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>
INTRODUCTION

This response has been prepared jointly by the MAR Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales.

The City of London Law Society ("**CLLS**") represents approximately 13,000 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 17 specialist committees.

The Law Society of England and Wales is the representative body of over 159,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The MAR Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on public markets.

We are taking this opportunity to comment generally on the relationship between the commentary in the CP and the draft Regulations/technical advice; to comment on certain of the questions and to suggest drafting changes to the draft implementing Regulations and draft technical advice, where we would hope our contribution may be useful. We have not sought to comment on all the questions or on all the matters discussed in the CPs or on all the draft implementing Regulations and draft technical advice.

GENERAL

We are concerned that the burden proposed to be placed on issuers is disproportionate, costly on an on-going basis, and impractically burdensome and that not enough thought has been given to the different position of issuers and PDMRs compared to regulated firms. We urge ESMA to rethink its approach to this. We believe ESMA has underestimated the effect of some of its proposals on issuers, PDMRs and the non- regulated advisers of issuers and that the proposals create requirements which are not needed to prevent misuse of inside information.

We are not sure what the status is of text in the consultation paper which is not reflected in the draft Technical Advice or which appears to be inconsistent with it, but in practice we think it is possible that ESMA commentary outside the Technical Advice will influence the approach of supervisory authorities and so we believe that ESMA should take care that there are no inconsistences between the final text of the Technical Advice and ESMA's feedback in relation to it.

If you have any queries or would like to discuss please contact Victoria Younghusband: victoria.younghusband@speechlys.com.< 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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
Whilst it is clear from Article 11(4) and the last sentence of Recital (32) of the MAR that the market sounding regime in Article 11(3) and (5) is a safe harbour and not mandatory the draft Regulation implies that it is mandatory. Its status as a safe harbour should be made clear in the recitals to the Implementing Regulation.

We are concerned that the draft Regulation does not make any distinction between the categories of disclosing market participant. We believe strongly that it is not appropriate or proportionate for provisions and procedures which a regulated firm is required to have in any event (for example under MiFID) to apply to issuers. Issuers that are not themselves regulated would not have company recorded mobiles and landlines (paragraph 101). The Technical Standard should be rewritten so it is sufficient for the regulated firm that is the disclosing market participant acting for the issuer to keep the records and soundings lists for a market sounding in which the issuer participates.

Also, if there were a group of advisors conducting a market sounding, it is not clear whether they must each prepare a record and be subject to the same requirements. For example presumably only one of them needs to read the script. It would be helpful to include a concept of a lead person in relation to a particular market sounding if there is more than one firm represented e.g. on a conference call.

If an issuer is conducting the sounding on its own, without the involvement of a regulated firm, it would not have recorded lines and so could not comply with the sounding requirements. The requirements should therefore be modified in the case of an issuer conducting the sounding on its own, to allow the issuer to instead keep a written record of the call.

In answer to Q.3, in principle, yes we agree, but we consider that the standards need to be considered in conjunction with the guidelines for potential investors that have not yet been published. In paragraph 74, it is stated that "Information disclosed by a DMP should enable a potential investor to make a sufficiently informed assessment." We do not think this is correct. The purpose of the safe harbour is to allow inside information to be disclosed and there should not be any requirement to require further information to be disclosed. An issuer may not be willing or able, for confidentiality reasons and other reasons, to provide full information at an early stage but may still wish to a market sounding. Moreover, since investors should not be acting on the information given to them there should be no expectation as to the amount of information they are given. <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>
In Article 13.2, we do not think the simplified script is sufficiently simplified. Where there is an ongoing relationship more items could be removed from the standard script. Please also note that there is an error in the drafting of the current simplified script with the wording of iv d being repeated at the end of iv c.

Whilst it is arguable that Article 11.3 of MAR requires record keeping requirements to non-wall crossed sounding (but see our comments on Q.8 below), we do not in any event agree that a prescribed script is necessary to comply with those requirements.
<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>
TYPE YOUR TEXT HERE
<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>
No, see our answer to Q.8.

In addition, it is clear from Article 11(4) and the last sentence of Recital (32) of the MAR that the market sounding regime in Article 11(3) and (5) is a safe harbour and not mandatory and so compliance with the record keeping requirements should not apply where the market sounding does not involve inside information.<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>

No, we do not agree. As stated in our answer to Q3, in the draft Commission Regulation Article 11 should include wording to make it clear that an issuer should not have to comply with the requirements of Article 11.3 where the market sounding is being made with the involvement of another disclosing market participant. Article 11.3 assumes that the main purpose for having the inside information is the market sounding – but in the case of an issuer there may be others in the issuer who have to have access to the inside information, for example because they are involved in the planning and execution of the proposed transaction which is the subject of the market sounding. It will not be possible for issuers to limit the time when inside information is made available to employees such as the CEO or Finance Director to shortly before the moment the market sounding is made. This is also true for employees of advisers to the issuer who are likely to have been involved in advising the issuer on the proposed transaction from an early stage. If Article 11.3 remains as drafted an exclusion is needed for those who are advising the issuer, as opposed to merely taking part in a market sounding.<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>
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<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>
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<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>
TYPE YOUR TEXT HERE
<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>
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<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>
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<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>
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<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>
We note that Article 17(1) of the MAR states that "*the issuer shall not combine the disclosure of inside information to the public with the marketing of its activities*". We consider that this wording is clearer than the wording of the draft Regulation (Annex VII) and the confusing reference to "*mixing with marketing communications*" in paragraph 252. We also do not think that Article 17(1) requires inside information to be in a separate section of the website which only includes inside information. Issuers commonly publish all regulatory announcements on their website (for example including PDMR dealing and major shareholder notification announcements) and we do not think it would be helpful to require inside information announcements to be held separately. This would also be costly and disproportionately burdensome for issuers. We suggest that Article 4(a) b. of the draft Regulation should read: "*allows users to view the inside information on an easily identifiable section of the website which does not include materials marketing its activities*."

ESMA should make it clear that the description required by Article 5(3)(c) of the draft Regulation (Annex VII) in relation to ensuring the confidentiality of the delayed inside information would be satisfied by a general description of the information barrier procedures and processes that are in place. This seems to be consistent with paragraph 265. Issuers will typically have policies on

the procedures they follow to ensure confidentiality and it would be unduly burdensome to require an issuer to set out in detail how the policy has been applied in practice in a particular case. Article 5(3)(b) should refer to the examples that will be included in the MAR guidelines referred to in Article 17(11) of MAR, as stated in paragraph 266. <ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>
Article 7(1)(b) of the draft Regulation is helpful in specifying that a new record is needed only when there has been a change in the original conditions. Article 7(1)(b) of the draft Regulation is helpful in specifying that a new record is needed only when there has been a change in the original conditions. However, we think the reference to "evidence" is burdensome and inappropriate and that it would be more appropriate to use the words “an explanation of the fulfilment of the conditions for the delay”, which would then also match the requirement for an "explanation" to be provided to the competent authority.

There are a number of serious difficulties with Article 7(1)(a). An issuer may not know the exact date when the inside information came into existence (Article 7(1)(a)(i)). This would be the case, for example, where there has been a serious fraud by an employee but it is impossible to establish when it first started or where a major customer is considering terminating a significant contract. A decision as to when something becomes inside information can be very difficult, for example, where an issuer is proposing to buy or sell something, the time when information becomes inside information will depend in part on the likelihood of the transaction making progress. This should read instead:

> *“(i) the issuer or emissions allowance market participant became aware of the inside information*”

In relation to Article 7(1)(a)(iii) the date on which the issuer/emissions allowance market participant is likely to publish inside information is event driven and will not be known with any certainty, if at all, on the date a decision to delay inside information is made, either initially or on an ongoing basis. If the inside information is in respect of a transaction in the course of negotiation, it may be that the negotiations ultimately fail so that no disclosure of inside information will be required (as there is no transaction to disclose. We suggest that Article 7.1(a)(iii) be deleted and a new sub-paragraph added which states “*the circumstances in which it is likely that the issuer or emissions allowance market participant will publish the inside information*”.

In relation to Article 7(1)(d) it should not be necessary for the issuer to keep a separate record each time there is a delay regarding confidentiality, access and awareness relating to that specific delay, and it would be disproportionately burdensome and costly to do so. The issuer should be able to refer to the general procedures and processes it has in place to protect the confidentiality and use of inside information.

In paragraph 270, it does not seem to be contemplated that there may be no disclosure required if negotiations fail or the information which was inside information otherwise ceases to be inside information (for example, where it was thought a major supplier might fail to renew a contract but it does so).<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. Despite the concerns expressed by the majority of respondents to its Discussion Paper over the extent of information required to be included in insider lists, the only change that is proposed to be made is to have the date and place of birth included as an alternative to the 'National Identification Number' in Member States when this does not apply (paragraph 296). The details required go far beyond the requirement in Article 18.3(a) of MAR to include "the identity of any person having access to inside information". To assemble, keep up to date and keep secure the large amount of personal data set out in the elements will be a considerable administrative burden and cost for issuers, and their advisors, both initially and on an on-going basis and is wholly disproportionate. Issuers and their advisors will not have the personal data being suggested for inclusion in the insider lists as part of the personnel records for their employees and will be required to obtain that detail from them for the purposes of the insider lists and then endeavour to keep it up to date. This will be administratively burdensome, intrusive for employees and very difficult to sustain in practice. It is an unnecessary invasion of the privacy of the employees concerned. It would be more appropriate and proportionate for supervisory authorities who wish to investigate a particular individual in a particular case to ask for information as needed for the investigation. Furthermore, the details required run counter to the principles in the Commission's Data Protection legislation and in particular that personal data must be "adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data."

It should be noted that advisers to issuers such as attorneys, accountants and communications agencies, will be required to keep multiple insider lists for all projects that they are involved for issuers subject to the MAR regime where disclosure of inside information is being delayed (and given the nature of their work on transactions which are matters in the course of development for issuers it will often be the case that this would apply to a large number of their issuer clients at the same time). The regime for insider lists, in terms of the content and form of the lists, needs to be manageable in practice for advisers handling a multitude of lists. The current proposals would require an onerous and disproportionate process which would be costly and time consuming and would require an inappropriate need to process their employees' personal data.

We think that journalists should not be included as persons who have regular access in ESMA's non-exhaustive list of categories in paragraph 298.

In Article 8(3)(c) of the draft Regulation (Annex VII) the words "*if applicable*" should be included after the words "*name of the project*" as the list might be a general list, as opposed to a deal-specific or event-based list.

In relation to Article 11, if SME Growth Market issuers are required to provide an insider list with all the information specified in Table 2 of Annex 1 and submit in accordance with the format for notification specified in Article 10(1) and (3) the value of the so called "exemption" in Article 18(6)(b) of MAR will be nugatory. We do not interpret Article 18(6)(b) of MAR as requiring such issuers to provide an insider list in the format and containing all the information of an insider list required to be kept under Article 18(1) of MAR. It is not of much assistance that ESMA is not requiring issuers on SME growth markets to establish internal systems and/or processes for the

relevant information to be recorded if they nevertheless are required to provide the same information as other issuers (paragraph 316). We disagree with ESMA's conclusion in its Preliminary High Level Cost Benefits analysis (Annex III) that this "should allow to achieve the objective of reducing their administrative burden and operational costs …" and do not understand ESMA's basis for this conclusion. <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. In practice, many issuers keep two types of lists. One is a general list for those employees who regularly have access to inside information e.g. because of their seniority as CEO or Finance Director or because of their involvement in the preparation of financial information. The other is a deal-specific or event based list e.g. relating to a proposed acquisition. As paragraphs 302 and 303 acknowledge, an issuer may also rely on advisers or others acting for it to keep their own lists of their employees with access to the inside information. However, Article 8 only allows the issuer to keep either a general list (which also includes deals) or a deal specific list – and not, as is usually the case as regards issuers listed or quoted on the London markets, a combination with, in some cases, more than one deal specific list (for example where a number of deals are being negotiated and in different jurisdictions)). It is important that the general list does not require all persons having access to inside information to be included – as this would prevent the approach of having both a general and a deal-based list.

The current wording of the Regulation suggests that the lists must be in a particular template form. This is not reflected in the commentary in the consultation paper. The preliminary high level cost benefit analysis for the insider list section in Annex III to the CP refers to some flexibility having been offered to the issuers and third parties for "the internal set up and maintenance of the list as now proposed by the CP". At the moment that flexibility is not reflected in the wording of the draft Regulation.

We therefore suggest Article 8.1 is redrafted to say:

> "Pursuant to Article 18(1) of Regulation (EU) No 596/2014… shall create and update an insider list. The insider list may take the form of:
>
> (a) A general list including persons having access to any inside information containing the information set out in Template 1 of Annex I of this Regulation; and/or
>
> (b) One or more deal-specific or event based lists that include the persons having access to relevant deal-specific or event-based inside information containing the information set out in Template 2 of Annex I of this Regulation
>
> Provided that when an issuer creates both a general list and a deal-specific or event-based list or lists, the general list may include only persons who because of their position have general access to inside information."

Also, the draft Regulation does not include any provision to make it clear that, if a person acting on behalf of an issuer keeps their own list of insiders it is sufficient for the issuer to 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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
We agree with the content to be provided but think that Annex 2 could be made much more "user friendly" and easier to complete by setting out in full the cross-references / specific examples, for example the full list of "*closely associated persons*" as regards section 1.2 and the description of transaction type in section 1.8.<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>
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<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>
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<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>
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<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>
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<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>
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<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>
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<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>
TYPE YOUR TEXT HERE
<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>
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<ESMA_QUESTION_MAR_TS_35>