



European Securities and
Markets Authority

Reply form for the ESMA MAR Technical standards



20 August 2014



European Securities and
Markets Authority

Date: 20 August 2014



Responding to this paper

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

Instructions

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

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_MAR_TS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

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

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

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

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

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

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

Publication of responses

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

Data protection

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



General information about respondent

| | |
|--------------------------------------|----------------------------|
| Are you representing an association? | Yes |
| Activity: | Non-financial counterparty |
| Country/Region | Europe |



Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1 >

The European Federation of Energy Traders (EFET) welcomes the work of the European Securities and Markets Authority (ESMA) on Technical Advice (TA) and Technical Standards (TS) for the implementation of the Market Abuse Regulation (MAR) and is keen to engage with ESMA on this issue.

EFET supports proportionate regulation and highlights the risk of unintended consequences should overly burdensome administrative requirements be imposed on market participants.

- We consider that ‘issuers’, as defined under MAR, are limited to legal entities issuing or proposing to issue financial instruments only, and we do not consider that counterparties to contracts which are financial instruments, as described in Sections C(4) to C(10) of Annex I to MiFID II (derivatives), are ‘issuers’ for the purposes of MAR. It is with this assumption in mind that we have reviewed and respond to the Consultation Papers.
- We consider that consistency between the various pieces of EU regulation is key and that disclosure under the Regulation on Wholesale Energy Markets Integrity and Transparency (REMIT) via company websites or other transparency platforms is appropriate and sufficient for MAR. In addition, we believe that close cooperation between ESMA and the Agency for the Cooperation of Energy Regulators (ACER) should be established.
- For the sake of clarity, we highlight that ‘a person professionally arranging or executing a transaction’, as defined under MAR, (i.e. ‘a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions, in financial instruments’) refers, in our view, only to Regulated Markets (RM), Multilateral Trading Facilities (MTFs), Organised Trading Facilities (OTFs) and Systematic Internalisers (SI), which are authorised under MiFID. We also refer in this context and for information, to the ACER REMIT Guidance (3rd Edition) (p.54, N°8.5.1.), which specifies (p. 12) that ‘persons professionally arranging transactions’ include ‘trading venues like energy exchanges and brokers’. It is with this assumption in mind that we have reviewed and respond to the Consultation Papers. **In the event that ESMA had another meaning in mind, clarity on this term is needed.** At any rate, the need to report all ‘near-misses’ could be overly burdensome and therefore, we suggest that establishing a ‘reasonable suspicion’ should encompass the 2-week timeframe required for investigating the original ‘suspicion’.

< ESMA_COMMENT_MAR_TA_1 >



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

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

<ESMA_QUESTION_MAR_TS_1>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_1>

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

<ESMA_QUESTION_MAR_TS_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_2>

III. Market soundings

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

<ESMA_QUESTION_MAR_TS_3>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_3>

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

<ESMA_QUESTION_MAR_TS_4>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>

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<ESMA_QUESTION_MAR_TS_5>

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

<ESMA_QUESTION_MAR_TS_6>

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<ESMA_QUESTION_MAR_TS_6>

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

<ESMA_QUESTION_MAR_TS_7>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_8>



IV. Accepted Market Practices

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

<ESMA_QUESTION_MAR_TS_9>

Yes, we agree that it would be too restrictive to dismiss practices that may be performed outside a trading venue. These should be treated in an equal manner for MAR purposes.

<ESMA_QUESTION_MAR_TS_9>

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

<ESMA_QUESTION_MAR_TS_10>

We consider that all market participants, including those exempt from MiFID and those not subject to MiFID, should be allowed to perform or execute an AMP, provided that they are acting in conformity with the relevant rules. We note that some market participants are exempt from MiFID, but supervised at the national level. Moreover, the identity and status of the person performing an AMP are not among the criteria under Articles 13(2), 13(3) and 13(4). Consequently, this issue should remain outside the scope of the TS.

<ESMA_QUESTION_MAR_TS_10>



V. Suspicious transaction and order reporting

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

<ESMA_QUESTION_MAR_TS_11>

For the sake of clarity, we highlight that ‘a person professionally arranging or executing a transaction’ as defined under MAR (i.e. ‘a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions, in financial instruments’) refers, in our view, only to Regulated Markets (RM), Multilateral Trading Facilities (MTFs), Organised Trading Facilities (OTFs) and Systematic Internalisers (SI), which are authorised under MiFID II. We also refer in this context and for information, to the ACER REMIT Guidance (3rd Edition) (p.54, N°8.5.1.), which specifies that ‘persons professionally arranging transactions’ include ‘trading venues like energy exchanges and brokers’. It is with this assumption in mind that we have reviewed and respond to the Consultation Papers. In the event that ESMA had another meaning in mind, clarity on this term is needed. At any rate, the need to report all ‘near-misses’ could be overly burdensome and therefore, we suggest that establishing a ‘reasonable suspicion’ should encompass the 2-week timeframe required for investigating the original ‘suspicion’.

We agree. The intention of the legislator to include OTC derivatives is clear from the Recitals.

<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>

Please see first our answer to Question 11.

We welcome ESMA’s clarifications, but remain of the view that two weeks as from the suspected breach may not be enough to produce a good quality report. We are therefore satisfied that the reference to the two-week period is contained only in Recital 3 as a ‘general’ and ‘indicative’ reference, rather than in the main body of the proposed Delegated Regulation in Annex VI of the CP.

In addition, we believe that reporting by phone is confusing and adds little value to the STOR regime. We therefore suggest that Article 9(3) of the proposed Delegated Regulation is deleted.

<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>

Please see first our answer to Question 11.

We think that effective surveillance greatly depends on the type and size of the organisations.

Automated surveillance should be mandatory only for ‘persons professionally arranging or executing transactions’, as defined under MAR (i.e. ‘a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions, in financial instruments’) and that are in our view only RMs, MTFs, OTFs and SIs authorised in accordance with MiFID. Any other interpretation would not be practically sensible as the requirement that the ‘automated system (...) cover the full range of trading activities’ (draft Delegated Regulation, see Article 5.1.) would be neither possible nor proportionate to implement in practice for market participants other than the ones mentioned above.

<ESMA_QUESTION_MAR_TS_13>

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

<ESMA_QUESTION_MAR_TS_14>



Please see first our answer to Question 11.

We believe the STOR reporting template should take due account of data privacy and security concerns. Furthermore, the template should be flexible to allow for differences between information required for securities and information required for commodity derivatives. In addition, we would support an approach whereby some fields can be left blank if information is not available at a given point in time, provided that the template is filled on a reasonable effort basis.

<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>

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<ESMA_QUESTION_MAR_TS_15>

Q16: Do you have any views on ESMA’s clarification regarding “near misses”?

<ESMA_QUESTION_MAR_TS_16>

Please see first our answer to Question 11.

We agree with ESMA’s five year record-keeping requirement. However, the application of this requirement to near-misses adds a further level of complexity from a reporting parties’ perspective and could create a disproportionate reporting requirement as per the interpretation of the term ‘reasonable’.

We reiterate our view that a near misses requirement would impose complexity and IT development costs on reporting parties without improving the surveillance regime of suspicious transactions and orders as the element of subjectivity in the reporting of events will not be removed. Moreover, the absence of a clear definition of near misses also creates legal uncertainty as to what has to be reported.

We eventually expect market participants professionally arranging and/or executing transactions to report under the STOR all transactions that are looked at to avoid having to keep records of near misses and related reasons for not submitting a STOR.

We, therefore, suggest that Article 10(2)(b) of the proposed Delegated Regulation is deleted and recommend that a suspicion would only be deemed ‘reasonable’ once an analysis has been undertaken and not as soon as a suspicion is formed.

<ESMA_QUESTION_MAR_TS_16>

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

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

<ESMA_QUESTION_MAR_TS_17>

We do not agree with ESMA's proposal for the disclosure of inside information in respect of emission allowances. It is unjustified for ESMA to apply the regime of the Transparency Directive (TD) to all disclosures of inside information under MAR, as this is not consistent with the MAR level 1 text, nor would it ensure an effective and efficient disclosure regime.

The application of TD requirements would effectively put in place duplicative reporting for those markets that are already covered by REMIT. However, the 2nd paragraph of Recital 20 and Article 25(3) of MAR make it clear that authorities should take into account REMIT when looking at financial instruments that are wholesale energy products. Similarly, Recital 51 recommends that no duplicative reporting is imposed on emission allowance market participants.

We would like to highlight the fact that neither 'active distribution' nor 'dissemination' are requirements under Article 17 of MAR, which only speaks about 'disclosure.' Moreover, the only references to the TD in MAR concern: i) the disclosure via OAM for RM instruments (Article 17(1)); and ii) the determination of the competent national authority for the notification of manager's transaction. Given that the phrase 'public disclosure' in Article 17 of MAR mirrors the requirement of Article 4 of REMIT, whereby 'market participants should publicly disclose,' we believe that the correct approach is to harmonise all information disclosure requirements for EAMPs to the regime developed under REMIT and to stipulate explicitly that any disclosure made under REMIT is sufficient for MAR purposes in respect of EAMPs also within the scope of REMIT. Additionally, participants in the emission allowances markets are different and more professional than retail investors in typical financial instruments (bonds, securities, etc.) and generally have good knowledge of the transparency platforms or company websites where inside information regarding the physical installations of the EAMPs are published. Therefore, there is absolutely no need to actively distribute inside information regarding EAMPs' physical operations via the media (cf. TD 'publication in newspapers allowing dissemination throughout the EU'), which would - from a practical point of view - be very burdensome, costly and disproportionate. In any case, Recital 51 of MAR level 1 text should be respected, so that no duplicative reporting should be put in place for EAMPs already covered by REMIT.

<ESMA_QUESTION_MAR_TS_17>

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

<ESMA_QUESTION_MAR_TS_18>

Yes, we believe so. Potential investors and market participants active in the emission allowances markets have very good knowledge of these markets and they know where this information can be accessed to the extent that it concerns EAMPs, which are already subject to REMIT. For EAMPs not subject to REMIT, instead of establishing a parallel reporting regime under MAR, ESMA should cooperate closely with ACER and other energy regulators to ensure that all EAMPs (even non-energy market participants) can access and use the EMFIP platform (to be set up by ENTSO-E under Regulation 543/2014) or other centralised information repositories upon request. Furthermore, apart from the disclosure made under REMIT, we do not see EAMPs who are wholesale energy market participants to possess any other inside information to be disclosed under MAR.

We strongly support the approach based on recital 51 of MAR, which states:

‘Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011 [REMIT], the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content.’ We suggest energy market participants’ websites as currently recommended in the ACER Guidance is preferable as every market participant would have access to it and can subscribe to RSS feeds. Where information has been disclosed under REMIT as per such a channel, this information should no longer constitute inside information for the purposes of MAR.

<ESMA_QUESTION_MAR_TS_18>

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

<ESMA_QUESTION_MAR_TS_19>

This would create duplication, could undermine mechanisms which have been instituted to-date and which are functioning well and lead to high additional implementation and operational costs. In addition, it would not bring any added value to the market because of the duplication of information already publicly available to any interested investor or participant on the emission allowances market. Duplicative reporting channels for the same information might lead to technical or other incidents whereby information is no longer considered as inside under REMIT (as immediately published on the market participants website or other transparency platform) but is not yet public under MAR. This would restrict market actions of an EAMP which is already subject and compliant to REMIT and complicate internal compliance processes.

<ESMA_QUESTION_MAR_TS_19>

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

<ESMA_QUESTION_MAR_TS_20>

We generally agree. However, the TS should not make the provision of an explanation to the national competent authority mandatory. By stating that ‘Member States may provide that a record of such an explanation is to be provided only upon the request of the competent authority,’ Article 17(4) of the level 1 text leaves this matter to the exclusive discretion of Member States. The current draft of the TS can be consistent with such an interpretation, but clarity is required from ESMA about the need for further national legislation or guidance on this point.

Regarding the notification of delayed disclosure of inside information by EAMPs, we do not agree with ESMA’s argumentation and proposal (point 277 and 278 of the CP) to the extent that this is relevant to an EAMP already subject to REMIT. Under REMIT, similar obligations apply to market participants which are required to notify ACER and the relevant competent authorities in case of delayed disclosure of inside information regarding their physical operations (article 4.2 of REMIT). A dedicated ACER notification platform has been created for these purposes (<https://www.acer-remit.eu/np/art42>). Where an EAMP subject to REMIT has submitted such an electronic notification to ACER, this should also be sufficient for MAR purposes, as it covers exactly the same information. Therefore, we urge ESMA to cooperate closely with ACER to receive the same information directly from ACER, and to avoid duplicative and/or new obligations on EAMPs.

Additionally, we do not agree that the identity of persons having taken part in the delayed disclosure decision should be communicated for reasons of protecting personal data. Such information brings no added value whatsoever.

<ESMA_QUESTION_MAR_TS_20>



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

<ESMA_QUESTION_MAR_TS_21>

No. We consider the details to be kept in the records to be too far-reaching for data protection and privacy purposes, e.g. identity of persons deciding, monitoring, publishing, delaying the publication.

<ESMA_QUESTION_MAR_TS_21>

VII. Insider list

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

<ESMA_QUESTION_MAR_TS_22>

We are answering this question in so far as the Insider List requirements apply to EAMPs.

We do not agree. We reiterate our view against including personal details such as passport numbers, home address, mobile numbers and personal e-mail addresses in the insider list and we are not satisfied with the reasons provided by ESMA in paragraph 295 of the CP for requesting them. The inclusion of personal details in the insider list seems disproportionate and inadequate to the task of protecting the integrity of financial market, as this information could be made available rapidly upon request. Moreover, we are of the opinion that the provision of such personal details of employees by commercial firms could raise Data Protection issues.

<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>

We are answering this question in so far as the Insider List requirements apply to EAMPs. Yes, we agree with the possibility to create one of two separate lists, either one dealing with "permanent insiders" or one dealing with "deal-specific/event-based insiders".

<ESMA_QUESTION_MAR_TS_23>



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

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

<ESMA_QUESTION_MAR_TS_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
We are answering this question in so far as the Insider List requirements apply to EAMPs. We welcome the requirement to use the data standard defined under MiFIR implementing texts, as well as international standards such as the Legal Entity Identifier, if applicable and available.
<ESMA_QUESTION_MAR_TS_25>



IX. Investment recommendations

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

<ESMA_QUESTION_MAR_TS_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_26>

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

<ESMA_QUESTION_MAR_TS_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_27>

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

<ESMA_QUESTION_MAR_TS_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_28>

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

<ESMA_QUESTION_MAR_TS_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_29>

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

<ESMA_QUESTION_MAR_TS_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_30>

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

<ESMA_QUESTION_MAR_TS_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_31>

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



<ESMA_QUESTION_MAR_TS_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_32>

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

<ESMA_QUESTION_MAR_TS_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_33>

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

<ESMA_QUESTION_MAR_TS_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_34>

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

<ESMA_QUESTION_MAR_TS_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_35>