

## **OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA)**

**of 22 January 2020**

### **Relating to the intended Accepted Market Practice on liquidity contracts notified by the Commissione Nazionale per le Società e la Borsa (Consob)**

#### **1 Legal basis**

1. Article 13 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (MAR)<sup>1</sup> provides that a national competent authority (NCA) may establish an accepted market practice (AMP). The relevant provision of MAR is supplemented by the Commission Delegated Regulation (EU) 2016/908 of 26 February 2016<sup>2</sup> (CDR 2016/908) that further specifies the requirements listed in Article 13(2) of MAR that a NCA should take into account before deciding whether or not to establish an AMP.
2. As required under Article 13(3) of MAR, a NCA intending to establish an AMP must notify ESMA and other NCAs of its intention at least three months before the AMP is intended to take effect.
3. According to Article 13(4) of MAR, ESMA shall, within 2 months from the receipt of the notification made by an NCA, issue an opinion on the intended AMP and publish it on its website. This opinion shall assess (a) the compatibility of the intended AMP with Article 13(2) of MAR and the CDR 2016/908 and (b) whether the establishment of the AMP would not threaten market confidence in the Union's financial market.
4. In accordance with Article 13(5) of MAR, where the NCA intends to establish a practice contrary to the opinion issued by ESMA, the notifying NCA is required to publish on its

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<sup>1</sup>OJ L 173, 12.6.2014, p. 1.

<sup>2</sup> Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance; OJ L 153, 10.6.2016, p. 3–12.

website a notice setting out in full its reasons for establishing the AMP, within 24 hours of establishing that AMP.

5. The Board of Supervisors adopts this opinion in accordance with Article 13(4) of MAR and Article 29 of the Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>3</sup>. This opinion is addressed to the Commissione Nazionale per le Società e la Borsa (Consob).

## 2 Background

6. MAR determines a harmonised framework prohibiting market manipulation. This encompasses a prohibition on entering into a transaction, placing an order to trade or engaging in behaviour which gives, or is likely to give, a false or misleading signal as to the supply of, demand for, or price of, an instrument falling within the scope of MAR, or which secures, or is likely to secure, the price of such an instrument. However, MAR also provides an exception to the general prohibition of market manipulation. To benefit from that exception, the concerned person needs to establish that the transaction conducted, the order placed, or the behaviour engaged in has been carried out for legitimate reasons and in accordance with a market practice formally accepted by a NCA, referred to as an AMP.
7. The protections and safeguards foreseen in MAR by the co-legislators with respect to activities falling within an AMP have been envisaged precisely because those activities (placing orders or conducting transactions) could, in themselves, constitute market manipulation. The mechanisms for doing so could be either by affecting the price formation process, by giving false or misleading signals as to the supply of, demand for, or price of the financial instrument or by securing the price at an abnormal or artificial level. Furthermore, market manipulation is one of the most serious types of misconduct in financial markets and one of the two types (together with insider trading) for which a criminal regime has been established in the EU through the Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse<sup>4</sup>.
8. This is the reason why it is particularly important to have scrutiny at EU level on these intended AMPs. Such scrutiny is exercised by ESMA through the issuance of the relevant opinions on practices that could be potentially manipulative but that are accepted and authorised to pursue the benefit they bring to market structure, operation or robustness.
9. Additionally, ESMA identified a common understanding for the establishment of the AMPs on liquidity contracts that NCAs should take into account when assessing a

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<sup>3</sup>OJ L 331, 24.11.2010, p. 84.

<sup>4</sup> OJL 173, 12.6.2014, p. 179-189.

proposed AMP. These agreed points of convergence were made public on 25 April 2017 in the form of an ESMA opinion (ESMA70-145-76) hereinafter referred to as the “ESMA Opinion on liquidity contracts”.

### 3 Procedure

10. In the present case, Consob notified ESMA on 18 April 2019 of its intention to establish an AMP relating to liquidity contracts, which aims at replacing the existing AMP on Liquidity Enhancement Agreements (LEAs) previously established by Consob on 19 March 2009 under Directive 2003/6/EC on market abuse (MAD). Consob has also informed ESMA that the other pre-existing AMPs<sup>5</sup> established under MAD will not be operational anymore as of 30 June 2019.
11. In accordance with the procedure foreseen in Article 11(2) of the RTS on AMPs, Consob requested ESMA on 14 June 2019 to cease the process of issuing an ESMA opinion after preliminary comments had been received.
12. On 22 November 2019, Consob notified ESMA a proposed MAR AMP that should substitute MAD AMP No 1 only once it comes into force. In the meantime, the MAD AMP No 1 remains applicable in Italy.
13. The present opinion is based on the information provided by Consob. The other NCAs were duly notified of the proposed AMP by ESMA, in accordance with Article 13(3) of MAR.

### 4 Opinion

#### 4.1 Rationale of the ESMA Opinion

14. The AMP notified by Consob refers to LEAs by which a financial intermediary (FI) quotes on shares or on units of closed-end real-estate collective investment undertakings (CIUs).
15. The practice would be available with respect to shares/units of closed-end real-estate CIUs traded on Italian regulated markets or multilateral trading facilities (MTFs).
16. Contrary to other AMPs analysed by ESMA in the past, this practice could be initiated by:
  - a. issuers who have requested admission to trading or approved the trading of their shares/units;

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<sup>5</sup> AMP n. 2 on Purchase of own shares to set up a shares warehouse position, see pages 7 onwards of [Consob's notification AMPs under MAD](#) and AMP n.3 on Buyback of bonds issued at predetermined conditions, see page 19 of the [ESMA Report on AMPs](#), published on December 2018.

- b. any other party in a control relationship with the issuer and authorised by the issuer itself; and
  - c. in the case of Italian closed-end real-estate CIUs, the asset manager in its own name (i.e. not on behalf of the CIUs it manages).
17. The AMP needs to be performed by a FI member of the relevant Italian trading venue where the concerned shares or closed-end CIU units are admitted to trading or traded with the issuer's consent.
18. The objectives declared by Consob of the proposed practice are: a) enhancing the liquidity of a particular share/unit of a closed-end real-estate CIU for a specified period of time thereby favouring regular trading activity and b) avoiding price fluctuations which are not in line with the market trend.
19. As already explained in detail in the opinion issued by ESMA on 16 December 2016 on the intended AMP on liquidity contracts notified by the Spanish Comisión Nacional del Mercado de Valores ([ESMA/2016/1663](#)), other mechanisms exist in EU markets to enhance the liquidity of financial instruments (e.g. market making or liquidity provision under a contract with a venue). The main difference between such classical mechanisms and the AMPs on liquidity contracts analysed by ESMA in the past is that the issuer of the financial instrument initiates the practice, determines when and for how long to put it in place, defines the size of the resources that will be devoted to it and, more importantly, provides those resources (in terms of cash and financial instruments) on its own account.
20. ESMA considers that, since those liquidity contracts are usually prompted and fully funded by the issuer of the share, the interests of the issuer may collide with the interests of the market as a whole and particularly with the investors' interests. Therefore, such practices require the maximum extent of precautions to ensure that the risks to market integrity that they could pose, notably in terms of effects on the price formation process and the perception of the liquidity of the issuer's share, are as contained as possible.
21. In light of this, the main risks where the issuer provides the funds and financial instruments in ESMA's view are the following:
- a. the possibility of the issuer instructing the financial intermediary to act in sensitive periods for the issuer (around publication of results, in the wake of key announcements or secondary offerings, during buy back or stabilisation periods, while a takeover is pending acceptance, etc.);
  - b. the possibility of the issuer or the financial intermediary favouring one-sided quoting (for instance, buying only or buying in bigger quantities than selling), ultimately creating an imbalance and moving (typically up) the price of the share;

- c. the possibility of quoting practices that would have a distorting effect on prices (by placing orders at a better price than what would result from independent parties);
  - d. the possibility of acquiring a dominant position in the market, with the associated distortive results that it would create;
  - e. the lack of transparency of the contract, in a manner that would prevent the overall market to assess how much liquidity is being “added” by the contract compared to the one that would be “naturally” present in the market;
  - f. the possibility of an adverse incentive for the financial intermediary to increase trading, for instance, to increase its remuneration under the contract.
22. Another element where the proposal submitted by Consob differs from other cases analysed in the past by ESMA is that it permits that the financial risk of the liquidity contract can be borne by the financial intermediary, a third party in control of the issuer or, in the case of closed-end real-estate CIUs, by their asset manager, independently from its role as such.
23. In other words, the proposal would permit the financial intermediary or a third party to provide the money and financial instruments, to bear the risk of the liquidity contract and to collect the economic benefit where it exists, as there is no obligation to return anything to the issuer.
24. In light of this, the main risks where the financial intermediary provides the funds and financial instruments in ESMA’s view are related to the possible misalignment between the objectives that should be pursued in carrying out the liquidity contract and the objectives of the intermediary in terms of generating the maximum return from its investment:
- a. the possibility of the financial intermediary favouring one-sided quoting (for instance, buying only or buying in bigger quantities than selling), ultimately creating an imbalance and moving (typically up) the price of the share;
  - b. the possibility of quoting practices that would have a distorting effect on prices (by placing orders at a better price than what would result from independent parties); or
  - c. the possibility of acquiring a dominant position in the market, with the associated distortive results that this would create.
25. In the case of an asset manager undertaking a liquidity contract in its own name (and not on behalf of the CIU it manages) and bearing the financial risk, ESMA considers

that this situation may raise specific issues related to the potential conflict of interest between the CIU and the asset manager itself<sup>6</sup>.

26. In the assessment of the compatibility of the proposed AMP with the criteria of Article 13(2) of MAR, ESMA has also considered the mechanisms described by Consob to mitigate the above-mentioned risks.
27. In the context of this assessment, ESMA has also considered in its assessment the extent to which the agreed points of convergence set out in the ESMA Opinion on liquidity contracts are considered in the intended AMP.

#### **4.2 *Assessment of the criteria and requirements laid down in MAR and the CDR 2016/908***

##### **On the notification received**

28. ESMA finds that the Consob's notification of 22 November 2019 provided the information required under Article 13(3) of MAR and Article 10 of the CDR 2016/908 (see annex). According to Consob, this proposal has been made further to an extensive consultation with relevant domestic bodies and takes into account the framework introduced by MAR and the ESMA Opinion on liquidity contracts.

##### **On the identification of elements related to the ESMA Opinion on liquidity contracts**

29. ESMA appreciates that Consob made reference to the conditions and limits set out in the ESMA Opinion on liquidity contracts in the proposed AMP when it refers to the provision of LEAs for shares: the need to take into account the liquidity of the financial instruments in light of the objective of enhancing liquidity, the written form of the contract, the trading venues where the liquidity contracts can be performed, the trading conditions for the performance of the AMP (presence in the order book, price and volume limits, trading during auctions and possibility to use block trades) and the limits to the resources that can be allocated to its performance.
30. ESMA notes in particular that, when it comes to LEAs for shares, the practice makes a distinction between two categories of shares defined according to their level of liquidity ("liquid" and "illiquid" shares/closed-end funds) by applying differentiated conditions and restrictions.
31. In that respect, ESMA notes that Consob has aligned the criteria for the determination of liquid markets for equity and equity-like instruments with MiFIR and Commission Delegated Regulation (EU) 2017/567. Given that the new framework leads to a

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<sup>6</sup> See for example, Article 14 AIFMD and Article 30(b) of Commission Delegated Regulation (EU) 231/2013, that identifies as a potential source of conflict of interest situations where "the AIFM has an interest in the outcome of a (...) transaction carried out on behalf of the AIF (...), which is distinct from the AIFs interest in that outcome".

material change in the identification of 'liquid' and 'illiquid' financial instruments, ESMA supports such amendment.

32. With respect to the type of contracts covered, and as further elaborated below, ESMA notes that the proposal contemplates a case that is not addressed in the ESMA Opinion on liquidity contracts: the provision of liquidity contracts at the risk of the financial intermediary or of a third party.
33. With respect to the scope of instruments covered by the AMP, ESMA also notes that the proposal goes beyond the scope of the ESMA Opinion on liquidity contracts by covering not only shares admitted to trading on regulated markets or MTFs but also units of real-estate closed-end funds.

### **Key issues arising from the proposed AMP- Assessment of the compatibility of the intended AMP with specific legislative criteria**

34. Consob's proposal contains three elements that differentiate their LEAs from other AMPs analysed by ESMA in the past:
  - a. Firstly, the FI may undertake the LEA at its own financial risk, i.e. making use of its own resources (cash and financial instruments) and therefore, the economic effects of the trading activities under the LEA have a direct effect on the FI.
  - b. Secondly, the same FI may undertake simultaneously the roles of LEA provider and specialist. As specialist, the FI would be appointed by the issuer and have a contract with the trading venue to deal on its own account as liquidity provider under pre-defined rules and conditions<sup>7</sup>.

Consob's proposal foresees that the specialist contract and the LEA can be performed simultaneously but separately.

- c. Thirdly, in the case of closed-end real-estate CIUs, the asset manager itself (and not the CIU it represents) may take the risk of performing the liquidity contract. In other words, the asset manager in its own name would provide its own shares/units and its own cash to perform the liquidity contract and therefore, the economic effects of the trading activities (gain or loss) under the LEA would apply to it.

### **Provision of the AMP at the FI's own financial risk**

35. As a preliminary point, ESMA notes that there is no explicit ban in MAR on the possibility for a FI to undertake the LEA at its own risk.

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<sup>7</sup> See for instance <https://www.borsaitaliana.it/azioni/notiziedettaglio/liquidityprovider.en.htm>

36. Moreover, ESMA considers that the fact that a firm performs the LEA at its own financial risk does not generate a presumption that such firm will engage in manipulative strategies.
37. However, in the case of AMPs, Article 13 of MAR establishes that trading activity that would otherwise be considered as manipulative may operate under a 'safe harbour' where strict requirements are met, amongst other criteria, ensuring a 'high degree of safeguards to the operation of market forces' (Article 13(2)(b) of MAR) and the integrity of directly or indirectly related markets (Article 13(2)(e) of MAR).
38. Additionally, the provision of an AMP at the FI's own risk deserves specific supervisory attention, since in this case the return of the FI would consist of the aggregation of the remuneration provided by the issuer and the outcome of its trading activity.
39. ESMA notes that this situation may give rise to adverse incentives described above derived from the possible misalignment of the objectives pursued by the issuer (liquidity enhancement and avoid price fluctuations) and the FI's objectives (generating the maximum return).
40. This risk of misalignment can be exacerbated by the possibility of the FI trading simultaneously in the relevant financial instruments under several roles: operating under the LEA (whereby in normal trading conditions the FI should be present on both sides of the book with passive orders), acting as specialist (where, again, in principle the FI should be present on both sides of the book with passive orders) and trading on its own account without any sort of constraints (i.e. it could post aggressive orders and execute transactions that change the equilibrium price).

*Regarding the safeguards to the operations of the market forces and the proper interplay of supply and demand (Article 13(2)(b) of MAR and Article 4 of the CDR 2016/908) and the impact on the proper functioning of the market (Article 13(2)(d) MAR Article 6(1)(a) of the CDR 2016/908)*

41. The need for specific safeguards to the operation of market forces and the proper interplay of the supply and demand in the case of LEAs undertaken at the FI's own risk takes relevance when it is possible to identify, on top of the potential conflict described above, additional potential scenarios in the proposal where adverse incentives for the FI's trading activity could materialise.
42. In this respect:
  - a. Paragraph 9 of the proposal indicates that the securities account cannot have more financial instruments at the expiry of the contract than at the beginning. In case the activity is undertaken at the FI's own risk there is an obvious incentive to raise the price of the instruments towards the end of the contract, since there is no obligation to return to the issuer the cash obtained by selling the excessive amount of financial instruments prior to the expiry.



- b. Paragraph 23 of the proposal enables the FI to accept tender offers or exchange offers by selling the financial instruments purchased during the activity. Consequently, in case there are rumours of an upcoming tender offer the FI may accumulate financial instruments instead of maintaining a balanced position as indicated in Consob's proposal.
43. ESMA acknowledges that, as supervised entities, FIs are subject to the rules on management of conflicts of interest, record-keeping and reporting obligations, as any other investment firm under MiFID II and MiFIR.
44. ESMA also recognises the additional arguments put forward by Consob in this respect, namely:
  - a. That activity of the FI at its own risk prevents one of the key risks in AMPs at the initiative of the issuer: the "creation of a floor in the price pattern", as described in Annex II, Section B, paragraph 1(b) of Commission Delegated Regulation (EU) 2016/522<sup>8</sup>;
  - b. FIs risking their own resources have an incentive to reduce the time of exposure in an open position, to prevent adverse price movements;
  - c. That incentive is fostered even further by the obligation in the AMP to close the open positions as soon as possible;
  - d. The price conditions introduced by the AMP, in line with the ESMA Opinion on liquidity contracts, prevent the FI from trading aggressively; and
  - e. The transparency rules of the proposed AMP foresee the disclosure of the total value of instruments purchased and sold. Consob has indicated that such disclosure would facilitate Consob's supervisory activity in case a FI makes a great profit out of the performance of the AMP.
45. Whereas ESMA recognises that these elements may reduce the possibility of a conflict of interest or permit the supervision of these potential misalignments where the LEA is provided at the FI's own account, they do not eliminate the risk of a possible misalignment of the objectives pursued by the issuer and by the FI, and the existence of adverse incentives for the FI.
46. ESMA notes that the fact that the LEA is carried out at the financial intermediary's own risk does not prevent by itself manipulative strategies. Similarly, it can be argued that

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<sup>8</sup> Transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, with prices falling below, or rising above a certain level, mainly in order to avoid negative consequences deriving from changes in the price of the financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances — usually known as 'creation of a floor, or a ceiling in the price pattern'.

the incentive to reduce the time exposure may also depend on the risk appetite of the financial intermediary.

47. ESMA concurs that the transparency requirements set out by the proposal, together with the transaction reporting requirements set out in Article 26 MAR should disincentivise manipulative strategies carried out by financial intermediaries.
48. However, ESMA disagrees with Consob's approach whereby the ex post analysis should be triggered in case the financial intermediary makes an extraordinary profit. As an example, a financial intermediary that could incur heavy losses due to the LEA, despite the compensation paid by the issuer, might also undertake manipulative strategies to avoid that loss.
49. The underlying issue is, regardless of the profit made, whether the proposal would permit operating under a 'safe harbour' to market participants that have incentives to manipulate the market. In this case, the financial intermediary performing the LEA at its own risk could potentially have the same incentives to manipulate the market as potentially, any other market participant.
50. From that perspective, the ESMA analysis of an AMP consists in identifying which are the arrangements and requirements set out by a national competent authority to counterweigh the risk described above. Where those arrangements and requirements do not seem sufficient, it does not automatically imply that the activity covered by the proposed AMP (in this case, the provision of the LEA at the financial intermediary's own risk) would be illegitimate but instead, that it should not operate under a 'safe harbour' because it should be subject, at the very least, to the same degree of scrutiny as any other market participant.

*Regarding the risk for the integrity of related markets under Article 13(2)(e) of MAR and Article 7 of CDR 2016/908)*

51. Similar analysis can be made with respect to the remuneration practices foreseen in the AMP: despite Consob's claims that the remuneration is in line with the ESMA Opinion on liquidity contracts and Article 7(c) of CDR 2016/908, the ESMA considers that the remuneration practice can go beyond them because the financial intermediary carries out the activity at its own risk.
52. Both the ESMA Opinion on liquidity contracts and, even more clearly, Article 7(c) of CDR 2016/908 assume that the terms of the contract (and in particular, the remuneration), render the financial intermediary indifferent about the economic outcome of the contract - which is a pre-requisite to consider that a proposed AMP is MAR compliant.
53. However, as already described above, in this case the financial intermediary would not be indifferent about the economic outcome of the contract, since it may have incentives (as any other market participant) to manipulate the market either to increase the price

of the financial instruments towards the end of the contract or to reduce the losses which it incurred over the life of the contract where the losses exceed the remuneration paid by the issuer.

### Conclusion

54. Consob concurred with ESMA in considering that the inherent risks of misalignment of objectives in case of performance of the AMP at the financial intermediary's own risk deserve specific supervisory attention.
55. Accordingly, Consob agreed to monitor specifically the trading activity of the financial intermediary carrying out the LEA at their own risk both on an ex-ante (when the contract is transmitted to Consob before the activity starts) and on an ex-post basis (by means of ongoing analysis of the data submitted by the financial intermediary through the transparency and record-keeping requirements set out in the proposal and in the transaction reporting obligation established in Article 26 MiFIR).
56. On that basis, ESMA considers that the proposal addresses the risks potentially posed by the LEAs when carried out at the financial risk of the financial intermediary and therefore is compliant with Article 13(2), letters (b), (d) and (e) of MAR.

### **Simultaneous provision of the AMP and acting as specialist on the same financial instrument and trading venue**

The simultaneous provision of services as liquidity provider under the LEA on the appointment of the issuer and as specialist on the account of a trading venue raises questions from the perspective of the transparency (towards the regulator) under Article 13(2)(a) of MAR, the safeguards to the operations of the market forces and the proper interplay of supply and demand (Article 13(2)(b) of MAR) and the risks for the integrity of the market (Article 13(2)(e) of MAR).

#### *Regarding transparency and disclosure to the public (Article 13(2)(a) of MAR and Article 3 of CDR 2016/908)*

57. Whilst the proposal permits that the same FI operates simultaneously as LEA provider and specialist on the same instrument and venue, it would be theoretically possible to offer 'packages' of services to the same issuer, where adverse incentives might materialise.
58. ESMA notes that Consob has agreed to monitor specifically the possible concurrence of a LEA (which must be notified to Consob prior to the start of the activity) with the provision of liquidity as specialist in the same financial instrument (which is public information). Therefore, ESMA does not identify a risk in terms of lack of transparency towards the regulator (Article 3(2)(a) CDR 2016/908).

*Regarding the safeguards to the operations of the market forces and the proper interplay of supply and demand (Article 13(2)(b) and Article 4 of the CDR 2016/908) and the risks for the integrity of the market (Article 13(2)(e) of MAR and Article 7 of CDR 2016/908)*

A) On the management of conflicts of interest

59. With respect to the management of conflicts of interest, ESMA reiterates the arguments made above about the simultaneous provision of services under the LEA and acting as a specialist. ESMA understands that also in this case possible misalignments between the objectives pursued by the issuer and by the FI and adverse incentives for the FI could arise.

60. Furthermore, ESMA considers that when the FI uses its own financial resources to perform the LEA and also provides other services on its own account, those conflicts of interest might be accentuated. Similarly, ESMA notes that nothing prevents the financial intermediary from doing any other proprietary trading activity in the same financial instrument.

61. The CDR 2016/908 introduces a specific requirement to manage conflicts of interest in its Article 7(f) of the CDR 2016/908, which requires financial intermediaries to have internal arrangements to ensure that trading decisions under the LEA remain *confidential from other units* within that person *and independent from orders to trade* received from clients, portfolio management *or placed on own account* (emphasis added).

62. In this respect, ESMA notes that the proposal requires the LEA to be carried out with separation of the FI's trading activity as a specialist, in line with the requirement in Article 7(f) of the CDR 2016/908. As described in Consob's notification, ESMA understands that the organisational structure of the financial intermediary should ensure independence between the trading decisions made in the context of the LEA and any other trading decision (proprietary or not) made on the financial instruments subject to the LEA.

B) On the limits of resources and positions

63. Whereas ESMA notes that the proposed AMP does not make any explicit reference to limits on positions, these are, in principle, implicitly addressed through the maximum amount of cash and securities that can be allocated to the liquidity contract which fulfil the criteria set out in the ESMA Opinion on liquidity contracts, together with the prohibition to use the financial instruments purchased or made available by the issuer to hold long-term shareholdings.

64. However, ESMA notes that the declared purposes of the LEA are enhancing the liquidity of a share/unit and avoiding price fluctuations which are not in line with the market trend. These goals broadly coincide with other liquidity provision schemes already available in the Italian market.

65. The proposal specifies that the limits on the resources only apply to the activity under the LEA (see paragraph 7 in the annex) but does not consider the resources used for the simultaneous activity as a specialist.
66. From that angle, it is questionable whether in those cases the reference to the limits established in Article 4(2) of the CDR 2016/908 and in the ESMA Opinion on liquidity contracts (and more specifically the limits on resources and on the volumes traded) would be fulfilled as the cash and financial instruments and the volumes traded as a specialist would not be counted for the purpose of the AMP despite them being operated simultaneously<sup>9</sup>. In fact, the necessity of the LEA is questionable where there is already a specialist providing liquidity on the same financial instrument and on the same trading venue.
67. ESMA recognises the additional arguments put forward by Consob regarding the differentiation between the activity under the LEA and as a specialist, namely that:
- a. Under certain Italian trading venues rules, the presence of specialists is compulsory and subject to specific conditions and obligations which differ from those arising from AMPs;
  - b. That market participants can differentiate between the liquidity offered under the role of specialist and under the LEA, as specialists are subject to transparency requirements, not only at the time of initiating the activity but also subject to the obligation of submitting nominative quotes;
  - c. The specialist is subject to obligations that do not exist under the AMPs such as:
    - i. submitting simultaneous buy and sell orders for comparable quantities;
    - ii. submitting buy and sell orders at competitive prices or with a percentage spread not exceeding certain limits;
    - iii. complying with minimum quotation obligations concerning times for entering the bids and offers and the duration of the undertaking whereas LEAs transactions tend to be reactions to orders;
    - iv. complying with strict conditions that otherwise would suspend the activity on the market; and
    - v. specialist activity is not covered by the Article 13 'safe harbour'.

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<sup>9</sup> These concerns are also relevant for the purposes of Article 13(2)(e) of MAR and Article 7(b) of the CDR 2016/908.

68. In line with that, ESMA considers it necessary to monitor specifically the simultaneous, but separate performance of LEA services and acting as specialist in the same financial instrument to prevent the existence of adverse incentives and the implicit aggregation of resources and trading activity that would take place to ensure compliance with Article 13(2)(a) and (b) of MAR and with the limits set out in the ESMA Opinion on liquidity contracts.

### Conclusion

69. Consob concurred with ESMA in considering that the inherent risks of misalignment of objectives and the implicit accumulation of resources in case of simultaneous performance of the AMP and the specialist role deserve specific supervisory attention.

70. Accordingly, Consob agreed to monitor specifically the trading activity of the financial intermediary carrying out the LEA acting simultaneously as specialist both on an ex-ante (when the contract is transmitted to Consob before the activity starts, noting that the appointment as specialist is made public by the trading venue) and on an ex-post basis (by means of ongoing analysis of the data submitted by the financial intermediary through the transparency and record-keeping requirements set out in the proposal and in the transaction reporting obligation established in Article 26 MiFIR).

71. On that basis, ESMA considers that the proposal addresses the risks potentially posed by the LEAs performed in parallel with the specialist activity on the same instrument and therefore compliant with Article 13(2), letters (a), (b) and (e) of MAR.

### **Assumption of the risk of the liquidity contract by the asset manager itself (and not the CIU it represents) in case of closed-end real-estate CIUs**

72. Another distinctive feature of the Consob proposal is that it enables third parties to promote and bear the risk of the LEA. There are two different cases for this:

- a. A third party controlling the issuer of shares and authorised by the issuer itself;
- b. The asset manager in its own name (and not the CIU on its behalf) where the LEA would be performed on shares/units of closed-end real state CIUs.

73. The fundamental difference that exists between both cases should be noted: whereas in the first case the issuer has to give its consent, regardless that the third party has a controlling stake, in the second, the CIU (and more specifically, the CIU without legal personality) may not have the capacity to assess whether such LEA is in its interest.

74. ESMA notes that real-estate closed-end CIUs are covered by AIFMD<sup>10</sup>, which identifies in Article 14 AIFMD and in Commission Delegated Regulation (EU) 231/2013 the

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<sup>10</sup> Directive 2011/61/EU on Alternative Investment Fund Managers.

obligation of asset managers to have in place an adequate management of conflicts of interest.

75. Article 30(b) of Commission Delegated Regulation (EU) 231/2013 identifies as a potential source of conflict of interests where “the AIFM has an interest in the outcome of a (...) transaction carried out on behalf of the AIF (...), which is distinct from the AIFs interest in that outcome”.
76. In the present case, the potential conflict of interest could arise in relation to the potential gain that the asset manager could make from the LEA and how would that gain (or loss) be integrated in the remuneration to be paid in the context of the management of the CIU.
77. As a matter of clarification, ESMA notes that Article 4 of Commission Delegated Regulation (EU) 2016/908 does not identify this type of potential conflict of interest as a matter for the analysis of regulators in the context of proposed AMPs (only refers to a conflict of interest between the beneficiary of the AMP and the clients of the person performing the AMP). However, ESMA considers this situation to be covered under the generic provision of Article 13(2)(b) of MAR.
78. ESMA acknowledges that, as shared by Consob:
  - a. The purpose of the asset manager when signing this type of contract is enhancing the liquidity of the relevant units/shares in the interest of the clients;
  - b. Banca d'Italia regulation on collective portfolio management foresees that asset managers that manage closed-end alternative investment funds not reserved to professional investors are obliged to buy at least 2% of the total net value of the AIFs under their management.
  - c. AIFMD does not prevent asset managers from carrying out transactions where a conflict of interest could be identified but instead: i) to identify those situations; and ii) to prevent, manage and monitor them.

### Conclusion

79. Consob concurred with ESMA in considering that the inherent risks of misalignment of objectives between the CIU managed and the asset manager bearing the risk of the LEA deserve specific supervisory attention.
80. Accordingly, Consob agreed to monitor specifically the performance of LEAs when the asset manager bears the financial risk of it both on an ex-ante (when the contract is transmitted to Consob before the activity starts) and on an ex-post basis (by means of ongoing analysis of the data submitted through the transparency and record-keeping requirements set out in the proposal and in the transaction reporting obligation established in Article 26 MiFIR).

81. On that basis, ESMA considers that the proposal addresses the specific risks potentially posed by the LEAs performed on closed-end real-estate CIUs when the asset manager provides the cash and financial instruments and therefore compliant with Article 13(2)(b) of MAR.

### **Assessment of the compatibility of the intended AMP with the individual legislative criteria**

#### **Article 13(2)(a) of MAR (further specified by Article 3 of the CDR 2016/908): Transparency and disclosure to the public**

##### **On the disclosure to the public**

82. In order for the market practice to be accepted, Consob has imposed transparency requirements towards the public relating to the LEA prior and periodically during its performance as well as when it ceases to be performed.

83. As to the content of the information required to be publicly disclosed under the proposed AMP, ESMA notes that it is in line with the content specified in Article 3(1) of the CDR 2016/908 as the issuer shall disclose to the public (prior to initiating, on a quarterly basis and after the finalisation of the LEA) the required information about the LEA using the methods set forth for the disclosure of inside information<sup>11</sup>.

84. In particular, ESMA notes that the proposal has been amended to ensure that the public is informed when a LEA is provided at the FI's own risk and not at the risk of the issuer.

##### Conclusion

85. ESMA considers that the means for disclosure of inside information set forth in Articles 2 and 3 of Commission Implementing Regulation (EU) 2016/1055 about the technical means for the appropriate public disclosure of inside information and for delaying the public disclosure of inside information are adequate for these purposes and therefore, that the requirement in Article 13(2)(a) of MAR is met<sup>12</sup>.

##### **On the transparency towards the regulator**

86. With respect to the information to be provided to Consob, the proposed AMP requires the issuer entering into a LEA to submit the written contract signed with the financial intermediary and any amendment thereto before the activity is performed. This information is also provided to the market operator of the relevant trading venue. Additionally, Consob has confirmed that it will monitor each contract submitted to them.

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<sup>11</sup> This requirement is also relevant for the purpose of Article 13(2)(e) of MAR and Article 7(g) of the CDR 2016/908.

<sup>12</sup> These arguments are also relevant for the purposes of Article 13(2)(d) of MAR and Article 4(1)(c) of the CDR 2016/908.



87. Furthermore, the proposed AMP explicitly requires the issuer to provide Consob with the same periodic information that is also to be disclosed to the public. In line with ESMA's previous position on CMVM's AMP<sup>13</sup>, ESMA understands that Consob can extract more detailed information about the transactions under the LEA from the daily transaction reports of the financial intermediary submitted under Article 26 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFIR). Such capacity should be read together with their capacity to access any document and data in any form from the issuer and the financial intermediary under Article 23(2) of MAR<sup>14</sup>.

88. Finally, ESMA notes that the original proposal has been amended to ensure that the separate performance of LEA services and acting as specialist in the same financial instrument will be specifically monitored by Consob.

### Conclusion

89. ESMA considers that the proposed practice provides enough transparency both to the public and to Consob, as requested by Article 13(2)(a) of MAR and Article 3 of the CDR 2016/908.

### **Article 13(2)(b) of MAR (further specified by Article 4 of the CDR 2016/908): the market practice ensures a high degree of safeguards to the operations of the market forces and the proper interplay of the forces of supply and demand**

90. In ESMA's opinion, the need to appoint a single financial intermediary for each financial instrument which is a supervised entity under letters (a) or (b) of Article 1 of the RTS on AMP and a member of the relevant trading venue is an important requirement for the proper performance of the contract as well as for its monitoring by Consob. ESMA notes that as supervised entities, financial intermediaries are subject to strict compliance requirements under MiFID II and MiFIR. In particular, the requirements relating to record keeping rules notably of orders and transactions, internal organisation and procedures, control systems, internal audit and human and technical resources are relevant in light of Article 4(1)(c) to (f) and 4(3)(b) of the CDR 2016/908<sup>15</sup>.

91. Furthermore, the proposed AMP also requires that:

- a. the financial intermediary to open specific securities and cash accounts in the name of the issuer, in its own name or in the name of the asset manager identified by the name of the issuer and the words "liquidity contract"<sup>16</sup>;

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<sup>13</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-145-171\\_opinion\\_on\\_cmvm\\_amp\\_on\\_liquidity\\_contracts.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-171_opinion_on_cmvm_amp_on_liquidity_contracts.pdf)

<sup>14</sup> These requirements are also relevant with respect to Article 13(2)(e) of MAR and Articles 7 (a) of the CDR 2016/908.

<sup>15</sup> These requirements are also relevant for the purpose of Article 13(2)(e) of MAR and Article 7(d) and (f) of the CDR 2016/908.

<sup>16</sup> These requirements are also relevant for the purposes of Article 13(2)(e) of MAR and Article 7(d) of the CDR 2016/908.

- b. the resources allocated in the securities account and the corresponding cash account must only be used for the performance of the LEA and the FI will register the orders submitted and the transactions carried out under the LEA and keep the records for five years;
- c. the issuer (or the asset manager) cannot give instructions to the financial intermediary while it is performing its activity under the LEA, unless there is a share buy-back programme in force, to ensure that the shares acquired under the buy-back programme are considered within the volume limits.

92. Article 4(2) of the CDR 2016/908 introduces the obligation for NCAs to assess the extent to which the market practice establishes an ex ante list of conditions for its performance as an AMP. ESMA notes that the proposed AMP from Consob includes conditions on prices and volumes under normal conditions which are different depending on the categories of financial instruments and aligned with those specified in the ESMA Opinion on liquidity contracts.

93. ESMA considers these measures as favouring the independence of the financial intermediary performing the liquidity contract from the issuer benefitting from it.

#### Conclusion

94. ESMA considers that the proposal fulfils the requirements set out in Article 13(2)(b) of MAR and Article 4 of the CDR 2016/908.

#### **Article 13(2)(c) of MAR (further specified by Article 5 of the CDR 2016/908): the market practice has a positive impact on market liquidity and efficiency**

95. The objectives declared by Consob of the proposed practice are: a) enhancing the liquidity of a particular share/unit of a closed-end real-estate CIU for a specified period of time thereby favouring regular trading activity and b) avoiding price fluctuations which are not in line with the market trend.

96. In that respect, the goal would ultimately benefit investors, including retail investors active on the relevant trading venues as the likelihood of finding a counterparty entering or exiting a position in that share would increase.

97. In its notification, Consob also declares that the quarterly reporting mechanism will permit market participants to identify whether any price movements caused by the activity of LEA are not consistent with fundamentals.

#### Conclusion

98. If properly implemented, namely in accordance with the trading conditions and restrictions enshrined in the ESMA Opinion on liquidity contracts, nothing suggests to ESMA that LEAs could not facilitate the interaction between demand and supply, with

a limited impact on parameters like volume weighted average price or daily closing price.

**Article 13(2)(d) of MAR (further specified by Article 6 of the CDR 2016/908): the market practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice**

99. The AMP would be available for all issuers who have requested admission to trading or approved the trading of their shares on Italian regulated markets and MTFs and the practice only concerns on-venue trading<sup>17</sup>. ESMA notes that transactions agreed off-venue (considering as such pre-arranged [negotiated] trades and pure OTC trades) cannot benefit from the AMP, not even in exceptional cases.
100. Therefore, the orders to be introduced and transactions to be carried out for the performance of the LEA will have to comply with the trading rules of the venue and be subject to the trading venue monitoring, including a real time monitoring of orders by the operator of the trading venue. As an additional requirement, the proposed AMP foresees that orders introduced during the auction phase will only be entered where the other participants have enough time to react.
101. Those requirements, together with the pre- and post-trade transparency requirements set out by MiFIR contribute to the capacity of market participants to adequately evaluate prices and orders entered into the order book and to be able to react to transactions, as required by Article 6(1)(b) of the CDR 2016/908.
102. The proposed AMP imposes specific trading conditions and restrictions on the performance of the liquidity contract in relation to the submission of the orders in the order book (presence on both sides of the order book in normal market conditions) and the order price, both during the session as well as during auction periods.
103. In ESMA's opinion, these requirements, which reflect the relevant conditions and limits set out in the ESMA Opinion on liquidity contracts, should reduce the risks of distortive price effects of the AMP. Furthermore, the above-mentioned conditions and restrictions taken together with the requirement for the FI to maintain a certain balance between the buying and selling activity in light of the market trends are considered as mitigating the risk of creating an imbalance through one-side quoting. Overall, in line with Article 6(1)(a) of the CDR 2016/908, this should reduce the effect of the practice on the price formation process in the concerned trading venue.
104. ESMA considers that the determination of the ex-ante list of situations when the execution of the liquidity contract must be suspended (in case of an IPO or a secondary offering, where stabilisation may take place, in case of public tenders or exchange offers, where financial instruments can solely be traded through auctions in application

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<sup>17</sup> This requirement is also considered relevant for the purpose of Article 13(2)(e) of MAR and Article 7 of the CDR 2016/908.

of the venue's rules or in case exceptional measures are adopted by the market operator) is an important feature of the proposed AMP as it avoids for the execution to coincide with sensitive processes and periods for the issuer.

### Conclusion

105. ESMA considers that the proposal fulfils the requirements set out in Article 13(2)(d) of MAR and Article 6 of the CDR 2016/908.

### **Article 13(2)(e) of MAR (further specified by Article 7 of the CDR 2016/908): the market practice does not create risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the Union**

106. On the nature and level of compensation for the services provided within the performance of the AMP 'strictu sensu' under Article 7(c) of the CDR 2016/908, ESMA acknowledges that there are elements supporting compliance with MAR and the CDR 2016/908:

- a. according to Consob's notification the remuneration should be designed so as not to alter the effective exposure to risk of each party and shall not provide incentives to the intermediary to influence prices or trades;
- b. the proposed AMP requires that the remuneration of the financial intermediary may include a variable component capped to a maximum of 15% of the overall remuneration. Here, ESMA would have welcomed more clarity about indicators on which the variable component can be based, noting that indicators relating to the performance of the liquidity contract, such as the number of trades carried out, the volumes traded or the price movement, potentially compromise the integrity of the market or may give rise to a conflict of interest.
- c. the remuneration mechanism and its level must be described in the written contract that must be submitted before the performance of the contract starts for Consob's monitoring of each contract.

107. Regarding how clearly the respective duties of the beneficiaries and the persons performing the AMP (Article 7(e) of the CDR 2016/908) have been defined, ESMA observes that the elements described in the proposed AMP ensure a clear definition of their respective responsibilities.

### Conclusion

108. With the conditions described above<sup>18</sup>, ESMA considers that the proposal fulfils the requirements of confidentiality and independence imposed by Article 13(2)(e) of MAR and Article 7(f) of the CDR 2016/908.

**Article 13(2)(f) of MAR (further specified by Article 8 of the CDR 2016/908): the outcome of any investigation of the relevant market practice by any competent authority or by another authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse, or codes of conduct, irrespective of whether it concerns the relevant market or directly or indirectly related markets within the Union**

109. ESMA has no evidence, information or indication on the outcome of any investigation that may question the AMP to be established.

**Article 13(2)(g) of MAR (further specified by Article 9 of the CDR 2016/908): the structural characteristics of the relevant market, inter alia, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail-investor participation in the relevant market**

110. The Italian trading venues where the proposed AMP could be performed are markets where the participation of retail investors may be significant. ESMA agrees that the proposed AMP could have a positive impact on retail investors' interests by increasing the probability of retail investors to trade their shares/units in closed-end funds under reasonable conditions of liquidity.

111. Furthermore, ESMA notes that transactions that are not accessible to retail investors (i.e. pre-arranged [negotiated] trades and OTC trades [like block trades]) are not covered by the AMP.

### **4.3 Conclusion**

112. ESMA considers that, in the terms described above and namely the enhanced supervision of Consob to address the potential risk of market manipulation and to avoid threats to market confidence, the proposed AMP is compatible with Article 13(2) of MAR and with the CDR 2016/908 and the proposal contains various mechanisms aimed at addressing the potential risk of market manipulation and limiting the threats to market confidence.

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<sup>18</sup> See "Key issues arising from the proposed AMP".

## **ANNEX. – NOTIFICATION FROM CONSOB RECEIVED BY ESMA DESCRIBING THE PROPOSED AMP**

### **Market Practice inherent to market liquidity enhancement activity (Practice no. 1)**

#### *Definitions*

1. For the purposes of this practice the following definitions shall apply:

a) **Financial Instruments:** shares or units/shares of Italian closed-end real-estate Undertakings for Collective Investment (CIUs) admitted to trading on regulated markets or multilateral trading facilities (MTFs) in Italy upon request or authorisation of the Issuer; shares are considered as liquid where the conditions set by Commission Delegated Regulation (EU) no. 2017/567 are satisfied, and as illiquid where such conditions are not met;

b) **Issuer (beneficiary of the market practice):** the issuer of the shares or any other party in control relationships with said issuer and authorised by the issuer itself to subscribe the Contract; in the case of Italian closed-end real-estate CIUs, the CIU itself, even though any obligations arising from the activity are discharged by the relevant asset manager;

c) **Financial Intermediary:** the intermediary authorised to provide the investment services and activities referred to under Article 1, paragraphs 5a) and 5b) of Legislative Decree no. 58/1998 (Italian Consolidated Law on Finance) which subscribes the Contract;

d) **Contract:** the liquidity enhancement agreement between the Issuer or, in the case of Italian closed-end real-estate CIUs, even between the relevant asset manager, and the Financial Intermediary relating to the Financial Instruments;

e) **Activity carried out with risk to the Issuer:** liquidity enhancing activity carried out by the Financial Intermediary upon assignment by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, where the economic effects of the trading activities carried out in execution of the Contract apply to the latter;

f) **Activity carried out with risk to the Financial Intermediary:** liquidity enhancing activity carried out by the Financial Intermediary upon assignment by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, where the economic effects of the trading activities carried out in execution of the Contract apply to the Financial Intermediary;

g) **Market:** Italian regulated market or multilateral trading facility (MTF) where the activity is carried out.

#### *The Contract*

2. This practice allows an Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, to enter into a Contract with a Financial Intermediary in order to enhance for a specified period of time the Market liquidity of the Financial Instruments thereby favouring regular trading activity and avoiding price fluctuations which are not in line with the market trend.

3. The Financial Intermediary shall be a member of the Markets where the activity is carried out and shall directly enter the orders into the Market.

4. The relationship between the Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, and the Financial Intermediary shall be formalised in the Contract, which shall be in written form. It is allowed to enter into only one Contract for each Financial Instrument.

5. The Contract may provide that the activity is carried out with risk to the Issuer or with risk to the Financial Intermediary. In both cases the Financial Instruments and/or cash used for the purposes of the practice must not exceed the limits referred to in paragraph no. 7 and are allowed to be property of the Issuer or, in the case of Italian closed-end real-estate CIUs, even of the relevant asset manager, or of the Financial Intermediary.

6. The Financial Intermediary shall keep separate records of all the information regarding the orders placed or entered into the Market, the related transactions conducted and the cash movements carried out within the activity performed, both in the event in which such activity is carried out with risk to the Issuer and in the event in which the activity is carried out with risk to the Financial Intermediary. To this end, the Financial Intermediary shall hold in the name of the Issuer or, in the case of Italian closed-end real-estate CIUs, even of the relevant asset manager, or in its own name a specific securities account and a related cash account, which shall include the name of the Issuer and the words “liquidity contract”. The records shall be kept for at least five years.

*6-bis.* The Financial Intermediary shall possess resources for the compliance and audit activities necessary to be able to monitor and ensure at all times compliance of its conduct with the conditions laid down for the accepted market practice.

7. The Contract shall establish maximum limits for the resources (Financial Instruments and/or cash) allocated to the performance of the activity, which shall be proportionate and commensurate to the purposes of the Contract both with regard to the positions opened on the buy or on the sell side and to the positions held when the activity started.

These limits shall be:

- a) for liquid financial instruments, no higher than 200% of the average daily trading volume on the Market during the 30 days prior to the start of activity and, in any event, no higher than € 20 million;
- b) for illiquid financial instruments, no higher than 1% of the outstanding issued Financial Instruments to be determined at the beginning of the day when the activity started or 500% of the average referred to in letter a) and, in any event, no higher than € 1 million. The 1%

limit is calculated at the beginning of the day when the activity starts and is updated when any significant change of the Financial Instruments issued occurs.

If the activity is performed on more than one Market, the limits are determined in relation to the most liquid Market.

If the time period referred to in letter a) is not applicable, another equivalent time period before the start of the activity shall be used.

The calculation of the limits takes into account the positions which are not closed and the resources which are transferred at the expiry date of other Contracts according to paragraph no. 9.

8. The resources allocated to the performance of the activity shall exclusively be used for that purpose. Financial Instruments purchased or made available to the Financial Intermediary by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, cannot be used in order to hold long-term shareholdings. Cash made available to the Financial Intermediary by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, can be transferred to the latter only upon completion of the activity set forth in the Contract. Financial Instruments purchased or made available to the Financial Intermediary by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, cannot be allocated to other purposes before the completion of the activity set forth in the Contract. Article 132 of the Italian Consolidated Law on Finance applies.

9. Financial Instruments purchased (sold) in execution of the Contract (and therefore excepted those held when the Contract was signed) shall be sold (purchased) on the Market before the expiry date of the Contract, unless the Contract envisages the possibility to close those positions in a subsequent period, and provided that the conditions set forth by this practice are complied with. If the activity is carried out using Financial Instruments or cash made available to the Financial Intermediary by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, the Contract may, as an alternative, allow the transfer of the above Financial Instruments or cash to another intermediary which has subscribed a new liquidity enhancement agreement. The Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, which intends to rescind the Contract on its own initiative before the expiry date shall give adequate advance notice of its intention to the Financial Intermediary, taking into account available information concerning the size of the positions opened by the Financial Intermediary and related Market liquidity.

#### *Conditions of independence of the Financial Intermediary*

10. The Financial Intermediary shall decide in an independent manner its trading activity on the Financial Instruments. The Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, cannot give any specific instructions on the trading activity, unless the instructions are given to comply with paragraph no. 21 below. The Financial Intermediary shall not be in control relationships with the Issuer or, in the case of Italian closed-end real-estate CIUs, even with the relevant asset manager, and it shall take trading



decisions independently from any interest that the Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, or other parties in control relationships with the latter have in relation to the price of the Financial Instruments.

11. The Financial Intermediary is required to adopt an organisational structure such that trading decisions concerning the activities regulated by this practice are independent from the interests related to investment services and activities it carries out and, in particular, independent from the orders to trade that it receives from clients or it places on behalf of clients (including possible orders to trade that the Financial Intermediary receives from the Issuer or, in the case of Italian closed-end real-estate CIUs, even from the relevant asset manager, beyond the relationship regulated by this practice) or on own account or in its capacity as specialist, and vice versa.

12. The liquidity enhancing activity may be performed in a way not separated from the activities under paragraph no. 21 below (share buy-back programs carried out in compliance with the conditions set forth by Commission Delegated Regulation (EU) no. 2016/1052 or by other accepted market practices) undertaken by the Financial Intermediary in the Financial Instruments on that Market. This is without prejudice to paragraph no. 6 above regarding the keeping of separate records of all the information thereof.

13. The business unit of the Financial Intermediary authorised to take trading decisions shall not receive any inside information from the Issuer or, in the case of Italian closed-end real-estate CIUs, even from the relevant asset manager.

14. The remuneration methods of the Financial Intermediary shall be consistent with the purposes of the activity, shall not alter the effective exposure to risk of each party as defined in the Contract, and shall not provide incentives to the Financial Intermediary to influence prices or trades. As an example, the following are not consistent with the purposes of the activity: the absence of a maximum cap for fees related to each transaction and to the whole activity and the dependence of the variable component of the remuneration on indicators regarding the price movements. The fixed component of the remuneration must be greater than the variable component, which must not exceed 15% of the total remuneration.

#### *Conditions for trading*

15. Enhancing liquidity involves entering orders to trade into the Market with the level of continuity deemed necessary to favour regular trading activity and avoid price fluctuations which are not in line with market trend.

16. In normal conditions, the Financial Intermediary shall enter orders to trade on both sides of the book, though with no requirement to submit the best bid and best ask or to submit symmetrical bid and ask orders. During the life of the Contract, the number of Financial Instruments purchased shall tend to be equal to the number of Financial Instruments sold. Therefore, the Financial Intermediary shall close the opened positions as soon as possible, i.e. avoiding to delay closing the opened positions, taking into account, among others, liquidity conditions of the Market and the difference between current prices and book prices of the opened positions. All positions opened on a Market shall be closed on the same Market. Pre-

arranged trades, i.e. matched orders of opposite sign with specific counterparties for predefined amounts and/or at predetermined prices, and off-market transactions (such as block trades) are not covered by this practice, thus they shall not be taken into account in order to quantify the opened positions and, for instance, they are not subject to trading conditions and disclosure requirements mentioned in this practice.

17. Buy orders shall be entered or amended during the continuous trading phase at a price not higher than the highest price between the price of the last independent trade and the current price of the highest independent buy order on the Market where the buy orders are entered into or amended.

*17-bis.* The price of buy orders entered or amended during an auction phase must be lower than the theoretical auction price. If the theoretical auction price has not yet computed, the price of the orders entered or amended during the auction phase follows the condition set in paragraph no. 17, referring where it is the case to transactions concluded in the preceding trading session. In any event, the orders are entered, amended or cancelled during the auction phase on condition that the final auction price is not affected and that the other participants have enough time to react.

18. Sell orders shall be entered or amended during the continuous trading phase at a price not lower than the lowest price between the price of last independent trade and the current price of the lowest independent sell order on the Market where the sell orders are entered into or amended.

*18-bis.* The price of sell orders entered or amended during an auction phase must be higher than the theoretical auction price. If the theoretical auction price has not yet computed, the price of the orders entered or amended during the auction phase follows the condition set in paragraph no. 18, referring where it is the case to transactions concluded in the preceding trading session. In any event, the orders are entered, amended or cancelled during the auction phase on condition that the final auction price is not affected and that the other participants have enough time to react.

19. For the purposes of the application of paragraphs no. 17, no. 17-*bis*, no. 18 and no. 18-*bis* above, orders to trade entered into the Market and transactions carried out on the Market by the Financial Intermediary outside the liquidity enhancement activity are deemed as “independent” where the independence conditions set forth in paragraphs no. 10, no. 11, no. 13 and no. 14 above are complied with. The trading orders entered and/or the transactions carried out by the Financial Intermediary in the performance, in a not separated way, of the activities connected to assignments received in the event of share buy-back programmes, included those in compliance with the provisions of Commission Delegated Regulation (EU) no. 2016/1052 or of other accepted market practices (paragraph no. 21), are not deemed as “independent”.

20. For illiquid financial instruments, the number of Financial Instruments purchased or sold on the Market in one trading day shall not exceed 25% of the average daily volume of such Financial Instruments traded on the same Market in the previous 20 trading days. If, for instance, the average daily volume of financial instruments traded on the Market is 100, in

one trading day the sum of the financial instruments bought and sold by the Intermediary must be no greater than 25. By way of derogation from this limit, the Intermediary may in any case carry out sales and purchases on the same day for a value of up to € 20,000 (so-called ‘hard threshold’).

20-*bis*. For liquid financial instruments, the percentage above is 15%.

21. If a share buy-back programme is ongoing, involving the purchase of own shares in compliance with the provisions of Commission Delegated Regulation (EU) no. 2016/1052 or of any other accepted market practices, the number of Financial Instruments purchased by the Financial Intermediary to be considered for the purpose of the quantitative limits set forth in paragraphs no. 20 and no. 20-*bis* above shall include the number of Financial Instruments purchased by the Issuer during such buy-back programmes. To this end, the Issuer or, in the case of Italian closed-end real-estate CIUs, even from the relevant asset manager, provides the Financial Intermediary with the necessary instructions before starting the trading activity on the Market.

22. (*repealed*)

23. For the purposes of this practice, the Financial Intermediary shall not operate:

- in case of IPOs or secondary offerings, in the periods during which the stabilisation activity referred to in Article 5 of Regulation (EU) no. 596/2014 and in Commission Delegated Regulation (EU) no. 2016/1052 can be carried out;

- in case the Financial Instruments are subject to a public tender and/or exchange offer, from the date of the announcement of the offer to the conclusion of the acceptance period; the Financial Intermediary is however allowed to adhere to the offer by selling the Financial Instruments purchased during the activity;

- in case the Financial Instrument is solely traded in the auction phase on the basis of the Market rules or exceptional measures adopted by the Market operator.

*Disclosure of the Contract and the trading activity*

24. When entering into the Contract, the Issuer shall disclose without delay to the public the following: the fact that the Contract has been entered into; the identification details of the Intermediary; whether the activity is carried out with risk to the Issuer or with risk to the Financial Intermediary; the remuneration methods (fixed or partly variable) of the Financial Intermediary; the Financial Instruments to which the market practice applies; whether the Financial Instruments fall into the category of liquid financial instruments pursuant to Commission Delegated Regulation (EU) no. 2017/567 or in that of illiquid financial instruments (paragraph no. 1(a)); the Markets on which the activity is carried out; the starting date of the liquidity enhancement activity; the duration of the activity; the situations or conditions that determine the temporary interruption, suspension or termination of the activity; the number of Financial Instruments and/or the amount of cash to be used for the purposes of the practice made available by the Issuer or, in the case of Italian closed-end real-

estate CIUs, even by the relevant asset manager, or by the Financial Intermediary; any other relevant condition set out in the Contract.

25. Any change to the information disclosed pursuant to paragraph no. 24 above shall be disclosed without delay to the public.

26. The Financial Intermediary shall inform the Issuer on the current situation of the accounts referred to in paragraph no. 6 with due regularity but only outside of Financial Instrument trading hours. In case of activity carried out with Financial Instruments owned by the Issuer or, in the case of Italian closed-end real-estate CIUs, even by the relevant asset manager, the Financial Intermediary shall establish a procedure for the immediate disclosure to the latter of the transactions carried out, in order to allow them to fulfil disclosure obligations to the public and to Consob according to rules and regulations.

27. Both in the event in which the activity is carried out with risk to the Issuer and in the event in which the activity is carried out with risk to the Financial Intermediary, the Financial Intermediary shall report to the Issuer within 15 days from the end of each quarter information on the number and value of Financial Instruments purchased and/or sold during the quarter on each Market, specifying for each trading session: date; average differential between the best sell order price and the best buy order price (so-called bid-ask spread), calculated according the Financial Intermediary's procedures; total number of Financial Instruments purchased and relevant size (%) in relation to the total Market volume; total number of Financial Instruments sold and relevant size (%) in relation to the total Market volume; total value of Financial Instruments purchased; total value of Financial Instruments sold; minimum price, maximum price and average price of purchases; minimum price, maximum price and average price of sales; number of transactions executed; average size of the transactions; overall position in Financial Instruments held at the end of the session in the securities account indicated in paragraph no. 6.

The above information shall be sent by the Financial Intermediary using the template available on the Consob website at <http://www.consob.it/web/area-operativa-interattiva/regolamento-abusi-di-mercato>.

The Issuer shall publish without delay the information received from the Financial Intermediary, specifying in the heading “quarterly report on liquidity enhancement activity”.

27-bis. When the activity ceases to be performed, the Issuer shall disclose without delay to the public: the fact that the performance of the activity has ceased; the reasons for or causes of the ceasing the performance of the activity; the information referred to in paragraph no. 27 in relation to the period following the last quarterly report. The report shall indicate in the heading “ceasing of liquidity enhancement activity”.

28. The information pursuant to paragraphs no. 24, no. 25, no. 27 and no. 27-bis above shall be disclosed to the public using the methods set forth for the disclosure of inside information.

*Communications to Consob and to the Market operator*

29. The Contract shall be transmitted without delay, and in any case before the activity is started, to Consob and to the Market operator, also in case of any amendment thereto.

30. Simultaneously with publication, the Issuer shall send Consob the information referred to in paragraphs no. 27 and no. 27-bis via certified email at [consob@pec.consob.it](mailto:consob@pec.consob.it), specifying as recipient “Markets Division” and indicating at the beginning of the subject line “Market practices: liquidity enhancement”.

### **Rationale for which the practice could constitute market manipulation**

The liquidity enhancement activity could give misleading signals to market participants. Given that it is implemented by the Financial Intermediary on behalf of the Issuer or, in the case of Italian closed-end real-estate CIUs, even of the relevant asset manager, the activity could promote the interests of the latter, such as, in particular, an increase in the prices of Financial Instruments.

Furthermore, the reduction of price movements due to the liquidity enhancement activity could lead to artificial price levels.

This practice cannot benefit from the exemption from the prohibitions of market abuse pursuant to Article 5 of Regulation (EU) no. 596/2014 and Article 1, paragraph 3, of Directive EC no. 2014/57/EU.

### **List of criteria taken into account for the acceptance of market practices**

#### **a) Level of transparency provided to the market**

##### **Consob’s conclusion and rationale**

In addition to the obligations set forth by current rules and regulations on trading in own shares in buy-back programmes, the Issuer shall ensure appropriate transparency, through the methods set forth for the disclosure of inside information, in relation to the key terms of the Contract and any amendment thereto, as indicated in paragraphs 24, 25, 26, 27-bis and 28.

Moreover, on a quarterly basis the Issuer shall publish, using the same modalities indicated above, the information received from the Financial Intermediary on transactions carried out during the relevant period, as indicated in paragraph 27.

The Contract and any subsequent amendment thereto shall also be transmitted to Consob and to the Market operator without delay, as indicated in paragraph 29.

In addition, the Issuer shall provide Consob with quarterly detailed reports on the activities undertaken, as indicated in paragraph 30. The above is without prejudice to the fact that Consob may require information from the Intermediary and the Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, pursuant to general rules and

regulations.

**b) Degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand**

**Consob's conclusion and rationale**

This practice does not impede the normal interaction of demand and supply. Transactions carried out by the Financial Intermediary under this practice are reactions to orders which, considering the volumes and size of the market, create an imbalance between demand and supply.

The Contract facilitates the interaction between demand and supply, and may be a key factor in this interaction since it aims at enhancing liquidity for otherwise less liquid financial instruments, thereby favouring regular trading activity and avoiding price fluctuations which are not in line with the market trend.

The fact that, as indicated in paragraphs 1 c), 3, 6, 6-bis, 10, 11, 12, 13 and 14, the activity is carried out by an independent intermediary subject to supervision by Consob and that is also a member of the Market promotes the regular play of market forces.

Furthermore, the operational limits specified in paragraphs 7, 16, 17, 17-bis, 18, 18-bis, 20, 20-bis, 21 and 23 and the remuneration methods of the Financial Intermediary indicated in paragraph 14 reduce the possibility of the activity influencing the price formation process and the correct interaction between supply and demand.

**c) Impact on market liquidity and efficiency**

**Consob's conclusion and rationale**

The objective of this practice is specifically to improve market liquidity and operational and informational efficiency.

Moreover, as indicated in paragraph 27, the quarterly transparency of the activity carried out in terms of trading volumes, frequency of the transactions, price of the trades, bid-ask spread and the comparison of these data with other data publicly available on the Financial Instrument or on comparable financial instruments allow market participants to identify whether any price movements caused by the activity of liquidity enhancement are not consistent with the fundamentals.

**d) The trading mechanism of the relevant market and the possibility for market participants to react properly and in a timely manner to the new market situation created by that practice**

### **Consob's conclusion and rationale**

In the performance of liquidity enhancement activity, the Financial Intermediary must trade on the Market in accordance with the relevant trading rules and within the relevant trading hours. Off-market transactions are not covered by the market practice.

The possibility of the activity influencing price formation process is reduced by the operational limits specified in paragraphs 7, 16, 17, 17-bis, 18, 18-bis, 20, 20-bis, 21 and 23, and by the remuneration methods of the Intermediary referred to in paragraph 14.

Thanks to the liquidity that it offers to market participants, the activity promotes the valuation of the Financial Instrument and the proper functioning of the market.

The manner indicated in paragraph 28 in which the information is published, which is the same as that envisaged for inside information, allows market participants to be promptly and symmetrically made aware of the information they need for an accurate valuation of the Financial Instruments.

The limits envisaged for the activity during auction or while a share buy-back programme is underway, as indicated in paragraphs 17, 17-bis, 18, 18-bis and 21, as well as the conditions that temporarily suspend the execution of the activity, as specified in paragraph 23 (in the case of purchase of IPOs, public bids, capital increases, etc.), reduce the risk of the activity altering in those periods the correct public perception of the price movements and volumes traded.

### **e) Risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instruments within the Union**

#### **Consob's conclusion and rationale**

This practice sets forth various mechanisms to protect the integrity of the market. These mechanisms concern measures to ensure independence of the trading decisions and minimize conflicts of interest as well as conditions designed to avoid that trading activities carried out under this practice have undesired effects on prices.

The transactions executed by the Financial Intermediary are, furthermore, the subject of periodic communication to Consob and the resources allocated for the performance of the activity must be proportionate and commensurate to the objective of enhancing liquidity.

The Contract establishes the independence of the Financial Intermediary vis-à-vis the Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, which shall not give to the Financial Intermediary any instructions to drive its decisions related to the buy or sale of the Financial Instruments. The trading decisions of the Financial Intermediary shall be taken independently from any interest that the Issuer or, in the case of Italian closed-end real-estate CIUs, even the relevant asset manager, or other parties in control relationships with the latter have in relation to the price of the Financial Instruments. The

Financial Intermediary shall not belong to the same group of the Issuer or, in the case of Italian closed-end real-estate CIUs, even of the relevant asset manager.

The Financial Intermediary shall adopt an organisational structure such that trading decisions concerning the activity regulated by this practice are independent from the interests related to investment services and activities carried out by the Financial Intermediary and, in particular, independent from the orders to trade that the Financial Intermediary receives from clients or places on behalf of clients (including possible orders to trade that the Financial Intermediary receives from the Issuer or, in the case of Italian closed-end real-estate CIUs, even from the relevant asset manager, beyond the relationship regulated by this practice) or on its own account or in its capacity as specialist, and vice-versa. Moreover, the remuneration methods of the Financial Intermediary must comply with the limit indicated in paragraph 14 and are reported to Consob and to the Market operator.

- f) Outcome of any investigation of the relevant market practice by any competent authority or other authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse or codes of conduct, irrespective of whether it concerns, directly or indirectly, the relevant market or related markets within the Union**

**Consob's conclusion and rationale**

In Consob's experience, there have been no (supposed) violations of market abuse rules and regulations related to the liquidity enhancement activity carried out through independent intermediaries.

Similar market practices have been accepted in other EU countries.

- g) Structural characteristics of the relevant market, inter alia, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail investors' participation in the relevant market**

**Consob's conclusion and rationale**

This practice concerns financial instruments traded on cash markets where retail investors involvement may be very significant. Nevertheless, this circumstance does not represent a risk since this practice enables retail investors to find counterparties interested in buying and selling Financial Instruments under reasonable conditions of liquidity. This practice is therefore favourable to retail investors.