



European Securities and
Markets Authority

Reply form for the ESMA MAR Technical advice





European Securities and
Markets Authority

Date: 20 August 2014



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Draft technical advice on possible delegated acts concerning the Market Abuse Regulation (MAR), published on the ESMA website ([here](#)).

Instructions

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

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_TA_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

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

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

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

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

ESMA_MAR_CP_TA_NAMEOFCOMPANY_NAMEOFDOCUMENT: e.g. if the respondent were ESMA, the name of the reply form would be ESMA_MAR_CP_TA_ESMA_REPLYFORM or ESMA_MAR_CP_TA_ESMA_ANNEX1

Publication of responses

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



Data protection

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



General information about respondent

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



Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1 >

TYPE YOUR TEXT HERE

< ESMA_COMMENT_MAR_TA_1 >

II. Specification of the indicators of market manipulation

Q1: Do you agree that the proposed examples of practices and the indicators relating to these practices clarify the indicators of manipulative behaviours listed in Annex I of MAR?

<ESMA_QUESTION_MAR_TA_1>

FIA Europe believes that the proposed combination of Annex I MAR indicators with the “examples of practices” set out in sections 4 to 12 of the draft technical advice and the “related indicators” set out in section 13 of the draft technical advice is complex and confusing. We suggest amending the draft technical advice to integrate the related indicators into the examples of practices of sections 4 to 12. FIA Europe also encourages further clarification of certain examples of practices included in the draft technical advice that could capture significant, legitimate trading activity mindful of the purposes of Annex I MAR.

General approach taken

We appreciate the utility of a non-exhaustive list of practices to consider in identifying, assessing and investigating suspected market manipulation. However, we do not believe that the examples of practices meaningfully clarify the Annex I MAR indicators including what should be understood as:

- “a significant portion of the daily volume of transactions”
- “a significant buying or selling position”
- “position reversals in a short period”, or
- “concentrated within a short time span in the trading session”

We query the legislative basis, purpose and utility of the so-called “related indicators” included at section 13 (a) to (s) of the draft technical advice. The description of these as “indicators” is confusing and we consider that the related indicators do not correspond to the indicators of market manipulation in Annex I MAR. We agree that the transactions, orders and behaviours cited may assist in identifying, assessing and investigating suspected market manipulation. To do so the transactions, orders and behaviours cited should be integrated into their corresponding examples of practice.

Clarification of the indicators of manipulative behaviours listed in Annex I of MAR

5(2) The example of practice on “abusive squeeze” does not require that a person holds a dominant position or colludes with a person holding a dominant position to be considered to engage in market manipulation. We consider this unnecessarily broad in application and an example of practice that would capture an undue proportion of legitimate transactions, orders and behaviour. We suggest ESMA amends the example of practice with reference to the “same person or persons linked to them”.

6(1) The example of practice on “wash trades” does not clearly distinguish between deliberate and accidental wash trades. Commercial market participants take reasonable precautions to avoid accidental wash trades, which are heavily penalised by trading venues. We do not consider accidental wash trades to be manipulative and we suggest that ESMA consider amendments to the example of practice to distinguish deliberate and accidental wash trades. We suggest that this could be achieved through an amendment to the example of practice to require collusion between counterparties.

7(5) The example of practice on “quote stuffing” does not provide any basis to distinguish supposed “quote stuffing” from legitimate behaviour. We suggest that ESMA amends the example of practice with clear reference to causing or likely to cause disorderly trading conditions. We further suggest that ESMA deletes the reference to “to camouflage their own strategy” – an activity we do not consider to be manipulative *per se*.

9(6) The example of practice on “advancing the bid” does not consider market making, where such practices described may be legitimate. We suggest that ESMA amends the example of practice with reference to “persons acting in concert or collusion”.



<ESMA_QUESTION_MAR_TA_1>

Q2: Do you think that the non-exhaustive list of indicators of market manipulation proposed in the CP are appropriate considering the extended scope of MAR in terms of instruments covered? If not, could you suggest any specific indicator?

<ESMA_QUESTION_MAR_TA_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TA_2>

Q3: Do you consider that the practice known as “Phishing”¹ should be included in the list of examples of practices set out in the draft technical advice?

<ESMA_QUESTION_MAR_TA_3>

No. FIA Europe notes that “phishing” as described at footnote 11 is a criminal offence in most EU Member States. We consider that this crime is generally unrelated to orders or transactions in financial instruments, auctioned products, spot commodity contracts or benchmarks. Therefore we do not consider it appropriate to include this crime amongst the examples of practice.

We note the reference to “phishing” at paragraph 66 of the SMSG’s advice to ESMA on the consultation papers [ESMA/2014/SMSG/047] (10 October 2014). We know of no such alleged manipulation described as “phishing” and we consider use of the term unhelpful.

<ESMA_QUESTION_MAR_TA_3>

Q4: Do you support the reference to OTC transactions in the context of cross product manipulation (i.e. where the same financial instrument is traded on a trading venue and OTC) and inter-trading venue manipulation (i.e. where a financial instrument traded on a trading venue is related to a different OTC financial instrument)?

<ESMA_QUESTION_MAR_TA_4>

FIA Europe accepts the reference to OTC transactions for the practices in question as consistent with the scope of the Regulation.

<ESMA_QUESTION_MAR_TA_4>

¹ In this context, “phishing” should be understood as the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication.



III. Minimum thresholds for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information

Q5: If you do not agree with the suggested thresholds, what would you consider to be appropriate thresholds of CO₂ emissions and rated thermal input below which individual information would have no impact on investors' decisions? Please substantiate.

<ESMA_QUESTION_MAR_TA_5>

Installations located in a Member State, participating EEA/EFTA country

Neither the primary legislation nor the draft technical advice is clear on which installations should be included in EAMP calculations. We consider that an "installation" per Article 3(e) of Directive 2003/87/EC must be located in an EU Member State or in EEA/EFTA country that has joined the ETS. However, we note that definition of "emission allowance" in Article 3(1)(19) MAR includes emission reduction units (ERUs) and certified emission reductions (CERs) issued pursuant to Article 6 of the Kyoto Protocol and the decisions adopted pursuant to the UNFCCC or the Kyoto Protocol. We suggest ESMA clarify that the thresholds apply to installations located in an EU Member State or participating EEA/EFTA country.

RTI threshold

We query the basis and application of the proposed 1050MW rated thermal input threshold. We believe that the average emission metrics used in the Consultant's report cited in ESMA's analysis are misapplied. We consider that appropriate average emission metrics are in the range of 0.2 to 0.35 kgCO₂ per kWh. Such average emission metrics would equate 6 MT CO₂ equivalent emissions with rated thermal input of minimum 2500MW. We suggest that ESMA re-assesses the Consultant's report and the quantitative analysis therein and revise the proposed RTI threshold as appropriate.

Application of the emissions and RTI thresholds

We believe that ESMA's analysis does not precisely explain the connection between the emissions and rated thermal input (RTI) thresholds. The analysis at paragraphs 45, 48 and 50 considers the thresholds together (i.e. in cases of companies exceeding both the emissions and RTI thresholds). However, the draft technical advice does not connect the thresholds, suggesting that a market participant exceeding either threshold would fall within scope of the Article 17(2) MAR disclosure requirement. We believe that the fourth line of the primary legislation is clear and that in order to be subject to the disclosure requirement an EAMP carrying out combustion activities must exceed both thresholds.

<ESMA_QUESTION_MAR_TA_5>

Q6: In your opinion, what types of entity-specific, non-public information held by individual market participants are most relevant for price formation or investment decisions in the emission allowance market?

<ESMA_QUESTION_MAR_TA_6>

FIA Europe considers that any entity-specific, non-public information meeting the definition of Article 7(1)(c) MAR is already subject to the Article 4 REMIT public disclosure requirement.

<ESMA_QUESTION_MAR_TA_6>

IV. Determination of the competent authority for notification of delays in public disclosure of inside information

Q7: Do you agree with the proposals for determining the competent authority to whom issuers of financial instruments and emission allowances market participants should notify delays in disclosure of inside information?

<ESMA_QUESTION_MAR_TA_7>
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Q8: Under point c) of paragraph 2 of the draft technical advice, in cases in which the issuer's financial instruments were admitted to trading or traded simultaneously in different MSs, which criteria should ESMA take into consideration to determine the relevant competent authority?

<ESMA_QUESTION_MAR_TA_8>
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Q9: Do you consider it would be appropriate to determine in a different manner the competent authority for the purpose of Article 17(5) of MAR, where the delay has the scope of preserving the stability of the financial system? If so, should the competent authority be determined according to mechanism set out in Article 19(2) of MAR or in another way?

<ESMA_QUESTION_MAR_TA_9>
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V. Managers' transactions

Q10: Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?

<ESMA_QUESTION_MAR_TA_10>
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Q11: Under paragraph 3 of the draft technical advice, do you consider the use of a “weighting approach” in relation to indices and baskets appropriate or alternatively, should the use of such approach be discarded? Please provide an explanation.

<ESMA_QUESTION_MAR_TA_11>
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<ESMA_QUESTION_MAR_TA_11>

Q12: Do you support the ESMA approach to circumstances under which trading during a closed period may be permitted by the issuer? If not, please provide an explanation.

<ESMA_QUESTION_MAR_TA_12>
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<ESMA_QUESTION_MAR_TA_12>

Q13: Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate, do you foresee any issue with the proposed approach regarding the disclosure of such transactions or the need to ensure that the closed period prohibition is respected?

<ESMA_QUESTION_MAR_TA_13>
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<ESMA_QUESTION_MAR_TA_13>

Q14: Do you consider the transactions included in the non-exhaustive list of transactions appropriate to justify the permission for trading during a closed period under Article 19(12)(b)?

<ESMA_QUESTION_MAR_TA_14>
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<ESMA_QUESTION_MAR_TA_14>

VI. Reporting of infringements

Q15: Do you agree with the analyses and the procedures proposed in the draft technical advice? Which best practices from existing national, European or international legislation or guidance could be useful for the protection of the reporting persons under the market abuse regime?

<ESMA_QUESTION_MAR_TA_15>
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<ESMA_QUESTION_MAR_TA_15>

Q16: Do you think there are other elements to be developed in relation to specific procedures for the receipt of reports of infringements under MAR and their follow-up, including the establishment of secure communication channels for such reports

<ESMA_QUESTION_MAR_TA_16>
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<ESMA_QUESTION_MAR_TA_16>

Q17: Do you see any other provision, measure or procedure currently in place under national laws of Member States that could complement the procedures proposed in the draft technical advice for the reporting of infringements of market abuse to competent authorities in order to increase the protection of personal data, especially in relation to:

- **compliance with data retention periods and notification requirements for data processing;**
- **protection of the rights related to data processing;**
- **security aspects of the data processing operation; and**
- **conditions for the management of reporting mechanisms (including limitations of cross-border data transferral)?**

<ESMA_QUESTION_MAR_TA_17>
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<ESMA_QUESTION_MAR_TA_17>

Q18: In the context of “the protection of employees working under contract of employment”, among the following common forms of unfair treatment - namely dismissal, punitive, transfers, harassments, reduction or loss of duties, status, benefits, salary or working hours, withholding of promotions, trainings, and threats of such actions - which are the most important forms of unfair treatment in case of reporting of infringements of market abuse to a competent authority? Which protection mechanisms against such unfair treatments would you consider effective (e.g. mechanisms for fair procedures and remedies including appropriate rights of defence)? Are you aware of any other aspects that could be relevant in this context? Please specify.

<ESMA_QUESTION_MAR_TA_18>
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Q19: Are you aware of any particular provision, measure or procedure currently in place under national laws of Member States or best practices that could effectively complement the mechanism of the competent authorities and the waiver of liability for report-



ing proposed in the draft technical advice, in order to increase the protection of employees working under a contract of employment? If yes, please provide examples.

<ESMA_QUESTION_MAR_TA_19>
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<ESMA_QUESTION_MAR_TA_19>