading market information, with the intent or purpose of potential market manipulation, through the media, including the internet, or by any other means, which results ~~or is likely to~~ result in the moving of the price of a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.

2. Taking of a long position, with the intent or purpose of potential market manipulation, in a financial instrument, related spot commodity contract, or an auctioned product based on emission allowances and then undertaking further buying activity and /or disseminating misleading positive information about the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, with the intent or purpose of potential market manipulation, with a view to increasing the price of the financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, by the attraction of others buyers. When the price is at an artificial high level, the long position held is sold out, with the intent or purpose of potential market manipulation, – usually known as pump and dump.

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

DETAILED REMARKS ON RELATED INDICATORS (draft advice on delegated act point 13)

Regarding the indicators in point 13, we would like to make the following particular comments.

The indicators in point 13 (page 19-21) are helpful in a general sense. We also welcome the introductory paragraph that states that the examples provided are non-exhaustive and that 'They shall not necessarily be deemed in themselves to constitute market manipulation but shall be taken into account where transactions or orders to trade are examined.' However a number of clarifications is needed.

In this vein, and in addition to the explanations made in the above section regarding the examples (ESMA draft advice points 3-12) which are often relevant to the indicators as well (ESMA draft advice point 13), we provide below further detailed explanations and make drafting suggestions for the explanatory opening paragraph of the point 13 and for the indicators included in that point.

Legitimate purpose

To reiterate, 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. We note indicators are extremely broad and require clarification that they may indeed have a legitimate purpose, especially indicators (a), (b), (c), and (e).

Likely

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), (p) 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.

Intent

In addition to the general remarks made above on the need to include the element of intent, we would like to specify that eg signals (f) and (g), among other signals, ought to refer to intent in order to indicate market manipulation, with a phrase like 'with the intent or purpose of', or in the same way the activity in point 9.1. on page 16 has the element of effort and the indicator in point 13 (d) includes the condition of 'no other apparent justification.' We believe that the delegated acts should follow more closely the CESR advice, which already included the element of intent in many instances. We provide mark-up suggestions below.

RELATED INDICATORS – mark up suggestion

Please note that the suggested mark up does not necessarily address all the issues that would need to be considered to ensure legal clarity in the Level 2 piece of law.

Related indicators of market manipulation

13. The following indicative, non-determinative and non-exhaustive indicators of market manipulation are related to the examples of practices and can relevantly clarify them, thus specifying further the indicators of Annex I of MAR.

The non-exhaustive lists of related indicators are to be evaluated on a case by case basis in determining whether market manipulation has occurred. They do not replace the full and thorough analysis to be conducted in relation to any suspicious activity or behaviour

They shall not necessarily be deemed in themselves to constitute market manipulation but shall be taken into account where transactions or orders to trade are examined by market participants and competent authorities. The following indicators are linked to one or more examples of practices of market manipulation as provided above but the relations described below are not limitative.

Where an example or an indicator seems to require that a conduct be characterized by a manipulative intent, this does not imply that, in the absence of any intent that conduct may not fall within the scope of the definition of market manipulation.

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.

There are examples of practices that actually might be deemed licit if, for in-stance, they are determined by legitimate reasons or are in compliance with laws and regulations (for example, because in conformity with the rules of the relevant trading venue; buy-back programmes and stabilization; legitimate arbitrage).

There are numerous other circumstances that may be relied on as establishing that orders or transactions are for a legitimate purpose.

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 points 4-12, such as agency cross transactions.

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.

Absent manipulative intent hedging in related markets is not market manipulation and is a legitimate behaviour.

As acknowledged by Recital 42 of MAR, a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned. It is nonetheless stressed that as highlighted by Recital 39 of MAR, the persons who act in collaboration with others to commit market abuse should also be liable for such practice or behaviour.
Regarding a "person who acts in collaboration with others" as referred to in recital (18a) of MAR, 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 should not 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. In such circumstances, "collaboration" will not be established.

a) Unusual concentration of transactions and/or orders to trade in a particular financial instrument, related spot commodity contract, or an auctioned product based on emission allowances, with the intent or purpose of potential market manipulation. This indicator can be relevant for the purpose of, namely, examples described in paragraphs 4(1) or 6(1) or for an additional practice known as ping orders (entering small orders to trade in order to ascertain the level of hidden orders and particularly to assess what is resting on a dark platform).

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

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

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

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

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

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

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

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

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

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

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

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

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

o) Transactions or orders to trade, with the intent or purpose of potential market manipulation, which have the effect of, ~~or are likely to have the effect of~~, maintaining the price of an underlying financial instrument, related spot commodity contract, or an auctioned product based on emission

allowances, below/above a strike price or other element used to determine the pay-out (e.g. barrier) of a related derivative at expiration date. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 4(2), 5(2), 5(3), 5(4) or 8(4).

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

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

r) Entering orders to trade or transactions, with the intent or purpose of potential market manipulation, before or shortly after the market participant or persons publicly known as linked to that market participant produce or disseminate contrary research or investment recommendations that are made publicly available. This indicator can be relevant for the purpose of, namely, practices described in paragraphs 12(10, 12(2) or 12(3).

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

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

In general, we believe that there is no need to add any further indicators.

Separately, we would like to make a general point that the MAR definition of benchmarks potentially includes a wide scope of benchmarks, ranging from critical benchmarks such as 'LIBOR' to proprietary (customised) indices. Such a wide scope would make it difficult to define practical implications for implementation. We remain available to discuss this issue further and consider potential solutions to address it.

In particular, customised indices should properly be seen as being designed only for bespoke investment products and in many cases are an embedded part of bespoke offering rather than being an underlying that is widely available and accessible to the wider public. They are often put together at client's request and can have limited usage depending on the given trading strategy. In addition, the customised indices will in many cases be subject to requirements of the particular regime that applies to the investment product. For example, under Prospectus Directive securities linked to a normal customised index are subject to a specific requirement for a review of that index by the competent authority for the relevant prospectus. Similarly, UCITS regulation imposes specific requirements for customised indices to which UCITS funds may be linked. Moreover, most customised indices would not rely on any form of third party submissions.

Furthermore, when looking at behaviour concerning benchmarks, we would welcome ESMA considering the July 2013 IOSCO Principles for Financial Benchmarks, the September 2012 UK Wheatley Review, the November 2012 Principles for Financial Benchmarks produced by the Global Financial Markets Association. The EU regulation on benchmarks has not been adopted yet. Therefore, it is even more imperative to take into account the fact that without knowing the scope, basis or proportionality of the underlying legislation it is challenging to fully consider the implementation and scope of application of MAR to all benchmarks.

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

No. In our understanding phishing is a criminal offence where sensitive information is acquired through masqueraded electronic communication. Insofar this is covered under insider dealing when the relevant inside information was acquired through criminal activities (pursuant to Art. 8(4)(d) MAR). We are concerned that to place this practice as an indicator for market manipulation is not supported by the Level 1 text and would also be misleading.

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

We believe that there is no peculiar need to refer to OTC transactions in the context of cross-product manipulation and inter-trading venue manipulation.

Should the reference to the cross-venue and cross-product manipulation be retained, an important point that we would like to raise, in addition to intent, is hedging. When a market participant is entering into an OTC derivative transaction, the bank would hedge it for instance via futures or underlying instruments. We would be concerned if that would be covered by the indicators of market manipulation. For the moment the language on cross-market manipulation is quite broad and could raise questions of legal certainty in this respect. We would welcome an explanation that this would be a legitimate behaviour to hedge client orders. In particular, we would suggest the following sentence to be added in examples of cross-product or cross-venue/OTC market manipulation and in the introductory parts in points 3 and 13: 'Absent manipulative intent, hedging in related markets or instruments is not market manipulation and is a legitimate behaviour.'

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

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

In general we would like to underline that the proposed rules should take into account the REMIT requirements and the work that has been already done by the concerned market participants to comply with REMIT. However, this should not necessarily always mean the same rules.

For instance, MAR implementing measures should allow the relevant market participants to use the same *data* as those gathered for REMIT for the calculation of the disclosure threshold. However, as the CP underlines, REMIT calculates the threshold on per installation basis, while MAR refers to the market participant level, potentially grouping several installations. The relevant EAMP should be allowed to do the threshold calculation (as well as meet the public disclosure obligation) based on the aggregation of data already collated for the purpose of REMIT compliance.

We would also welcome a number of clarifications on the suggested thresholds.

The obligation under Art 17.2 of MAR to publicly disclose inside information applies to emission allowances market participants (EAMP). We welcome that the draft technical advice retains the reference to the EAMP as the entity on which the obligation is imposed. However the ESMA consultation paper in its analytical part on page 26 in footnote 16 refers to 'company'. ESMA consultation paper also refers to 70 companies being captured by the 6 million tones of CO2 a year threshold. To ensure legal clarity we would welcome an explanation whether ESMA considers an EAMP to refer to a legal entity or a group.

We would also welcome additional clarifications on how the two proposed threshold were set, for instance on how the equivalence between the thresholds was determined. We are concerned that looking only at coal-powered electricity production for the threshold equivalence determination would not be sufficient. The coal-powered electricity production based thresholds may be not equivalent for other types of activities.

Furthermore, we also suggest that the disclosure threshold of 1050MW rated thermal input has been set too low, as based on the analysis by consultants Europe Economics and Norton Rose Fulbright for impact assessment on threshold for disclosure of non-public information on emission allowances. http://ec.europa.eu/clima/policies/ets/oversight/docs/ee_and_nrf_analysis_en.pdf.

It appears that the contractors report which determined the 1050MW figure has used a conversion factor for CO2/MWh of electricity output rather than the correct measure of CO2/MWh fuel input.

The commonly used conversion factors for different fuels (kg CO2 produced from kWh of the fuel) can be found here: http://www.volker-quaschning.de/datserv/CO2-spez/index_e.php.

Factors for certain fuels are also provided by Carbon Trust and can be found here: http://www.carbontrust.com/media/18223/ctl153_conversion_factors.pdf.

Using the aforementioned measure of fuel input, 1050MW of rated thermal input is equivalent to at most, 3 million tonnes of CO2 per year, and not 6 million tonnes as stated in the Consultation Paper. As such, it is our opinion that the 1050MW threshold at which the disclosure obligations become applicable should be *at least* doubled so that it is equivalent to 6 million tonnes CO2 per year. We would refer to EFET and support their detailed explanations.

We would also like to underline that in our opinion, the thresholds apply cumulatively (and not alternatively) and thus the disclosure requirements only apply if both thresholds are exceeded, given that Article 17.2 (Paragraph 2) indicates a cumulative application by using the word 'and'.

In general, regarding the level of the threshold it should not be set too low to ensure that only the relevant information is disclosed to the market.

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

We are not aware of any entity-specific information relevant for price formation or investment decisions in the EU emission allowances market, in addition to what is already disclosed under REMIT. In recent years, non-public information that have most contributed to price formation in this market were information related to policy developments and regulatory changes.

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

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

We agree with the proposal for the notification of delays in emission allowances.

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

No comment.

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

No comment.

Managers' transactions

We support AFME on this section.

In addition, it might be considered whether the language of the relevant drat advice on the delegated act should be reviewed, in particular as to:

- the appropriateness of some technical suggestions for OTC derivatives and
- the applicability of the vocabulary used to asset classes other than venue traded securities, eg OTC derivatives.

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

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

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

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

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

Reporting of infringements

We support AFME on this section.

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

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

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

- *compliance with data retention periods and notification requirements for data processing;*
- *protection of the rights related to data processing;*
- *security aspects of the data processing operation; and*
- *conditions for the management of reporting mechanisms (including limitations of cross-border data transferral)?*

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

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