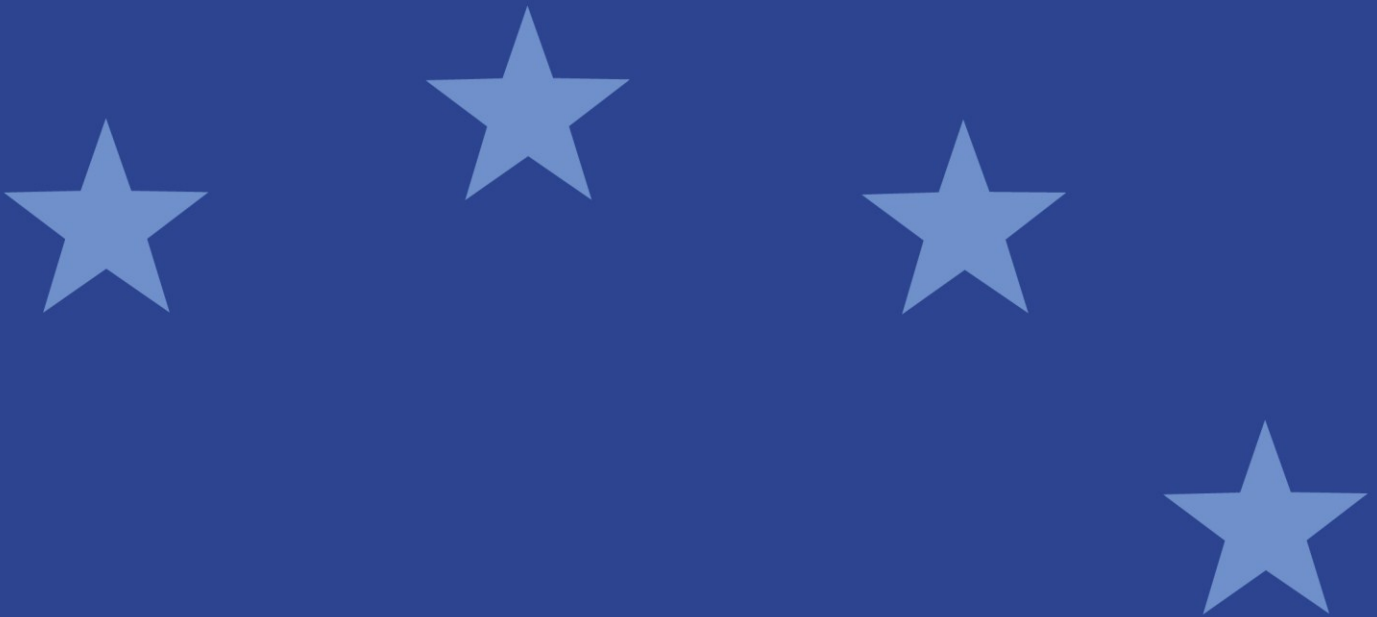




European Securities and  
Markets Authority

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





European Securities and  
Markets Authority

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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:	Issuer
Country/Region	Germany



## **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>  
TYPE YOUR TEXT HERE  
<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<sup>1</sup>” should be included in the list of examples of practices set out in the draft technical advice?**

<ESMA\_QUESTION\_MAR\_TA\_3>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_4>

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<sup>1</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.

**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>  
No.

ESMA is going to interpret the duty to notify managers' transaction in a way that will create misleading market signals and massive additional compliance problems.

As already expressed in our position paper on ESMA's discussion paper in January 2014 ESMA does not make a difference with regard to how the respective financial instrument has been acquired by the PDMR. By definition an acquisition of a financial instrument may only create signals for the market if there is an active investment decision by the reporting person. This is also the core legislative and economic rationale behind the duty to publish PDMRs' transactions: Other market participants may extract from the reported transaction the PDMR's current expectations with regard to the listed company. Market participants would be definitely misled if the duty to report also covered transactions that resulted from situations where the PDMR has no discretion and/or is completely passive.

Consequently, **gifts, inheritances and denotations should be out of scope**, because they have in common that that due to the lack of consideration they are not based on an symptomatic investment or divestment decision of the person in question. This is why we oppose ESMA's proposal on this point (see para 2)m), p. 46). **In the same manner, any non-discretionary purchase, sale or execution of a financial instrument should be out of scope because such transactions will never reveal changes of the PDMR's expectations and thus will rather mislead the market.** Therefore, the extent to which acquisitions under remuneration plans will form a transaction to be notified should be limited. From our perspective the duty to notify should be limited at least in two respects. First, **any acquisition and sale that follows a non-discretionary remuneration plan should be out of scope**, because such transaction will by definition never provide markets with information on the expectations of the person in question (see above). Against this background we doubt that para. 2)b) should be in the scope without any exemption.

If a stock based salary plan is pre-determined there is also no need to ban "trading" in the closed period. In addition to that, we still miss a clarification as to when a notification becomes due with respect to derivative instruments under those plans (phantom stocks). From our point of view, also here, it has to be avoided in any case that a reported transaction creates a misleading signal to the marke

<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>

We would prefer an index weight of 50 percent. The German regulator has chosen this weight, and we are not aware that it has caused concerns regarding market integrity or circumvention strategies.

<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>

As explained above any pre-determined purchase or sale as well as any transaction where the PDMR is completely passive should be principally permitted (both within the closed period and out of the closed



period) as they not create signals for the market are – by definition – not executed on the basis of inside information.

<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>

In general securities held under a fully discretionary portfolio or asset management mandate should be out of the scope of the notification duty if there is no influence by the PDMR and, hence, no investment decision taken that can be influenced by the PDMR's (inside) knowledge.

The consequence of ESMA's proposal will be that PDMR's contract with the third party will have to determine that no transaction in the shares of the issuer or instruments relating to it will be undertaken. In fact, ESMA's interpretation will ban investments of the manager in own shares even if they are undertaken indirectly. If this is not the intention of ESMA the rule could be clarified in a way that the weight of the PDMR's company should not exceed a certain threshold under the asset management mandate.

Regarding the interpretation of transactions that are conducted by third parties under an asset management mandate we are of the opinion the ESMA's is not consistent with the text of MAR. Art. 19 (11) MAR states that a PDMR "shall not conduct any transactions on its own account or for the account of a third party" in the closed period. An fully discretionary asset management mandate cannot be subsumed under this definition as the asset manager acts on "its own account", so that is simply not the PDMR who acts. Thus, indirect investments undertaken by a third party on a fully discretionary basis cannot be banned according to the level-1-text.

Both concerns hold also true with respect to the investment in collective investment undertakings (such as UCITS). We wonder whether ESMA's position would in practice mean that a PDMR will not be able anymore to invest in mutual funds or other indirect investment schemes that may invest in the listed company where the PDMR is employed. The PDMR of a German blue chip may for example not be permitted to invest in an investment funds specialised on European equities, because he/she will have not control of any of the transactions of the funds and thus will not be able to ensure that he receives the information on trades by the fund manager nor will he/she be able to ensure compliance with a trading ban. Thus, ESMA should clarify that the trades of the asset managers of collective investment undertakings will never lead to a notification nor will they fall under the trading ban. <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 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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_19>