



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_ANEX1

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?	No
Activity:	Regulated markets/Exchanges/Trading Systems
Country/Region	Germany

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>

Deutsche Börse Group (DBG) appreciates the opportunity to respond to ESMA's Consultation Paper – Technical Advice on the Market Abuse Regulation (MAR). DBG welcomes the agreement for a new regulation updating and strengthening the existing framework to ensure market integrity and investor protection. Through the introduction of provisions to prevent market abuse in the form of a regulation, a harmonized EU framework will be established facilitating legal certainty, simplified compliance, and avoidance of regulatory arbitrage. This framework will be further enhanced through the revised Market Abuse Directive (MAD) introducing an EU-wide system of sanctions to deter against market abuse.

DBG supports efficient, fair, orderly and transparent financial markets that meet the needs of well protected and informed investors and provide a source for companies to raise capital and for investors to hedge their portfolios.

Considering recent market developments in trading platforms and technologies, the implementation and application of new market abuse regime needs to be closely aligned with the evolving regulatory landscape which will be re-shaped, e.g. by the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). DBG appreciates the opportunity to contribute to this task and hopes that our responses will be found helpful in this context.

Our main concerns refer to the proposed specification of the indicators of market manipulation: We argue in particular to consider the peculiarities of benchmarks which is subject to a dedicated regulation; with regard to retail securitized derivatives we propose to develop technical standards in a way which does not impair hedging activities of issuers and quoting activities of market makers which are essential for liquidity provision in these instruments. Furthermore, phishing should not be included in the list of indicators of manipulative behaviour as it is not a trading-specific issue and proven security procedures do exist in order to prevent these kinds of activity. Finally, we strongly support the approach to cover transactions taking place in the over the counter (OTC)- space within the new regime.

< 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 1 of MAR?

<ESMA_QUESTION_MAR_TA_1>

Deutsche Börse Group believes that when assessing the potential for a benchmark to be subject to market manipulation a key aspect to consider is the nature of the data that is used to construct that benchmark. It is critical to understand that data for benchmarks is usually being sourced from various different markets with differing degrees of regulation, i.e. transparent, regulated markets in the case of certain benchmarks, or less transparent and less regulated OTC markets in the case of others. We believe that data in the form of estimates/indications submitted by parties with a beneficial interest in the underlying product or index creates a clear conflict of interest (e.g. their submission of “subjective” data can influence the benchmark used by them as an underlying or reference price for financial exposure within their company). These types of submissions will be more prone to the exploitation of conflicts of interest than data submitted by regulated trading venues where price formation takes places according to pre-defined and transparent rules and under extensive market surveillance, unless those conflicts of interest are managed effectively.

Consequently, DBG distinguishes benchmarks by dividing them into the following three categories:

- (a) Category 1: benchmarks based on panel-based data when they are prone to a conflict of interest and experience discretionary powers;
- (b) Category 2: benchmarks based primarily on transaction data from OTC markets;
- (c) Category 3: benchmarks based primarily on regulated transaction data from regulated markets, and MTFs operated by regulated markets (regulated data).

Cases of misconduct or attempted manipulation of benchmarks in category 1 have been identified by regulators and are currently being investigated. An apparent conflict of interest was at the heart of this misconduct where data providers and those actively investing in index-based financial products were identical and thus beneficiaries of certain index values. The reliability of certain benchmarks in category 2 is also currently under scrutiny for the same reason.

In contrast, benchmarks in category 3 have not been the subject of regulatory concern, nor have the regulatory authorities identified any demonstrable misconduct in relation to their compilation. A key differentiating factor of benchmarks within category 3 is that they are calculated on the basis of a regulated trading venue’s transparent data. In particular, regulated markets are required to comply with stringent regulation concerning market integrity, orderly and transparent price formation, the operation of efficient markets and are not permitted to have any trading exposure in their indices or related financial products. Moreover, their compliance with such regulations is subject to close and continuous oversight by the relevant regulatory authorities. It can be considered though, that according to the pending EU COM benchmark regulation proposal, even transaction data from OTC market shall be considered “regulated data” when stemming from an approved reporting arrangement as defined in point (36) of paragraph 1 of Article 2 of MiFIR in accordance with mandatory post trade data requirements.

As regards no. 9.5 in the Consultation Paper:

For retail securitized derivatives there is typically only one market-maker who dominates the market. Under certain circumstances it may be necessary for the issuer to widen the spread, e.g. due to changes in the underlying liquidity or differing (main) trading hours of the derivative product and the underlying

instrument. In such cases, the practice of widening the spread should not be considered an indicator of manipulative behaviour.

As regards no. 9.8 in the Consultation Paper:

Issuers of retail securitized derivatives typically hedge outstanding positions against market movements in order to maintain a neutral market position towards the end investor (no speculation against investors). Naturally, depending on the liquidity of the underlying financial instrument, the hedging transactions may have an effect on the price of the underlying instrument. Such practices should not be considered an indicator of cross-product manipulation.

<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>

Deutsche Börse Group agrees with the proposed non-exhaustive list of indicators.

<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>

Deutsche Börse Group considers that phishing shall not be included in the list as it is not likely being an issue of trading. Traders have to pass dedicated security measures of the trading venues. Either trading is done via web-trading, where the trader has, besides his credentials (user name and password), a token (password generator) in order to log-in. In order to generate a password from the token for every log-in it has to be physically where the trader is; or trading is done via a separate network, which is a dedicated closed network without access to the internet.

<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>

Deutsche Börse Group supports this approach. In general, Deutsche Börse Group has the impression that manipulation should not be limited in the kind of instruments used as long as it might affect the listed instruments and thereby can give a false or misleading impression.

However, while we support the reference to OTC transactions in the context of cross product manipulation, we urge ESMA to pay particular attention to the OTC space as it lacks transparency and regulation and thus needs more surveillance than regulated markets.

<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>

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>

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<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>

Generally Deutsche Börse Group agrees with the types of transactions listed in the draft technical advices; however we would like to point out that borrowing transactions should need to be notified and disclosed only if they are related to the respective financial instruments.

<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>

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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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<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>

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<ESMA_QUESTION_MAR_TA_19>