MAR FRAMEWORK
FAQ ON
IMPLEMENTATION AND INTERPRETATION
-
Summary of questions reviewed by AMAFI

The MAR framework, comprising the Market Abuse Regulation (MAR) and its implementing measures, came into effect on 3 July 2016.

Since our membership had identified points relating to MAR provisions and requiring particular attention in terms of implementation or interpretation, AMAFI met with representatives of the French financial markets authority (AMF) to discuss these issues.

Citing existing laws and regulations and with reference to these discussions, this set of frequently asked questions (FAQ) seeks to provide guidance to AMAFI members by offering information that will help them determine their response to MAR-related questions. Naturally, this is a living document. The answers it provides may therefore be extended or modified to reflect ongoing discussions and to incorporate new insights as they become available, notably from the European Commission, the European Securities and Markets Authority (ESMA) or the AMF. The FAQ will also be expanded to include new questions that are brought to AMAFI's attention.

The first version of this document was published on 15 June 2016 (*AMAFI / 16-29*). This new version updates the initial FAQ, adding new questions on investment recommendations (*V. III*).

DISCLAIMER

Readers are reminded that the sole purpose of this document is to share with members the discussions held within AMAFI committees on certain MAR implementation questions.

While it also draws on discussions with AMF representatives, this document has not been submitted for their approval and they may not under any circumstances be held liable for it.

AMAFI disclaims all liability for the information contained in this memo, which must be treated with care at all times.

The following abbreviations are used in the remainder of the document:

- **MAD 1**: Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on market abuse and its implementing measures;
- **MAR**: Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse;
- **MiFIR**: Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012;
- **MIFID 2:** Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;
- **Market soundings**: Market soundings as defined in MAR Article 11;

- **IR 2016/347**: Commission Implementing Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of **insider lists** and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council;
- **DR 2016/958**: Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of **investment recommendations** or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest;
- **DR 2016/957**: Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for **preventing, detecting and reporting** abusive practices or **suspicious orders or transactions**;
- **DR 2016/960**: Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting **market soundings**.

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I. INSIDER LISTS

1.1. Given data privacy issues, how should ISPs manage insiders from third parties?

Answer of 15 June 2016: The third parties considered here are legal entities operating outside the ISP, such as, for example, a legal firm that assists the ISP in a specific deal. MAR provides a framework for the format and content of insider lists by requiring certain pieces of personal information on insiders. In a given transaction, if individuals working for these third parties become insiders, the question is whether the ISP should add them to its own insider list and, if so, how it should go about gathering and keeping their personal data, particularly given the legal constraints connected with data privacy.

Until now, under the existing framework and based on a position published by the AMF, only the third party entity itself needed to be included in the ISP's insider list. That third party was then required in turn to maintain its own list of insiders, updating it to include the names of individual partners or employees with insider status.

In AMAFI's view, given the lack of indications to the contrary in the applicable measures, the amendments introduced by MAR to the framework for insider lists do not appear to call the cascade approach to keeping insider lists into question. The AMF is expected to confirm this interpretation through the amendments currently being made to its issuer policy on permanent disclosures and inside information, given the elements contained in the paper that it published on 20 April for a public consultation running until 30 May.

Any other solution would leave ISPs facing the issue of managing the personal data of people over whom they have no official authority in the absence of a direct reporting relationship.

1.2. How does the section on permanent insiders relate to the section on deal-specific or event-based inside information?

Answer of 15 June 2016: MAR states that persons required to draw up and keep an up-to-date insider list "*may insert*" a supplementary section into their insider list with the details of individuals who have access at all times to all inside information (*IR 2016/347, Art. 2.2*). It says that "*the details of permanent insiders included in* [this section] *shall not be included in the other sections of the insider list*".

AMAFI believes that this provision cannot be interpreted as barring an ISP from adding an insider both to the section on permanent insiders (*IR 2016/347 Annex 1, Template 2*) and to the deal-specific section of the list (*IR 2016/347 Annex 1, Template 1*), if it deems it appropriate to do so in the light of its business activities or organisation.

AMAFI reiterates that the notion of a "permanent" insider is distinct from that of a "temporary" or "deal-specific" insider, which refers to someone who is an insider in relation to a specific transaction or event involving an issuer. It is up to each ISP to determine, based on its organisation and procedures, whether to classify the person in one or both of these categories.

- For example, the ISP may decide that while a permanent insider has regular access to inside information on an issuer because his duties cause him to have routine dealings with that issuer (resulting in his inclusion in the "permanent insiders" section), that same person is not necessarily an insider in all deals involving that issuer.
- Conversely, the ISP may feel that a permanent insider who is actively involved in a given transaction should also be added to the deal-specific section.

1.3. On the topic of national identification numbers, how should firms go about developing their IT systems in the absence of a harmonised framework for national identification numbers in Europe?

Answer of 15 June 2016: MAR does not make it mandatory to include national identification numbers in the format for insider lists. The regulation states clearly that this information should be provided "*where applicable*" (*IR 2016/347, Recital 5 and Annex 1*).

The AMF has confirmed the non-mandatory nature of this information[1]. This position is made even more necessary by the lack of a stable harmonised reference framework within Europe. AMAFI notes however that the list of identification numbers adopted by Member States is included in the MiFIR draft RTS on transaction reporting, so it is possible that the IR could be amended to make this information compulsory. This requirement would be applied according to the same implementation rules as those laid down for MIFIR.

1.4. What is the best way to deal with the fact that it may be difficult or even impossible to gather personal data on people located outside the EU?

Answer of 15 June 2016: This question raises the issue of a potential conflict between MAR and data privacy requirements.

While this question can only be settled by the courts, AMAFI stresses that no one is expected to perform miracles. If an ISP is unable to provide the regulator with a version of the list containing all the requisite personal data for insiders based outside the EU, it should still be able to provide evidence of its efforts to obtain this information or the barriers under local law that prevent it from accessing such information.

By extension, and under the same conditions, AMAFI believes that the same answer could apply in a situation where an employee refuses to provide the ISP with personal data (personal phone number, for example).

1.5. Should insiders' personal data be stored in IT systems that are specific to insider lists?

Answer of 15 June 2016: No. There is nothing in the legislation preventing personal data from being stored in two different sites or information systems. AMAFI believes that ISPs are free to keep these data in a dedicated IT system for insider lists or in the HR system, for example. If this option is taken, however, the ISP must still be able to quickly provide the regulator with all the information required pursuant to MAR.

[1] See AMF Position-Recommendation DOC-2016-08, "Guide to ongoing disclosure and management of inside information", p.44, footnote 59.

II. MARKET SOUNDINGS

2.1. How should persons receiving market soundings be informed that communications will be recorded and kept and how should their consent be obtained?

Answer of 15 June 2016: Where the market sounding is conducted by recorded telephone lines, or audio or video recording is being used, the standard set of compulsory information to provide to persons receiving a market sounding should, according to the proposals put forward by ESMA, include a "*statement*" indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded (*DR 2016/960, Art. 3.3 b*).

Does this "statement" have to be included in the script of every market sounding or could clients be provided with one-time information, in the contractual documentation, for example?

AMAFI points out that this obligation appears to be equivalent to that provided for in MiFID 2's organisational rules and specifically Article 16.7 on recording and keeping telephone and electronic communications[2], which allows investment firms to provide a one-time "*notification*" when entering into relations with clients. In this instance, ESMA does not offer such an option, but does not propose banning it either. AMAFI therefore believes that the possibility of providing a general statement is workable, especially since the client "*notification*" referred to in MiFID 2 is, by virtue of the terms used, necessarily more formal than the specific "*statement*" for persons receiving market soundings provided for here by MAR. ISPs should therefore be able to provide general information to persons receiving market soundings, without having to repeat it every time they conduct a new sounding.

2.2. What are the "factors" that may impact the estimation of when the information will cease to be inside information?

Answer of 15 June 2016: MAR states that: "*Where information that has been disclosed in the course of a market sounding ceases to be inside information according to the assessment of the disclosing market participant, the disclosing market participant shall inform the recipient accordingly, as soon as possible*" (*MAR, Art. 11.6*). To implement this provision, persons receiving soundings must be informed "*where possible"*, about "*the factors that may alter that estimation*" (*DR 2016/960, Art. 3.3e*).

AMAFI views this as merely an option rather than an obligation applicable to all soundings. The aim is to enable those conducting soundings to provide those receiving soundings with, for example, a suggested timeline for the deal, specifying that the timing could change depending on market conditions: these conditions constitute a "factor" that could impact the estimation of when the information will cease to be inside information.

[2] "*An investment firm shall notify new and existing clients that telephone communications or conversations between the investment firm and its clients that result or may result in transactions will be recorded.*" "*Such a notification may be made once, before the provision of investment services to new and existing clients.*"

2.3. Does a market sounding necessarily entail the transmission of inside information?

Answer of 15 June 2016, amended 9 February 2017: No. No provision of MAR, with the exception of the specific case dealt with in Article 11.2, makes the communication of inside information a necessary condition for application of the specific rules on market soundings, keeping in mind the fact that, whatever the situation, the conditions of Article 11.1 must be satisfied for a market sounding to be recognised.

2.4. Is it possible to act "on behalf and on the account" of an issuer without a written mandate?

Answer of 15 June 2016: Yes. Article 11.1d of MAR states that one of the criteria defining a market sounding is that information should be communicated "*by a third party acting on behalf or on the account of*" another party, such as the issuer.

The mandate under which one person acts on behalf and on the account of another person does not need to be written down[3]. Its existence may be proven circumstantially. As a result, it does not particularly matter whether the ISP's involvement is the subject of a formal written record or whether it is undertaken within the framework of discussions instigated by the ISP itself with the issuer or following a call for bids by the issuer.

2.4.a Can an ISP that participates in a call for bids conducted by an issuer be deemed to be acting "on behalf and on the account of" that issuer?

Answer of 2 February 2017: No. While a mandate may be unwritten (*see Question 2.4 above*), it may not be potential only. The purpose of a call for bids is to decide which respondent will be selected by the issuer. Once chosen, that respondent may be considered to be acting on the issuer's behalf and account. Once the call for bids is underway, and unless it is considered to be fictitious because the issuer has already made its choice and the selected ISP is aware of this, the mere possibility of obtaining a mandate at a later stage is not enough to prove that a mandate exists. This may be proven only after the call for bids.

However, the fact that these situations do not come within the scope of market soundings shall not prevent the ISP, even in the absence of a mandate from the issuer, from controlling, as applicable, the potential transmission of confidential or inside information to investors contacted within the framework of these calls for bids.

Once an ISP knows that it has won the call for bids, it shall be considered to be acting on behalf and on the account of the issuer, even if no formal mandate has been given.

[3] ESMA/2015-1455 Final Report – Draft technical standards on the Market Abuse Regulation (28 September 2015), § 66.

2.5. Is the provision of information for the purpose of negotiating a Euro PP transaction excluded from the definition of market soundings?

Answer of 9 February 2017, amended 22 July 2021: Yes. Article 1 of Regulation (EU) 2019/2015 of the European Parliament and the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) N° 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets ("SME Regulation") provides that Article 11 of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse ("MAR") is amended by enshrining the exclusion of the negotiation of a Euro PP transaction from the market sounding regime[4] [5]. Thus, the entry into force of this Regulation confirms AMAFI's position taken before the entry into force of MAR and reaffirmed in this FAQ from 2017.

Article 1 of SME Regulation provides that "*Where an offer of securities is addressed solely to qualified investors as defined in point (e) of Article 2 of Regulation (EU) 2017/1129 of the European Parliament and of the Council (*1), communication of information to those qualified investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of bonds by an issuer that has financial instruments admitted to trading on a trading venue, or by any person acting on its behalf or on its account, shall not constitute a market sounding. Such communication shall be deemed to be made in the normal exercise of a person's employment, profession or duties as provided for in Article 10(1) of this Regulation, and therefore shall not constitute unlawful disclosure of inside information. That issuer or any person acting on its behalf or on its account shall ensure that the qualified investors receiving the information are aware of, and acknowledge in writing, the legal and regulatory duties entailed and are aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information*".

Specifically, during the negotiation phase of a Euro PP transaction, the issuer engages in discussions with certain qualified investors to negotiate the contractual terms of the transaction. These discussions meet the conditions set out in article 11.1a of MAR, as amended by article 1 of the SME Regulation. It specifies that "*The aim of the communication of information in that negotiation phase is to structure and complete the transaction as a whole, and not to gauge the interest of potential investors as regards a pre-defined transaction*" *(SME Regulation, whereas .6, 2nd par*). Thus, provided that it meets the conditions of article 11.1a of MAR, the communication of information to qualified investors in the context of the negotiation phase of a Euro PP transaction does not constitute market sounding[6].

According to Article 4 of the SME Regulation, the provision relating to the exclusion of the negotiating phase of a Euro PP transaction from the market sounding regime (*SME Regulation, Art. 1*), came into force on **1 January 2021**.

[4] According to this new article 11.1a of MAR "*That issuer or any person acting on its behalf or on its account shall ensure that the qualified investors receiving the information are aware of, and acknowledge in writing, the legal and regulatory duties entailed and are aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information*".

[5] While this note deals exclusively with the exclusion of the negociations of a Euro PP transaction from the scope of market soundings, the Regulation covers a broader scope and provides for this exclusion for any communication of information to qualified investors for the purpose of contractually negotiating their participation in a bond issuance.

[6] Notwithstanding the exclusion of the communication of information to qualified investors for the purpose of negotiating the contractual terms of their participation in a EURO PP transaction from the scope of market soundings, a sounding phase may take place at another stage of the transaction.

2.6. Do MAR provisions on market soundings apply to 'solicitations of interest' and pilot fishing?

Answer of 15 June 2016, amended 9 February 2017: No in both cases.

An ISP can contact investors at its own initiative and without consulting with the issuer, to gauge investor appetite for a potential corporate finance transaction[7] and so determine whether to make a pitch to execute that transaction for the issuer. This type of action forms part of the usual role played by ISPs in matching the interests of issuers and investors[8].

Such solicitations are excluded from the definition of market sounding as provided for by the AMAFI standard[9] and should also be excluded under MAR. First of all, the criterion of communicating information "*prior to the announcement of a transaction"* is not satisfied: no "*announcement*" is possible because the ISP is merely assessing the operational feasibility of a transaction that it could present to the issuer but about which the issuer knows nothing for the time being; as long as no sufficiently precise discussion has been engaged between the ISP and the issuer, no "*announcement*" is possible. Furthermore, this type of action is not conducted "*on behalf and on the account*" of the issuer (*see above 2.4.*) because it is carried out at the ISP's own initiative before any discussion with the issuer about its actual interest.

Pilot fishing, meanwhile, is a technique used during initial public offerings (IPOs) whereby an ISP advising the issuer suggests that the company's management meet with selected investors to tell them about the issuer's business and position relative to other firms in the sector.

Initial public offerings (IPOs) on a regulated market have the peculiarity of involving, by definition, securities that are initially unlisted (and have not yet been the subject of a request for admission to trading). Accordingly, the first question that needs to be asked is: **do these transactions fall within the scope of MAR** as defined by Article 2? In the absence of securities that are listed or for which a request has been made for admission to trading on a market covered by MAR, inclusion in the scope of MAR may occur only if the conditions of Article 2.1 (d) are satisfied[10], i.e. there are listed financial instruments within the issuer (or its group) that have an effect on or whose own price depends on the price of the instruments offered within the IPO. This type of situation is relatively common in the mid/large cap universe, but remains highly exceptional among small caps, leading many IPOs to be excluded from the scope of MAR and hence from the scope of market soundings.

However, if the answer to the first question is yes and the proposed transaction falls within the scope of MAR, because the issuer has issued listed bond securities, say, or because it is the subsidiary of a listed company, **it becomes necessary to consider the specific conditions relating to the application of market sounding rules defined in MAR Article 11.1**.
Two conditions must both be met for the communication of information to potential investors within the framework of an IPO to be covered by the scope of this article:

(i) The communication must take place before the IPO is announced, and
(ii) It must be designed to "gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing".

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[7] This type of action consists in asking investors about investment opportunities that are purely theoretical at the time but that various conditions, such as the state of the market (including yield levels that the ISP believes might interest an issuer) or issuer communications (such as the announcement that it plans to dispose of a stake over the course of the year), might render possible.

[8] These discussions play an important role in ISPs' activities on debt capital markets by enhancing their market intelligence and enabling them to generate ideas in order to make effective pitches to client issuers.

[9] See AMAFI / 14-11, op. cit.

[10] *MAR, Art. 2.1 (d)*: "*This Regulation applies to the following [...] d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference".*

Pilot fishing during IPOs, however, seeks merely to gauge investor interest in the company in a very general manner, but not the conditions relating to an IPO, such as potential size or pricing.

Since the criterion pertaining to gauging investor interest in the transaction and its related conditions is not satisfied, pilot fishing does not fall within the scope of market soundings.

2.7. According to what criteria might takeover bids and mergers be subject to market sounding provisions?

Answer of 15 June 2016, amended 9 February 2017: Although the communication of inside information is not a pre-requisite for market sounding (*see above 2.3.*), communication of such information may give rise to a market sounding.
Where a person communicates information with the intention of making a public offering to purchase the securities of a company[11] or proposing a merger with another company, although such communication will frequently give rise to the transmission of inside information, it does not in and of itself constitute a market sounding.

This would cease to be the case if:

(i) the communication covered inside information on financial instruments that fall within the scope of MAR[12], and if
(ii) it satisfied the twin criteria set down in MAR Article 11.2, namely:
   a) "*the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities*" and
   b) "*the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger*".

2.8. Do the market sounding provisions apply to credit updates?

Answer of 9 February 2017: No. Credit updates[13] are meetings that are regularly organised by issuers to keep investors informed about their financial position or creditworthiness. They do not cover corporate transactions and thus do not fall within the scope of market soundings, because their purpose is not to "*gauge the interest of potential investors in a possible transaction and the conditions relating to it*". At this stage, the goal is simply to present the issuer. Furthermore, while ISPs may occasionally be involved in this type of gathering, they do so by invitation from the issuer – just like participating investors – and thus do not act on behalf or on the account of the issuer, or on a potential transaction.

Meetings of this kind with investors may also be organised with a view to a potential transaction whose principle may or may not have been announced to the market (e.g. the intention to conduct an IPO or a capital increase) without specifics being provided. They are usually held after the yearly or interim earnings have been released. In this case, as with credit updates, if the meeting with investors is solely intended to present the issuer using the public information about it, such gatherings do not fall within the scope of market soundings because they are not intended to "*gauge the interest of potential investors in a possible transaction and the conditions relating to it*".

[11] Including public exchange offers and contributions.
[12] MAR, Art. 2.1, noting that MAR does not apply to financial instruments that have not been admitted to trading or that are not traded on a regulated market, MTF or OTF.
[13] Also known as non-deal roadshows.

2.9. Do the market sounding provisions apply to deal roadshows?

Answer of 9 February 2017: No. A deal road show is a meeting with potential investors, institutional clients, shareholders and financial analysts whose purpose is to present the issuer as well as a transaction whose terms *(price and size especially)* have already been announced to the market and that has already received AMF approval (*where required*).

In a deal road show, whether equity- or bond-related, information is certainly communicated with a view to gauging the interest of potential investors in a transaction but it is provided after the transaction is announced and covers various elements, including the terms of the transaction, which are public by this point because they have already been announced to the market.

If a deal road show meets the above description, the conditions of MAR Article 11.1, which identify situations that fall within the scope of market soundings, shall not be satisfied.

2.10. Can a reverse enquiry by a potential investor to an ISP concerning the securities of an issuer trigger application of the market sounding provisions?

Answer of 9 February 2017: A reverse enquiry means an approach made by an investor or investors to an ISP, asking the firm to contact an issuer about a reserved bond issue for the investors and under the conditions set down by them. The market sounding provisions will not apply each time an enquiry by an investor or investors is directly followed by a transaction between the investor and the issuer, because the ISP did not contact the potential investors or seek to gauge their interest. It merely acted as the intermediary in a primary market transaction between an issuer and investors and conducted at the latter's initiative.

However, market sounding might be deemed to take place if the initial enquiry is not directly followed by a transaction. This could occur if the initial enquiry prompts the ISP, following discussions with the issuer, to approach other investors to test their interest in the issue originally proposed by the reverse enquiry. Moreover, even if the original enquiry came from the investor, during this phase, when other investors are approached, the ISP is potentially acting on behalf or on the account of the issuer. The market sounding criteria may therefore be satisfied, subject to a case-by-case assessment.

2.11. Is an ISP subject to market sounding provisions if it contacts investors to clarify the terms of structured EMTNs that it is issuing itself or asking a third party to issue?

Answer of 9 February 2017: An PSI may issue on its own account – or ask a third party to issue – structured EMTNs that it believes may offer a placement solution that meets investor expectations. As part of this, the ISP may contact investors that might be interested in these notes in order to adjust the issuance terms to reflect potential demand. Accordingly, the question arises of whether this contact with investors comes under the market sounding rules.

This question needs to be considered particularly carefully because although this type of contact appears to fall within the scope of market soundings as defined by MAR Article 11-1, this notion is challenged on three fronts:

(i) First, these situations need to be placed in the context of MAR and the provisions governing market soundings: while application of the sounding rules is not linked to the communication of inside information, the fact remains that the objective is to be able to detect and take effective action against situations resulting, following transmission to investors, in the use of inside information or of confidential information that is subsequently reclassified as inside information (*see MAR, Recitals 34, 35 and 36*).

The situations considered here, though, involve savings products rather than financing products, as defined by the AMF in Position DOC-2012-08. While for the latter there is a genuine risk that inside or confidential information about the issuer could be transmitted, it is hard to see how this could be the case for the issuance of a savings product such as a structured EMTN, when the ISP that issues the notes or has them issued has no other objective than to facilitate marketing with respect to investor expectations.

(ii) Second, in some situations, discussions with investors to adjust the issuance terms of structured EMTNs to match investor expectations are carried out under conditions that definitely fall outside the scope of market soundings. This would be the case whenever the party that determines the parameters of the future product and, in this capacity, holds discussions with potential investors to adjust the parameters accordingly, is not the party that issues the product.

In such situations, which may not be regarded as totally marginal, the issuer has no role in the discussions with investors. It merely responds to the demand by proposing to issue the notes at a given price. Meanwhile, the party that conducts the discussions may certainly not be considered to be acting on behalf of the entity that is planning to issue the EMTNs. It acts independently of the issuer and in fact often selects the issuer following a call for bids based on the issuer's proposed issue price and rating[14].

It is hard to see the rationale for applying different treatment under the market sounding framework to situations that are identical aside from the fact that discussions with investors are conducted by the issuer itself or by a person not acting on the issuer's behalf, with only the former required to meet the rules applicable to market soundings.

This further emphasises the importance of the distinction drawn above between financing products and savings products, as market sounding rules do not apply to the latter.

(iii) Further confirmation that the market sounding framework does not apply to savings products is provided by the fact that the European co-legislators never intended this to be the case. On the contrary, they exclusively targeted investment products, as evidenced by the following two MAR recitals: market soundings "*are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned*" (*MAR, Recital 32*). "*Examples of market soundings include situations in which the sell-side firm has been in discussions with an issuer about a potential transaction, and it has decided to gauge potential investor interest in order to determine the terms that will make up a transaction; where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; or where the sell-side is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors*" (*MAR, Recital 33*).

[14] On this point, see the situations described in the joint letter sent to AMAFI by the AMF and the ACPR dated 30 May 2016 in answer to its request to categorise the activity in question.

Based on all these points – and particularly the last one – there does not appear to be any reason why market sounding rules should apply to contact with investors aimed at adjusting the issuance terms for structured EMTNs to ensure that these products match investor needs as closely as possible.

2.12. Do the market sounding rules apply when ISPs query investors ahead of block trades or disposals of holdings on the secondary market?

Answer of 9 February 2017: Besides primary market transactions, there are situations where an ISP might query investors with a view to conducting a secondary market transaction involving a block trade or disposal of a holding. These situations come within the scope of market soundings if they involve "*such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors*" (*MAR, Art. 11.1b*).

As ESMA pointed out, these situations need to be divided into two main categories.

- Situations where the disposal is comparable to a placement and subject to the market sounding provisions.

ESMA[15] says that if transactions involve very large blocks of instruments (particularly relative to daily trading volumes), it may be necessary, before proceeding with the block trade itself, to sound out potential investors by passing on information about the proposed deal (such as volume, price and even the identity of the seller), which could in some cases have a material impact on the price of the financial instruments in question.

In such situations, contacting investors ahead of a block trade could count as a market sounding if the criteria set out in MAR Article 11.1 are met.

- Other situations where the market sounding provisions do not apply.

ESMA[16] says that when, in its discussions with investors, the professional is not trying to gauge the conditions relating to the potential size or pricing of a transaction, but actually trying to negotiate and conclude the transaction, these actions do not qualify as market soundings. It adds that in this case, MiFID 2 provisions apply and shall not overlap with those of MAR Article 11.

For example[17] in the case of block trades during M&A transactions, it is generally accepted that the purpose of contacting investors is not to "*gauge the interest of potential investors in a possible transaction"* but to negotiate the terms of a specific transaction with identified investors, as these types of deals are typically spread over time because of the many parameters that need to be clarified in order to determine the characteristics (including contractual terms) of the transaction with investors.

[15] ESMA/2015-1455 Final Report – Draft technical standards on the Market Abuse Regulation (28 September 2015), § 68 and 69.
[16] ESMA/2015-1455, op. cit, §70.
[17] This reasoning is consistent with that laid out in the now repealed AMAFI professional standard on market soundings and investor tests (*AMAFI 14-11*), from which Article 11 of MAR draws heavily. The standard stated that the definition of market soundings did not extend to contact with investors within the framework of an order execution activity not intended to "*gauge the interest of potential investors in a possible transaction*" but rather to negotiate the terms of a transaction conducted directly within the framework of these discussions.

2.13. Is contact with investors conducted in the context of securitisation transactions subject to the MAR provisions on market soundings?

Answer of 9 February 2017: Securitisation transactions are carried out on behalf of a client (the transferor), which transfers a portfolio of assets (such as claims or bonds) to a securitisation vehicle (the issuer), which then issues debt securities. The ISP may contact potential investors in advance about their interest in the future securities issue. The peculiarity of a securitisation transaction lies in the fact that the issuer, i.e. the securitisation vehicle, is merely a means to transform the client's asset portfolio into financial securities. Accordingly, the issuer has no will of its own (since the vehicle did not exist when contact was made).

It is therefore hard to say that the ISP is acting on behalf and on the account of the issuer when it contacts investors. However, it might be considered to be working on behalf and on the account of the transferor. In this case, though, the transferor on whose behalf and account the ISP is acting is not an issuer, a secondary offeror of financial instruments, an emissions allowance market participant or a third party acting on behalf or on the account of one of the aforementioned three parties. For this reason, these contacts do not appear to come under the scope of the MAR provisions on market soundings.

That being said, confidential information that could potentially be communicated to investors during this phase shall be covered at the very least by a confidentiality agreement.

III. INVESTMENT RECOMMENDATIONS

3.1. Is it necessary to list previous recommendations if the direction of the recommendation for the security has not changed?

Answer of 15 June 2016: Yes. MAR requires inclusion of a list of all recommendations on the security during the preceding 12-month period, containing for each recommendation: the date of dissemination, the price target and the direction of the recommendation (*DR 2016/958, Art. 4.1 i.*). There is nothing to suggest that application of this obligation depends on whether the direction of the recommendation has changed.

3.2. How should net long and short positions to be disclosed in investment recommendations be calculated?

Answer of 15 June 2016, as amended on 6 July 2017: As regards disclosure of conflicts of interest, MAR requires the entity issuing the recommendation to state whether it holds a net long or short position that exceeds the threshold of 0.5% of the issuer's total issued share capital. It should be noted that this position is "calculated in accordance with Article 3 of Regulation (EU) No 236/2012 and with Chapters III and IV of Commission Delegated Regulation (EU) No 918/2012, a statement to that effect specifying whether the net position is long or short" (*DR 2016/958, Article 6.1 (a)*).

The method for calculating the threshold is thus the same as that arising from the Short Selling Regulation[18]. In particular, positions arising from market-making activities should not be taken into account[19].

In this context, AMAFI would like to point out that this obligation represents a change to the current rules. MAD I requires entities only to report investments that reach 5% of the issuer's capital[20]. Up to now, the method used to calculate these long positions was that arising from the Transparency Directive[21]. From now on, net short or long positions must be calculated using the methodology laid down in the Short Selling Regulation.

This means institutions must therefore, in accordance with this methodology, carry out the IT upgrades needed to populate the relevant information systems for long positions, as is already the case for net short positions.

The question has also been raised as to whether disclosures of any long or short positions can be consolidated at group level, as is the case under the Short Selling Regulation[22].

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[18] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps and Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling (the 'Short Selling Regulation').

[19] It should also be possible to apply other specific calculation rules, notably relating to subscription rights and convertible bonds, as applied to net short positions.

[20] Article 6.1 of Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.

[21] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers.

[22] Cf. Article 13.2 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling.

By analogy with the Short Selling Regulation, and given that the quality of information provided to the market would improve as a result, an approach under which consolidated long or short positions should be disclosed at group level appears to be preferable. In accordance with this assumption, AMAFI considers that net short and net long positions for all legal entities making up a group may be "aggregated and netted, with the exception of the positions of the management entities that perform management activities". If an ISP decides to aggregate its positions at group level, the net long or short position to be disclosed in the relevant recommendations when it reaches 0.5% of the issuer's capital will be this aggregate position.

3.3. Who are the persons whose identity must be disclosed in the recommendation?

Answer of 6 July 2017: Article 2 of DR 2016/958 stipulates that the identities of persons "who produce investment recommendations" must be clearly disclosed in recommendations. Furthermore, that same article points out the need to disclose additional information "about the identity of any other person(s) responsible for the production of the recommendation". Paragraph 1 (b) of that same article provides for situations where the person producing a recommendation is working for the ISP under a contract of employment. It is in this context that an analyst, for example, may be designated as the person producing a recommendation.

It emerges from this analysis that the identities of individual employees who produce a recommendation must be disclosed in the same way as the identity of the ISP that employs them and is responsible for producing the recommendation.

3.4. How should the list of recommendations issued over the past 12 months be drawn up?

Answer of 6 July 2017: Article 4.1 (i) of DR 2016/958 requires the inclusion "in the recommendation […] in a clear and prominent manner […of] a list of all […] recommendations on any financial instrument or issuer that were disseminated during the preceding 12-month period". Furthermore, Article 4.1 (h) stipulates that "where a recommendation differs from any of their previous recommendations concerning the same financial instrument or issuer that has been disseminated during the preceding 12-month period, the change(s) and the date of that previous recommendation [must be included in the recommendation in a clear and prominent manner]".

To be able to draw up such a list, it must first be determined whether, within a given ISP, when, for example, an analyst publishes a 'buy' recommendation on a given financial instrument, a seller issuing a 'sell' recommendation on the same financial instrument the following day:

- constitutes a change to the recommendation previously issued by the analyst or the ISP; or
- constitutes a new recommendation, since it is issued by a different person within the same ISP (in the example here, the seller).

A first approach would be to consider the recommendation issued by the seller as a change to the recommendation previously issued by the analyst. In this case, both should be included in the single list referred to in paragraphs (i) and (h) of Article 4.1 of DR 2016/958, drawn up in the ISP's name.

A second approach would be to consider the seller's recommendation a new recommendation, which must therefore be included in a separate list from the list of recommendations issued by the analyst. These lists covering all recommendations issued by the ISP must be taken together to assess whether the ISP has met the requirement laid down in paragraphs (i) and (h) of Article 4.1 of DR 2016/958.

In any event, and regardless of the approach adopted, which will probably need to be governed by the ISP's internal procedures, the ISP must make available to its clients all recommendations concerning a given financial instrument produced by persons working in its name and on its behalf. Arrangements for disseminating the information depend on each ISP's internal organisation – it may be included in the document supporting the recommendation or made available via a link to a website.

Lastly, it should be noted that, when a client is sent a communication that sets out in full a previously issued recommendation without adding any new information, this should not be considered a new investment recommendation, unless it includes a confirmation or assessment of the previous recommendation[23].

3.5. How does one determine whether an investment recommendation pertains to the same derivative financial instrument as a previously issued recommendation?

Answer of 6 July 2017: As seen in the previous answer, the requirements laid down in DR 2016/958 notably assume the ability to identify whether a communication is a new recommendation or a change to a previously issued recommendation. To make that determination, it is first necessary to identify whether the recommendation relates to the "same financial instrument or issuer" as the previous recommendation. As regards derivative financial instruments, the question of whether the issuer is the same can be set aside, since these instruments are contracts and not securities.

For these derivative financial instruments, then, it remains to be identified whether the recommendation relates to the same financial instrument as the previous recommendation. If so, the second recommendation is indeed a change to the previous recommendation. If not, the second recommendation, which relates to another financial instrument, must be considered a new recommendation rather than a change to the previous recommendation.

ESMA has provided some initial answers to the question of identifying derivative financial instruments. It points out that where an ISIN exists for the financial instrument in question, that ISIN should be used to identify whether it is the same financial instrument. If there is no ISIN, all reasonable efforts should be made to identify financial instruments by other means. As an example, ESMA suggests that an ISP could establish a proprietary taxonomy[24].The operational feasibility of this proposal remains to be confirmed.

AMAFI considers that the same reasoning could be applied to structured products.

3.6. How should a recommendation relating to an option strategy be analysed?

Answer of 6 July 2017: An option strategy is an investment strategy combining a number of options. Although such strategies combine various financial instruments, they are not financial instruments in and of themselves. Article 3 of MAR defining investment recommendations stipulates that the latter necessarily concern "one or several financial instruments".

As such, if an option strategy is considered an inseparable whole that cannot be thought of as equivalent to a combination of several financial instruments, it must be concluded that no recommendations can be issued on option strategies. This analysis, previously highlighted by AMAFI, reiterates that, for a disclosure to qualify as an investment recommendation, it must notably relate to one or more identifiable financial instruments[25].

[23] V. Questions and Answers on the Market Abuse Regulation, ESMA/2016/1644, question 6.
[24] Cf. ESMA/2016/1644, question 8.
[25] Cf. AMAFI 16-43 §20 and 21

ESMA points out in its Q&A document[26] that "Where a recommendation relates to several financial instruments independently, such as part of sectorial research, the requirements [of DR 2016/958] would apply to each financial instrument that is the subject of the recommendation".

This position is justified on the basis that the recommendation relates independently to several issuers or financial instruments. As such, it can be broken down into a number of recommendations on a number of financial instruments or issuers. By analogy, a recommendation on an option strategy cannot be considered as independently recommending the different financial instruments that are combined within the strategy.

3.7. Who are the persons in respect of whom conflicts of interest must be disclosed?

Answer of 6 July 2017: Article 5 of DR 2016/958 establishes a general obligation to disclose potential conflicts of interest relating to persons who produce investment recommendations or "any natural […] person working for them under a contract, including a contract of employment". The text thus indicates that conflicts of interest that could impair the objectivity of natural persons linked to the ISP through a contract of employment (such as analysts or sellers) must be disclosed.

To determine whether conflicts of interest must be disclosed on the basis of the personal interests of sellers or analysts, the person(s) responsible for the recommendation must be identified (*Cf. question 3.3*), since the text aims to make public any information that could impair the objectivity of such persons.

Furthermore, Article 6, which supplements the general provisions set out in Article 5 by laying down additional obligations concerning the disclosure of conflicts of interest, refers to ISPs that are legal persons. In this context, Article 6.1 (c) even stipulates that conflicts of interest must be disclosed at group level in certain situations expressly referred to.

In conclusion, it appears that potential conflicts of interest to be disclosed must involve an ISP legal person, its group and its natural person employees, when they produce the recommendation. Secondarily, it should be noted that this solution is in keeping with the financial analysis practice established by an AMF position[27], which also aims to inform clients about the objectivity of information disclosed to them.

3.8. How should the obligation to disclose information on the price and date of acquisition of shares purchased prior to a 'public offering' be applied?

Answer of 6 July 2017: Article 6.2 (c) of DR 2016/958 requires ISPs and persons working for them to include in disclosures on conflicts of interest "information on the price and date of acquisition of shares where natural persons working for the person referred to in the first subparagraph [investment firm or credit institution] under a contract of employment or otherwise, and who were involved in producing the recommendation, receive or purchase the shares of the issuer to which the recommendation, directly or indirectly, relates, prior to a public offering of such shares".

An initial question that arises is which transactions are covered by "a public offering of such shares".

AMAFI considers that the notion of a "public offering of such shares" should be interpreted in French law as being covered by the notion of an offer of securities to the public as defined in Article L411-1 of the French Monetary and Financial Code, i.e. "a placing of securities by financial intermediaries."

[26] Cf. ESMA/2016/1644, questions 9 and 10.
[27] Cf. AMF Position/recommendation 2013-25, "Guide to financial analysis" (§5.3.1).

A second question relates to the period preceding such transactions denoted by the term “prior”. In the absence of further clarification in the text itself, AMAFI considers that this period should be understood in relation to the objective being pursued. Recital 6 of DR 2016/958 stipulates that: “Disclosures of interests or conflicts of interest should be specific enough as to enable the recipient of the recommendation to take an informed view of the degree and nature of the interest or conflict of interest”.The objective is thus to provide the recipients of the recommendation with relevant information so that they can assess its objectivity. AMAFI therefore considers that ISPs will be required to provide the relevant information about shares purchased prior to a public offering of securities if they deem such information pertinent in view of the degree and nature of the potential conflict of interest.

3.9. Can a communication relating to factual elements – for example, reiterating information required by regulations – be considered an investment recommendation?

Answer of 6 July 2017: AMAFI has explained[28] that when a communication reiterates, even in summary form, information set out elsewhere in a KIID or prospectus, without distorting its factual presentation in those documents, it should not in principle be considered as recommending or suggesting an investment strategy[29].

Similarly, as regards products distributed via private placement, communications containing only factual information and not suggesting an investment strategy cannot be considered investment recommendations. Moreover, this analysis has been confirmed by ESMA, which reiterates that a communication containing only factual information about a financial instrument or issuer is not considered an investment recommendation provided that it does not explicitly or implicitly recommend or suggest an investment strategy[30].

[28] Cf. AMAFI/16-43.
[29] ESMA confirmed this analysis in a feedback document it published following its consultation document appended to its final report on the MAR RTS of 28 September 2015 (cf. *ESMA/2015/1455,* §355).
[30] Cf. ESMA/2016/1644, question 5.

IV. PREVENTION AND DETECTION OF MARKET ABUSE

4.1. What information needs to be kept on orders or transactions that are identified as suspicious but that have not been reported to the AMF?

Answer of 15 June 2016: As regards the measures to be taken in terms of the monitoring, detection and reporting of suspicious transactions or orders, MAR includes a requirement to maintain for a five-year period information documenting the analysis carried out and the reasons for submitting or not submitting a STOR to the AMF (*DR 2016/957, Art.3.8*).

Obviously, this requirement applies only to information about orders or transactions that were detected, analysed and then the subject of a decision not to file a report. It does not concern orders or transactions that went unreported because they were deemed to be non-meaningful based on pre-determined parameters or the nature of the service provider's activities.