



European Securities and  
Markets Authority

## **Reply form for the ESMA MAR Technical advice**



20 August 2014



European Securities and  
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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](http://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](http://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	Europe



## Introduction

**Please make your introductory comments below, if any:**

< ESMA\_COMMENT\_MAR\_TA\_1 >

FIA EPTA is an association of European principal traders formed in June 2011 under the auspices of the Futures Industry Association (FIA). FIA EPTA represents 25 principal trading firms that, on a combined basis, provide significant amounts of liquidity to European regulated markets and multilateral trading facilities (MTFs).

FIA EPTA Members are generally the electronic versions of the floor-based jobbers, market makers or specialists in equity and/or derivatives markets. They are authorised under MiFID for undertaking the investment activity 'dealing on own account' or as "local" firms. Members exclusively trade their own capital and do not act as deposit takers in any form. They engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

< 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 EPTA believes the proposed framework of “indicators”, “practices” and “related indicators” is confusing, and if not clarified, will make it difficult for market participants to monitor effectively for manipulation.

We understand ESMA’s mandate was to provide technical advice clarifying the indicators of manipulative behaviour listed in Annex I MAR and additional indicators if necessary in light of technical developments.

FIA EPTA agrees the “practices” set out in sections 4 to 12 of the draft technical advice are consistent with the first part of this mandate and do clarify the Annex I indicators.

However, FIA EPTA believes the “related indicators” set out in section 13 do not clarify the Annex I indicators, nor do we believe these additional indicators are necessary following technical developments. Rather, ESMA describes them as “linked to” and relevant for the purpose of the practices in sections 4 to 12. They are drafted very broadly and reflect what in many, or even most cases, are legitimate trading activities.

FIA EPTA has very serious concerns regarding the practical implications of these related indicators. We believe it is unclear if and how market participants should integrate the related indicators when calibrating their automated surveillance systems, as ESMA’s approach in paragraphs 195-196 of the Consultation Paper on Draft technical standards on MAR [ESMA/2014/809] requires.

FIA EPTA is specifically concerned that firms may be required to surveil on the basis of the related indicators. We do not believe it is possible to program effective monitoring metrics given the current broad and subjective wording, such as for example “*unusual repetition of a transaction among a small number of parties over a certain period of time.*” We have highlighted several examples of the impracticalities of monitoring on the basis of the related indicators below.

Even if it were possible to program monitoring metrics based on the related indicators, FIA EPTA believes these would result in the overwhelming majority of alerts generated by surveillance systems being ‘false positives’ that nevertheless require analysis. This would cost significant time and resources for market participants to investigate and document, as legitimate orders would also regularly trigger based on the related indicators. This would also potentially increase the number of Suspicious Orders and Transactions Reports (STORs) to national competent authorities, which would potentially decrease the latter’s ability to identify genuine and grave cases of market manipulation.

Therefore, FIA EPTA suggests that ESMA either:

1. Clarify explicitly that persons within the ambit of Article 16(1) and (2) MAR operating automated surveillance systems should program monitoring metrics based on the Annex I indicators and the practices set out in sections 4 to 12 of the draft technical advice only, and not the related indicators; or
2. Amend the draft technical advice to integrate the related indicators into the relevant practices of sections 4 to 12, so that market participants have clear and concrete guidance on what to monitor for when operating automated surveillance systems.

Moreover, in order to strike a balance between – on the one hand, creating a practical tool for analysing whether or not orders to trade, transactions or behaviours may indicate possible market abuse – and, on the other, providing maximum clarity and foreseeability for market participants, FIA EPTA suggests that ESMA consider issuing subsequent guidance to make it clear to market participants that, although a (related) in-

indicator was triggered, the behaviour would not be considered to be market manipulation because the particular order, transaction or strategy was based on a legitimate trading or investment decision. While we understand ESMA's mandate relates to clarifying the indicators of manipulation, we would welcome subsequent clarification by means of guidance on the indicators of legitimate reasons, such as the following paragraph:

*"In general, the price of a financial instrument must be the result of the freely established shared vision of buyers and sellers of a specific financial instrument, based on timely and reliable information, and may not be influenced (or tried to be influenced) in a certain direction through the use of improper means."*<sup>1</sup>

This could, for instance, be:

- a news or research report;
- quotes generated in line with an existing quoting obligation under a market making agreement;
- an order instigated by an algorithm based on a legitimate arbitrage strategy
- an automatically generated signal from a trading algorithm based on any other legitimate trading strategy; or
- remedying a breach of a clearing or risk parameter.

### **Examples of excessively broad indicators**

As noted above, FIA EPTA believes that some of the related indicators describe situations too broadly and are likely to cover transactions and orders to trade that are more often than not legitimate activity. We highlight below some examples:

#### **Paragraph 13.a), b) and c)**

The word "unusual" as used in these three related indicators is both vague and a relative concept. Trading in new and/or illiquid financial instruments may often generate uncommon trading patterns compared to trading in established or more liquid instruments, while not being "unusual" in this context.

#### **Paragraph 13.d)**

We do recognize that this indicator would be relevant for practices described in paragraphs 4(1) or 8 (4). However, it would also cover any improvement or even joining of the current bid- and offer during opening and close (a trading practice very common for market makers providing liquidity), precisely when the majority of trading takes place.

#### **Paragraph 13.e)**

Frequent ordering, amending and cancellation is not necessarily a bad thing. In fact, it has clear benefits for its users and the markets as a whole. Nearly every financial institution, including banks, pension funds, asset managers and internet retail brokers, apply similar techniques to break orders into smaller pieces in order to smoothen execution at better prices for their end-users. This is, in itself, not market abuse.

A market-maker conducting legitimate market-making activities complying with the rules and market-making schemes of a particular trading venue will have an order-to-trade ratio ("OTR") that is higher than the average market participant. A market maker provides a service to the market in the form of additional liquidity by continuously sending orders into the market to update prices and provide two-sided quotes. As a market maker often has a contractual (and with MiFID II also regulatory) obligation to continuously provide

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<sup>1</sup> Sources: Netherlands Authority for the Financial Markets ("AFM"), page 4 of their brochure on market abuse dated February 2010 (<http://www.afm.nl/~media/Files/brochures/2010/marktmanipulatie.ashx>) and page 142 of the Dutch 'Handbook on Market Abuse' (2008, ISBN 978-90-13-05125-4).



quotes, he is restricted in his ability to control the level of messaging as an update of his quotes is usually triggered by a change in the price of an underlying or volatility, which a market maker cannot control. Moreover, a market maker cannot control how many of these orders will be matched by other members of the trading venue and will result in actual transactions. Therefore, unless a market maker is willing to be exposed to a significant amount of (extra) risk, it has limited control over his OTR. This is why ESMA has suggested to exempt market makers from the mandatory OTR regime under MiFID II.<sup>2</sup>

### **Paragraph 13.f)**

We do recognize that this indicator is relevant for the purpose of practices described in paragraphs 5(2) or 8(4), but it would also catch legitimate orders in financial instruments with a relatively low liquidity or instruments where the majority of liquidity is not on the screen but in the call-around market. Moreover, a market maker committed to providing quotes for an illiquid instrument may demonstrate behaviour that could be caught by this description.

### **Paragraph 13.g)**

This indicator basically describes **every** transaction or order to trade during a specific time period because as a rule every transaction or order to trade will influence the price. The larger the transaction or order to trade, the bigger the impact this transaction or order to trade will have, which is a legitimate and logical consequence. Therefore we believe this indicator is far too broad to be useful.

### **Paragraph 13.h)**

Again, this indicator could describe almost any transaction or order to trade because as a rule every transaction / order to trade will influence the price. Likewise, this indicator purports to clarify practice 9(6) (“advancing the bid”), which text itself makes no allowance for legitimate market making, and therefore combined with this related indicator will significantly over capture legitimate trading behaviour.

### **Paragraph 13.j)**

We believe this indicator also describes mainly legitimate transactions and orders to trade. Every transaction has an impact on the (volume) weighted average price of an instrument (either changing the price or changing the weight of the current price). The effect of a transaction will be even more pronounced in case of illiquid instruments that only trade occasionally, as every trade is likely to change the weighted average price significantly.

<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>

FIA EPTA believes that the list of indicators proposed in the CP are appropriate considering the extended scope of MAR in terms of instruments covered and no additional indicators are necessary.

<ESMA\_QUESTION\_MAR\_TA\_2>

**Q3: Do you consider that the practice known as “Phishing<sup>3</sup>” should be included in the list of examples of practices set out in the draft technical advice?**

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<sup>2</sup> ESMA, Discussion Paper on MiFID/MiFIR draft RTS/ITS (2014/548), Par 18, p. 277-278.

<sup>3</sup> 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.

<ESMA\_QUESTION\_MAR\_TA\_3>

FIA EPTA believes that 'phishing', while clearly illegal, is not necessarily linked with market abuse and mainly related to defrauding retail banking clients. Moreover, phishing may be already subject to criminal sanctions under the criminal legislation of Member States and be subject to another evidentiary standard than market abuse. Therefore, FIA EPTA believes it should not be included in the list of examples of practices.

<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 EPTA believes that the reference to OTC transactions is appropriate given the extended scope of MAR.

<ESMA\_QUESTION\_MAR\_TA\_4>



### **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 CO<sub>2</sub> emissions and rated thermal input below which individual information would have no impact on investors' decisions? Please substantiate.**

<ESMA\_QUESTION\_MAR\_TA\_5>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_7>

**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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_8>

**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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_9>



## 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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_10>

**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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_18>

**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 reporting 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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_19>