esma European Securities and Markets Authority

Reply form for the ESMA MAR Technical standards

20 August 2014

European Securities and Markets Authority

Date: 20 August 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Draft technical standards on the Market Abuse Regulation (MAR), published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_MAR_TS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **15 October 2014**.

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

Naming protocol - In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_MAR_CP_TS_NAMEOFCOMPANY_NAMEOFDOCUMENT: e.g.if the respondent were ESMA, the name of the reply form would be ESMA_MAR_CP_TS_ESMA_REPLYFORM or ESMA_MAR_CP_TS_ESMA_ANNEX1

Publication of responses

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

Data protection

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

General information about respondent

Are you representing an association?	Yes
Activity:	Audit/Legal/Individual
Country/Region	UK

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>
The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This response has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

< ESMA_COMMENT_MAR_TA_1>

II. 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.

<ESMA_QUESTION_MAR_TS_1>
Disclosure to competent authorities

We do not agree that Article 5(3) of Regulation 596/2014 (**"MAR"**) must be interpreted as mandating reporting to the national competent authorities of multiple venues. The alternative description of the venue (note the use of the singular in all language versions) – on which the shares have been admitted to trading or are traded – was included to cater for trading on OTFs and MTFs where there is no formal process of "admission" to trading. Had the legislators intended to create an explicit requirement to report to every trading venue on which shares are traded, Article 5(3) of MAR would have provided as follows:

> "In order to benefit from the exemption provided for in paragraph 1, the issuer shall report to the competent authority of the trading venues/each trading venue on which the shares have been admitted to trading or are traded each transaction relating to the buy-back programme, including the information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of Regulation (EU) No 600/2014."

This question of interpretation assumes particular importance because the legislators, and MAR itself, have expressly recognised that shares may be traded on an MTF or an OFT without the issuer's request or approval, and acknowledge that issuers should not be required to make notifications to the competent authorities of MTFs or OFTs in respect of which the issuer has not approved trading of its shares or requested admission to trading of its shares. It is for this reason that Article 17(1) of MAR limits public disclosure requirements to issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State.

Whilst the language used in Article 3(1) of the draft RTS in Annex IV of CP 2014/809 (**"the draft RTS"**) does limit the requirement for public disclosure of details of buy-back programmes to Member States in which an issuer has requested admission of its shares to trading on a Regulated Market or a Multilateral Trading Facility, no equivalent limitation applies in respect of trade reporting obligations – we assume as a result of the (in our view mistaken) interpretation of Article 5(3) described above. A proviso equivalent to that in Article 3(1) of the draft RTS should apply in respect of trade reporting obligations.

Requiring issuers to report trades to the competent authorities of those MTFs in respect of which the issuer has not approved trading of its shares or requested admission to trading of its shares will impose a very significant and disproportionate burden on issuers, and most particularly on SMEs whose shares are more likely to be traded on MTFs or OTFs. We do not believe this is what the legislators intended.

Buy-backs undertaken through derivatives

Article 5(1) of MAR provides that the prohibitions in Articles 14 and 15 (insider dealing and market manipulation) will not apply to trading in own shares in "buy-back" programmes. This Article replicates the provisions of Article 8 of Directive 2003/6/EC (**"MAD"**) in respect of buy-backs. The MAD Implementing Regulation 2273/2003 expressly recognises, in Article 5(1) third paragraph, that the purchase of own shares can be effected through derivative financial instruments (pursuant to contracts resulting in the physical delivery of shares), and further specified the price limitations with which the issuer should comply to fall under the safe harbour.

ESMA appears to have concluded that the text of MAR necessarily excludes the purchase of own shares undertaken through derivatives trading from the buy-back safe-harbour. We understand that ESMA has reached this conclusion by contrasting the reference to trading in own shares in buy-back programmes in Article 5(1) of MAR with the reference in Article 5(4) of MAR to trading in "securities or associated instruments" for the stabilisation of securities; notwithstanding the fact that MAD and Implementing Regulation 2273/2003 make a similar distinction between trading in own shares for buy-backs, and the stabilisation of a financial instrument.

This restrictive interpretation of trading in own shares adopted by ESMA, as reflected in recitals (2) and (3) of the draft RTS, would significantly reduce the scope of the existing buy-back safe harbour. It may also undermine the effectiveness of the restrictions which ESMA seeks to impose under Article 5(1) of the draft RTS.

We consider that the purchase of own shares, effected through derivative instruments, should fall within the safe harbour, provided that appropriate disclosure, volume and price limitation, and reporting requirements are set and complied with.

OTC trades
Article 4(1) of the draft RTS seeks to restrict the buy-back safe-harbour to transactions carried out on a trading venue where the shares are admitted to trading or traded. Where the buy-back purchases are effected would appear unimportant as long as the appropriate disclosure, volume and price limitation, and reporting requirements are complied with. Trades not executed on a trading venue could be reported to the relevant competent authorities and identified as OTC for the purposes of the public disclosure of aggregated volume per day and per venue.

Per-venue volume limit

We recognise that the primary policy aim of the conditions is to ensure that the issuer does not dominate trading by executing excessive volumes. Using a per-venue 25% limit has the merit of providing a clear and readily applicable approach, and protects the stability of the individual venue. We would however encourage ESMA to consider the impact of a per-venue volume limit for companies subject to requirements that restrict them to making repurchases on particular types of venue.
<ESMA_QUESTION_MAR_TS_1>

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

<ESMA_QUESTION_MAR_TS_2>
Article 7(1)(d) of the draft RTS suggests that the identity of the stabilisation manager need only be disclosed if known at the time of publication. We consider that the text of Implementing Regulation 2273/2003 more accurately reflects ESMA's policy intention:

> "(d) the identity of the stabilisation manager, unless this is not known at the time of publication in which case it must be publicly disclosed before any stabilisation activity begins."

Article 5(5) of MAR requires that all stabilisation transactions be notified by issuers, offerors, or entities undertaking the stabilisation, whether or not they act on behalf of such. persons, to the competent authority of the trading venue. Article 7.3 of the draft RTS recognises that the issuer, offeror and entities undertaking the stabilisation may appoint one amongst them to take responsibility for pre-stabilisation disclosure (in practice a 'stabilisation coordinator'). It would be helpful if Article 7.3 of the draft RTS clarified that post-stabilisation public disclosure can also be made by that person/entity.

It is unclear whether it is ESMA's intention that ancillary stabilisation should be undertaken in accordance with Article 8 (price conditions) – as Article 9 of the draft RTS currently proposes - or rather in accordance with Article 7 (disclosure and reporting conditions), as Article 11 of MAD Implementing Regulation 2273/2003 currently provides. Assuming that the latter is the intention, we note that overallotment

occurs once only at the time the securities are issued at the fixed price recognised in Article 9(a) of the draft RTS. It seems to us that for the avoidance of uncertainty or confusion, specifically tailored disclosure and reporting conditions should be applied in respect of ancillary stabilisation.

The reference in Article 9(e) of the draft RTS to the required stabilisation period should cross-refer to Article 6 rather than Article 7.

We consider that Article 10 of the draft RTS is unnecessary in so far as it relates to sell transactions given that stabilisation is defined in article 3(2)(d) as a purchase or offer to purchase. If Article 10 is to be included in the draft RTS, the recitals should make clear that the act of selling securities, or purchasing securities after such sales, will not of itself be deemed abusive solely because it falls outside the scope of the safe-harbour.
<ESMA_QUESTION_MAR_TS_2>

III. Market soundings

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

<ESMA_QUESTION_MAR_TS_3>
At the recent Open Hearing, ESMA stated that the market soundings provisions were not a safe harbour. We disagree with that approach. It is important that the industry have certainty that a market sounding which is carried out in accordance with the requirements set out in the Regulation, and by ESMA, would not amount to improper disclosure in breach of Article 10(1). We consider that the intention of the Regulation must have been to create conditions under which market participants could conduct market soundings with clarity as to this position. Article 11(4) expressly states that "For the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article". We urge ESMA to reconsider this point.

We recognise that Article 11(3) of MAR requires the keeping of a written record of its consideration of whether (or not) any market sounding will involve the disclosure of inside information. ESMA has not been given a mandate to prescribe any standards in respect of this record, although we note that the text currently set out in the proposed Article 12(2) of the draft RTS would be helpful as guidance.

The provisions in Article 12(2) and 12(5) of the draft RTS contain overlapping provisions requiring a written record of the explanation of the disclosing market participant (**"DMP"**)'s conclusion as to whether a market sounding will involve the disclosure of inside information. This appears unnecessary, but as indicated above, we consider that the contents of Article 12(2) should not be within the RTS, but rather form part of ESMA guidance.
<ESMA_QUESTION_MAR_TS_3>

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?

<ESMA_QUESTION_MAR_TS_4>
We do not agree with the proposal for the standard template for scripts in respect of soundings which do not involve the communication of inside information.

Article 13(1) of the draft RTS purports to require the use of a script for any market sounding (including sounding that do not involve the communication of inside information as set out in Article 13(1)(iii). Article 11(9) of MAR empowers ESMA to develop draft regulatory technical standards for persons to comply with the requirements laid down in paragraphs 4, 5, 6 and 8. Paragraphs 4, 5, 6 and 8 all relate to sounding involving the communication of inside information).

We note ESMA's suggestion in paragraph 91 of Consultation Paper 2014/809 that it is appropriate to apply record keeping requirements for market soundings where the DMP categorises the information as not inside information "in order to allow the DMP to avail itself of the protection under Article 11 also under these circumstances". With respect, this reasoning is flawed: ESMA does not have the power to hold out the promise of protection under Article 11 of MAR in such circumstances – the DMP will inevitably have failed to comply with Article 11(5)(a) of MAR and accordingly will fall outside the ambit of the statutory deeming provision in Article 11(4) of MAR.

We also consider that the simplified script templates to be used in accordance with Article 13(2) of the draft RTS could be further simplified.
<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>
It would be helpful if ESMA would confirm that the records that the disclosing market participant must maintain in respect of market soundings are limited to the names of the firms and employees sounded, the date and time of the sounding and of any follow-up communications, and the contact details used for the sounding as set out in Article 14(1) of the draft RTS. It would also be helpful if ESMA would confirm that it does not consider that persons who have been sounded to be "persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies" pursuant to Article 18(1) of MAR. If ESMA does consider that persons sounded fall within the scope of Article 18(1) of MAR, then the requirement for a separate sounding list to be kept under Article 14(1) of the draft RTS is duplicative and not in accordance with better regulation principles.
<ESMA_QUESTION_MAR_TS_5>

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?

<ESMA_QUESTION_MAR_TS_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_6>

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

<ESMA_QUESTION_MAR_TS_7>
We consider that if a market sounding beneficiary were to participate in a market sounding call with a disclosing market participant mandated to undertake the sounding, the market sounding beneficiary should not be required to record the conversation as well as the disclosing market participant. Such a requirement would be a particularly burdensome requirement for SMEs. Similarly, where there are multiple participants on the call, it should be acceptable that they should agree that one party take responsibility for recording the call.
<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>
It would be helpful to clarify that the provisions in Article 11(3)(d) of the draft RTS relate to the inside information to be disclosed in the course of the market sounding.

Article 11(9) of MAR empowers ESMA to develop draft regulatory technical standards with which persons wishing to benefit from the statutory protection in Article 11(4) of MAR must comply, but does not empower ESMA to impose more extensive record-keeping requirements on DMPs. <ESMA_QUESTION_MAR_TS_8>

IV. Accepted Market Practices

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

<ESMA_QUESTION_MAR_TS_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_9>

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?

<ESMA_QUESTION_MAR_TS_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_10>

V. Suspicious transaction and order reporting

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

<ESMA_QUESTION_MAR_TS_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>
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<ESMA_QUESTION_MAR_TS_13>

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

<ESMA_QUESTION_MAR_TS_14>
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<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>
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<ESMA_QUESTION_MAR_TS_15>

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

<ESMA_QUESTION_MAR_TS_16>
In our view, there is great uncertainty as to the requirement to record and retain records generally relating to near misses. We consider that there should be a clear distinction between what amounts to insider information and non-inside information. However, it is not clear how "near" a miss needs to be for it to count as a near miss. For example, if a piece of information passes all of the tests necessary to be inside information, but it is already public, it would not generally be the case that passing on such information would be considered to be a near miss. However, if a piece of information passed all of the tests other than the fact that it was not considered to be price-sensitive, or information that a reasonable investor would use in making investment decisions, then it might be more common to treat the information as a near miss. At the moment, in the UK, the requirement to keep records of near misses is not set out in legislation but it is, on occasions, considered good practice by a regulator. This gives firms considerable scope to take a practical approach to what amounts to a near miss. Encapsulating the idea of near misses in legislation requires precision in the drafting in order to be clear on what information is captured. This is particularly important given the new requirements relating to the use of scripts, and the creation of records, for non-inside information (for example, in the context of a market sounding).

Therefore, we consider that ESMA needs to give detailed guidance to firms on what amounts to near misses, or to remove the concept from its guidance. If the concept is to be retained, we think that the

additional clarity should focus on (1) the necessity for the information at least to be subject to some duty of confidentiality (which might be being broken through sharing that information) and (2) which parts of the definition of inside information must be lacking before the information can be considered to be a near miss.
<ESMA_QUESTION_MAR_TS_16>

VI. 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?

<ESMA_QUESTION_MAR_TS_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_17>

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?

<ESMA_QUESTION_MAR_TS_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_18>

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?

<ESMA_QUESTION_MAR_TS_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_19>

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

<ESMA_QUESTION_MAR_TS_20>
Article 4(1)(b) the draft RTS at Annex VII is less clear than the level 1 provision in Article 17(1) of MAR. We do not consider that requiring inside information to be held separately from regulatory announcements will be helpful to investors, and it would be disproportionately burdensome for issuers. The policy aim can be achieved simply by requiring the information to be an located in easily identifiable section of the website that does not include information pertaining to the marketing of the issuer's activities.

Article 5(3)(c) of the draft Regulation (Annex VII) seems unduly prescriptive and burdensome in so far as it appears to require an issuer to set out in detail how its policies and processes have been applied in practice in each case. We consider that in the majority of cases, a general description of the information barrier procedures and processes should be sufficient.

<ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>
Article 7(1)(a) is likely to present issuers with considerable challenges (it will often be difficult to determine the exact date when inside information came into existence). A clearer and more readily applicable test might be the date when the issuer or EAMP became aware of the inside information. Similarly, the

date on which the issuer or EAMP is likely to publish inside information will in most cases be event driven – specifying the relevant event might prove a more useful record.

The clarification at paragraphs 107 and 110 of ESMA's approach to cleansing announcements is helpful. We would invite ESMA to take account of the practical considerations it describes in those paragraphs in implementing procedures and record keeping requirements upon issuers in respect of delays in disclosure of inside information. We note in particular that the approach taken by ESMA in paragraphs 107 to 110 does not appear to accord completely with the statement in paragraph 270 that issuers should "ensure that inside information is eventually disclosed in an appropriate manner, although we recognise that information about a failed transaction will eventually cease to be information that would be of any relevance to a reasonable investor.
<ESMA_QUESTION_MAR_TS_21>

VII. Insider list

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

<ESMA_QUESTION_MAR_TS_22>
No. To require issuers and their advisers to assemble, keep up to date and keep secure the enormous amount of personal data set out in the elements will be a considerable and costly administrative burden and is wholly disproportionate.

Only a very small proportion of transactions become the subject of initial regulatory inquiries, and even fewer become the subject of investigations, or enforcement actions. Whilst we do not have access to the requisite statistics, which national competent authorities should be able to provide, our sense is that likely is that fewer than 1% of insider lists are called for.

The proposed requirements also constitute a disproportionate and unnecessary invasion of the privacy of the employees concerned. Typically, personal data of this nature is maintained confidentially within personnel/HR departments. However, to enable insider lists to be maintained up to date during the currency of a transaction, the list would need to be maintained by the transaction team, which is not trained to process sensitive data of this nature. Securing this data from misuse and potential identity theft is also likely to prove a significant issue.

Furthermore, the requirement to maintain the lists with that level of personal data for 5 years is likely to conflict with the Commission's new proposals to enshrine a right to be forgotten.

The Commission's Data Protection legislation envisages that personal data must be "adequate, relevant, and **limited to the minimum necessary** in relation to the purposes for which they are processed" and "only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data."

The details which ESMA proposes to specify go far beyond what is required to fulfill the policy intention of Article 18.3(a) of MAR which is to identify any person having access to inside information and in our view cannot be justified with the data protection requirements. We note that the elements appear to be being required for the convenience of regulatory enforcement, which, as noted above, is likely to require access to only a very small proportion of the total number of insider lists ESMA proposes should be retained.

We believe that the personal information which should be required to be kept in the lists should be limited to the name (first name, surname, birth surname), job description, business address, business emails, company landlines and company mobiles, which should, in most cases, be sufficient to identify the relevant individuals. Authorities who wish to investigate a particular transaction or individual should then be able to request further information as needed for the purposes of the specific inquiry or investigation.

We also note that the level of detail required will effectively negate any relief that Article 18(6) of MAR had intended to confer on SMEs, who will in any event need to maintain the information in 11(3) (a) and (c) in order to be able to produce the information on request.
<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>
No. Most issuers maintain a general list which only includes persons who have general access to inside information because of their role or their seniority, and transaction-specific or event-based list or lists. ESMA's proposals should allow issuer to maintain a combination of these rather than requiring one or the other to be kept.

The draft RTS should provide that where a person acting on behalf of an issuer keeps their own insider list, the issuer need only keep a record of the fact that employees of that person also have access to the inside information.
<ESMA_QUESTION_MAR_TS_23>

VIII. Managers' transactions format and template for notification and disclosure

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

<ESMA_QUESTION_MAR_TS_24>
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_25>

IX. Investment recommendations

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"?

<ESMA_QUESTION_MAR_TS_26>
Scope

ESMA states in paragraph 349 that the concepts of "investment recommendation" and "information recommending or suggesting an investment strategy" are understood to include research, morning notes and technical analysis. The concepts cannot automatically cover these items, whether or not they do must depend upon their substantive content and whether they are intended for distribution channels or for the public. In particular the phrase "technical analysis" is capable of applying to a wide range of materials which would not be "recommendations" as defined and for which, if it were always regarded as such, the current Level 2 requirements would not necessarily be appropriate.

We assume that ESMA is saying that, in the light of its comments in paragraph 363, research and morning notes should be regarded as intended for distribution channels, and that this is a change from the position under Recital 3 of the current Market Abuse Investment Recommendations Directive, which is not included in the new draft. We express no view on the policy position, but note that there is a lack of legal certainty in the current proposal. In particular it is not clear to us why morning notes should necessarily be seen as intended for distribution channels or the public if they are only sent to a few clients. To address the issue raised by ESMA it might be more appropriate to require that, where relevant, it should be made clear to the client that the material sent to it is neither a MiFID personal recommendation nor research which has been produced in accordance with MAR.

We therefore understand ESMA's comments in paragraph 349 to refer to the "distribution channels" aspect in the definitions of " investment recommendation" and "information recommending or suggesting an investment strategy", as we do not consider there is any substantive difference between the current and future concepts of "investment recommendation" and "information recommending or suggesting an investment strategy" and if there were, then it is unlikely that the current Level 2 measures provide an appropriate benchmark.

Introduction of "expert" category

We disagree with the introduction of the proposed "expert" category. Its creation has the effect of altering the Level 1 legislation so that an additional category of person is included into the list in Article 3 (1) (34) (i). We do not think that Level 2 legislation can do this, nor do we think it is necessary.

If there are to be two categories within Article 3 (1) (34) (ii), then this should not be achieved by creating an "expert" category which is subjected to requirements which are identical to persons falling within Article 3 (1) (34) (i). The issue seems to arise out of a concern about the wide range of persons now potentially caught, given that the new regime does not refer to only "relevant persons". Thus it would be more appropriate to keep the existing rules for persons within Article 3 (1) (34) (i) who currently fall within the concept of "relevant persons" and to have a more bespoke and limited regime for others.

In any event, even if the expert concept is retained, the only requirements imposed on an expert should be those which relate to the direct proposal of particular investment decisions. The Regulation only applies to non-qualified persons who directly propose a particular investment decision and any additional provisions

imposed on "experts" should therefore apply to this activity. Otherwise the Level 2 legislation effectively changes the meaning of the Level 1 legislation.
<ESMA_QUESTION_MAR_TS_26>

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?

<ESMA_QUESTION_MAR_TS_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_27>

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

<ESMA_QUESTION_MAR_TS_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_28>

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.

<ESMA_QUESTION_MAR_TS_29>
Article 4 (3) – we think that the information required by paragraph (b) should also be included in this list.
<ESMA_QUESTION_MAR_TS_29>

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.

<ESMA_QUESTION_MAR_TS_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_30>

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

<ESMA_QUESTION_MAR_TS_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_31>

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?

<ESMA_QUESTION_MAR_TS_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_32>

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?

<ESMA_QUESTION_MAR_TS_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_33>

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

<ESMA_QUESTION_MAR_TS_34>
Article 6 (a) – it seems to us that the recommendation itself might not indicate the identity of the disseminator. We believe the important issue is that the disseminator makes their identity clear and prominent, whether or not it is in the recommendation itself. We appreciate that this would be a clarification of the existing Implementing Directive.
<ESMA_QUESTION_MAR_TS_34>

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?

<ESMA_QUESTION_MAR_TS_35>
We understand the limited comments to which ESMA refers in paragraph 412 to relate to cases where research magazines obtain broker reports and reproduce sections of the "investment advice". In our view it would be excessive and unnecessary to treat all reporting as "disseminating substantially altered investment recommendations", the context is what matters. Where the situation concerns reporting on what is clearly a more detailed publication, then we do not believe that publication of extracts by news disseminators should be considered a substantial alteration provided that the substance of the recommendation is not altered. In such a situation the position is clear to the viewers/listeners, they are not "misled".
<ESMA_QUESTION_MAR_TS_35>