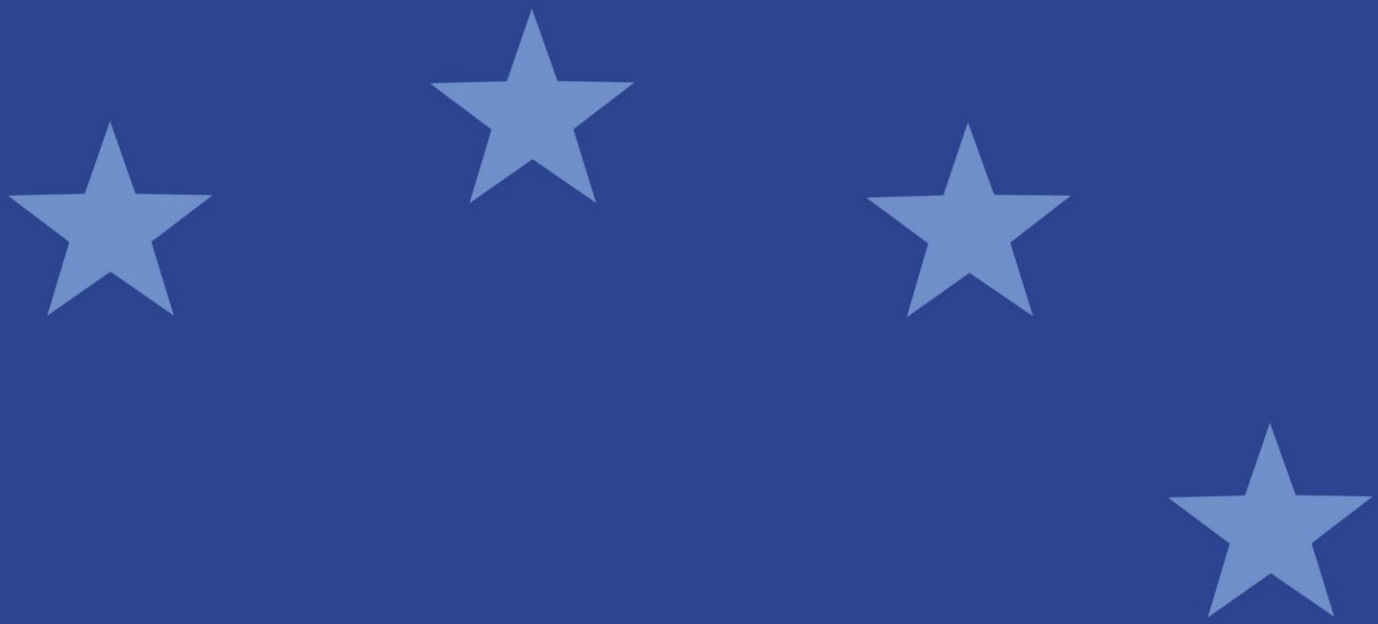
esma European Securities and Markets Authority

Consultation Paper

Draft guidelines on the Market Abuse Regulation



28 January 2016 | ESMA/2016/162

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by the 31st of March 2016**.**

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

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

The collection of confidential responses is without prejudice to the scope of Regulation (EC) No 1049/2001[1]. Possible requests for access to documents will be dealt in compliance with the requirements and obligations laid down in Regulation (EC) No 1049/2001.

Data protection

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

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents , OJ L 145, 31.5.2001, p. 43–48,

Who should read this paper

This paper may be specifically of interest to any investor that deals in financial instruments and emission allowances subject to the Market Abuse Regulation, issuers of instruments in the scope of the Regulation, financial intermediaries, investors receiving market soundings, operators of trading venues and participants in the emission allowance market.

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Annex II: Preliminary high-level Cost-benefit analysis

Acronyms used

CP	Consultation Paper
DMP	Disclosing market participant
DP	Discussion Paper on policy orientations on possible implementing measures under the MAR, published on 14 November 2013
ITS	Implementing technical standards
MAD	Market Abuse Directive; Directive 2003/6/EC of the European Parliament and the Council on insider dealing and market manipulation (market abuse)
MAR	Market Abuse Regulation; Regulation (EU) No 596/2014 of the European Parliament and of the Cou0ncil of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
MTF	Multilateral trading facility
MSR	Person receiving the market sounding
RTS	Regulatory technical standards

1 Executive Summary

Reasons for publication

Article 11(11) of Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (MAR)[2] provides that ESMA shall issue guidelines addressed to persons receiving market soundings. Article 17(11) of MAR provides that ESMA shall issue guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public. This consultation paper (CP) follows the Discussion Paper (DP) issued on November 2013[3].

Contents

Section 2 contains the draft Guidelines for persons receiving market soundings, while Section 3 presents the draft Guidelines on legitimate interests and omissions likely to mislead the public. Both Section 2 and Section 3 provide an introduction on the background together with an analysis of the provisions included in the text of the Guidelines.

Annex I sets out a summary of the questions contained in this paper, Annex II provides a description of the legislative mandate to ESMA to develop Guidelines and Annex III includes the draft cost-benefit analysis for the Guidelines.

Next Steps

ESMA will consider the feedback it receives to this consultation with a view to finalising the two sets of Guidelines and publishing a final report by early Q3 2016, around the entry into application of MAR.

[2] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC; (OJ L 173, 12.6.2014, p. 1)

[3] Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649); http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf

2 Guidelines for persons receiving market soundings

2.1 Background and mandate

1. Article 11(1) of MAR describes a "market sounding" as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. Further descriptions are provided in Recitals 32 and 33 or MAR. Article 11(4) states that, when a DMP discloses inside information to a MSR in the course of a market sounding in accordance with the conditions in Article 11(3) and (5), this should be deemed to have been made in the normal course of the exercise of a person's employment, profession or duty, and therefore not to constitute market abuse.

2. As required under Article 11(9) and Article 11(10) of MAR, ESMA has developed draft regulatory and implementing technical standards (RTS and ITS) respectively to determine appropriate arrangements, procedures and record keeping requirements and to specify the systems and notification templates to be used by DMPs when conducting market soundings. These RTS and ITS were submitted to the European Commission on 28 September 2015[4].

3. Article 11(11) of MAR requires ESMA to issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to MSR, regarding:

    a) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;

    b) the steps that such persons are to take into account when information is disclosed to them in order to comply with Articles 8 and 10 of MAR; and

    c) the records that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of MAR.

4. The Draft Guidelines proposed in the present CP are aimed at meeting the mandate that ESMA has been given under Article 11(11) of MAR. They take into account the feed-back received from the public consultation on a DP issued on November 2013[5]. The Draft Guidelines proposed in the present CP are also taking into account the provisions contained in the draft RTS and ITS on market soundings that were submitted by ESMA on 28 September 2015 to the European Commission for adoption. However, it should be reminded that the RTS and ITS that were submitted to the European Commission on 28 September 2015 have not been adopted yet and might be subject to changes by the European Commission. In such case the guidelines may need to be reviewed accordingly.

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[4] Final report on draft technical standards on the Market Abuse Regulation (ESMA/2015/1455; http://www.esma.europa.eu/system/files/2015-esma-1455_-_final_report_mar_ts.pdf

[5] Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649); http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf

2.2 General remarks

5. It should be noted that a common market practice is for an advisor to a transaction to conduct a market sounding for a given number of clients, and a similar number of brokers. Often, those brokers will in-turn sound their clients. However, it should be borne in mind that the protection afforded by the market soundings regime of MAR is only available to DMPs - as listed in Article 11(1)(a)-(d) of MAR. A third party must be acting on behalf of an issuer to be considered a DMP, and hence brokers who receive inside information from an advisor during the course of a market sounding, and then in turn sound their clients, would not be captured by the market sounding regime nor afforded the protection against an allegation of unlawful disclosure of inside information.

6. The MAR regime is intended to regulate the way market soundings are conducted including the transmission of inside information in the course of such soundings. However, in practical terms, not all market soundings involve the disclosure of inside information.

7. When elaborating the draft Guidelines on the records to be kept by the MSR, ESMA has considered the record keeping requirements imposed on DMPs through the MAR and the related draft technical standards it has submitted to the Commission, so as to avoid unnecessary duplication of recording of the same information. In addition, the retention period of five years proposed in the guidelines for the records to be kept by MSR is aligned with the period specified in Article 11(8) of MAR with reference to the DMPs' record keeping obligations.

2.3 Designated persons or contact point within the MSR entitled to receive market soundings

8. ESMA proposed in the DP that MSRs may wish to internally designate a person to receive market soundings and determine whether the MSR should agree to receive the market sounding. In such cases, MSRs should ensure that this is appropriately publicised to the DMP (e.g. through sell side relationship management, on data vendor contacts, or on their website).

9. The responses to the DP supported the possibility for MSRs to delegate persons working for them to receive market soundings. Two respondents noted that designating a contact point rather than person(s) would be better as personnel regularly change. They also agreed that it should be made public for easier access.

10. Taking into account the feedback from the DP, in the guidelines ESMA added a reference to contact points in addition to designated persons. As a good practice MSRs should keep evidence of their decision to designate a specific person or a contact point to receive the market sounding and the way that information is made available to the DMPs.

2.4 Communicating the wish not to receive market soundings

11. Establishing a process that minimises inadvertent and unintentional disclosure of inside information includes as a necessary preliminary step the determination of the scope wherein such information can circulate. For this reason, ESMA proposed in the DP that persons receiving MSRs should notify the DMPs whether they wish not to receive market soundings.

12. Only two respondents provided comments on this point. One supported the MSR notifying DMP when they wish to not be wall-crossed, and another stated that this was unrealistic given the large number of sell side firms. Another respondent also suggested the MSR should communicate with the DMP clearly, explicitly and in writing.

13. In the proposed draft Guidelines ESMA confirms its approach and specifies that MSRs may express their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions and notify the DMP accordingly.

14. ESMA proposes in the guidelines that MSRs should keep records for a period of five years of the notification of their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions.

2.5 MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information

15. ESMA proposed in the DP that MSRs should conduct their own assessment as to whether the information they have received in the course of the market sounding is inside information or ceased to be inside information. MSRs should then record their own assessment.

16. With reference to MSRs' obligation to carry out their own assessment as to whether the information disclosed by the DMP is or is not inside information, three respondents agreed that the MSR should always conduct its own assessment. One respondent stated that even where the MSR has given notice to the DMP that it does not wish to receive market soundings involving the disclosure of inside information, they should still determine for every sounding whether they have been given inside information.

17. The majority of respondents considered that it was unnecessary for MSRs to carry out their own assessment of the nature of the information they received when they have been wall-crossed. A respondent also noted that it is often very clear whether information is inside information or not. Only when it is not clear whether information is inside information, should the recipient be required to analyse the information. Another respondent highlighted the difficulties around the definition of inside information.

18. With reference to the obligation for MSRs to keep records of their own assessment of whether the information they have received is inside information or ceases to be inside information, there were mixed responses, with the majority of respondents disagreeing with such requirement. In particular, three respondents noted that having granular record

keeping requirement could create disproportionate burden on the MSR, especially as some firms receive a large number of soundings most of which are uncontentious.

19. Many respondents suggested that records should only be required in event of disagreement with the DMP as to the nature of the information. One respondent pointed out that there would be no added value in asking the MSR to assess the nature of the information once it has accepted to receive the market sounding provided that it agrees with the DMP on the nature of the information; therefore such respondents requested that the Guidelines allow for the assessment to consist of the MSR's acceptance of the DMP's assessment.

20. ESMA would like to remind that according to Article 11(7) of MAR, the MSRs are required to conduct their own assessment on whether they are in possession of inside information as a result of the market sounding. In conducting such analysis MSRs cannot limit to assess the information they received from the DMP, but should also consider any other related information they might be in possession of. Such requirement stems from Article 11(7) of MAR, which provides that the MSR «*shall assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information*». In practical terms, MSRs may be in possession of inside information as a result of being officially wall-crossed or as a result of information received from one or more other sources, that when combined with that received by the DMP amount to inside information.

21. Therefore, in order to comply with Article 11(11)(a) of MAR, in the draft Guidelines ESMA proposes that one factor MSRs should take into account in order to assess whether they are in possession of inside information as a result of the market sounding is all the information available to them, including the information obtained from other sources than the DMP. Similarly, taking into account the DMP's notification that the information obtained in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information available to them, including the information obtained from other sources than the DMP.

22. In order to comply with Article 11(11)(c) of MAR, in the guidelines ESMA proposes that, in order to ensure the enforceability of the relevant provisions, MSRs should keep records of their assessment and the reasons therefor for a period of five years.

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

2.6 Discrepancies of opinion between DMP and MSR

23. ESMA proposed in its DP that should the MSR disagree that they have been provided with inside information in the course of the market sounding, or that they have not been cleansed of inside information after they have already been wall-crossed, they should inform the DMP of this discrepancy of opinion.

24. ESMA also proposed that the MSR should forward any supporting information that is in the public domain to the DMP, and that where information provided to the MSR is not considered by them to be inside information, even though the DMP considers that they have wall-crossed the MSR, the latter may avoid unnecessary restrictions on themselves and other buy side firms when providing supporting information.

25. There were mixed responses to the DP on these proposals. Some respondents suggested that any dialogue between the DMP and MSR to resolve a discrepancy of opinion may be commercially difficult and unduly burdensome. Other respondents suggested that dialogue between the two parties is important in such situations.

26. In the DP, ESMA also questioned whether MSRs should inform the DMP also when they believe they have been passed inside information in the course of the market sounding but the DMP does not share the same view. Or alternatively, should the MSR only inform the DMP of any disagreement they have with the DMP in circumstances where the DMP considers information to be inside information but the MSR does not.

27. There were mixed responses on the proposal. Those against stated that this would result in undue discussion between the DMP and the MSR, which in itself entails a risk of more inside information being disclosed, particularly if the MSR has access to information which the DMP does not. Other considerations raised by respondents included the fact that the MSR may have to engage the DMP in any case to encourage cleansing, that dialogue could be encouraged but not necessarily required. Additionally, some respondents pointed out that, in practice, most MSRs would rely on the DMP assessment as they are in the best position to make the assessment.

28. Taking into account the responses to the DP, ESMA has further elaborated on the scenario of the discrepancy of opinion in the draft Guidelines. It is proposed that in the case of market soundings where according to the DMP no inside information is disclosed, where the MSR assesses it is in possession of inside information, if the different assessment is due to the fact that the MSR is in possession of further information than that received from the DMP, then the MSR should refrain from informing the DMP of such discrepancy of opinion. Differently, if the different assessment is based exclusively upon the information that the MSR received from the DMP, then the MSR should inform the DMP of such a discrepancy of opinion.

29. Similarly, where the MSR receives the DMP's notification informing that the information communicated in the course of the market sounding ceased to be inside information and the MSR disagrees with the DMP's conclusion, if the different assessment is due to the fact that the MSR is in possession of further information than that received from the DMP, then the MRS should refrain from informing the DMP of such discrepancy of opinion. Differently, the MSR should inform the DMP of such discrepancy of opinion, if the opinion is based solely on the information disclosed by the DMP.

30. ESMA is of the view that the proposed approach should ensure that, where a DMP has wrongly considered the information passed in the course of the market sounding as non-inside information, then the fact that the MSR should inform them of such a circumstance

may force the DMP to reassess the nature of the information and prevent it from inadvertently spreading inside information to other MSRs without flagging it as such.

31. Differently, ESMA is of the view that where the disagreement between DMP and MSR is due to the fact that according to the former inside information is disclosed but the latter disagrees, there is no need for requiring the MSR to inform the DMP of such discrepancy of opinion as there should be limited risk of spreading inside information to other MSRs without flagging it as such. In any case, nothing will prevent the MSR from liaising with the DMP in order to clarify their different views.

32. It should be reminded that, irrespective of the DMP's assessment, where the MSR assesses it is in possession of inside information, it should therefore comply with the prohibition arising from being in possession of inside information. Differently, where the MSR assesses it is not in possession of inside information it will be always in the position to disregard the DMP's contrary assessment and the prohibitions arising from being in possession of inside information. However, MSRs should bear in mind that, should their assessment be wrong, they may in fact be in possession of inside information and therefore be pursued by the relevant competent authority for breaching the provisions on insider dealing and unlawful disclosure of inside information.

33. In order to comply with Article 11(11)(c) of MAR, ESMA proposes in the guidelines that, in order to ensure the enforceability of the relevant provisions, MSRs should keep records of any discrepancy of opinion for a period of five years.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

2.7 MSRs' obligation to report to competent authorities

34. ESMA proposed in the DP that, in instances where MSR suspects improper disclosure of inside information, they should be encouraged to notify the relevant competent authority of this potential violation.

35. Some respondents to the DP highlighted that MSRs' obligation to report may affect non-regulated persons and be too burdensome. Others pointed out that the obligation may cause the DMPs to be over-cautious and routinely classify market soundings as involving inside information, having knock-on effect for the MSR to constantly challenge the DMP's analysis. Some respondents also stressed that MSRs should inform the competent authority only after informing the DMP and the DMP continues the improper conduct. Finally, the SMSG pointed out that MAR does not empower ESMA to require MSR to notify the competent authorities about potential violation of the DMP.

36. Taking into account the responses to the DP, ESMA is of the view that introducing an obligation for MSRs to report to the competent authority may be counter-productive for the market sounding regime and be too burdensome, particularly with reference to non-regulated persons. For these reasons any reference to such an MRS's obligation has been deleted from the Guidelines text. It is also reminded that would MSRs or staff with MSRs

wish to report a suspicion of improper disclosure of inside information in relation to market sounding, they can always rely on the provisions of Article 32 of MAR relating to the reporting of actual or potential infringements.

2.8 Internal procedures and staff training

37. In the proposed draft Guidelines ESMA treats the MSR's internal procedures and staff training. This aspect was not included in the DP and it is consulted for the first time.

38. The proposed draft guidelines require MSRs to establish, implement and maintain internal procedures to ensure that the information received in the course of the market sounding is internally communicated only through pre-determined reporting lines and on a need-to-know basis. This is aimed at ensuring that the information received in the course of the market sounding is treated confidentially and does not freely spread within the MSR.

39. The internal procedures should ensure that the MSR's function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and composed of staff properly trained to that purpose. The purpose of this requirement is to identify within the MSR what function or body is responsible for the above mentioned assessment, taking also into consideration the amount of information that such function or body has access to. In fact, as already pointed out, MSRs should conduct their own assessment as to whether they are in possession of inside information not only taking into account the information received from the DMP, but also all the information available to them. Considering the potentially wide variety of persons that can receive market sounding, ESMA is of the view that MSRs should have the flexibility to determine their internal organisation, deciding whether such function or body should also be responsible for receiving the market soundings or whether existing functions (e.g. the compliance or the legal department) should be involved in the process.

40. The internal procedures should also allow to manage and control the flow of inside information arising from the market sounding within the MSR and the application of the prohibitions to the MSR and its staff, under Articles 8 and 10 of MAR, arising from being in possession of inside information as a result of the market sounding.

41. ESMA is of the view that, in order to ensure the enforceability of the relevant provisions, MSRs should keep records for a period of five years of the above mentioned internal procedures.

42. The proposed draft Guidelines also set forth that all the MSR's staff that are entrusted to receive and process the information received as a result of the market sounding are properly trained on the relevant internal procedures and on the prohibitions arising from being in possession of inside information.

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

2.9 List of MSR's staff that are in possession of the information communicated in the course of the market soundings

43. In the proposed draft Guidelines, ESMA requires that, for each market sounding, MSRs should draw up a list of the persons working for the MSR that are in possession of the information communicated in the course of the market soundings. This aspect was not included in the DP and it is linked with the provisions on internal procedures.

44. The aims of this requirement are to: (i) improve the internal management of the flow of information resulting from market soundings, (ii) allow MSRs to demonstrate compliance with the inside information prohibition, and, (iii) foster the competent authorities' ability to reconstruct the information flow in the course of a possible investigation. ESMA recognises that there may be some overlapping with the provisions set forth by Article 18 of MAR with reference to the obligation of drawing up an insider list. However, it should be borne in mind that MSRs may not be issuers or persons acting on their behalf or account and therefore may not be subject to the insider list provisions.

45. In the proposed guidelines ESMA suggests that MSRs should keep records of such a list for five years.

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

2.10 Assessment of related financial instruments

46. ESMA proposed in the DP that the MSR should demonstrate its own determination on whether securities are related securities, by maintaining a full audit trail of its analysis.

47. Some respondents disagree with the need for a full audit trail for related securities analysis. Some respondents pointed out that it is sensible for MSRs to assess the related securities. Some others suggested that the whole process should take into account size and resources of the MRS to carry out this task.

48. In the proposed draft Guidelines, ESMA requires that, where the MSR assesses that they are in possession of inside information as a result of a market sounding, they should identify all the issuers and financial instruments to which that inside information relates. The MSR should keep record of their assessment for a period of five years.

49. The proposed approach has not changed from the DP, as the identification of related financial instruments should be considered an important step among the ones to take in order to comply with Article 8 and 10 of MAR under Article 11(11)(b) of MAR.

2.11 Written minutes or notes and recording of telephone calls

50. ESMA proposed in the DP that the MSRs should ensure that any follow-up calls to the DMP following a sounding approach which did not result in a wall-crossing should be conducted on company recorded mobile and land lines.

51. Some respondents highlighted that the use of recording facilities should fall on DMPs, in particular if the market sounding did not involve the disclosure of inside information.

52. Taking into account the responses to the DP in the proposed draft Guidelines, ESMA no longer imposes on MSRs any requirement for the recording of telephone calls, as such obligations will fall on the DMPs under the draft RTS developed by ESMA. This will not prevent the MSR to record the telephone calls on their own initiative, notably for commercial purposes, provided that the DMP has given in advance their consent to the recording.

53. However, ESMA is specifying the behaviour required from the MSR where the market sounding has taken place during unrecorded meetings or unrecorded telephone conversations. Taking into account the RTS on market soundings which in such instances require the DMP to draft written minutes or notes to record the communication of the information, the proposed Guidelines require the MSR to sign these minutes or notes drawn up by the DMP where the MSR agrees upon their content. Where the MSR does not agree with the DMP upon the content of the minutes or notes drawn up by the DMP, the MSR should provide the DMP with their own version of the minutes or notes duly signed within five working days after the market sounding.

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

2.12 Proposal of guidelines

1. **Designated persons or contact point within the MSR entitled to receive market soundings**

   Where the person receiving the market sounding (MSR) designates a specific person or a contact point to receive market sounding, the MSR should ensure that that information is made available to the disclosing market participants (DMP).

2. **Communicating the wish not to receive market soundings**

   After being addressed by a DMP, the MSR should notify it whether they wish not to receive future market soundings in relation to either all potential transactions or particular types of potential transactions.

3. **MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information**

1) While taking into account the DMP's assessment, MSRs should independently assess whether they are in possession of inside information as a result of the market sounding taking into consideration as a relevant factor all the information available to them, including the information obtained from sources other than the DMP.

2) While taking into account the DMP's notification that the information disclosed in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information available to them, including the information obtained from other sources than the DMP.

4. **Discrepancies of opinion between DMP and MSR**

1) In the case of market soundings where according to the DMP no inside information is disclosed, where the MSR assesses on the contrary they are in possession of inside information they should:

   a. refrain from informing the DMP of the discrepancy of opinion if the different assessment is due to the fact that the MSR is in possession of other information than that received from the DMP; or

   b. inform the DMP of the discrepancy of opinion if the different assessment is based exclusively upon the information that the MSR received from the DMP.

2) In the case of market soundings where according to the DMP inside information has been disclosed, where the MSR receives the DMP's notification informing that the information

communicated in the course of the market sounding ceased to be inside information and disagrees with the DMP's conclusion, the MSR should:

a. refrain from informing the DMP of the discrepancy of opinion if the different assessment is due to the fact that the MSR is in possession of other information than that received from the DMP; or

b. inform the DMP of the discrepancy of opinion if the different assessment is based exclusively upon the information that the MSR received from the DMP.

5. Internal procedures and staff training

1) The MSR should establish, implement and maintain internal procedures to:

a. ensure that the information received in the course of the market sounding is internally communicated only through pre-determined reporting lines and on a need-to-know basis;

b. ensure that the function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and composed of staff properly trained to that purpose;

c. manage and control the flow of inside information arising from the market sounding within the MSR and its staff, in order for the MSR and its staff to comply with Articles 8 and 10 of MAR.

2) The MSR should ensure that the staff receiving and processing the information in the course of the market sounding are properly trained on the relevant internal procedures and on the prohibitions, under Articles 8 and 10 of MAR, arising from being in possession of inside information.

6. List of MSR's staff that are in possession of the information communicated in the course of the market soundings

For each market sounding, MSRs should draw up a list of the persons working for them that are in possession of the information communicated in the course of the market soundings.

7. Assessment of related financial instruments

Where the MSR has assessed they are in possession of inside information as a result of a market sounding, the MSR should identify all the issuers and financial instruments to which that inside information relates.

8. Written minutes or notes

Where in accordance with [Article 6(2)(d) of Delegated Regulation (EU) …/…[RTS on Market soundings]] the DMP has drawn up written minutes or notes of the unrecorded meetings or unrecorded telephone conversation, the MSRs should:

a. sign these minutes or notes where they agree upon their content; or

b. provide the DMP with their own version of the minutes or notes duly signed within five working days after the market sounding where they do not agree upon the content of the minutes or notes drawn up by the DMP.

9. Record keeping

MSRs should keep records in a durable medium that ensures accessibility and readability for a period of five years of:

a. the notifications referred to in paragraph 2;

b. the assessments referred to in paragraph 3 and the reasons therefor;

c. the discrepancy of opinion referred to in paragraph 4;

d. the procedures referred to in paragraph 5;

e. the lists referred to in paragraph 6; and

f. the assessment of related instruments referred to in paragraph 7.

3 Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public

3.1 Background and mandate

54. Article 17(1) of Regulation (EU) No 596/2014 (MAR) sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. Article 17(2) of MAR sets forth a similar provision with reference to emission allowance market participants. Article 17(4) of MAR specifies that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

    a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

    b) delay of disclosure is not likely to mislead the public;

    c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

55. It should be stressed that for an issuer or emission allowance market participant to be able to delay the disclosure of inside information, all the above conditions have to be met.

56. Article 17(11) of MAR requires ESMA to issue guidelines to establish a non-exhaustive and indicative list of:

    a) legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information; and

    b) situations in which delay of disclosure is likely to mislead the public.

57. The draft Guidelines proposed in the present Consultation Paper (CP) are aimed at meeting the mandate that ESMA has been given under Article 17(11) of MAR. They take into account the feed-back received from the public consultation of the DP issued on November 2013[6].

[6] Discussion Paper on ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649); http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf

3.2 Legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information

58. It should first be pointed out that ESMA's empowerment to issue Guidelines refers only to issuers, as emission allowances market participants are not mentioned in Article 17(11) of MAR.

59. In the DP ESMA proposed to include in the list of legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information the cases mentioned in Recital 50 of MAR (referred to in the DP as recital 24a) and the examples provided by CESR in its second set of Guidance (CESR/06-562b).

60. The examples of legitimate interests of the issuer to delay the disclosure of inside information provided in Recital 50 of MAR which mirror Article 3(1) of Directive 2003/124/EC are:

    a) ongoing negotiations, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer;

    b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between those bodies, provided that public disclosure of the information before such approval, together with the simultaneous announcement that this approval is still pending, would jeopardise the correct assessment of the information by the public.

61. The examples provided by CESR in its second set of Guidance (CESR/06-562b) are:

    a) confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations;

    b) product development, patents, inventions etc. where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible;

c) when an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure;

d) impending developments that could be jeopardised by premature disclosure.

62. Most respondents to the DP pointed out that the examples provided in Recital 50 of MAR and in the CESR second set of Guidance are still appropriate.

63. One respondent mentioned the case of the CEO's resignation from their post as an example of legitimate interest to delay the disclosure of inside information, until their successor has been appointed. However, ESMA is of the view that this does not represent a case of legitimate interest to delay disclosure of inside information and therefore that information should be disclosed as soon as possible.

64. Another respondent mentioned as possible legitimate interest the case where a delay would be needed in order for a parent company to check the accounting information received by the subsidiaries. In this particular case, if the information as such is not precise (e.g. because the missing information from the subsidiary is significant) then there is no inside information at this point. Differently, if the information is precise enough to be considered inside information, the time needed for the parent company to check the accounting information received by a subsidiary should not qualify as a legitimate reason to delay disclosure under Article 17(4) of MAR, but could fall within the general provision laid down in Article 17(1) of MAR, where it is provided that issuers should inform the public «*as soon as possible*».

65. The SMSG agreed with the approach proposed in the DP, emphasising that also additional situations and circumstances could constitute legitimate interests for delaying the disclosure of inside information. The SMSG also pointed out that «*the right to delay should not be interpreted narrowly. An issuer should be allowed to keep the information secret if disclosure of the information may be detrimental to him. A mere probability that such detriment may occur should suffice for the right to delay disclosure to become applicable*».

66. In this respect it is important to clarify that the fact that the issuer has legitimate interests that are likely to be prejudiced by immediate disclosure of the inside information is not sufficient, per se, to delay the disclosure of the inside information. In fact, for an issuer to be able to delay the disclosure of inside information, all the conditions set forth in Article 17(4) of MAR must be met. Provided that all the other conditions are met, in the approach proposed in the present draft Guidelines ESMA recognises that the provided list of legitimate interest is indicative and there may be other cases where immediate disclosure of the information may be detrimental to the issuer.

67. Finally, the SMSG suggested that the Guidelines include the case where an issuer is faced with an unexpected and significant event, and a short delay may be acceptable if it is necessary to clarify the situation. In this respect, ESMA acknowledges that some time may be needed for the issuer to clarify the situation in case of an unexpected and significant event and ascertain the inside information. However, ESMA would refrain from including such a wide and potential far reaching example in the list of legitimate interests,

and considers that it may rather fall under the general provision laid down in Article 17(1) of MAR, where it is provided that an issuer shall inform the public of inside information «*as soon as possible*».

68. Other responses to the DP are dealt with in the relevant specific paragraphs hereunder.

69. Taking into account the responses to the DP, in the proposed draft Guidelines ESMA provides a list of legitimate interests for the issuers to delay disclosure of inside information. In the proposed draft Guidelines there is no longer reference to «*impending developments that could be jeopardised by premature disclosure*», as it was deemed to be a too generic provision. It should be highlighted that such list is not meant to be exhaustive and issuers may be in other situations where they have legitimate interests to delay the disclosure of inside information. However, it should be borne in mind that the possibility to delay the disclosure of inside information as per Article 17(4) of MAR represents the exception to the general rule of disclosure to be made as soon as possible according to Article 17(1) of MAR, and therefore should be narrowly interpreted.

70. It should be also noted that the list is indicative. It should be for the issuers to explain that they are in a case where their legitimate interests are likely to be prejudiced by immediate disclosure of inside information, and that each situation, including those listed in the draft Guidelines, should be assessed on a case by case basis.

3.2.1 **Ongoing negotiations and grave and imminent danger to the financial viability of the issuer**

71. These two cases, already mentioned in Recital 50 of MAR, are maintained in the guidelines and are separately listed as examples of situations where legitimate interests to delay the disclosure of inside information may exist.

72. A legitimate interest may exist where the issuer is conducting negotiations, the outcome of which would likely be jeopardised by immediate public disclosure of that information..

73. One respondent to the DP suggested that the Guidelines explicitly mention merger and acquisition (M&A) transactions as an example of negotiations whose outcome would be likely to be affected by immediate public disclosure. In the proposed draft Guidelines, ESMA did not provide a list of types of negotiations. However, M&A transactions are generally to be considered to fall in this case.

74. Another instance falling within the scope of legitimate interest under Article 17(4)(a) could be where the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer. No substantial changes are proposed with reference to this particular case. It should be noted that this particular case does not refer to the possibility of delaying public disclosure of information related to the issuer's temporary

liquidity in order to preserve the stability of the financial system under Article 17(5) of MAR.

75. It should be reminded that Article 17(4) of MAR states that it should be for the issuer to explain to the national competent authority, in addition to how the other two conditions for delaying disclosure of inside information are met, how immediate public disclosure is likely to prejudice the issuer's interests and to jeopardise the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer.

3.2.2 Decisions taken or contracts entered into by the management body of an issuer which need the approval of another body of the issuer in order to become effective

76. A legitimate interest for the issuer to delay disclosure of inside information, already mentioned in Recital 50 of MAR, may arise where the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's bylaws, the approval of another body of the issuer in order to become effective.

77. This is the case of two-tier issuer systems where certain types of decisions of the Management Board have to be approved by the Supervisory Board in order to have legal effects.

78. However, in order for that to be considered a legitimate interest to delay disclosure of inside information, in the proposed guidelines, ESMA states that the following conditions must be met:

a) an announcement explaining that the approval of another body of the issuer is still pending would jeopardise the correct assessment of the information by the public;

b) an announcement explaining that the approval of another body of the issuer is still pending would jeopardise the freedom of decision of the other body;

c) the issuer arranged for the decision of the body responsible for such approval to be made, possibly within the same day;

d) the decision of the body responsible for such approval is not expected to be in line with the decision of the management body, as for instance it would be where the two bodies are expression of the same shareholders represented in the management body or in cases where such body has consistently approved the management body's decision on similar issues.

79. The above conditions are aimed at ensuring that the simple fact that issuers have two different decisional bodies does not represent, per se, a legitimate interest for delaying the disclosure of inside information until the second body's definitive approval.

80. No possibility of delay should be granted where the issuer does not arrange for such decision to be adopted, possibly, within the same day nor where the decision of the

issuer's second body is expected. For example, in cases concerning a capital increase or the payment of dividends, the correct assessment of the information would clearly not be jeopardised when the issuer's second body had always or regularly agreed to such decisions/proposals of the management body. Therefore, in these cases the issuer would not be allowed to delay the disclosure of that information until the decision of the issuer's second body.

81. With reference to the condition where immediate disclosure would endanger the conclusion of the second body, it could be where the issuer's second body would be prejudiced in its autonomous decision by the preliminary disclosure of the information, e.g. due to public pressure exerted on its own decisional process.

82. As a general rule, issuers are expected to disclose the inside information explaining that the definitive decision of the issuer's second body is still pending. Only where the above four conditions are met, the issuer would have a legitimate interest to delay the disclosure of inside information.

3.2.3 **Development of a product or an invention**

83. A legitimate interest for the issuer to delay disclosure of inside information, already mentioned in the CESR second set of Guidance, may be where the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer.

84. In this particular case it will be the issuer's interest to proceed to patent the product or the invention or otherwise protect its rights by other means as soon as possible.

85. It should be noted that the issuer should be able to explain to the national competent authority how immediate public disclosure is likely to prejudice the ability to patent the product or the invention or otherwise protect the issuer's rights.

3.2.4 **The issuer is planning to buy or sell a major holding in another entity**

86. A case of legitimate interest for the issuer to delay disclosure of inside information may be where the issuer is planning to buy or sell a major holding in another entity and the conclusion of the transaction is very likely to fail with immediate disclosure of that information.

87. This particular case differentiates from the case of ongoing negotiations as it involves situations where such a plan has been already decided but the negotiations have not started yet.

88. It should be noted that the issuer should be able to explain to the national competent authorities the reasons why the conclusion of the deal is very likely to fail with immediate disclosure of that information.

3.2.5 Deal or transaction previously announced and subject to a public authority's approval

89. A respondent to the DP suggested that the Guidelines include in the list of legitimate interests the case where the issuer is discussing with a public authority (e.g. Antitrust) about possible conditions that such public authority might impose on the issuer for the transaction to be effective.

90. Taking into account the response to the DP, the guidelines mention the legitimate interest that may exist in the situation where a deal or transaction previously announced is subject to a public authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction.

91. For instance, in case of take-overs or merger and acquisitions the legitimate interest to delay the disclosure of inside information does not relate to the disclosure of the take-over nor the merger and acquisition announcement themselves. When these decisions are announced the issuers should provide the public with proper information about the pending public authorities' approval or authorization, including the existence of possible conditions that could be imposed by such authorities. A legitimate interest to delay relates to the actual conditions that the public authorities may impose further to the announcement, in the course of the contacts with the issuer within the authorisation process. Such conditions may be the selling of part of a business in a determined geographical area (that could be imposed by a competition authority) or an increase in the capital of the issuer (that could be imposed by the prudential authority, where the issuer is also a regulated person).

92. It should also be noted that the delay is only admissible where the issuer can justify how immediate disclosure of the above conditions will likely affect the possibility for the issuer to meet such requirements.

Q8: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

3.3 Situations where the delay in the disclosure is likely to mislead the public

93. In the DP, ESMA proposed two examples of situations where the delay in the disclosure of inside information is likely to mislead the public, namely where the undisclosed inside information contradicts previous public announcements of the issuer (e.g. anticipated results previously publicly announced by the issuer) or the market's current expectations.

94. Since in order to delay the disclosure of inside information all the conditions laid down in Article 17(4) of MAR should be met, the above situations are examples where immediate and appropriate disclosure is always necessary and mandatory.

95. Most respondents to the DP, including the SMSG, disagree to include in the list of situations where the delay in the disclosure of inside information is likely to mislead the public, the case where the undisclosed inside information contradicts the market's current expectations.

96. One respondent pointed out that inside information always contradicts market expectations. Some others highlighted that delayed disclosure of inside information should be considered as misleading only if the issuer actively sets signals that contradict the inside information under delay.

97. Another respondent highlighted that the approach proposed in the DP could favour short-term trading interests rather than the long-term interests, as it refers to «*current expectations*», while issuers should consider market expectations over the long term.

98. The SMSG also noted that inside information always contradicts market expectations, and the main case where delay in the disclosure is misleading the public should be where the issuer actively contradicts the inside information under delay. Therefore, the SMSG envisaged adopting a general rule whereby delay is always misleading only if it contradicts a previous public announcement of the issuer. Should ESMA decide to keep the referral to market's expectations, the SMSG suggested the adoption of an approach where delay in the disclosure of inside information should be considered misleading only if an issuer sets signals that strongly contradict the inside information under delay, if need be making reference to long term expectations rather than current expectations.

99. Taking into account the responses to the DP, in the proposed draft Guidelines ESMA now provides three situations where the delay of disclosure of inside information is likely to mislead the public, namely where:

a) the inside information the issuer intends to delay the disclosure of is materially different from a previous public announcement of the issuer on the matter to which the inside information relates to;

b) the inside information the issuer intends to delay the disclosure of regards the fact that the issuer's financial objectives are likely not to be met, where such objectives were previously publicly announced;

c) the inside information the issuer intends to delay the disclosure of is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously set.

100. An example of a situation described in the letter c) above may be where the information the issuer intends to delay is in contrast with the content of an interview released by the CEO of an issuer, or with the information conveyed by the management of the issuer during a road-show.

101. The proposed guidelines keep the reference to market expectations. However, taking into account the responses to the DP, in order to provide more clarity to the concept of market's expectations such reference has been linked to the signals that the issuer has

previously set. In assessing the market's expectation the issuers should take into account the market sentiment, for instance considering the consensus among financial analysts.

102. The situations described in the letter a), b) and c) above are examples where immediate and appropriate disclosure is always necessary and mandatory. Nonetheless, it should be noted that the list should not be deemed to be exhaustive as there may be other situations where the delay in the disclosure is likely to mislead the public.

103. ESMA also considered to include in the list of situations in which delay of disclosure of inside information is likely to mislead the public the situation where issuers are delaying disclosure of inside information according to Article 17(4) of MAR and make public information that is inconsistent with the information under delay. However, ESMA is of the view that situation is already covered by the prohibition of market manipulation and did not explicitly mention such case in the guidelines.

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

Q10: Do you see other elements to be considered for assessing market's expectations?

3.4 Proposal of guidelines

1. Legitimate interests of the issuer for delaying disclosure of inside information

For the purposes of point (a) of Article 17(4) of Regulation (EU) No 596/2014, the cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests could include but are not limited to the following circumstances:

a. the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure of that information;

b. the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer;

c. the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's bylaws, the approval of another body, other than the shareholders general assembly, of the issuer in order to become effective, provided that all the following conditions are met:

   i. immediate public disclosure of that information before such a definitive approval would jeopardise the correct assessment of the information by the public;

   ii. an announcement explaining that such approval is still pending would jeopardise the freedom of decision of the other body;

   iii. the issuer arranged for the decision of the body responsible for such approval to be made, possibly, within the same day; and

   iv. the decision of the body responsible for such approval is not expected to be in line with the decision of the management body, as for instance it would be where such body is the expression of the same shareholders represented in the management body or in cases where such body has consistently approved the management body's decisions on similar issues.

d. the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer;

e. the issuer is planning to buy or sell a major holding in another entity and the disclosure of such an information would jeopardise the conclusion of the transaction;

f. a transaction previously announced is subject to a public Authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction.

2. Situations in which delay of disclosure of inside information is likely to mislead the public

For the purposes of point (b) of Article 17(4) of Regulation (EU) No 596/2014, the situations in which delay of disclosure of inside information is likely to mislead the public includes at least the following circumstances:

a. the inside information whose disclosure the issuer intends to delay is materially different from a previous public announcement of the issuer on the matter to which the inside information refers to;

b. the inside information whose disclosure the issuer intends to delay regards the fact that the issuer's financial objectives are likely not to be met, where such objectives were previously publicly announced;

c. the inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously set.

Annex I: Summary of questions

Guidelines for persons receiving the market soundings

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public

Q8: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

Q10: Do you see other elements to be considered for assessing market's expectations?

Annex II: Preliminary high-level cost-benefit analysis

Guidelines for persons receiving market soundings

A market sounding is «*a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors*». The draft RTS and ITS on market soundings that were submitted by ESMA to the European Commission on 28 September 2015 outline appropriate arrangements, systems and procedures and notification templates for DMPs when conducting market soundings.

The draft Guidelines for persons receiving market soundings outline: i) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information, ii) the steps that such persons are to take into account when information is disclosed to them in order to comply with Articles 8 and 10 of MAR and iii) the records that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of MAR.

	Description
Benefits	The Guidelines are aimed at providing clarity and legal certainty by defining a common set of rules for the persons receiving the market soundings across the European Union, consistent with the rules set forth by the TS with reference to DMPs. The Guidelines, outlining the MSR's obligation, should reduce the risk of spreading of inside information as a result of the market sounding and consequently reduce the risk of abuses. The draft Guidelines regulate the buy-side consistently with the provisions set forth in the TS on market soundings and are aimed at facilitating the supervisory and investigative activities of the competent authorities. Overall, the main benefit arising from the rules contained in the Guidelines would be enhanced market integrity.
Compliance costs *- One-off* *- On-going*	Most of the responsibility for compliance with the market sounding regime falls on the DMPs. However, also MSRs will bear some costs arising from the requirements outlined in the Guidelines. It should be noted that buy-side firms will be impacted by the requirements in a different manner. For instance, should the MSRs deem that the requirements outlined in the Guidelines are too burdensome, they may choose to be sounded less frequently, in particular when inside information is disclosed in the course of the market sounding. As a result of the Guidelines requirements, MSRs will need to have in

	place internal procedures in order to: i) ensure that the information received in the course of the market sounding is internally communicated only through pre-determined reporting lines; ii) ensure that the function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and composed of staff properly trained to that purpose; iii) clearly identify the prohibitions to the MSR and its staff arising from being in possession of inside information as a result of the market sounding. This would be a significant one-off cost for the MSRs in relation to establishing and implementing the procedures, but also an ongoing cost in relation to the resources to be assigned to the task of assessing whether the MSR is in possession of inside information as a result of the market sounding. MSRs will also have to train their staff entrusted to process the information received as a result of the market sounding. This will involve differentiated training for the staff involved in receiving the market sounding approaches and for the staff being part of the function or body entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding. The internal training would be primarily a small one-off cost for the MSRs. The Guidelines will also require the MSRs to list the staff that are in possession of the information communicated in the course of the market soundings and identify all the issuers and financial instruments to which that inside information relates. This would be a ongoing cost for the MSRs, since the two requirements will have to be fulfilled for each market sounding received. The Guidelines also require the MSR to keep records of: i) their wish not to receive market soundings in relation to either all potential transactions or particular types of potential transactions; ii) the assessment as to whether the MSR is in possession of inside information as a result of the market sounding; iii) the internal procedures regarding the market soundings; iv) the discrepancies of opinion between the MSR and the

	DMP; v) the list of staff in possession of inside information as a result of the market sounding; vi) the assessment of all the issuers and related instruments. Record keeping requirements would contain one-off elements for the internal procedures and the wish to receive market soundings in relation to either all potential transactions or particular types of potential transactions, and ongoing elements for the other records that MSRs will have keep upon reception of each new market sounding. Lastly, where the DMP has drawn up written minutes or notes of the unrecorded meetings or unrecorded telephone conversation and the MSR does not agree upon the content such minutes or notes, the Guidelines require the MSR to provide the DMP with their own version of the minutes or notes. This should be a minor cost for MSRs, as the outlined regime envisages it in residual cases, in the absence of any recording and in case of disagreement between DMP and MSR.

Legitimate interests of the issuer for delaying public disclosure of inside information and situations in which delay of disclosure is likely to mislead the public.

Article 17(1) of Regulation (EU) No 596/2014 (MAR) sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. Article 17(2) of MAR sets forth a similar provision with reference to emission allowance market participants. Article 17(4) of MAR specifies that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that: a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant; b) delay of disclosure is not likely to mislead the public; c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

Article 17 (11) of MAR requires ESMA to issue Guidelines to establish a non-exhaustive indicative list of: i) legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information and ii) situations in which delay of disclosure is likely to mislead the public.

	Description
Benefits	The Guidelines are aimed at providing clarity and enhancing legal certainty by defining a list of legitimate interests of issuers for delaying public disclosure of inside information and situations in which delay of

	disclosure is likely to mislead the public. Although such lists should not be considered exhaustive and are meant to be indicative, they should assist the issuers in conducting their assessment as to whether they meet the conditions to delay inside information according to MAR. This should contribute to reduce the number of controversial cases of delay in the disclosure of inside information. Overall, the main benefit arising from the Guidelines would be a clearer and more uniform application of the provisions on delay of disclosure of inside information in the European Union and therefore an enhanced market integrity.
Compliance costs *- One-off* *- On-going*	It should be noted that the costs for issuers arising from the public disclosure regime arise from the level 1 and level 2 provisions. The Guidelines will not burden the issuers with any additional costs, as they do not set forth any additional requirement for the issuers.