EC Proposal for a Regulation on Market Abuse

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AMAFI's suggested amendments

As a complement to its observations on the proposal of the European Commission for a regulation on insider dealing and market manipulation (market abuse) set forth in AMAFI / 12-07, AMAFI suggests some amendments to the proposed text, as explained below.

Insertions of new wording are underlined in bold; deletions are crossed out in bold.

- **Article 2 – Scope**

Proposed amendments

1. This Regulation applies to the following:

(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made ;
(b) financial instruments traded on a MTF or on an OTF ~~**in at least one member State**~~ **that meets criteria of type of investors and financial instruments concerned**;
~~**(c) behaviour or transactions relating to a financial instrument referred to in points (a) or (b) irrespective of whether or not the behaviour or transaction actually takes place on a regulated market, MTF or OTF;**~~
~~**(d) behaviour or transactions, including bids, relating to**~~ the auctioning of emission allowances or other auctioned products based thereon pursuant to Commission Regulation No 1031/2010.34 Without prejudice to any specific provisions referring to bids submitted in the context of an auction, any requirements and prohibitions in this Regulation referring to orders to trade shall apply to such bids.

2. **Points 1 to 3 of** article 7 ~~**and 9**~~ also apply to the acquisition or disposal of financial instruments not referred to in points (a) and (b) of paragraph 1 but whose value ~~**relates to**~~ **depends on** a financial instrument referred to in that paragraph. This notably includes derivative instruments for the transfer of credit risk that relate to a financial instrument referred to in paragraph 1 and financial contracts for differences that relate to such a financial instrument.

3. Market manipulations and attempts to engage in market manipulation referred to in articles 8 and 10 also apply to ~~**transactions, orders to trade or other behavior relating to**~~:

(a) ~~**types of**~~ financial instruments, including derivative contracts or derivative instruments for the transfer of credit risk where **the** ~~**transaction, order or behaviour**~~ **market manipulation or attempt to engage in market manipulation** has or is likely or intended to have an effect on a **related** financial instrument referred to in points (a) and (b) of paragraph 1;

(b) spot commodity contracts, which are not wholesale energy products, where ~~transaction, order or behaviour~~ **the market manipulation or attempt to engage in market manipulation** has or is likely or intended to have an effect on **related** financial instruments referred to in points (a) and (b) of paragraph 1; or

(c) ~~types of~~ financial instruments, including derivative contracts or derivative instruments for the transfer of credit risk where the ~~transaction, order or behaviour~~ **market manipulation or attempt to engage in market manipulation** has or is likely or intended to have an effect on **related** spot commodity contracts.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 31, measures identifying the criteria related to the types of investors and types of financial instruments that make an MTF or OTF subject to this Regulation.

Explanations

Paragraphs 1 (c), 1 (d) and 3

The scope combines and levels out concepts that differ significantly in nature: financial instruments on the one hand (*§ 1. (a) and (b)*) and behaviors and transactions on the other hand (*§ 1. (c) and (d)*). The definitions of insider dealing and improper disclosure of inside information and of market manipulation already include these concepts, while being a lot more precise[1]. Using the concepts of transactions, behaviors and orders in the scope therefore does not bring value in terms of defining abuses. Instead, it creates uncertainty as to the application of these concepts because it generates inconsistencies, for e.g.:

- The definitions of insider dealing and improper disclosure of inside information refers only to acquisitions and disposals and not to transactions generally (*see Article 7*). Covering any transaction in the scope (*Article 2.1 (c)*) therefore creates confusion.

- The use of the term « behaviour » is also confusing. Article 2.3, which concerns the scope of market manipulations, seems to infer that orders are a subset of the concept of behaviour: « *Articles 8 and 10 also apply to transactions, orders to trade or other behaviour (…)* » (AMAFI underlines). But then why are orders explicitly mentioned here and not in paragraphs 1 and 2 of

[1] Insider dealing and improper disclosure of insider information (Art. 7) is defined as :
- Using inside information to acquire or dispose of financial instruments to which the information relates → concept of transactions
- Using inside information to cancel or amend an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information → concept of orders
- Attempt by a person in possession of inside information to acquire or dispose of or to cancel or amend an order concerning a financial instrument to which the information relates → concept of behaviour
- Recommending or inducing another person to engage in insider dealing → concept of behaviour
- Improperly disclosing inside information to another person outside of the normal course of the exercise of professional duties → concept of behaviour

Market manipulation (Art. 8) is defined as :
- Entering into a transaction, placing an order or any other behavior, which gives or is likely to give, false or misleading signals or which secures or is likely to secure at an abnormal or artificial level the price of one or several financial instruments or which affects the price of one or several financial instruments via a fictitious device or any other form of contrivance.
  → concepts of transactions, orders and behaviours
- Disseminating false or misleading information which has the consequences of giving or being likely to give, false or misleading signals or securing or being likely to secure at an abnormal or artificial level the price of one or several financial instruments
  → concept of behaviour

Article 2 that also include the concept of behaviour and that apply also to insider dealing, which explicitly includes orders (*Article 7*)?

The concepts of behaviour and transactions are not inadequate in themselves (for e.g. behaviour is useful to define some types of market manipulation) but they should be used where they are needed, otherwise they conflict with the more precise definitions provided for in the regulation for market manipulation and insider dealing, which creates confusion that is harmful for common interpretation by competent authorities and courts.

To remove these uncertainties, this amendment distinguishes between:
- what constitutes the scope itself: the financial instruments concerned
- what is related to the definitions of insider dealing, improper disclosure of inside information and market manipulations, which is included in Articles 7 and 8.

Paragraph 1 (a)

The mention in paragraph (b) that the MTF or OTF concerned is one that is in existence in at least one Member State is not needed because the definitions of MTF and OTF refer to such system or facility "in the Union" (see Article 5. 3 and 4).

Paragraph 1 (b)

The all encompassing extension of the scope to any MTF and OTF is not practical as is for three reasons:

- Some MTFs or OTFs trade or will trade some financial instruments for which the concept of "issuer" is meaningless (e.g. currency or interest rate derivatives), hence not subject to transparency requirements. Applying the notions of inside information and insider dealing to these markets is therefore not straitghforward or may even not be possible.

- Some MTFs or OTFs trade or will trade financial instruments that are not admitted to trading on a regulated market and whose trading on these venues has not been requested or approved by their issuers. In this case, the proposed regulation provides that these issuers, who are not subject to the transparency requirements of the Prospectus and Transparency Directives, should not have to disclose inside information (*Art.12, par. 8*). But, paradoxically, the other market participants would still have the obligation to prevent and detect insider dealing related to theses issuers. This two-pronged approach will not secure the integrity of these financial instruments' markets: if issuers do not have to identify inside information, they will not ring-fence it. Requesting other market participants to do so is therefore useless from a market integrity point of view.

- Some financial instruments will have been traded once on a MTF or OTF, with no permanent trading on these platforms. It is neither proportionate nor useful to apply the market abuse rules to these instruments. In general, it is concerning that the private decision by an operator of an MTF or OTF to admit a particular instrument to trading should have the consequences of subjecting all market participants to insider dealing and market manipulation rules, even when they are trading over the counter.

Instead, priorities should be set on those MTFs and OTFs that create the most risks to markets' integrity and investor protection, so that the Regulation can apply in a proportionate manner. The proposed amendment allows the Commission to adopt delegated acts to set these priorities, depending for example, on the types of financial instruments traded and the types of investors concerned (retail, institutional,…).

Paragraph 2

Article 7 deals not only with insider dealing (that concerns acquisitions and disposals) but also with improper disclosure. Hence, the reference to Article 7 needs to be amended.

Article 9 does not refer to acquisitions or disposals but to the prohibition of insider dealing and improper disclosure of inside information, which are defined in Article 7: a reference to Article 9 is therefore not relevant.

The terms "relates to" are not sufficiently precise: one implication of using those terms could be that all the financial instruments of a given issuer should be considered as related, even though their values are not dependent upon each other and the inside information held on one instrument has no impact on the value of other instruments. The incentive for a person to acquire or dispose of a derivative related to another financial instrument on which it has inside information exists precisely when there is a benefit to be had on the price movement the information will have on the derivative. The inherent logic is the dependence (to whatever extent) between the two financial instruments, not the mere linkage.

Paragraph 3

Market manipulations using derivatives seek to have an effect on a financial instrument related to that derivative, not on any other financial instrument. This amendment re-establishes consistency with Recital (20): "(…) *engaging in market manipulation or attempting to engage in market manipulation in a financial instrument may take the form of using related financial instruments such as derivative instruments that are traded on another trading venue or over the counter*"

- **Article 3 – Exemption for buy-back programmes and stabilisation**

Proposed amendments

1. The prohibitions in Articles 9 and 10 of this Regulation do not apply to trading in own shares in buy-back programmes when the full details of the programme are disclosed prior to the start of trading, trades are reported as being part of the buyback programme to the competent authority and subsequently disclosed to the public, and adequate limits with regards to price and volume are respected.

2. The prohibitions in Articles 9 and 10 of this Regulation do not apply to trading in own ~~**shares**~~ **financial instruments** for the stabilisation of a financial instrument when stabilisation is carried out for a limited time period, when relevant information about the stabilisation is disclosed, and adequate limits with regards to price are respected.

Explanations

MAD's safe harbor for stabilisation (MAD, art. 8) was aiming at any financial instruments, not only shares. There is no rationale for limiting the scope of the safe harbor to shares only.

- **Article 14 – Manager's transactions**

Proposed amendments

1. The prohibition in (a) of Article 9 shall not apply to persons discharging managerial responsibilities within an issuer of a financial instrument who acquire, dispose of or exercise rights on this financial instrument for their own account, providing the transactions are undertaken by a portfolio manager exercising full discretion according to a discretionary mandate. The main characteristics of the mandate are made public promptly after its conclusion.

~~1.~~ **2.** Persons discharging managerial responsibilities within an issuer of a financial instrument or an emission allowance market participant, not exempted pursuant to the second subparagraph of paragraph 2 of Article 12, as well as persons closely associated with them, shall ~~ensure~~ **report** ~~that information~~ to the competent authority ~~is made public about~~ the ~~existence of~~ transactions conducted on their own account relating to the shares of that issuer, or to derivatives or **to** other financial instruments linked to them, or to emission allowances or related derivatives. ~~Such persons~~ **Competent authorities** shall ensure that the information is made public within two business days after the day on which the transaction occurred.

~~2.~~ **3.** For the purposes of paragraph 1 transactions that must be notified shall include:
– the pledging or lending of financial instruments by or on behalf of a person referred to in paragraph 1;
– transactions undertaken by a portfolio manager or other person on behalf of a person referred to in paragraph 1 ~~including~~ **except** where **a mandate referred to in paragraph 1 has been concluded.**

~~3.~~ **4.** Paragraph 1 shall not apply to transactions totaling under EUR 20,000 over the period of a calendar year

~~4.~~ **5.** This Article shall also apply to any auction platform, auctioneer and auction monitor in relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (No) 1031/2010

~~5.~~ **6.** The Commission may adopt, by means of delegated acts in accordance with Article 31, measures modifying the threshold in paragraph 3 taking into account the developments in financial markets.

~~6.~~ **7.** The Commission shall adopt, by means of delegated acts in accordance with Article 31, measures specifying the professional functions of persons who are considered to discharge managerial responsibility as referred to in paragraph 1, the types of association, including by birth as well as under civil and contractual law, considered to create a close personal association, the characteristics of a transaction referred to in paragraph 2 which trigger that duty, and the information that must be made public and the means of informing the public.

~~7.~~ **8. ESMA shall develop draft regulatory technical standards to determine the criteria the mandate referred to in paragraph 1 shall meet.**

Explanations

A new paragraph is inserted to allow managers of listed companies to trade their companies' stocks at lower regulatory risk. Managers have practical difficulties executing transactions on their company's stocks because of the timing restrictions applying to them. They are also very much under the public eye in this respect and compliance with applicable regulation is thus essential. Giving them the possibility to organize their stocks' trading following a pre-defined programme implemented by an independent intermediary would be a significant progress.

The proposed provision is inspired by the AMF's recommendation n° 2010-07 that provides for the use of discretionary management mandate provided specific conditions are met and they are entered into when the manager does not possess inside information. ESMA would be charged with the task of determining which criteria these discretionary mandates should meet.

It should not be mandatory to report transactions executed under a discretionary mandate since these transactions reflect the decisions of the portfolio manager, not the manager's, and the characteristics of the mandate are made public when it is concluded.

Currently, under MAD, the publication of managers' transactions is made centrally by competent authorities. Removing this obligation would fragment the information to the market and harm transparency, hence the proposed amendment.

- **Article 5 – Definitions**

Proposed amendments

(…)
10. "spot commodity contract" means any contract for the supply of a commodity traded on a spot market which is promptly delivered when the transaction is settled including any derivative contract that must be settled physically.

11. "spot market" means any commodity market in which commodities are sold for cash and promptly delivered when the transaction is settled.
(…)
20. For the purposes of applying paragraphs 10 and 11, ESMA shall develop draft regulatory standards to determine for each type of commodity contract what the terms "promptly delivered" refer to.

Explanations

Insertion of point 20. The implementation of MiFID I has shown that competent authorities can have very different views on the concept of « promptly delivered ». For example, one could consider that 9 days is still prompt, and others that the limit is 3 days. It is absolutely necessary to harmonise these views. One way to do it is to charge ESMA with establishing technical standards by type of commodity contract.

- **Article 6 – Inside information**

Proposed amendments

1. For the purposes of this Regulation, inside information shall comprise the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments, and which if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

(b) in relation to derivatives on commodities, **without prejudice to Regulation (EU) No… of the European Parliament and the Council on Wholesale Energy Market Integrity and Transparency,** information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such derivatives or to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts; ~~**notably**~~ information which is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, ~~**contracts**~~ or customs, on the relevant commodity derivatives or spot markets **in so far as this information is likely to have a significant effect on the prices of such derivatives or related spot commodity contracts**.

(c) in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments.

(d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and related to the client's pending orders in financial instruments, which is of a precise nature, which relates, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

~~**(e) information not falling within paragraphs (a), (b), (c) or (d) relating to one or more issuers of financial instruments or to one or more financial instruments, which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected.**~~

2. For the purposes of applying paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or ~~**may**~~ **are** reasonably ~~**be**~~ expected to come into existence or an event which has occurred or ~~**may**~~ **is** reasonably ~~**be**~~ expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances

3. For the purposes of applying paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions.

4. For the purposes of applying paragraph 1 b), ESMA shall develop draft regulatory standards to determine for each type of spot commodity market and commodity derivative the information required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules or customs.

Explanations

Paragraph 1 (b)

The specific characteristics of the definitions of Regulation (EU) No…of the European Parliament and the Council on Wholesale Energy Market Integrity and Transparency should be taken into account when applying the definition of inside information of this Regulation to financial instruments related to wholesale energy products.

Information which is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contracts or customs is so large in itself that it is unclear what other type of information could be included. Also, the information concerned needs to be circumvented so that producers/users of commodities are not prevented from trading when in possession of information pertaining to the operation of their business, which is not to be disclosed in accordance with legal or regulatory provisions, market rules or customs and may be of strategic value. The adverb “notably” is therefore deleted. Information which is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules or customs is not necessary price sensitive, hence the addition.

The disclosure provisions contained in contracts are not known to other market participants than the parties of the contract, which makes it impossible to identify.

Paragraph 1 (e)

The market abuse regulation is based on the fundamental obligation for issuers to make public inside information and also on the transparency rules set by the Transparency Directive. If “relevant information” is defined with no clear reference to such basic foundations, major difficulties and differences in interpretations among market participants and competent authorities are to be expected.

The concept could also lead to ex-post interpretation by competent authorities based on data not available at the time of trading. This would be damaging in terms of legal certainty for many years as building a clear and harmonised interpretation via the competent authorities and national courts acting under the umbrella of the European Union Court of Justice would take a long time.

In addition, this new type of inside information creates uncertainty in the appreciation of inside information by issuers and intermediaries and for the application of their obligations to draw up insider lists, to set up Chinese walls and to calibrate their market abuse surveillance arrangements. For issuers particularly, it may restrict even more the periods of time during which their managers are allowed to trade the issuer’s stocks. Also, because there would be no disclosure obligation attached to this new type of inside

information, it would be very unclear when the surveillance carried out by intermediaries and issuers on the financial instruments concerned could stop.

Paragraph 2

The use of "may" in addition to the use of "expected" and "come into existence" adds another layer of probability which is not appropriate for the definition of "precise".

Paragraph 4

As most of the commodity spot and derivatives markets are not regulated yet at the Union level, it is necessary to be more precise on the information that is considered as mandatory to disclose. This will provide some legal certainty and will allow for a proper identification of inside information and an appropriate surveillance of the commodity markets. Missing that, the whole set of rules against market abuse in commodity markets will be based on a weak foundation and is likely to be ineffective.

- **Article 7 – Insider dealing and improper disclosure of inside information**

Proposed amendments

1. For the purposes of this Regulation, insider dealings arises where a person possesses inside information and uses that information by **placing an order to acquire or dispose of, or by** acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates. The use of inside information to cancel or amend an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered as insider dealing.

~~**2. For the purposes of this Regulation, attempting to engage in insider dealing arises where a person possesses inside information and attempts to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates. The attempt to cancel or amend an order concerning a financial instrument to which the information relates on the basis of inside information where the order was placed before the person concerned possessed the inside information, shall also be considered an attempt to engage in insider dealing.**~~

2 ~~**3.**~~ For the purposes of this Regulation, a person recommends or induces another person to engage in insider dealing if the person possesses inside information and recommends or induces another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

3 ~~**4**~~. For the purposes of the Regulation, improper disclosure of inside information arises where a person possesses inside information and discloses the inside information to any other person, except where the disclosure is made in the normal course of the exercise of duties resulting from an employment or profession.

4 ~~**5**~~. Paragraphs 1, 2, 3 and 4 apply to any person who possesses inside information as a result of any of the following situations:
(a) being a member of the administrative, management or supervisory bodies of the issuer;
(b) having a holding in the capital of the issuer;

(c) his having access to the information through the exercise of duties resulting from an employment or profession;
(d) being involved in criminal activities.

Paragraphs 1, 2, 3 and 4 also apply to any inside information obtained by a person under circumstances other than those referred to in points (a) to (d) and which the person knows or ought to know, is inside information.

5. Paragraphs 1 to 3 apply irrespective of whether the transaction or order actually takes place on a regulated market, MTF, OTF or over-the counter.

6. Where the person referred to in paragraph 1 and 2 is a legal person, the provisions of those paragraphs shall also apply to the natural persons **who possess inside information and** who take part in or influence the decision to carry out, or **who** attempt to carry out, the acquisition or disposal for the account of the legal person concerned.

7. Where the person referred to in paragraph 1 is a legal person, the provisions of that paragraph shall not apply to a transaction by the legal person if the legal person had in place effective arrangements which ensure that no person in possession of inside information relevant to the transaction had any involvement in the decision or behaved in such a way as to influence the decision or had any contact with those involved in the decision whereby the information could have been transmitted or its existence could have been indicated.

8. Paragraph 1 shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded, or is to satisfy a legal or regulatory obligation that arose, before the person concerned possessed inside information.

9. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (No) 1031/2010, ~~**the prohibition under paragraph 1 shall also apply to the**~~ **insider dealing arises where a person possesses inside information and** use**s** ~~**of inside**~~ **that** information by submitting, modifying or withdrawing a bid for **its** own account ~~**of the person that possesses inside information**~~ or for the account of a third party.

New Recital (14a)

The prohibition to use inside information by placing an order to acquire or dispose of the financials instruments to which the information relates applies irrespective of whether the order is accepted or not by the intermediary.

Explanations

Paragraphs 1 and 2 and new Recital (14a)

The two constituents of the definition of attempt, "*attempting to acquire or dispose of financial instruments*" and "*attempting to cancel or amend an order*", are not clear. They implicitly require the characterization of a mental element, which is not feasible for firms and difficult to achieve for authorities.

In practical terms however, an attempt to commit insider dealing refers to orders that, for whatever reasons, are not executed. As orders are already in scope of the surveillance systems (see Article 11.2),

better legal certainty is obtained by amending paragraph 1 to explicitly include the placement of orders as a form of using inside information.

A new recital makes it clear that the order exists even when it has been rejected by the firm.

Paragraph 5

Re-instatement of deleted sentence in Article 2.1 (c).

Paragraph 6

Drafting correction.

Paragraph 9

Paragraph 1 is a definition, not a prohibition.

This amendment re-establishes consistency with the provision of paragraph 7 that allows legal entities to set up internal Chinese walls. It ensures third parties acting on behalf of the issuer without possessing inside information are not caught in.

- **Article 8 – Market manipulation**

Proposed amendments

1. For the purposes of this Regulation, market manipulation shall comprise the following activities:

(a) entering into a transaction, placing an order to trade or any other behavior which has the following consequences:
– it gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or
– it secures, or is likely to secure, the price of one or several financial instruments or a related spot commodity contracts at an abnormal or artificial level;

(b) entering into a transaction, placing an order to trade or any other behavior affecting, **or likely to affect**, the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance; or

(c) disseminating information through the media, including the Internet, or by any other means, which has, **or is likely to have,** the consequences referred to in subparagraph (a), where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. When information is disseminated for the purposes of journalism, such dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media, unless:
– those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question; or
– the disclosure or dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of financial instruments.

~~**2. For the purposes of this Regulation, an attempt to engage in market manipulation shall comprise the following:**~~
~~**(a) attempting to enter into a transaction, trying to place an order to trade or trying to engage in any other behaviour as defined in paragraph 1(a) or (b); or**~~
~~**(b) attempting to disseminate information as defined in paragraph 1(c).**~~

2 ~~**3**~~. The following behaviour shall be considered as market manipulation or attempts to engage in market manipulation:
(a) conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument or related spot commodity contracts which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions,
(b) the buying or selling of financial instruments at the close of the market with the effect or intention of misleading investors acting on the basis of closing prices,
(c) the sending of orders to a trading venue by means of algorithmic trading, including high frequency trading, without an intention to trade but for the purpose of:
– disrupting or delaying the functioning of the trading system of the trading venue;
– making it more difficult for other persons to identify genuine orders on the trading system of the trading venue; or
– creating a false or misleading impression about the supply of or demand for a financial instrument.
(d) taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument or related spot
commodity contract (or indirectly about its issuer) while having previously taken positions on that financial instrument or related spot commodity contract and profiting subsequently from the impact of the opinions voiced on the price of that instrument or related spot commodity contract, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.
(e) the buying or selling on the secondary market of emission allowances or related derivatives prior to the auction held pursuant to Regulation No 1031/2010 with the effect of fixing the auction clearing price for the auctioned products at an abnormal or artificial level or misleading bidders bidding in the auctions.

3. ~~**4**~~. For the purposes of applying points (a) and (b) of paragraph 1 of Article 8, and without prejudice to the forms of behaviour set out in paragraph 3, Annex I defines non-exhaustive indicators related to the employment of fictitious devices or any other form of deception or contrivance, and non-exhaustive indicators related to false or misleading signals and to price securing.

4. Paragraphs 1 to 3 apply irrespective of whether the order, transaction or behaviour takes place on a regulated market, MTF, OTF or over-the counter.

5. The Commission may adopt, by means of delegated acts in accordance with Article 31, measures specifying the indicators laid down in Annex I, in order to clarify their elements and to take into account technical developments on financial markets.

Explanations

Paragraph 1

Attempts to engage in market manipulation are already included in the definition of market manipulation, which is itself wide ranging. For example, paragraph 1 (a) provides that the effect of “any behaviour” does not have to happen for the manipulation to be characterised: it is sufficient that the effect is likely to

happen. So, any behavior that is likely to have the stated effects is in the scope of market manipulation. “Any behavior” is a very large concept, large enough to include attempts.

Hence, a specific definition of attempts to engage in market manipulation is not needed, all the more that it creates confusion. Paragraph 2 that defines attempts is therefore deleted (additional horizontal amendments would be needed throughout the proposed regulation to remove references to attempting to engage in market manipulations) and paragraph 1 is amended to ensure it includes likely effects in (b) and (c) as well.

Paragraph 4

Re-instatement of deleted sentence in Article 2.1 (c).

- **Prevention and detection of market abuse and market soundings**

Proposed amendments

Article 11

1. Any person who operates the business of a trading venue shall adopt and maintain effective arrangements and procedures in accordance with [Articles 31 and 56] of Directive [new MiFID] aimed at preventing and detecting market abuse.

2. Any person professionally arranging or executing transactions in financial instruments shall ~~**have systems in place**~~ **adopt and maintain effective arrangements and procedures** to detect ~~**and report**~~ orders and transactions that might constitute insider dealing, market manipulation or an attempt to engage in market manipulation or insider dealing. If that person reasonably suspects that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, might constitute insider dealing, market manipulation or an attempt to engage in market manipulation or insider dealing, the person shall notify the competent authority without delay.

3. A person in a professional capacity who intends to query one or more investors with a view to setting the terms of a possible future significant distribution or buy-back of securities in which it is acting at the request of an issuer or seller, shall maintain appropriate records of its queries.

Prior to the query, should the information to be communicated be inside information, it shall obtain the investor’s agreement to receive such information.

4. ESMA shall develop draft regulatory technical standards to determine**:**

- appropriate arrangements and procedures for persons to comply with the requirements established in paragraph 1**;**
- the systems and notification templates to be used by persons to comply with the requirements established in paragraph 2**;**
- **the type of queries that are deemed to be carried out in the context of a possible future significant distribution or buy-back of securities on behalf of an issuer or seller and the recording arrangements that are appropriate to comply with the requirements established in paragraph 3.**

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by [...].
Power is conferred to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation 1095/2010.

New Recital (14b)

Market soundings consist in the questioning of one or more investors by market professionals, in advance of a non public possible future significant distribution or buy-back of securities, in which they are acting at the request of an issuer or seller, with a view to setting its terms and conditions. The ability to conduct such market soundings is important for the proper functioning of capital markets.

However, care must be taken because of the risk of improper use of inside information that may be disclosed during the questioning. To ensure market soundings are conducted without compromising the integrity of the market, this Regulation should require market professionals to take appropriate measures to prevent improper communication of inside information and insider dealing.

Article 1
Definitions

X. Significant distribution means an initial or a secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed.

Explanations

Paragraph 2

The requirements for persons operating business of a trading venue and persons executing transactions shall be identical.

Paragraphs 3 and 4, New Recital (14a) and Article 1

Market soundings are an important tool for the success of certain financial transactions. When markets are volatile, uncertain or lacking comparable benchmarks, the ability by market professionals to interview a small number of select clients to determine the interest in the financial transaction under consideration and to help set its price prior to its announcement is important. Market sounding helps secure the reception of the issuer's securities by investors and, more generally, creates a positive dynamic amongst investors on the issuer's securities. In case of a postponement or abandonment, it is also a way to protect the reputation of the issuer from any negative effect such an announcement would have caused, which could be detrimental in volatile markets.

Given the international nature of most of the financial transactions concerned by market soundings and the use of syndicates of financial institutions to carry them out, a harmonized approach within the European Union is highly desirable to set the provisions covering these practices and ensure their enforcement.

The proposed recital states the importance of market soundings while stressing the risk they may pose for market integrity when they involve communicating inside information, which calls for the introduction of specific rules in the Regulation.

The insertion of a new paragraph (3) in Article 11 aims to mitigate the risks posed by market soundings:

- Firstly, a requirement is inserted to ensure competent authorities have access to the necessary records to carry out their investigations. This takes the form of an obligation for professionals to maintain records of the market soundings they conduct, whether inside information is communicated or not. It is proposed that ESMA drafts regulatory technical standards to determine the specific recording arrangements required.

- Secondly, to ensure investors are not communicated inside information without being fully aware of it, professionals are required to obtain their agreement when they intend to conduct a market sounding involving the transmission of inside information.

This paragraph also defines the scope of the queries constituting market soundings, as the questioning of investors may occur in many different situations that do not constitute market soundings. For this reason, a definition is inserted in Article 1 for the terms “significant distribution” and ESMA is charged with drafting regulatory standards to determine the types of queries that are deemed to be carried out in the context of a significant distribution.

- **Article 12**

Proposed amendments

(…)
8. This Article shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State or~~, in the case of an instrument only traded on a MTF or an OTF, have not requested or approved trading of their financial instruments on a MTF or an OTF in a Member State.~~ **whose financial instruments are not traded on an MTF or OTF meeting criteria referred to in Article 2.**
(…)

Explanations

Even though this requirement imposes additional burden on issuers, any issuer whose financial instruments are traded on an MTF or OTF subject to this Regulation should be under the obligation to disclose inside information to the market. If not, the issuer will not identify, nor protect inside information pertaining to its financial instruments, hence jeopardizing the integrity of the market.