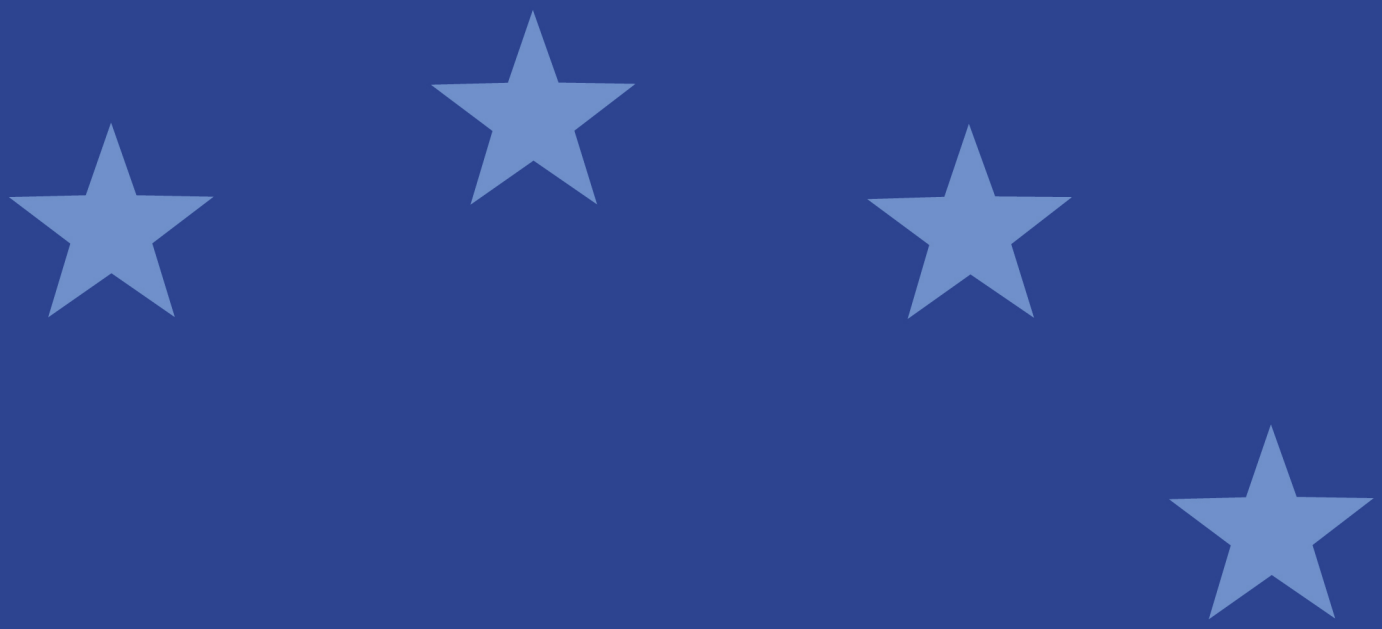
esma European Securities and Markets Authority

Reply form for the ESMA MAR Technical standards



20 August 2014

European Securities and
Markets Authority

Date: 20 August 2014

Responding to this paper

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

Instructions

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

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

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

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

Responses are most helpful:

i. if they respond to the question stated;

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

iii. describe any alternatives that ESMA should consider

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

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

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

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

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

Publication of responses

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

Data protection

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

General information about respondent

Are you representing an association?	Yes
Activity:	Investment Services
Country/Region	Finland

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>
Federation of Finnish Financial Services (FFI) represents financial companies. Our objective is to secure a benign operating environment, well-functioning financial market and effective payment systems. We also promote loss prevention in addition to social welfare and safety. The FFI represents banks, insurers, authorized pension companies, finance houses, securities dealers and financial employers operating in Finland.

From our point of view, the most important issue in the proposed Level II rules relate to Q22 and the content of the insider lists.

As the Securities and Markets Stakeholder Group (SMSG) states in its advice to ESMA on October 10th, 2014, insider lists are an important tool for competent authorities when investigation market abuse, but the SMSG is concerned about the extensive information ESMA intends to be provided by insiders.

Disclosing a person´s private phone and mobile numbers as well as e-mail addresses is not necessary for the identification of persons. Such requirement might have severe impact on such individual´s privacy and should not automatically be required to be included in the insider list. Competent authority could have additional information upon request. As SMSG states in its advice to ESMA, some of SMSGs' members hold the opinion that intervening the data protection laws cannot be justified with the integrity of the market and the detection of insider trading. The minimal content of the list should be the name and another identification data of the insider.

Should detailed elements be required, a minor error in the insider list should not lead into sanctions (e.g. an outdated telephone number or e-mail address). A person may have several employers and it creates an unnecessary red tape for market participants to assess all the features of an employment.

We emphasize that keeping up-to-date detailed information that is secondary from supervision and reporting viewpoint, increases administrative burden disproportionally and thus creates costs.
< ESMA_COMMENT_MAR_TA_1>

II. Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

<ESMA_QUESTION_MAR_TS_1>
The FFI does not agree with the proposal. The current rule should remain or at least National Competent Authorities should be authorized to grant exemptions from the volume restrictions. It is important for companies with less liquid securities to have a possibility for higher volume restriction
<ESMA_QUESTION_MAR_TS_1>

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

<ESMA_QUESTION_MAR_TS_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_2>

III. Market soundings

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

<ESMA_QUESTION_MAR_TS_3>
ESMA's mandate in MAR article 11(9) to develop draft regulatory technical standards is in our view limited to market soundings containing inside information. As such imposing the same strict record keeping and procedural requirements on DMPs sounding the market with information not considered to be inside information seems outside the scope of MAR article 11, and as such, to overlap with DMP's current requirement to establish an insider register. When a DMP assesses whether the establishment of an insider register regarding certain transaction is required, it makes at the same time an assessment whether inside information exists or not. Therefore, we consider that introducing these new standards would mostly just cause duplicate work and is not advisable. Regarding the determination of the time period when the transaction is expected to be made public, it is normally not possible to accurately or reliably determine such time, and therefore this requirement should be excluded.

We would furthermore encourage ESMA to clarify in the draft technical standards presented to the Commission the scope of the obligations imposed on DMPs. In the consultation paper paragraph 71 ESMA with regard to the scope of the sounding regime refers to MAR's definition of inside information , but at the same time proposes that the sounding regime should apply regardless (and only with minor modifications) to soundings not containing in-side information. Furthermore MAR article 11(1)(b) restricts the market sounding regime with regard to a secondary offeror to transactions that based on quantity or value is distinct from ordinary trading. Neither MAR nor the consultation paper contain a definition of ordinary trading. In addition paragraph 69 of the consultation paper distinguish between "trying to gauge the conditions relating to the potential size or pricing" and "actually trying to conclude the transaction". The latter should according to ESMA not be considered a market sounding but the distinction is difficult and further clarification of the scope of the market sounding regime in this regard would be welcome.

Regarding the determination of the expected time period when the transaction is expected to be made public, it is normally not possible to accurately or reliably determine such time, and therefore this requirement should be excluded.

It should be noted that mandate to draft Level II measures is restricted to MAR articles 11(4)-(6) and not to (3), which concerns market participants obligation to record the conclusions whether an information is inside information or not. (4) – (6) concern the record-keeping requirements for inside information. These should be clearly distinguished so that no requirement concerning other than inside information has the same requirements as inside information.
<ESMA_QUESTION_MAR_TS_3>

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

<ESMA_QUESTION_MAR_TS_4>
We do not agree. The script is way too detailed. In addition, the proposed template is not suitable for any existing market practices in debt capital primary markets. There are two different ways of informing the investors about the transaction:

1) In most cases there is no sounding (as defined in the MAR), i.e. the investors are not informed before the announcement. These cases are not in the scope of the proposed standards;

2) In some cases, there is a need to contact certain key investors before the announcement. Market practice in the Nordic countries is to require these investors to sign a non-disclosure agreement ("NDA") before any information, even the name of the issuer, is disclosed to them.

The proposal seems to be prepared for a market practice which has not existed in a few years in our markets. In addition, nowadays the majority of the investors do not even accept sounding that takes place before the launch. It is of course possible to add the script to current NDA templates, but as the NDA already prevents the investor from trading with the financial instruments of the issuer, there should not be a need to include the script. Therefore, the concept of the script should be abandoned.

As Securities and Markets Stakeholder Group (SMSG) has stated in its advice to ESMA on October 10th, 2014, some processes regarding market soundings proposed by ESMA seem to be too complex. As a result market sounding might be discouraged. We deem a standard template as one of these.
<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>
We consider that a telephone recording, where available, should be sufficient as it includes all necessary information (the name of the sounded firm and employee, date and time, contact details). In case sounding takes place in a face-to-face meeting, written record of the meeting includes the same information. Therefore a separate list is not necessary. More importantly, if an NDA has been made before the sounding, as is often the case, the agreement should fulfil the requirements of a sounding list. Reporting should not dominate the procedure and requirements for duplicate work should always be avoided while preparing Level II measures.
<ESMA_QUESTION_MAR_TS_5>

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

<ESMA_QUESTION_MAR_TS_6>
As stated under Q3, we see that this requirement is overlapping with DMP's current requirement to establish an insider register.
<ESMA_QUESTION_MAR_TS_6>

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

<ESMA_QUESTION_MAR_TS_7>
As stated under Q4, we think that the concept of scripts should be abandoned. Therefore, a confirmation of the going-through of the script should not be required in the written record. In all other aspects we agree with ESMA's proposal.

However, we do support the proposed approach for determining the competent authority to who issuers of financial instruments should notify delays in disclosure for inside information.
<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>
As stated under Q3, we see that this requirement is overlapping with DMP's current requirement to establish an insider register.
<ESMA_QUESTION_MAR_TS_8>

IV. Accepted Market Practices

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

<ESMA_QUESTION_MAR_TS_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_9>

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

<ESMA_QUESTION_MAR_TS_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_10>

V. Suspicious transaction and order reporting

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

<ESMA_QUESTION_MAR_TS_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>
We support ESMA´s view that reports should be submitted as soon as possible once reasonable suspicion is formed. Making a high quality report within two weeks of the suspected breach electronically and in a secure manner is challenging, as reporting needs to be based on facts and analysis, taking into account all information available. The obligation to justify the delay between the suspected breach and the submission of STOR according to specific circumstances of the case is an extra administrative burden especially for smaller investment firms.
<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>
We would like to reiterate our concerns[1] regarding a uniform requirement for investment firms to have in place automated surveillance systems for detecting suspicious transactions and orders.

MAR article 16 refers to "effective arrangements" which should not be construed as the same as an automated system. We propose that ESMA in the technical standard take a risk based approach which would allow for proportionality and for the smallest investment firms to comply with the requirement through manual procedures and systems. The Level II measures should not automatically lead to an adoption of a massive IT system and proportionality needs to be taken into account.

ESMA clarified on CP that in the situation where a chain of market participants are involved in a transaction, each entity has its own obligation to report suspicions. ESMA should take into account different investment firm structures, for example banks functioning in a group where transactions are transmitted to another member bank or investment firm. It should be acceptable that arrangements, systems and procedures are arranged at the group level, not separately in each member.
<ESMA_QUESTION_MAR_TS_13>

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

<ESMA_QUESTION_MAR_TS_14>
Identity of the person making the disclosure is required for competent authorities to make further enquiries or investigations. Is the privacy of the person making disclosure ensured or is his/her identity public information?
<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

[1] EBF response of January 27, 2014 to Q64 of ESMA's discussion paper on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649)

<ESMA_QUESTION_MAR_TS_15>
We would like to emphasize additional costs to investment firms, for example IT-systems, should STOR be in an electronic format, and subject to adequate levels of security.
<ESMA_QUESTION_MAR_TS_15>

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

<ESMA_QUESTION_MAR_TS_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_16>

VI. Technical means for public disclosure of inside information and delays

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

<ESMA_QUESTION_MAR_TS_17>
Yes. The proposal is in line with the current disclosure mechanism relating to the listed companies.
<ESMA_QUESTION_MAR_TS_17>

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

<ESMA_QUESTION_MAR_TS_18>
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<ESMA_QUESTION_MAR_TS_18>

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

<ESMA_QUESTION_MAR_TS_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_19>

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

<ESMA_QUESTION_MAR_TS_20>
Yes. Information required for the notification and as well details of explanatory were clear. No need for a common template.
<ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_21>

VII. Insider list

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

<ESMA_QUESTION_MAR_TS_22>
As the SMSG states in its advice to ESMA, insider lists are an important tool for competent authorities when investigation market abuse, but the SMSG is concerned about the extensive information ESMA intends to be provided by insiders.

Disclosing a person´s private phone and mobile numbers as well as e-mail addresses is not necessary for the identification of persons. Such requirement might have severe impact on such individual´s privacy and should not automatically be required to be included in the insider list. Competent authority could have additional information upon request. As SMSG states in its advice to ESMA, some of SMSGs' members hold the opinion that intervening the data protection laws cannot be justified with the integrity of the market and the detection of insider trading. The minimal content of the list should be the name and another identification data of the insider.

Should detailed elements be required, a minor error in the insider list should not lead into sanctions (e.g. an outdated telephone number or e-mail address). A person may have several employers and it creates an unnecessary red tape for market participants to assess all the features of an employment.

We emphasize that keeping up-to-date detailed information that is secondary from supervision and reporting viewpoint, increases administrative burden disproportionally and thus creates costs.

Paragraph 298 refers to "persons having access to databases". Proposed formulation would bring persons who do not handle insider information within the scope, e.g. ICT experts. It is also challenging to make an entry to the register within the same day, if a person receives insider information outside the business hours, and the person maintaining the register is no longer available.

In paragraph 296 ESMA acknowledge that unequivocal identification of the insider could be achieved by registering the National Identification Number. However, a National Identification Number should not only render date and place of birth superfluous but also information regarding birth surname and home address. Furthermore the requirements to include home and mobile phone numbers along with the insider's email addresses would indirect pose a requirement for issuers and other market participants subject to the requirement to maintain insider lists to update information not relevant from a business point of view.

The preferred solution for obtaining contact information on insiders would be that competent authorities request the information and the issuer (or other person) returns any contact information already registered.

In addition, a clarification is needed with regard to whether the format and content of insider lists also apply to persons receiving inside information as a result of a market sounding.
<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_23>

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

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

<ESMA_QUESTION_MAR_TS_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_25>

IX. Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

<ESMA_QUESTION_MAR_TS_26>
ESMA proposes to use the definition of "persons closely associated" in MAR article 3(1)(26) to extend the concept of related person in the draft regulatory technical standards article 2(2). The requirement to disclose the interests of this wide group of people in an investment recommendation is however, not compatible with the general principles of employment law. As such it is not possible for the person preparing the investment recommendation or his/her employer to mandate that the persons' spouse/partner, child or relative who has shared the same household for at least one year on the date of the dissemination of the investment recommendation concerned to inform the person preparing the investment recommendation of shareholdings in relation to an issuer to which the recommendation relates. ESMA should revert to the disclosure standard in article 5 of the Commission Directive 2013/125/EC.
<ESMA_QUESTION_MAR_TS_26>

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

<ESMA_QUESTION_MAR_TS_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_27>

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

<ESMA_QUESTION_MAR_TS_28>
The obligation in article 4(1)(d) of the draft regulatory technical standards to include the time of dissemination may pose practical problems due to dissemination methods e.g. dissemination by email and possible delays in the delivery of emails. Moreover, there is an obligation to include the date and time of any price of financial instrument mentioned in the investment recommendations and hence there is no need to include the time of dissemination.
<ESMA_QUESTION_MAR_TS_28>

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_29>
We do not agree as the obligation in article 4(2)(c) of the draft regulatory technical standards to make available detailed information about the valuation or methodology and the underlying assumptions is very extensive and may contain business secrets which do not amount to proprietary models. Similarly, the obligation in article 4(2)(d) to indicate where more detailed information is directly and easily accessible in relation to proprietary models is problematic.
<ESMA_QUESTION_MAR_TS_29>

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_30>
The extension of the scope in article 5(1) of the draft regulatory technical standards to indirect influence should be reconsidered as it can be difficult for the person preparing the investment recommendation to ascertain the level of influence in advance.

Moreover clarification is needed in relation to how article 5(3)(a) corresponds with article 5(3)(b)-(c). If point (a) means that if the threshold is met there is an obligation to disclose the precise holding of the company, this may often pose practical challenges as major shareholders (above 5 percent) are disclosed in the issuers annual accounts, whereas the precise holdings are not disclosed. Hence, the person preparing the investment recommendation may not have information on the actual holding and should not be obliged to obtain the information.
<ESMA_QUESTION_MAR_TS_30>

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

<ESMA_QUESTION_MAR_TS_31>
The threshold in article 5(3) of the draft regulatory technical standards in relation to shareholdings exceeding 0,5% of the total issued share capital seems very low given that the shareholding should per se constitute a conflict of interest. This should be seen in the light of article 5(3)(b) according to which any holding would need to be disclosed if there was a conflict of interest.
<ESMA_QUESTION_MAR_TS_31>

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

<ESMA_QUESTION_MAR_TS_32>
I our opinion the positions of the producer of the investment recommendation should not be aggregated with the positions of the related persons in order to assess whether the threshold has been reached as this is not compatible with normal principles of employment law, cf. our answer to Q26 above.
<ESMA_QUESTION_MAR_TS_32>

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

<ESMA_QUESTION_MAR_TS_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_33>

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

<ESMA_QUESTION_MAR_TS_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_34>

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

<ESMA_QUESTION_MAR_TS_35>
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<ESMA_QUESTION_MAR_TS_35>