

**ICMA response
to
ESMA Consultation Paper
on
draft technical standards on the Market Abuse Regulation**

Below, in easier to read form, is the response ICMA submitted on 15 October 2014 (on the ESMA-mandated form) to ESMA's 15 July 2014 Consultation Paper on Draft technical standards on the Market Abuse Regulation (ESMA/2014/809).

Part I - General

General information about respondent

Are you representing an association?	Yes
Activity:	Other Financial service providers
Country/Region	International

Introduction

Please make your introductory comments below, if any:

- 1. Scope of response** – The International Capital Market Association is responding to Questions Q2 to Q8 (on stabilisation and market soundings) and Question 22 (on insider lists) of this ESMA/2014/809 consultation paper in relation to its primary market constituency that lead-manages syndicated debt securities issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Committee¹, which gathers the heads and senior members of the syndicate desks of 47 ICMA member banks, and ICMA's Legal and Documentation Committee², which gathers the heads and senior members of the legal transaction management teams of 18 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe. These responses are made in the context of the international syndicated wholesale/institutional issuance of investment grade 'vanilla' (typically fixed/floating rate USD, GBP and EUR-denominated) corporate bonds / debt securities (Eurobonds). ICMA expects others (such as general banking associations) will also be responding in relation to cross-cutting aspects that do not exclusively impact debt securities issuance.
- 2. ICMA "Activity"** – ICMA has selected, under "General information about respondent" above, "Other Financial service providers" though "Banking sector" and "Investment services" might also be seen as potentially correct in respect of ICMA's lead-manager members.
- 3. Format of response / RTS and ITS redlines** – Below are the defined terms that are used in this response:
 - **ICMA** – The International Capital Market Association;
 - **CP** – ESMA's current consultation paper (ESMA/2014/809);
 - **DP** – ESMA's preceding discussion paper (ESMA/2013/1649);
 - **ICMA's DP response** – ICMA's response³ to the DP;
 - **draft RTS** – CP Annex IV stabilisation/soundings draft RTS;
 - **draft ITS** – CP Annex V soundings draft ITS;
 - **RTS redline** – the redline mark-up of the draft RTS that is set out, under the "RTS redline mark-up" heading, in this "introductory comments" section;
 - **ITS redline** – the redline mark-up of the draft ITS that is set out, under the "ITS redline mark-up" heading, in this "introductory comments" section;
 - **MAR** – the new Market Abuse Regulation (EU/596/2014);
 - **MiFID II** – the revised Markets in Financial Instruments Directive (2014/65/EU);
 - **OTC** – over the counter;
 - **MAD** – the currently applicable Market Abuse Directive (2003/6/EC); and

¹ See <http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/>.

² See <http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documents-Sub-committee/>.

³ See <http://www.icmagroup.org/assets/documents/Market-Practice/Regulatory-Policy/EU-Market-Abuse-Directive--related-documents/ICMA-response-to-MAR-DP-2013-11-Jan14.pdf>.

- **Stabilisation Regulation** – the currently applicable Stabilisation Regulation under MAD (EC/2273/2003).

The paragraphs of this response are numbered in one single consecutive sequence across the CP questions.

4. **General** – It is very helpful that ESMA has been able to allow the markets three months to respond to the CP (particularly given that the consultation period has spanned the summer break when it is very difficult to gather individual stakeholder representatives into collective deliberations). It is also very helpful that ESMA held an open hearing on 8 October towards the end of the consultation period, which enabled more informed stakeholder interventions, and that ESMA representatives sought to react to the interventions, which has enabled stakeholders to refine their CP responses and provide ESMA with more accurate and relevant information. ESMA's revised proposals are, in general, greatly improved compared to some of the approaches under consideration in the DP, though various concerns remain and are outlined in this response. Additionally, there seem to be (i) various inconsistencies between and within the CP narrative and the related draft RTS and draft ITS and also (ii) some overlap with the Level 1 provisions of MAR, which this response also addresses.

RTS redline mark-up

[See Annex A for RTS redline imported when submitting response using the ESMA-mandated response form.]

ITS redline mark-up

[See Annex B for ITS redline imported when submitting response using the ESMA-mandated response form.]

Part II - Stabilisation

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

Background

5. **General** – Stabilisation may not be foremost in the minds of issuers, investors and other market parties but it is a valuable tool for lead managers to counter market instability and to avoid substantial investor losses and failed fund-raising by European companies that might otherwise result (particularly in bear markets). In this respect, see further #25-26 (at p.7) of the 'easier to read' version of ICMA's consolidated response⁴ to ESMA's 22 May consultation paper ESMA/2014/549 on MiFID II. The draft RTS needs to be amended to ensure, in this respect, that stabilisation remains a realistically deployable tool, particularly once the current bull market in bonds ends. Whilst some aspects of the draft RTS may be workable, others seem to be problematic, in particular the multiple disclosure/reporting obligation, unknown MTF/OTF venues and the unnecessarily detailed disclosure requirements. Distinctly, ICMA has been revising the stabilisation guidelines in the ICMA Primary Market Handbook⁵ and would be happy to share these with ESMA if desired.
6. **DP responses** – It does not seem clear that responses to the DP have been taken into account in drafting the CP's stabilisation aspects. Most aspects proposed in the CP seem to directly follow the DP with no acknowledgement of, or opinion on, any potential alternative approaches suggested in stakeholder responses (in contrast for example to the CP's aspects relating to pre-sounding). Consequently, since there is no indication of any ESMA thinking in relation to the

⁴ See [http://www.icmagroup.org/assets/documents/Market-Practice/Regulatory-Policy/MiFID-Related-Documents/MiFID2---ICMA-Combined-Response-to-ESMA-CP-2014-08-01-\(ICMA-Website-version\).pdf](http://www.icmagroup.org/assets/documents/Market-Practice/Regulatory-Policy/MiFID-Related-Documents/MiFID2---ICMA-Combined-Response-to-ESMA-CP-2014-08-01-(ICMA-Website-version).pdf).

⁵ See <http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/ipma-handbook-home/>.

points raised in ICMA's DP response, this response is of necessity drafted on the basis that ESMA is unaware of such points.

Reporting to regulators

7. **Reporting to which regulators** – MAR Article 5.4(b) provides for information to be “*notified to the competent authority of the trading venue*”. ESMA states (at CP #48) that, having considered centralised reporting in the DP, it believes multiple reporting should in fact be required – on the basis ESMA considers this (i) is consistent with MAR Level 1, (ii) works for regulator recipients and (iii) avoids additional regulator effort. ESMA makes no reference to considerations flagged in stakeholder responses to the DP and presumably was previously aware of its member regulator views in terms of sufficiency and convenience; and MAR’s substantively final provisions have been public since trilogue negotiations completed in mid-2013. Presumably, the CP proposed approach follows ESMA having concluded since the DP that the flexibility allowed it at Level 2 by MAR Level 1 is less than it previously thought. In respect of multiple reporting, it would be particularly helpful if ESMA maintained on its website a public list of the currently applicable contact details of each of its member regulators for receipt of stabilisation reports.

Incidentally, CP #48 notes regulators should receive details of stabilisation transactions “*conducted on their trading venue*”. This seems to be reflected in RTS Article 7.2, second paragraph (which should incidentally be renumbered for clarity). In this respect, it should be noted that stabilisation in the bond markets is mainly conducted OTC (see further #12). This seems to open up two options for ESMA.

- Either reporting is to be made to the regulators of all MAR-scope venues on which stabilisation trades are actually conducted - in which case ESMA’s apparent intent (as understood from the 8 October open hearing) that OTC stabilisation trades also be subject to reporting could most obviously be satisfied by direct reporting to ESMA (since there is no regulator “*of the trading venue*” MAR Level 1 restriction), with the last paragraph of draft RTS Article 7.2 being redrafted as below (and as marked in the RTS redline):

“[...] [Competent authorities of the trading venues shall be notified of the stabilisation transactions carried out on their trading venues and ESMA shall be notified of other stabilisation transactions.]”

- Or, alternatively, reporting is to be made to the regulators of all MAR-scope venues on which the securities are admitted (or where admission has been applied for) or traded, regardless of which, if any, of these also hosted stabilisation transactions - in which case (i) OTC stabilisation would be covered anyway, (ii) the implications set out in #8 below would arise and (iii) the last sentence in the last paragraph of draft RTS Article 7.2 should be deleted (hence the “[]” in the drafting suggestion above).
8. **Unknown MTF/OTF trading venues** – A distinct aspect relating to the above is MAR’s expansion of trading venue scope to MTFs and (especially) OTFs. The consent of the issuers of securities is not required for admission or trading of their securities on such trading venues. Consequently, issuers (and intermediaries conducting stabilisation on their behalf) may well be unaware of MTFs and (especially) OTFs that are relevant for MAR’s stabilisation safe harbour disclosure and reporting obligations. This problem would largely be addressed to the extent MiFID II provides for the maintenance of accessible public real-time lists of instruments which are admitted to, for which admission has been applied for, or which are traded on specific MAR-scope venues. Otherwise this would mean issuers (and intermediaries conducting stabilisation on their behalf) would need to either (i) comply with the disclosure and reporting obligations relating to the jurisdictions of the venues they are actually aware of and, in relation to any venues they are not aware of, rely on the provisions of MAR Recital 12 and draft RTS Recital 1 (that state stabilisation outside the safe harbour is not necessarily abusive) for regulator forbearance in terms of potential manipulation charges; or more conservatively (ii) comply with the disclosure and reporting obligations relating to all jurisdictions in the EEA.
9. **Who reports to regulators (stabilisation coordinator)** – The reporting obligation of the stabilisation safe harbour is set out in MAR Article 5.5 and requires reporting “*by issuers, offerors, or entities undertaking the stabilisation, whether or not they act on behalf of such persons*”. In practice, issuers and stabilisation managers may appoint one of their own as ‘stabilisation

coordinator' to inter alia undertake such reporting on their behalf. This should be recognised, to promote legal certainty, in draft RTS Article 7.3 as below (and as marked in the RTS redline):

"The issuer, the offeror and the entities undertaking the stabilisation may appoint one of them to be responsible for [...] the notification reporting pursuant to Article 5(5) of Regulation (EU) No 596/2014."

ESMA seems to consider (c.f. CP #47) that it seems preferable that the entity which is actually undertaking the stabilisation measure be responsible - this would seem more restrictive than, and so inconsistent with, the "issuer" / "offeror" / "entities undertaking the stabilisation" choice actually provided for by MAR Article 5.5.

10. **What recorded and reported to regulators** – Under the Stabilisation Regulation, the reporting requirement is stated as just "details of all stabilisation transactions" without further detail. The Stabilisation Regulation distinctly includes a stabilisation order/transaction recording provision that effectively requires (by cross-referencing to Article 20.1 of Directive 93/22/EEC), at a minimum, "details of the names and numbers of the instruments bought or sold, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned". There has been no indication in the DP or CP that these requirements have been found insufficient in any way. Though a similar reporting requirement is set out in MAR Article 5.5, ESMA now proposes, in draft RTS Article 7.2, to specify (for both record-keeping and reporting purposes) that "details of all stabilisation transactions" and orders include, in relation to stabilisation of bonds, "as a minimum" the following referenced from Articles 25 and 26 of the Markets in Financial Instruments Regulation (EU/600/2014):

- (a) "all the information and details of the identity of the client and the information required under" the Third Money Laundering Directive;
- (b) "relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order";
- (c) "complete and accurate details of such transactions";
- (d) "details of the names and numbers of the financial instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, means of identifying the investment firms concerned, and a designation to identify a short sale as defined in Article 2(1)(b) of [the Short Selling Regulation (EU/236/2012)] in respect of [...] sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation. For transactions not carried out on a trading venue, the reports shall include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to [identifiers for different types of transactions in bonds under ESMA MiFID II RTS] Article 21(5)(a)".

The information required under the above seems unnecessarily detailed and burdensome. It would create a new burden for non-EEA stabilisation managers who are not subject to MiFID II regime and so will not already be subject to the above provisions in that context (bearing in mind that equivalent non-EEA rules will involve keeping different forms of records). It would also add a burden for EEA stabilisation managers, since the referenced MiFIR Article 25 requirements are record-keeping only rather than reporting. There is also a reference in this respect to MiFID II Article 26.2, which does not actually list any recordable information and so is presumably a typographic error and should be deleted in any case. It is unclear that there would be any additional value derived by regulators from receiving the above level of detail. Finally, references to "client" would logically have to be reviewed and amended as stabilisation trades are effected on stabilisation managers' own account. Consequently, the MiFID cross-references should be deleted and replaced by wording replicating the existing stabilisation record-keeping regime as below (and as marked in the RTS redline):

"2A. For the purpose of the notification duty set out in Article 5(5) of Regulation (EU) No 596/2014, the entities undertaking the stabilisation must record each stabilisation order or transaction in securities and associated instruments with, as a minimum, details of the names and

numbers of the instruments bought or sold, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned. [...]

Distinctly, the provision is unrelated to the rest of Article 7.2 (which relates to post-stabilisation public disclosure rather than to private record-keeping and reporting to regulators) and so should be numbered distinctly (also as noted above and marked in the RTS redline).

Public disclosure (pre- and post-stabilisation notices)

11. **Pre-stabilisation notice timing** – Draft RTS Article 7.1 provides for specified information to be adequately publicly disclosed (this means in practice the publication of pre-stabilisation notices) “*before the opening of the offer period*”. In this respect CP #40 states that such disclosure should occur “*right before the opening of the offer period*”, with no acknowledgment of any stakeholder DP feedback (let alone any rebuttal thereof). In this respect, #5 of ICMA’s DP response noted:

“Stabilisation pre-notice timing – It would be helpful if the approach taken for defining the beginning of the stabilisation period - “the date of adequate public disclosure of the terms of the offer of the relevant securities (i.e. including the spread to the benchmark, if any, once it has been fixed)” - be extended to also define when prior public notice of stabilisation purchases is to be given. Earlier than this and lead-managers are unlikely to have any clear idea of the likelihood of stabilisation being necessary and so may have to publish pre-stabilisation notices systematically on a defensive basis. So extending would result in the stabilisation period starting on publication of the prior public notice.”

It is unclear whether ESMA has so far considered the above and so the Draft RTS Article 7.1 provision is suggested to be redrafted as below (and as marked in the RTS redline):

“The following information shall be adequately publicly disclosed by the time of, or at the same time as, the adequate public disclosure of the terms of the offer of the securities: [...]”

12. **OTC trading** – Distinctly from the #8 comment on trading venues, it is worth noting that significant bond trading occurs OTC, even where such bonds are admitted to trading and/or actually traded on a regulated market, MTF or OTF. Nothing should be taken to imply that stabilisation trades can only occur on a regulated market, MTF or OTF and draft RTS Article 7.2(e) is accordingly qualified by the terms “*where applicable*”. However, an equivalent to Recital 12 of the current MAD Stabilisation Regulation should also be included, as set out below (and as marked in the RTS redline):

“Stabilisation activity may be carried out either on or off a regulated market, MTF or OTF and may be carried out by use of financial instruments other than those admitted or to be admitted to trading, or trading on, the regulated market, MTF or OTF which may influence the price of the instrument admitted, or to be admitted to trading, or traded, on a regulated market MTF or OTF.”

13. **Who publishes notices (stabilisation coordinator)** – Draft RTS Article 7.3 provides for “*The issuer, the offeror and the entities undertaking the stabilisation shall appoint one of them as responsible*” for the pre-stabilisation notice. This is helpful to an extent (despite CP #44’s apparent inconsistency), but, as noted in #11 of ICMA’s DP response, entities carrying out stabilisation that want to benefit from the safe harbour merely need the relevant transparency obligations to be satisfied (it being irrelevant by whom) as the consequences are theirs to bear. Ideally, legislation would either (i) leave such responsibility open or (ii) simply add the stabilisation coordinator to the existing (MAD) list to read as below (and as marked in the RTS redline):

“The issuer, the offeror and the entities undertaking the stabilisation may appoint one of them to be responsible for (i) the disclosure pursuant to paragraphs 1 and 2 [...].”

The above also applies the approach to the post-stabilisation notice, for consistency, and so the end of the lead-in sentence to draft RTS Article 7.2 should be consequently deleted (as marked in the RTS redline).

14. **Inclusion of stabilisation manager name in pre-stabilisation notices** – The lead-in to draft RTS Article 7.1 requires the specified information to be “*publicly disclosed before the opening of the offer period*”. Yet paragraph d) of that Article purports not to simply list specified information in relation to the lead-in (the identity of the stabilisation manager), but to set out a completely distinct primary obligation: that the information be “*publicly disclosed before any stabilisation activity*”

begins". The related CP #41 confirms that this information is to be published before any stabilisation activity begins "unless this [information] is known at the time of [the pre-stabilisation notice] publication". It therefore seems that this is a typographical error and that draft RTS Article 7.1(d) should be amended in line with CP #41 and the current MAD Stabilisation Regulation text to read as below (and as marked in the RTS redline):

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

15. **Applicable jurisdiction for public notices** – MAR Article 5.4(b) only requires "*relevant information about the stabilisation is disclosed*", without specifying a specific jurisdiction in contrast to the adjacent requirement that such relevant information is also "*notified to the competent authority of the trading venue*" (and see further #7 and #8 in this respect). However, draft RTS Article 2(b) helpfully provides, in relation to Regulated Market securities, that transparency is to follow only the related Transparency Directive (2004/109/EC) mechanism. The residual application of MAR Article 17.1's "*manner which enables fast access and complete, correct and timely assessment*" should hopefully be unlikely to involve divergent interpretations by the various regulators having overlapping jurisdiction under MAR Article 22 (the regulators where the venue(s) are located and the regulators where the stabilisation activity occurs).
16. **Ancillary stabilisation (disclosure and reporting conditions)** - Draft RTS Article 9(a) requires, sensibly and in line with the current MAD Stabilisation Regulation, that securities be overallocated "*only [...] at the offer price*". However, the Article 9 lead-in incoherently (and out of line with the current MAD Stabilisation Regulation) requires compliance with the stabilisation price ceilings of Article 8 (which are stated in any case to be inapplicable to straight debt). The current MAD Stabilisation Regulation refers instead to the disclosure and reporting conditions equivalent of draft RTS Article 7. This, as noted in #25-26 of ICMA's DP response, results in ambiguity as to whether the intended legislative obligation is for (i) stabilisation purchases consequent to an overallocation to comply with the disclosure and reporting conditions and/or (ii) the overallocation itself to comply with the disclosure and reporting conditions on a *mutatis mutandis* basis (i.e. as if the references to "stabilisation" in Article 7 were instead to "ancillary stabilisation"). However, (i) would be generally superfluous (as stabilisation purchases need to independently comply with the disclosure and reporting conditions) and (ii) would be superfluous in most of the line items (as overallocation is a one-off event occurring at the time the securities are issued at the fixed price recognised in Article 9(a) and not attributable to individual stabilisation managers). It seems (congruently) from CP #44 that it is just the existence, maximum size and usage conditions of the overallocation facility that are intended for publication. Consequently, the reference in the Article 9 lead-in should be to the specific provision of Article 7 that is actually relevant to ancillary stabilisation - namely Article 7.1(e) (as marked in the RTS redline).
17. **Ancillary stabilisation (overallotment 5% cap)** – CP #52 retains MAD's 5% overallocation cap on the basis that ESMA believes "*that the existing rules have work well in practise*" (sic), though at least there is some stakeholder feedback acknowledged (some market participants stressing that the limit of 5% is too prohibitive and that over-allotting beyond 5% should also be within the 'safe harbour'). It should be noted, bearing in mind the current long-running bull market, that things might not "*work well*" in a future bear market for bonds.
18. **'Relevant securities'** – "*Relevant securities*" is a specific term defined (in Article 2.6 of the current MAD Stabilisation Regulation) for the purposes of the current MAD stabilisation safe harbour. This defined term is redundant under MAR (in light of MAR Article 2.1 on scope) and the definition is indeed not repeated in the draft RTS. References to "relevant securities" in the draft RTS are consequently inappropriate and should be amended to be references to just "securities" (as marked in the RTS redline). Incidentally, the term appears once in MAR, Recital 32 – also presumably accidentally.
19. **'Further acquisitions'** – Draft RTS Article 10 (no equivalent in the current MAD Stabilisation Regulation) purports to exclude "*sell transactions*" from the stabilisation safe harbour. This seems entirely superfluous since stabilisation that is eligible for the safe harbour is clearly defined in MAR as a "*purchase or offer to purchase*". Article 10 further purports to exclude "*further acquisitions conducted after*" sales by stabilising entities. This, unqualified, is inappropriate as stabilisation may occur in different 'bursts' over the stabilisation period and is likely to be

interspersed with sales - as stabilising managers respond to specific investor demand for the securities, either in between or concurrently with episodes of “selling pressure” (the latter being perfectly plausible as a selling by a limited number of investors can have a significantly adverse impact on secondary price levels). However, securities purchased through stabilisation are booked separately from other purchased securities and are indeed not resold until the end of the stabilisation period (except to other stabilisation managers). To the extent ESMA wishes to include a restriction in this area, Article 10 should be amended as below (and as marked in the RTS redline):

“Securities purchased pursuant to stabilisation shall not be resold during the time period referred to in Article 6, except, where there are several entities undertaking the stabilisation, to other such entities. Sell transactions of the securities subject to stabilisation measures carried out during the time period referred to in Article 6 of this Regulation by an entity undertaking the stabilisation shall not benefit from the exemption provided by Article 5(4) of Regulation (EU) No 596/2014.”

20. **Typos** – In addition to the above, there seem to be a few other typographic errors and inconsistencies in the draft RTS. These are marked in the RTS redline.

Part III - Soundings

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

Soundings generally

21. **Soundings generally** – Though the approach proposed by the CP is much improved and seems generally workable (except as outlined below), the procedures remain generally quite onerous. The current impact of this may be muted by the generally issuer-friendly corporate bond market environment – at issue will be what happens when market conditions turn from ‘bull’ to ‘bear’ market. It is essential to bear in mind that MAR’s sounding procedures regime derives from the prohibition on disclosure of inside information that is unlawful – i.e. outside “*the normal course of the exercise of an employment, profession or duties*”. So this MAR prohibition on the unlawful disclosure of inside information would not be breached:

- (a) when disclosing inside information in compliance with MAR’s sounding procedure provisions, as this effectively ‘deems’ (non-rebuttably) the disclosure concerned not to breach the unlawful disclosure prohibition (a classic ‘safe harbour’ concept);
- (b) where inside information is otherwise disclosed in “the normal course of the exercise of an employment, profession or duties”; or
- (c) when disclosing information that is not inside information.

- 21A. **Sounding on issuer behalf** – MAR Article 11.1 defines soundings inter alia as being by “*a third party acting on behalf or on the account of*” the issuer. Further to the DP, ESMA has sensibly continued to conclude (cf. CP #64/66) that formal instruction by the issuer is not necessary and that informal instruction is sufficient. However ESMA also suggests (in CP #65 and in draft RTS Recital 17) that a third party DMP should be considered as “*acting on behalf*” of the issuer where the DMP has obtained from the issuer “*enough information to lead it to believe that a deal launch is highly probable*”. Knowledge of a launch seems irrelevant to the underlying concept of issuer ‘authorisation’ in this context, so the end of draft RTS Recital 17 should be deleted and it should thus read as below (and as marked in the RTS redline):

“A disclosing market participant, alone or as part of a syndicate, could be considered as acting on behalf of or for the account of the market sounding beneficiary, when the disclosing market participant has concluded a written agreement with the market sounding beneficiary or has received, in oral or written form, instructions or a mandate from the market sounding beneficiary.”

22. **‘Peripheral’ procedural obligations** – Non-compliance with the draft RTS and draft ITS procedural provisions alone is not sanctionable as this is not a breach of the MAR Article 14(c) prohibition; such provisions are only relevant in the context of #21(a) (and see further also #27).

In this respect, it is pertinent that MAR Article 30 on sanctions does not apply to MAR Article 11 on soundings.

23. **Definition of inside information** – As noted in ICMA's DP response (at #36), applying a sensible interpretation of the MAR Level 1 definition of inside information when considering enforcement action is crucial to the effective operation of the MAR insider regime. Most recently this has not been helped by the UK Upper Tribunal finding⁶ (though technically only a first instance judgment) that “*likely*” to “*significantly*” impact price means merely that a “*non-trivial*” price impact be a “*realistic prospect*” / not “*fanciful*” (i.e. merely ‘plausible’).

Standards applicable prior to sounding

24. **Standards prior to sounding / general** – Most of the revised proposals seem broadly workable and the underlying rationale seems sound, except for various residual or new points arising that are noted either below or in the context the proposed sounding scripts in response to Q4.
25. **Syndicate member DMPs** – Eurobond syndicates can be very large and only a minority of the syndicate members (usually the most active ones) will be involved in any market soundings. Consequently, the statement at CP #64 that “*each member of the syndicate is considered to be a DMP*” seems technically incorrect at first glance. However, the draft RTS defines “*syndicate*” at Article 2(k) to mean only those members of a syndicate that are DMPs - so the approach seems workable after all. Incidentally, the draft ITS also defines, but does not actually use, the term “*syndicate*” at Article 2(c), which should probably be deleted (as marked in the ITS redline).
26. **Lists of the ‘unwilling’** – CP #87 notes that, whilst a majority of respondents favoured option 1 in the DP, a significant minority stated investors should not be “*prevented*” from expressing their general wishes to DMPs (the lists of the ‘unwilling’ proposed to be mandated in option 2 in the DP). Investors should certainly not be prevented from expressing such wishes - however the adoption of option 1 by ESMA would not have prevented them from doing so. So this concern is not a valid basis for ESMA's proposal to proceed (as set out in draft RTS Article 14.3) on the basis of option 2. Distinctly, it is helpful that draft RTS Recital 22 clarifies DMPs are not expected to proactively maintain their lists of the unwilling.
27. **Non-inside information soundings** – As detailed in ICMA's DP response (at #50-51), procedural provisions, where no inside information is involved, are outside MAR's scope (since there is no question of a breach of MAR's prohibition on unlawful disclosure of inside information) (and see also #21 and #22). CP #91 refers to establishing at Level 2 procedures to enable a DMP to avail itself of the protection under Article 11 where inside information is disclosed during sounding that has been categorised by the DMP as not being inside. This will not be relevant to DMPs who, if in any doubt and out of prudence (understandably given the potential sanctions involved), will treat information as inside (and see #33). Draft ITS Annex I/iii should consequently be deleted and the lead-in to draft ITS Annex I/iv should be consequently deleted (both as marked in the ITS redline).

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?

28. **Minimising duplication between/within RTS and ITS** – Draft RTS Article 13.1 requires that soundings scripts include the information that is set out both (i) in the body of the article and (ii) in draft ITS Annex I. This is unnecessarily duplicative and open to the risk of an inconsistency⁷, so the earlier requirement should be deleted by draft RTS Article 13.1 being amended to read as below (and as marked in the RTS redline):

⁶ See <http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Hannam-v-FCA.pdf>.

⁷ For example, draft ITS Annex I /iv./b in the main script includes end wording (“*and the potential investor is obliged to keep such information confidential*”) that is missing from the related reference in draft RTS Article 13.1/iv/b. That wording should be deleted in any case as it also duplicates MAR Art.11(5)(d) that is already covered by draft RTS Article 13.1/iv/d. Incidentally, the wording's reference to “potential investor” seems inconsistent with the draft RTS and draft ITS terminology and should have been “market sounding recipient”. Furthermore, the same language was duplicated in iv./c and d of the draft ITS Annex I.

“1. A disclosing market participant shall use a script for conducting any market sounding. Whilst a script could be tailored for specific transactions, it shall always contain at least the information set out in Annex I of the ITS on market sounding.”

Similarly, the second form of script in draft ITS Annex I should be deleted and draft RTS Article 13.2 should be amended to read as below (and as marked in the RTS redline):

“A disclosing market participant may use a simplified standard script when sounding a market sounding recipient with whom it has an ongoing relationship and who has previously confirmed to the disclosing market participant that they are aware of the consequences of holding inside information. The simplified script includes all the items listed in the template set out in Annex I of the ITS on market sounding, except for item iv(d).”

29. **Disclosing ‘transaction’ vs. ‘issuer’ information** – CP #74 notes that whilst it is “generally” transaction information that is disclosed during sounding, other information such as ‘issuer’ information (e.g. relating to its financial standing) might also be included. This seems correct and is reflected in draft RTS Recital 18, but not in either draft RTS Article 13.1/v (which should be deleted anyway as noted in #28) or draft ITS Annex I/v, which should be amended to conform and read as below (and as marked in the ITS redline):

“v. The information being sounded in accordance with Article 12(1) of the RTS on market sounding.”

30. **Anticipated time when information ‘ceases to be inside’** – CP #76 and #108 note DMPs should determine the time when the transaction is expected to be made public and disclose this during the sounding, whilst CP #94.iv.c, draft RTS Article 13.1/iv/c (which should be deleted anyway as noted in #28) and draft ITS Annex I/iv/c refer to disclosing in a sounding the anticipated time when the sounded information will “cease to be inside information”. There are several problems with this provision. First, it seems to be an obligation distinct from, and additional to, MAR Article 11.6 and so not based on MAR Level 1. Second, it would not help investors who must assess for themselves when they cease to be in possession of inside information (as noted in MAR Article 11.7). Third, any disclosure has to correspond to the DMP’s factual assessment and knowledge (or it would be misleading to investors) - and DMPs may in many cases not know when the transaction is likely to become public (especially for the initial soundings) or when the information would cease to be price-sensitive if the transaction were to be postponed or cancelled (which incidentally should also be reflected in draft RTS Article 12.2 by requiring that the DMP “seek to determine” the transaction’s estimated public announcement as marked in the RTS redline). A DMP’s inability to anticipate when a transaction is expected to go public or when the sounded information will otherwise cease to be inside may not be problematic for some investors, for example if they are not currently exposed to the impacted market segment (and so may not be subject to trading pressures) or if they are able to continue trading through persons that are Chinese-walled from the person being sounded. Other investors can, and should, ask whether the DMP is able to make any assurances they consider individually necessary and simply withhold their consent to be wallcrossed if not. Consequently the lead-in to draft ITS Annex I/iv/c should be deleted (as marked in the RTS redline).

31. **Informing recipients where anticipated timeline no longer valid** – CP #94.iv.c, draft RTS Article 13.1/iv/c (which should be deleted anyway as noted in #28), draft ITS Article 5 and draft ITS Annex I/iv/c refer to DMPs disclosing how sounding recipients will be informed if the timeline referred to in #30 is no longer valid. Given the deletion of lead-in to draft ITS Annex I/iv/c explained in #30, ESMA’s proposed form of wording is pointless. However MAR Article 11.10 indeed requires ESMA to “develop draft implementing technical standards to specify [...] the technical means for appropriate communication of the information referred to in [MAR Article 11.6] to the person receiving the market sounding.” In this respect, a generally accepted method of communication should be sufficient without being subject to specific recipient consent. This, as for the initial sounding, should include telephone and face-to-face meetings (with the same concomitant recording procedures). Consequently draft ITS Article 5 and the latter part of draft ITS Annex I/iv/c should, respectively, be clarified as below (and as marked in the ITS redline):

- *“1. Where a disclosing market participant, for the purposes of applying Article 11(6) of Regulation 596/2014, communicates further information to the market sounding recipient,*

such further communication shall be in written and durable form, using a generally accepted electronic means of transmission.

2. Where such further communications are conducted over the telephone, they shall take place on a recorded line of the disclosing market participant. Where such further communications are conducted in other ways, such as via conference meetings, a written record of the further communication in a durable form shall be maintained and include:

a. the date and time of the event and its attendees;

b. the information disclosed by the disclosing market participant during the further communication; and

c. any document and material provided by the disclosing market participant to a market sounding recipient during the further communication.

4. In the case of such further communications conducted through conference meetings, a video or audio recording shall also be considered as an appropriate record for the purpose of point (b) of paragraph 2.”

- *“[...] and an explanation on how the market sounding recipient will be informed in case the disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Article 11(6) of Regulation 596/2014.”*

32. Consent to proceed with conversation – This seems to be an additional requirement that is both superfluous and inconsistent with MAR Level 1, since the DMP must, under MAR Article 11.5(a), obtain the market sounding recipient’s consent to receive the sounded inside information itself. The second part of draft ITS Annex I/ii should accordingly be deleted (as marked in the ITS redline).

33. Information “is” vs. “is treated as” inside – DMPs err on the side of caution when considering whether information is inside or not, understandably given (i) the sanctions for getting it wrong and (ii) the ever wider and less intuitive interpretation certain regulators have been placing on the inside information definition in recent years (most recently as noted in #23). Consequently DMPs in practice treat much information as inside, even if they would consider it not so on a sensible interpretation of the inside information definition. This fact should be reflected in the wording of the sounding scripts in draft ITS Annex I/iv as below (and as marked in the ITS redline).

“iv. In cases where a disclosing market participant has concluded that the information included in the market sounding should be treated as inside information:

a. a statement explaining that the disclosing market participant has considered the information and concluded it should be treated as inside information;

b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded should be treated as inside information;

c. [...];

d. [...];

e. consent of the market sounding recipient to receiving the information being sounded, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014.”

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

34. ‘Downstream’ information sharing – Recording details of just the persons actually contacted by the DMP (and not any persons to whom information was subsequently distributed to internally), as proposed in CP #96, seems sensible.

35. Contact details ‘used’ – There will be no contact details used for the sounding where it is conducted face to face (as acknowledged in CP #101), so draft RTS Article 14.1(c) should be amended accordingly as below (and as marked in the RTS redline):

“c. the contact details used (e.g. telephone numbers, emails) for soundings not conducted face to face.”

36. **Keeping records being of value to DMPs** – This should not be presumed to be so (as it is in CP #97), as explained in ICMA’s DP response (at #54).

37. **Sounding vs. insider lists** – See #43 in response to CP Q22.

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?

38. **Gatekeepers** – Requiring DMPs to keep details of any ‘gatekeeper’ contacts that exist and are notified by potential market sounding recipients, as proposed in CP #98 and draft RTS Article 14.2, seems workable.

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

39. **Recorded communications** – The proposals in CP #101-103 seem generally sensible. However, recording face to face meetings is relatively invasive and may be somewhat unrealistic in that it may well be instinctively seen by market sounding recipients as insultingly impugning their integrity. In this respect, it is helpful that draft ITS Article 3.4 specifies video/audio recording as *“also”* being appropriate. Distinctly, investor signature to a record of the information disclosed during the discussion is unlikely to be forthcoming (investors tend to be reticent in this respect) and so not a practical approach. Consequently, the DMP should be simply be required to keep a written record itself, with draft ITS Article 3.3.b amended as below (and as marked in the RTS redline):

“the information disclosed by the disclosing market participant during the market sounding”

40. **Written confirmations** – It seems sensible, as proposed in CP #105, not to require written confirmation of agreement to receive inside information as this will indeed appear in the communication records.

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

41. **Non-sounding DMP staff ‘need-to-know’** – DMPs are internally organised between functions that are treated as ‘private-side’ (such as DCM/origination and syndicate) and those that are treated as ‘public-side’ (such as sales) – this helps the efficient establishment and internal policing of information barriers. In this respect, it seems workable to limit the number of DMP employees, be they ‘private-side’ or ‘public-side’, not responsible for sounding yet having access to the sounded information, to those with a ‘need to know’. However *“ensuring”* that non-sounding ‘private-side’ staff *“are not in possession”* of the sounded information (as provided for in draft RTS Article 11.3.c) would disproportionately undermine the value of segregating such ‘public’ and ‘private’ sides. Consequently the second sentence in draft RTS Article 11.3.c should be deleted (as marked in the RTS redline).

42. **DMP processes / controls generally** – Subject to the preceding point, the proposed approach in CP #106 seems broadly workable.

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

43. **Sounding vs. insider lists** – MAR Article 18.1(a) on insider lists (rather than sounding lists) relates to *“persons who have access to inside information and who are working for [issuers] under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies”*. However CP Annex VII draft ITS Art.8.1.a needs to be amended to be consistent with MAR Level 1 since, as currently

drafted, it applies to “persons having access to any inside information” without reflecting the above MAR Article 18.1(a) additional qualification.

Annex A – Draft stabilisation/soundings RTS redline mark-up

[NB: Cover page not reproduced.]

Draft

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

[...]

supplementing Regulation (EU) No (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) with regard to regulatory technical standards for the conditions that buy-back programmes and stabilisation measures must meet, the appropriate arrangements, systems and procedures for disclosing market participants conducting market sounding and the criteria, procedures and requirements for establishing an accepted market practice and for maintaining, terminating and modifying the conditions for its acceptance

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)¹⁶ [OJ L 173, 12.6.2014, p. 1], and in particular Articles 5(6), 11(9) and 13(7) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) The provisions of Article 5 of Regulation (EU) No 596/2014 only cover behaviour directly related to the purpose of the buy-back and stabilisation activities. Behaviour which would not benefit from such provisions under Regulation (EU) No 596/2014 should not in itself be deemed to constitute market abuse, although they are covered by Regulation (EU) No 596/2014 and may be subject to administrative and criminal penalties, if the competent authority establishes that the action in question constitutes market abuse.

(2) Article 5 of Regulation (EU) No 596/2014 refers to associated instruments only in the context of stabilisation of securities. Accordingly, buy-back programmes involving

~~(3)~~ associated instruments, such as financial derivatives, will not benefit from the exemption provided in Regulation (EU) No 596/2014.

~~(34)~~ [Need to consequentially renumber all recitals] As transparency is a prerequisite for the prevention of market abuse, it is important to specify the mechanisms to be used for public disclosure of information, which is required to be publicly disclosed under this Regulation.

(5) Issuers having adopted buy-back programmes should inform their competent authority and the public.

(6) In order to prevent market abuse, the daily volume of trading in own shares in buy-back programmes should be limited.

(7) Particular attention has to be paid to the selling of own shares during the life of a buy-back programme, to the possible existence of closed periods within issuers during which transactions are prohibited and to the fact that an issuer may have legitimate reasons to delay public disclosure of inside information.

(8) Stabilisation transactions mainly have the effect of providing support for the price of an offering of ~~relevant~~ securities [See Response #17] during a limited time period if they come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in the ~~relevant~~ securities. This is in the interest of those investors having subscribed or purchased those ~~relevant~~ securities in the context of a significant distribution, and of issuers. In this way, stabilisation can contribute to greater confidence of investors and issuers in the financial markets. Furthermore, this is achieved by the purchase, rather than the sales of the ~~relevant~~ securities.

(9) In relation to stabilisation, block trades that are strictly private transactions should not be considered as a significant distribution of ~~relevant~~ securities.

(10) In the context of an initial public offer, when Member States permit trading prior to the beginning of the official trading on a regulated market, the permission covers 'when issued trading'.

(11) Market integrity requires the adequate public disclosure of stabilisation activity. Methods used for adequate public disclosure of such information should be efficient and can take into account market practices accepted by competent authorities. Besides, an appropriate reporting of the stabilisation transactions is necessary to allow competent authorities to supervise stabilisation activities. Furthermore, it is preferable to clarify in advance the allocation of the responsibilities between the issuers, the offerors or the entities undertaking the stabilisation for fulfilling the applicable reporting and transparency requirements taking into account who has the relevant information.

(12) There should be adequate coordination in place between all investment firms and credit institutions undertaking stabilisation. During stabilisation, one investment firm or credit institution should act as a central point of inquiry for any regulatory intervention by the competent authority in each Member State concerned.

(13) In order to avoid confusion, stabilisation activity should be carried out by taking into account the market conditions and the offering price of the ~~relevant~~ security. Transactions to liquidate positions that were established as a result of stabilisation activity, should be undertaken to minimise market impact having due regard to prevailing market conditions.

(13A) Stabilisation activity may be carried out either on or off a regulated market, MTF or OTF and may be carried out by use of financial instruments other than those admitted or to be admitted to trading, or trading on, the regulated market, MTF or OTF which may influence the price of the instrument admitted, or to be admitted to trading, or traded, on a regulated market MTF or OTF. [See Response #12]

(14) Overallotment facilities and 'greenshoe options' are closely related to stabilisation, by providing resources and hedging for stabilisation activity.

(15) Particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilisation when it results in a position uncovered by the 'greenshoe option'.

(16) The ability to conduct market soundings is important for the proper functioning of financial markets and therefore a market sounding regime is needed to provide a legal framework within which such activity is clearly defined and can be conducted legitimately. Information disclosed by a disclosing market participant should enable a market sounding recipient as a potential investor to make a sufficiently informed assessment and inside information should be properly flagged as required. Provided that all applicable market sounding standards and requirements are complied with, disclosing market participants should be afforded a measure of protection against allegations that they have committed market abuse through ~~unlawful~~~~improper~~ disclosure of inside information. In this respect, appropriate arrangements, procedures and record keeping requirements are necessary in order to ensure that market sounding activities are managed and controlled effectively and smoothly, being in the interest of the disclosing market participant to ensure appropriate internal controls, guaranteeing the legitimacy of market sounding activities, are in place.

(17) A disclosing market participant, alone or as part of a syndicate, could be considered as acting on behalf of or for the account of the market sounding beneficiary, when the disclosing market participant has concluded a written agreement with the market sounding beneficiary or has received, in oral or written form, instructions or a mandate from the market sounding beneficiary, ~~or, has sufficient information from the market sounding beneficiary to conclude that the transaction subject to the market sounding is reasonably expected to come into existence or occur.~~ [See Response #21A]

(18) When determining which information to disclose to a potential investor, a disclosing market participant should carefully consider whether the disclosure should include only the exact characteristics of the possible transaction, or also other information which may provide context and background to the possible transaction, but is not directly related to it.

(19) Communications related to and prior to a private placement or a block trade would normally fall under the scope of the market sounding regime when they are intended to provide information to potential investors in order to gauge their interest in a possible transaction and the conditions relating to it such as its potential size or pricing.

(20) Operational procedures and their regular review and update are key for the correct and effective application of the relevant requirements throughout the process of a market sounding. For this purpose, employees of a disclosing market participant should be appropriately trained in relation to the conduct of a market sounding, with a particular focus on the legal implications of market sounding activities and the assessment of the nature of the information communicated through market soundings.

(21) Effective planning of a market sounding would imply that the disclosing market participant determines for each particular market sounding the type and number of investors it intends to sound, taking into account the specific circumstances surrounding the subject of the market sounding and the willingness of the investors to be sounded. When planning the market sounding process, a disclosing market participant should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the anticipated date for the launch or announcement of the potential transaction, but it should also recognise the anticipated launch or announcement is also dependent on external factors such as changing market conditions.

(22) In addition to obtaining and recording the consent of a potential investor to receive inside information in relation to every market sounding, a disclosing market participant should also keep a list of those potential investors that have informed it that they are not willing to be sounded in relation to potential transactions. Potential investors may express their wish not to be approached in relation to all potential transactions or particular types of transactions. It should be the responsibility of the potential investor to keep the disclosing market participant updated in relation to its preferences. Disclosing market participants are not expected to continually approach the potential investors on its list to ensure the list remains up-to-date, although it may be in their commercial interest to periodically reconfirm the position with potential investors.

(23) The definition of common criteria, procedure and requirements across the Union for the establishment of an accepted market practice by a national competent authority, as well as common requirements for maintaining, terminating or modifying an accepted market practice by a competent authority, contributes to the development of uniform arrangements used by competent authorities in the sphere of accepted market practice and improves the clarity of the legal regime under which these practices are legitimate.

(24) An accepted market practice should be performed in a way that ensures market integrity and investor protection without creating risks for other market participants and other related markets. It should also be subject to a sound surveillance and proper supervision from the competent authority that accepted it. Therefore, the status of the entity performing the accepted market practice, especially when acting on behalf or for the account of another person who is the direct beneficiary of the market practice, is of particular relevance. The competent authority will need to assess for the particular market practice under consideration whether such entity needs to be a supervised person.

(25) When assessing the impact of a practice on market liquidity and efficiency, competent authorities should positively consider market practices whose one or more of their objectives are, inter alia, to promote regular trading of illiquid financial instruments, minimize price fluctuations due to excessive spreads and limited supply or demand of a financial instrument without contradicting a market trend, avoid abusive squeezes, provide quotes when there is the risk of not having counterparties for a trade, provide transparency of prices, facilitate the evaluation of fair and actual prices in markets where most trades are conducted outside a trading venue or facilitate orderly operations where a participant has a dominant position.

(26) The provisions in this Regulation are closely linked, since they deal with exemptions to provisions of Regulation (EU) No 596/2014 when certain circumstances or conditions are met. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including

investors that are non-Union residents, it is desirable to include certain of the regulatory technical standards required by Regulation (EU) No 596/2014 in a single Regulation.

(27) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(28) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹⁷ [OJ L 331, 15.12.2010, p. 84].

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down regulatory technical standards for:

- (i) the conditions to be met by buyback programmes and the stabilisation of financial instruments in order to benefit from the exemption provided for in Article 5 of Regulation (EU) No 596/2014;
- (ii) determining appropriate arrangements, procedures and record keeping requirements for disclosing market participants conducting market soundings, to comply with the requirements laid down in paragraphs 4, 5, 6 and 8 of Article 11 of Regulation (EU) No 596/2014, pursuant to Article 11(9) of Regulation (EU) No 596/2014; and
- (iii) the criteria, the procedure and the requirements for establishing an accepted market practice, as well as the requirements for maintaining, terminating or modifying the conditions for its acceptance pursuant to Article 13(7) of Regulation (EU) No 596/2014.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) No 596/2014:

- a) 'time-scheduled buy-back programme' means a buy-back programme where the dates and quantities of securities to be traded during the time period of the programme are set out at the time of the public disclosure of the buy-back programme;
- b) 'adequate public disclosure' means, for instruments admitted to trading on Regulated Markets, the use of the information dissemination and storage mechanism(s) set up in the member state as part of their implementation of the public disclosure made in accordance with the procedure laid down in Directive 2004/109/EC (Transparency Directive), and, for other financial instruments, the use of the technical means for public disclosure of inside information pursuant to Article 17(1) of Regulation (EU) No 596/2014;
- c) 'offeror' means the prior holders of, or the entity issuing, the ~~relevant~~ securities;
- d) 'allotment' means the process or processes by which the number of ~~relevant~~ securities to be received by investors who have previously subscribed or applied for them is determined;
- e) 'ancillary stabilisation' means the exercise of an overallotment facility or of a "Greenshoe option" by investment firms or credit institutions, in the context of a significant distribution of ~~relevant~~ securities, exclusively for facilitating stabilisation activity;

- f) 'overallotment facility' means a clause in the underwriting agreement or lead management agreement which permits acceptance of subscriptions or offers to purchase a greater number of ~~relevant~~ securities than originally offered;
- g) 'greenshoe option' means an option granted by the offeror in favour of the investment firm(s) or credit institution(s) involved in the offer for the purpose of covering overallotments, under the terms of which such firm(s) or institution(s) may purchase up to a certain amount of ~~relevant~~ securities at the offer price for a certain period of time after the offer of the ~~relevant~~ securities;
- h) "disclosing market participant" means a person referred to in Article 3(32) of Regulation (EU) No 596/2014;
- i) "market soundings" means the activity defined in Article 11(1) and (2) of Regulation (EU) No 596/2014;
- j) "market sounding beneficiary" means a person referred to in point (a) to (c) of Article 11(1) and Article 11(2) of Regulation (EU) No 596/2014;
- k) "syndicate" means a group of disclosing market participants who act in coordination as a third party referred to in Article 11(1)(d) of Regulation (EU) No 596/2014;
- l) "supervised persons" means persons who are subject to supervisory duties from regulators, authorised persons under MiFID, or persons subject to prudential supervision in a Member State;
- m) "interested parties" means an issuer, an intermediary or any other party or group of parties that subscribe or promote the accepted market practice.

CHAPTER II BUY-BACK PROGRAMMES

[NB: Chapter II not reproduced.]

CHAPTER III STABILISATION OF SECURITIES

Article 6

Time-related conditions for stabilisation

1. Stabilisation shall be carried out only for a limited time period.
2. In respect of shares and other securities equivalent to shares, the time period referred to in paragraph 1 shall, in the case of a significant distribution in the form of an initial offer publicly announced, start on the date of commencement of trading of the ~~relevant~~ securities on the concerned trading venue and end no later than 30 calendar days thereafter.
3. Where the initial offer publicly announced takes place in a Member State that permits trading prior to the commencement of trading on a trading venue, the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the final price of the ~~relevant~~ securities and last no longer than 30 calendar days thereafter. Such trading shall be carried out in compliance with the rules, if any, of the trading venue on which the ~~relevant~~ securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.
4. In respect of shares and other securities equivalent to shares, the time period referred to in paragraph 1 shall, in the case of a significant distribution in the form of a secondary offer, start on the date of adequate public disclosure of the final price of the ~~relevant~~ securities and end no later than 30 calendar days after the date of allotment.
5. In respect of bonds and other forms of securitised debt (which are not convertible or exchangeable into shares or into other securities equivalent to shares), the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the terms of the offer of the ~~relevant~~ securities

(i.e. including the spread to the benchmark, if any, once it has been fixed) and end, whatever is earlier, either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the ~~relevant~~ securities.

6. In respect of securitised debt convertible or exchangeable into shares or into other securities equivalent to shares, the time period referred to in paragraph 1 shall start on the date of adequate public disclosure of the final terms of the offer of the ~~relevant~~ securities and end, whatever is earlier, either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the ~~relevant~~ securities.

Article 7

Disclosure and reporting conditions for stabilisation

1. The following information shall be adequately publicly disclosed ~~before the opening of the offer period by the time of, or at the same time as, the adequate public disclosure of the terms of the offer~~ [See Response #11] of the ~~relevant~~ securities:

- a) the fact that stabilisation may be undertaken, that there is no assurance that it will be undertaken and that it may be stopped at any time;
- b) the fact that stabilisation transactions are aimed to support the market price of the ~~relevant~~ securities during the stabilisation period;
- c) the beginning and end of the period during which stabilisation may occur;
- d) the identity of the stabilisation manager, unless this is not known at the time of publication, in which case it [See Response #14] must be publicly disclosed before any stabilisation activity begins;
- e) the existence and maximum size of any overallotment facility or greenshoe option, the exercise period of the greenshoe option and any conditions for the use of the overallotment facility or exercise of the greenshoe option.

The application of the provisions of this paragraph shall be suspended for offers under the scope of application of the measures implementing Directive 2003/71/EC.

2. Within one week of the end of the stabilisation period, the following information must be adequately disclosed to the public ~~by the entity undertaking the stabilisation measure~~ [See Response #13]:

- a) whether or not stabilisation was undertaken;
- b) the date at which stabilisation started;
- c) the date at which stabilisation last occurred;
- d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out; and
- e) the trading venue(s) on which the stabilisation transactions were carried out, where applicable.

2A. [See Response #10] For the purpose of the notification duty set out in Article 5(5) of Regulation (EU) No 596/2014, the entities undertaking the stabilisation must record each stabilisation order or transaction in securities and associated instruments with, as a minimum, details of the names and numbers of the instruments bought or sold, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned ~~the information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of Regulation (EU) No 600/2014. [See Response #10]~~ Where the stabilisation transactions take place on several trading venues in different Member States, the competent authorities of the trading venues shall be notified of the stabilisation transactions carried out on their trading venues and ESMA shall be notified of other stabilisation transactions. [See Response #7]

3. The issuer, the offeror and the entities undertaking the stabilisation ~~may~~ shall appoint one of them to ~~be~~ be responsible for (i) the disclosure pursuant to paragraphs 1 and 2 [See Response #13] and (ii) the notification reporting pursuant to Article 5(5) of Regulation (EU) No 596/2014 [See Response #9].

4. Where several entities undertake the stabilisation acting, or not, on behalf of the issuer or offeror, one of those persons shall act as central point of inquiry for any request from the competent authority of the trading venue on which the ~~relevant~~ securities have been admitted to trading or are traded.

Article 8

Specific price conditions

1. In the case of an offer of shares or other securities equivalent to shares, stabilisation of the ~~relevant~~ securities shall not in any circumstances be executed above the offering price.
2. In the case of an offer of securitised debt convertible or exchangeable into instruments as referred to in paragraph 1, stabilisation of those instruments shall not in any circumstances be executed above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

Article 9

Conditions for ancillary stabilisation

In order to benefit from the exemption provided for in Article 5(4) of ~~of~~ Regulation (EU) No 596/2014, ancillary stabilisation must be undertaken in accordance with Article 7.1(e)~~8~~ [See Response #16] of this Regulation and with the following:

- a) ~~relevant~~ securities may be overallocated only during the subscription period and at the offer price;
- b) a position resulting from the exercise of an overallocation facility by an investment firm or credit institution which is not covered by the greenshoe option may not exceed 5% of the original offer;
- c) the greenshoe option may be exercised by the beneficiaries of such an option only where ~~relevant~~ securities have been overallocated;
- d) the greenshoe option may not amount to more than 15% of the original offer;
- e) the exercise period of the greenshoe option must be the same as the stabilisation period required under Article 6~~7~~ [Apparent typographic error];
- f) the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of ~~relevant~~ securities involved.

Article 10

Restrictions

[Securities purchased pursuant to stabilisation shall not be resold during the time period referred to in Article 6, except, where there are several entities undertaking the stabilisation, to other such entities.] Sell transactions of the securities subject to stabilisation measures carried out during the time period referred to in Article 6~~7~~ [Apparent typographic error] of this Regulation by an entity undertaking the stabilisation ~~and further acquisitions conducted after such sales~~ shall not benefit from the exemption provided by Article 5(4) of Regulation (EU) No 596/2014. [See Response #19]

CHAPTER IV

ARRANGEMENTS, PROCEDURES AND RECORD KEEPING REQUIREMENTS FOR THE ACTIVITY OF MARKET SOUNDING

Article 11

Internal arrangements and procedures

1. A disclosing market participant shall establish and maintain internal arrangements supported by operational procedures setting out how to carry out the market soundings to ensure its compliance

with Article 11(3) to (8) of Regulation (EU) No 596/2014 prior, during and after the conducting of the market sounding. A disclosing market participant shall regularly review such arrangements and procedures and update them when necessary.

2. The procedures referred to in paragraph 1 shall include, inter alia, the template for standard scripts, including at least the information set out in Article 13~~6~~ *[Apparent typographic error]* of this Regulation, and the arrangements regarding how market sounding records are made and maintained.

3. As part of the internal procedures referred to in paragraph 1, a disclosing market participant shall take the necessary steps to:

- a. limit the number of employees responsible for conducting the market sounding, having regard to the nature and characteristics of the transaction;
- b. ensure employees responsible for conducting market soundings are appropriately trained and understand the key risks and obligations arising from market soundings. This shall include training in relation to assessing whether information is inside information as well as conducting the market sounding process;
- c. limit the number of employees who are not responsible for conducting the market sounding but having access to the information to those with a legitimate reason for such access, taking into account the characteristic of the transaction. ~~A disclosing market participant shall ensure that clear internal arrangements are established to ensure that its employees who are not responsible for conducting the market sounding and who do not have a legitimate reason to have access to inside information are not in possession of that inside information.~~ *[See Response #41]*
- d. reduce as much as possible the time between the moment when inside information is made available to the employees conducting the market sounding and the moment when market soundings with investors are conducted.

Article 12

Procedures prior to conducting a market sounding

1. A disclosing market participant shall determine in advance the content of the information it will disclose to a potential investor.

2. For the purposes of Article 11(3) of Regulation (EU) No 596/2014, when considering whether the market sounding will involve the disclosure of inside information, a disclosing market participant's ~~shall include in the~~ written record ~~an explanation of its conclusion. This~~ *[Duplication with MAR Art. 11.3]* shall include all the relevant information that contributed to the conclusion such as any opinion provided by the market sounding beneficiary as to whether or not the information is inside information, and the source of that information. As part of this conclusion a disclosing market participant shall also ~~seek to~~ *[See Response #30]* determine the time when the transaction is estimated to be announced.

3. In the case of a syndicate, the disclosing market participants shall have appropriate arrangements in place aimed at establishing an agreement between the syndicate's members on: (i) the information that will be disclosed to potential investors as part of the market sounding, and (ii) the conclusion referred to in paragraph 2.

4. If a disclosing market participant has concluded the information to be disclosed in any market sounding will involve the disclosure of inside information it shall, before starting the market sounding, inform a market sounding beneficiary of that conclusion and of the information it proposes to disclose in any market sounding if the disclosing market participant has concluded an agreement with, or received direct instructions or a mandate, from the market sounding beneficiary.

5. For the purpose of applying Article 11(3) of Regulation (EU) No 596/2014, a disclosing market participant shall keep a written record of ~~its consideration, any discussion undertaken with the market sounding beneficiary, and an explanation justifying its conclusion regarding whether the market sounding will involve the disclosure of inside information.~~ *[Duplication with MAR Art. 11.3]*

Article 13

Information and modalities for communicating with potential investors

1. A disclosing market participant shall use a script for conducting any market sounding. Whilst a script could be tailored for specific transactions, it shall always contain at least the following information set out in Annex I of the ITS on market sounding. [\[See response #28\]](#):

- ~~i. clarification that the conversation is classified as a market sounding;~~
- ~~ii. confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation;~~
- ~~iii. in cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information:
 - ~~a. a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor, may cause them to be an insider, and~~
 - ~~b. a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential;~~
 - ~~c. consent of the market sounding recipient to receiving the information which is the subject of the proposed market sounding;~~~~
- ~~iv. in cases where a disclosing market participant has concluded that the information included in the market sounding is inside information:
 - ~~a. a statement explaining that the disclosing market participant has considered the information and concluded it is inside information;~~
 - ~~b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded it is inside information;~~
 - ~~c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid;~~
 - ~~d. a statement explaining that obligations and prohibitions apply to the possession of inside information, including point (b), (c) and (d) of Article 11(5) of Regulation (EU) No 596/2014, and that administrative and criminal penalties may be incurred in the event of a breach of Regulation (EU) No 596/2014;~~
 - ~~e. consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014; and~~~~
- ~~v. information regarding the transaction in accordance with Article 12(1) of this Regulation.~~

2. A disclosing market participant may use a simplified standard script when sounding a market sounding recipient with whom it has an ongoing relationship and who has previously confirmed to the disclosing market participant that they are aware of the consequences of holding inside information. The simplified script includes all the items listed in [the template set out in Annex I of the ITS on market sounding paragraph 1](#), ~~except for item iv(d), as set out in [Annex I of the ITS on market sounding. [\[See response #28\]](#)~~

Article 14

Data regarding market sounding recipients

1. A disclosing market participant shall make and maintain accurate records in relation to each market sounding conducted, including:

- a. the names of all firms and employees at those firms who were sounded by the disclosing market participant;

- b. the date and time of each sounding, including any follow up communication
- c. the contact details used (e.g. telephone numbers, emails) for ~~the~~ soundings not conducted face to face. [See Response #35]

2. A disclosing market participant shall draw up a list of the contact details of designated persons or contact points entrusted by a potential investor to receive market soundings, if this information has been provided by the potential investor.

If the contact details of a designated person or contact point are provided by a potential investor, a disclosing market participant shall use these details to approach the potential investor, unless the disclosing market participant reasonably believes that the contact information on the list is not up-to-date.

3. A disclosing market participant shall draw up a separate list of potential investors that have informed it that they do not wish to be sounded in relation either to any potential transaction or particular types of potential transactions, and refrain from sounding them in relation to those transactions.

Article 15

Record keeping requirements

1. For the purpose of Article 11(8) of Regulation (EU) 596/2014 in relation to each market sounding, a disclosing market participant shall ensure that the following records are kept in a durable medium and in an accessible form for a period of at least five years:

- a. the relevant internal arrangements and procedures and any changes to them;
- b. the record provided for in Article 12(5);
- c. the records provided for in Article 14(1);
- d. where applicable, the consent of the market sounding recipient to receiving inside information pursuant to point (a) of Article 11(5) of Regulation (EU) 596/2014;
- e. all communications relating to the market sounding between the disclosing market participant and all market sounding recipients in the course of the sounding, including any document and material provided by the disclosing market participant to a potential investor; and
- f. where applicable, the communication pursuant to Article 11(6) of Regulation (EU) 596/2014 [To clarify not an additional requirement] explaining that the information that has been disclosed in the course of a market sounding has ceased to be inside information.

2. Such records shall be made available to the competent authority upon request.

CHAPTER V

ESTABLISHING AN ACCEPTED MARKET PRACTICE

[NB: Chapters V to IX and Annex I not reproduced.]

Annex B – Draft soundings ITS redline mark-up

[NB: Cover page not reproduced.]

Draft

COMMISSION IMPLEMENTING REGULATION (EU) No .../... laying down implementing technical standards with regard to the systems and notification templates to be used by disclosing market participants according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) of XXX

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse)¹⁸ [OJ L 173, 12.6.2014, p. 1.] and in particular Article 11(10) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) The ability to conduct market soundings is important for the proper functioning of financial markets and therefore a market sounding regime is needed to provide a clear framework within which such activity is clearly defined and can be conducted legitimately. In this context, in order to ensure uniform condition of application of Article 11 Regulation (EU) No 596/2014 across the Union, disclosing market participants shall use pre-determined notification templates, a precise format of record and defined technical means for appropriate communication with market sounding recipients.

(2) Records are key for demonstrating that market soundings have been appropriately carried out. They serve as a means to allow a disclosing market participant to demonstrate the legitimacy of its conduct, and as an important audit trail for competent authorities when conducting investigations. The use of common notification templates, record formats and technical means guarantees the harmonised application of the market sounding regime across the Union.

(3) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority (hereafter referred to as ESMA) to the Commission.

(4) The ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹⁹ [OJ L 331, 15.12.2010, p. 84].

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down implementing technical standards, pursuant to Article 11(10) of Regulation (EU) No 596/2014, specifying the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 4, 5, 6 and 8 of Article 11 of the same regulation, particularly the precise format of the records referred to in paragraphs 4 to 8 and the technical means for appropriate communication of the information referred to in paragraph 6 of that regulation to the person receiving the market sounding.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) No 596/2014:

- a) “disclosing market participant” means a person referred to Article 3(2) of Regulation (EU) No 596/2014;
- b) “market soundings” means the activity defined in Article 11(1) and (2) of Regulation (EU) No 596/2014;
- c) ~~“syndicate” means a group of disclosing market participants who act in coordination as a third party referred to in Article 11(1)(d) of Regulation (EU) No 596/2014.~~ [\[See response #25\]](#)

CHAPTER II

**TEMPLATES, FORMAT OF THE RECORDS AND TECHNICAL MEANS TO BE USED FOR THE
ACTIVITY OF CONDUCTING A MARKET SOUNDING**

Article 3

Format of records

1. Pursuant to *Article 11*(8) and (9) of Regulation 596/2014 the records shall be kept and stored by the disclosing market participant in a format that ensures their durability, accessibility and readability over the period of retention and their electronic transmission to the competent authority upon request.
2. Unless otherwise provided in paragraph 3, the record of the information shall be maintained in a written, durable and electronic form.
3. Where market soundings are conducted over the telephone, they shall take place on a recorded line of the disclosing market participant. Where market soundings are conducted in other ways, such as via conference meetings, a written record of the market sounding in a durable form shall be maintained and include:
 - a. the date and time of the event and its attendees;
 - b. ~~confirmation of and agreement on the~~ information actual content disclosed by the disclosing market participant during the market sounding; and [\[See response #39\]](#)
 - c. any document and material provided by the disclosing market participant to a market sounding recipient during the market sounding.
4. In the case of market soundings conducted through conference meetings, a video or audio recording shall also be considered as an appropriate record for the purpose of point (b) of paragraph 3.

Article 4

Template for scripts

For the purpose of Article 13 of RTS on market sounding, the templates set out in Annex I to this Regulation shall be used. These templates shall be maintained in electronic form clearly listing all the items to be included in the script in accordance with Article 13 of the Regulatory Technical Standards, as referred to in Article 11(9) of Regulation 596/2014.

Article 5

Technical means for communication with the market sounding recipient

1. Where a disclosing market participant, for the purposes of applying Article 11(6) of Regulation 596/2014, a disclosing market participant, where applicable, shall communicate further information to the market sounding recipient that the information that has been disclosed in the course of the market sounding has ceased to be inside information. Such further communication shall be in written and durable form, using an generally accepted electronic means of transmission that is acceptable to the market sounding recipient. [See Response #31]

2. Where such further communications are conducted over the telephone, they shall take place on a recorded line of the disclosing market participant. Where such further communications are conducted in other ways, such as via conference meetings, a written record of the further communication in a durable form shall be maintained and include:

a. the date and time of the event and its attendees;

b. the information disclosed by the disclosing market participant during the further communication; and

c. any document and material provided by the disclosing market participant to a market sounding recipient during the further communication.

4. In the case of such further communications conducted through conference meetings, a video or audio recording shall also be considered as an appropriate record for the purpose of point (b) of paragraph 2. [See Response #31]

Article 6

[NB: Article 6 not reproduced.]

ANNEX I

Template for the scripts of market sounding

Description of the items:

- i. Clarification that the conversation is classified as a market sounding.
- ii. Confirmation that the disclosing market participant is speaking with the appropriate person ~~and that person's consent to proceed with the conversation.~~ [\[See Response #32\]](#)
- iii. ~~In cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information:~~
 - a. ~~a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor, would become inside information;~~
 - b. ~~a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential;~~
 - c. ~~confirmation of the market sounding recipient's consent to be sounded.~~ [\[See Response #27\]](#)
- iv. ~~The following~~ [\[See Response #27\]](#) ~~In cases where a disclosing market participant has concluded that the information included in the market sounding is inside information:~~
 - a. a statement explaining that the disclosing market participant has considered the information and concluded it [should be treated as is](#) [\[See Response #33\]](#) inside information;
 - b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded [should be treated as it is](#) [\[See Response #33\]](#) inside information, ~~and the potential investor is obliged to keep such information confidential~~ [\[Duplicates MAR Art. 11\(5\)\(d\) already covered in #d below\]](#);
 - c. ~~the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and~~ [\[See Response #30\]](#) [an explanation on how the market sounding recipient will be informed in case the disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Article 11\(6\) of Regulation 596/2014](#) ~~anticipated time is no longer valid~~ [\[See Response #31\]](#);
 - d. a statement explaining that obligations and prohibitions apply to the possession of inside information, including point (b), (c) and (d) of Article 11(5) of Regulation (EU) No 596/2014, and that administrative and criminal penalties may be incurred in the event of a breach of Regulation (EU) 596/2014;
 - e. consent of the market sounding recipient to receiving the ~~inside~~ [information being sounded](#) [\[See Response #33\]](#), as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014.
- v. ~~The~~ [information being sounded](#) ~~regarding the transaction~~ in accordance with Article 12(1) of the RTS on market sounding. [\[See Response #29\]](#)

Simplified template for the scripts of market sounding

(to be used in accordance to Article 13(2) of the RTS)

Description of the items:

- ~~i. Clarification that the conversation is classified as a market sounding.~~
- ~~ii. Confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation.~~
- ~~iii. In cases where a disclosing market participant has concluded that the information included in the market sounding is not inside information:
 - ~~a. a statement warning the market sounding recipient that even though the disclosing market participant has concluded that no inside information will be passed during the market sounding, there is a risk that the assessment is incorrect or that the information, when combined with other information held by the potential investor, would become inside information;~~
 - ~~b. a statement clarifying that the market sounding recipient is under an obligation to assess for itself whether it is in possession of inside information and therefore subject to the obligations and prohibitions that apply to the possession of inside information, including keeping the information confidential;~~
 - ~~c. confirmation of the market sounding recipient's consent to be sounded.~~~~
- ~~iv. In cases where a disclosing market participant has concluded that the information included in the market sounding is inside information:
 - ~~a. a statement explaining that the disclosing market participant has considered the information and concluded it is inside information;~~
 - ~~b. a reference to the fact that, by giving its agreement to proceed with the sounding, the market sounding recipient will receive information which the disclosing market participant has concluded it is inside information, and the potential investor is obliged to keep such information confidential;~~
 - ~~c. the anticipated time when information will cease to be inside information, with an appropriate caveat that this may be subject to change in light of changing market conditions, and an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid; consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014;~~
 - ~~d. consent of the market sounding recipient to receiving the inside information, as referred to in point (a) of Article 11(5) of Regulation (EU) No 596/2014.~~~~
- ~~v. Information regarding the transaction in accordance with Article 12(1) of the RTS on market sounding. [\[See Response #28\]](#)~~