esma European Securities and Markets Authority

# Reply form for the ESMA MAR Technical advice

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 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: | Choose an item. |
| Country/Region | Europe |

## Introduction

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

< ESMA_COMMENT_MAR_TA_1>
For the section above: Activity = Non Financial Counterparty.

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.

In summary, our key points on the consultation are the following:

- 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.
- 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 believe that the information held by Emission Allowance Market Participants (EAMPs) is not relevant in relation to the price developments of emission allowances and their derivatives. Therefore, establishing a specific threshold (even one of the higher ones that have been proposed) is expected to be of limited value. Imposing additional requirements to EAMPs without relevance to investors' decisions seems unnecessary and the threshold for exemption of such requirements should thus be increased to exempt most EAMPs.
- We are confused by the draft technical advice on the carbon dioxide equivalent and rated thermal input thresholds. Article 17(2) of MAR clearly states that the thresholds apply to the EAMP, i.e. the legal entity, active in the market. The proposed advice, however, refers to 'companies' to be captured by the threshold. We do not understand this departure from the MAR text, which, in addition, creates uncertainty as to whether the threshold has been conceptualised and thought through by the consultants Europe Economics in relation to 'group' or 'entities' within a group.
- In addition, we consider that the carbon dioxide threshold and rated thermal input threshold - as currently proposed by ESMA - are not equivalent. We believe that the 1050 MW figure is much too low and at the proposed level it could encompass many more EAMPs than intended. According to our calculations, the MW threshold for 6 million tonnes should be at least double. Further, there is a misunderstanding in the consultants' report (footer 41 on page 24) in respect of the term 'rated thermal input.' The consultants consider 'rated thermal input,' *de facto*, to be similar to 'capacity' used in the ACER Guidance regarding REMIT. This is not correct. Rated thermal input refers to the nominal energy introduced in a power plant, i.e. the amount of fuel converted in energy value (MW/h thermal), whereby the equivalent of 'capacity' as used in the ACER Guidance should be 'net electrical output,' being the output energy of the power plant or the electrical energy injected in the electrical grid (MWh electrical). [Net electrical output = rated thermal input x unit efficiency ([30%->60%]) + extra energy losses before grid injection typically due to auxiliary services as pumps, losses in transformators, etc.]. Our analysis would suggest a threshold in the 2,500-3,000 MW range and this is the range that we would support.
- Furthermore, we are concerned that the threshold of 6 million tonnes of CO2 and 1050 MW, by its cumulative nature, will mostly capture EAMPs due to the combined CO2 t/MW capacity of many small

installations which operate independently from one another. Such an EAMP would be subject to the disclosure obligations, whereas in practice, the small size of some installations will likely mean that any information the firm holds about their capacity and utilisation will be so small as not to have a significant price effect upon the market for emissions allowances. In nearly all, if not all, case, the information would fail the 'significant' leg of the inside information test. We, therefore, propose to introduce a minimum MW/ t $CO_2$ threshold per installation before the disclosure threshold takes effect. For example, this individual threshold could be set at half of the overall threshold, meaning that if an installation does not have a thermal input capacity of at least half the total input threshold, then disclosure for that installation would not be required. This would be proportionate and sensible, and would reflect the event-based approach to determining what has an impact on the emissions market.

- Finally, MAR states that the first applicable threshold is the carbon dioxide threshold and, in cases, where EAMPs carry out combustion activities, this first threshold is compounded by a MW threshold. The proposed guidance needs to make it clear that only in the event of both thresholds (i.e. the MW capacity and the tonnes of $CO_2$) being breached are EAMPs required to disclose information pertaining to emissions allowances. Article 17 (2) of the MAR level 1 text is clear that both thresholds need to be breached. It states that '[The requirements to report information on emissions allowances] shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent and, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold.' We understand these thresholds to be cumulative and therefore, not alternative, but we are concerned that the draft advice seems to introduce uncertainty in this respect.

< 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>
There is no need to add any further examples or indicators to Annex I of MAR. All examples should include an element of intent in order to indicate market 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>
There is no need to add any further 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>
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>

[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>
The information held by EAMPs is not relevant in relation to the price developments of emissions allowances and their derivatives. Therefore, establishing a specific threshold (even one of the higher ones that have been proposed) is expected to be of limited value.

Such an approach is evidenced in DG CLIMA's report, which shows in table 1.2 that only very few events actually had a significant effect on prices, such as the German nuclear shutdown.

As establishing a threshold is however part of the level 1 texts, we would like to contribute to this task by pointing out several aspects:

- Lower thresholds, while increasing the benefits only marginally, would also result in considerably increased implementation costs. This means that the incremental benefits to liquidity are unlikely to offset the costs for all but the largest industrial emitters;
- Market participants are unlikely to hold material and relevant information, whether this threshold is set at 6 million tonnes of emissions per annum or at a higher value.

**We would argue that imposing additional requirements to EAMPs without relevance to investors' decisions seems unnecessary and the threshold for exemption of such requirements should thus be increased to exempt most EAMPs**.

We are confused by the draft technical advice on this point. MAR clearly states that the thresholds apply to the EAMP, i.e. the legal entity, active in the market. The proposed advice, however, refers to 'companies' to be captured by the threshold. We do not understand this departure from the MAR text, which, in addition, creates uncertainty as to whether the threshold has been conceptualised and thought through by the consultants Europe Economics in relation to 'group' or 'entities' within a group.

We call for a clarification as a pre-condition for being able to comprehensively comment on the size of the proposed thresholds.

When it comes to the scope of the information to be disclosed, ESMA is adding confusion when referring in paragraph 37 of the Consultation Paper to 'important firm specific information.' It is clear from the level 1 text that Art. 17(2) explicitly refers to information related to the physical operations of the installations (or activities). Recital 51 of MAR re-iterates this. We do not understand what additional inside information, which is 'important firm specific information' and not related to physical operations could be inside information.

We would also like to state that, in our understanding, even for an EAMP above the threshold, the disclosure obligation applies only to the extent that any information qualifies as 'inside information,' which by nature requires a case-by-case assessment, i.e. taking into account the size of the installation and the incident/event, both related to the current situation in the market.

Regarding the proposed threshold itself, the Consultation Paper introduces a second threshold of 1050 MW of rated thermal input, stating that 6 million tonnes of C02 is equivalent to this 1050 MW figure. It is our opinion that the calculation and metric used for converting CO2 to MW of rated thermal input has been performed incorrectly and that as a consequence, the MW threshold contained in the Consultation Paper has been set too low. As such, we believe that the MW threshold calculation should be reconsidered before ESMA issues its Technical Advice. Additionally, we do not agree with the consultants view that

rated thermal input is de facto equivalent to 'capacity' as used in the ACER Guidance on REMIT. Rated thermal input refers to the nominal energy introduced in a power plant, i.e. the amount of fuel converted in energy value (MWh thermal), whereby the equivalent of 'capacity' as used in the ACER Guidance should be 'net electrical output,' being the output energy of the power plant or the electrical energy injected in the electrical grid (MWh electrical). [Net electrical output = rated thermal input x unit efficiency ([30%->60%]) + extra energy losses before grid injection typically due to auxiliary services as pumps, losses in transformators, etc.].

By way of background, oil, power and gas producers commonly operate installations such as offshore platforms, terminals and processing plants within the EU. These installations are normally equipped with thermal input capacity to provide power for everyday operations and to provide redundancy in the event of unexpected circumstances.

We have sought to provide a detailed explanation of our viewpoint below.

**Detailed Explanation**

The below table displays commonly accepted conversion factors for various fuels - kg CO2 produced from kWh of the fuel.

The figures provided below differ from those quoted in the contractors report produced by Europe Economics. For example, they use a conversion factor for coal of 0.65 – 1kg of C02 per kWh. By contrast, we offer a lower number of 0.34 kg CO2 per kWh. The reason for this difference is that we believe the contractors report has used a conversion factor for CO2/MWh of electricity output, rather than the correct measure of CO2/MWh fuel input when the capacity measure quoted is fuel input based.

| Fuel | Emissions in kgCO2/kWh |
|---|---|
| Lignite | 0.36 |
| Hard coal | 0.34 |
| Fuel oil | 0.28 |
| Diesel | 0.27 |
| Crude oil | 0.26 |
| Kerosene | 0.26 |
| Gasoline | 0.25 |
| Refinery gas | 0.24 |
| Liquid petroleum gas | 0.23 |
| Natural gas | 0.20 |

By using the above conversion factors (which are based on rated thermal input), we offer the example of a lignite power station with an input capacity of 1050MW operating at 8000 hours per year (a high utilisation factor of over 90%). The calculation of the annual CO2 emissions of such a plant would be performed as follows:

**1050 (MW) x 8000 (Hours) x 0.36 (Conversion Factor) = 3,024,000 tonnes of CO2 per year.**

As we can see from the above calculation, the emissions of the power plant in this example would be approximately 3 million tonnes of C02 per year. Furthermore, using the same methodology in relation to other fuels, we calculate the following annual CO2 emissions for a 1050MW thermal input plant:

| **Fuel** | **Annual CO2 Emissions for 1050 MW Plant** |
|---|---|
| Lignite | 3,024,000 tonnes C02 |
| Hard Coal | 2,856,000 tonnes C02 |
| Fuel Oil | 2,352,000 tonnes CO2 |
| Diesel | 2,268,000 tonnes CO2 |
| Crude Oil | 2,184,000 tonnes CO2 |

Natural Gas 1,680,000 tonnes CO2

Based on the examples provided in the table above, it is evident that 1050MW of thermal rated input is equivalent to 3 million tonnes of CO2 per year, at most, and not 6 million tonnes, as stated in the Consultation Paper. On this basis, it is our opinion that the threshold at which the disclosure obligations become applicable should be raised from 1050MW to at least 2100MW per market participant.

We would argue further that the capacity threshold should be even higher, based on a more 'normal' utilisation factor of 70-80%. **This would suggest a threshold in the 2500-3000MW range and this is the range that we would support.** Amending the MW threshold to this level would correctly align the figure with the proposed threshold of 6 million tonnes of CO2.

**Installation Size**

In addition to the above points, we would also like to draw ESMA's attention to the fact that where an oil, power or gas firm does exceed the MW threshold, this will often occur due to the combined MW capacity of many small installations which operate independent from one another.

As such, while an oil, power and gas firm may exceed the proposed 1050MW threshold in total, and therefore be subject to the disclosure obligations, in practice the small size of some installations will likely mean that any information the firm holds about their capacity and utilisation may be so small as not to have a significant price effect upon the market for emissions allowances.

We, therefore, propose that it may be useful to introduce a minimum MW threshold per installation before the disclosure threshold takes effect. For example, this individual threshold could be set at half of the overall threshold, meaning that if an installation does not have a thermal input capacity of at least half the total input threshold, then disclosure for that installation would not be required.

An individual installation threshold of this type would serve to ensure that firms do not engage in non-useful reporting of information about installations whose thermal rated input is far below the total threshold.

In any cases, we reiterate that we are of the opinion that no additional disclosure obligations or requirements should be imposed to EAMPs that are subject to REMIT publication obligations as well. Regardless of the threshold set under MAR, all the information (and in much more detail with lower thresholds) regarding the physical operations of the EAMPs who are REMIT participants is already publically available as a result of REMIT obligations and applicable transparency regulations (a.o. Reg 543/2013).
<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>
In the emissions market prices are mainly influenced by macro-economic information and EU Member States' policy decisions (e.g. EU Emissions Trading System (ETS) revision, nuclear phase out, amount of certified emission reductions (CERs) that could be taken into account in the EU). To the extent that inside information has been a major concern in the carbon markets, those concerns have largely related to the release of verified emissions data after the first year of the scheme.

Industrial emitters hold little non-public information that would be relevant for price formation. Planned and unplanned shutdowns of production, storage, transmission and other facilities do not have a significant effect on price formation, as very few industrial installations are large enough to impact the wider market and if one thermal unit is out, it will most probably be replaced by another thermal unit, which, in the end, will have little to no impact on the emission allowances markets. Much more relevant to the market is the impact of non-thermal generation/productions units (such as nuclear facilities, which are

CO2-neutral) facing planned or unplanned unavailability, as the loss of capacity will most probably be replaced by thermal units emitting CO2; or the fact that industrial emitters are leaving Europe.

It is also possible to estimate industrial emissions from observed macroeconomic data, fuel prices, etc. The vast majority of industrial installations, however, are not sufficiently large to have a major impact on emissions prices.
<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>
We agree with the proposal for the notification of delays in disclosure of inside information related to emission allowances. As the disclosure obligations for EAMPs relate to their physical operations, this would also be aligned with the notification duty for delayed disclosure under REMIT done to national regulators. To the extent possible, convergence should be sought between REMIT and MAR in order to reduce additional costs, processes, information flows, etc. for impacted market participants. Therefore, any delayed disclosure under REMIT should release the EAMP from any additional notification requirements under MAR, and should different competent authorities (energy regulator vs. financial regulator) be involved, these should cooperate and exchange relevant information.
<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 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>