esma 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?	Choose an item.
Activity:	Choose an item.
Country/Region	Choose an item.

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>
The Financial Services User Group (FSUG) is the expert group set up by the European Commission following the core objective "to secure high quality expert input to the Commission's financial services initiatives from representatives of financial services users and from individual financial services experts".
The FSUG welcomes the draft technical standards on the Market Abuse Regulation which are likely to increase and enhance the quality of information being made available both to investors and to competent authorities, which should in turn enable investors to make improved investment decisions.
Widespread and large market abuses targeting mostly non-insider investors are indeed one of the main reasons for the lack of trust of individual investors in the EU capital markets, as illustrated by the annual Consumer Scorecards produced by the European Commission, where "pensions, investments and securities" persistently rank as the worst consumer market of all.
Due to the volume of the draft technical standards we do not respond to all questions but focus on those that are of key importance for individual investors and financial services users.
< 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>
Before we answer to the specific question we would like to start with a general remark on this section. In recital 17 ESMA states that the current deadline (7 market sessions) for publication of buyback transactions should be maintained and argued that "the current system seems to work" and that this deadline seems to be a "good balance between transparency and administrative burden". FSUG regrets that the arguments provided by investor representatives responding to the DP regarding the deadline for publication of buyback transactions have not been taken into account in the draft technical standards. Transparency is a prerequisite for the prevention of market abuse. Investors are interested in having more timely transaction reports related to a buy-back program and rely on a more timely provision of information on such transactions. We believe that timely information would be if such information would be provided by T+1. This would also leave plenty of time (the transaction date on which the purchase took place plus one day) for settlement purposes. Given that ESMA proposes the disclosure of aggregated figures only we consider that the administrative burden for issuers can and should not justify not meeting the basic need for investors to receive timely information. This is even more true as the same deadline is proposed for disclosure towards the competent authorities.

Q1: We generally agree with the approach proposed by ESMA, although we consider that a lower limit of 15% would have been more appropriate for liquid shares. This would result in the use of three different thresholds based on liquidity (i.e. 15% for liquid shares, 25% for illiquid shares and 50% for shares with extreme low liquidity). A (lower) volume limitation of 15% would be more appropriate for liquid shares, rather than the current (higher) volume limitation of 25%, to avoid market distortion (more specifically, to limit distortion of the price-setting mechanism). We do not agree with the proposal to calculate the volume limits per "relevant" trading venue instead of performing an accurate a calculation across venues. The excessive fragmentation and induced lack of transparency of EU capital markets should not be a reason for treating unfairly individual investors, who in effect have no real access to the other so-called "venues" than the regulated "home" markets. This would open the doors for abusive use and may lead to circumventions. Here again, a mandatory consolidated tape (MiFiD II) in our opinion would be appropriate.
<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>
We agree, except for the timeframe regarding the reporting obligation towards the competent authority which we consider too broad, see also our general remarks on buybacks above. Stabilisation activities could give false or misleading signals and should therefore only be carried out for a very limited period of time.
<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>

With respect to the timing of market soundings, we regret the fact that ESMA does not use the possibility to restrict the hours in which market soundings can take place. When planning the market sounding process, the disclosing market participants should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the envisaged date for the launch of the potential transaction. We suggest allowing market soundings to be carried out for a limited period of 24 hours prior to the actual issue taking place in order to limit the possibility of inappropriate use of the information. Especially considering the fact that the current market practise already is that transactions take place within 24-48 hours after a sounding.

That being said, we generally agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding. It is important that disclosing market participants meet certain standards prior to conducting a market sounding but, more importantly, it needs to be ensured that they provide sufficient information to potential investors in the event that these investors are sounded out (e.g. provided with inside information). This will not only enable investors to assess whether or not they should take part in the market sounding, but also whether the information they received is price-sensitive (so it is clear to investors that they are restricted from trading or acting on that information). The standards that should apply prior to conducting a market sounding are important, but we think it is more important that it is made clear what information precisely will be made public afterwards.
<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>
We agree with the proposals for standardised (minimum) scripts to be used by disclosing market participants when performing market soundings in order to take a more consistent approach to soundings across the industry.

The elements included in the list make seem to be clear and should be sufficient to enable investors to determine whether the information they received is price-sensitive (making it is clear to investors that they are restricted from trading or acting on that information, by means of the threat of administrative and/or criminal penalties in case of a breach).
<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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Q7: Do you agree with these proposals regarding recorded communications?

<ESMA_QUESTION_MAR_TS_7>
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<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>
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<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. As OTC transactions are included in MAR they should not per se be excluded from the scope of AMP. The question of inclusion/exclusion should be coherent with all other transactions within the scope of MAR. As a result of this an accepted market practice can be established, provided that the requirements which apply under the MAR are met. Therefore, the national competent authority should include OTC trading in its assessments of market practices, as well as whether these practices meet the necessary requirements. One of these requirements is that the specific market practice should have a substantial degree of transparency to the market. OTC markets are, by definition, less transparent (in terms of trailing positions, prices, transactions and scales of exposure). Consequently, when conducting its assessment of a particular market practice the competent authority will need to consider carefully whether this specific requirement has been met for OTC trading. Summarised, we support ESMA's view that competent authorities should have to consider carefully if the transparency criterion according to Article 13 (2) (a) is being met and recommend that the same standards apply regardless of the trading venue.
<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>
The approach proposed by ESMA is too cumbersome and complicated and may hinder a sound surveillance and harmonised supervision which is necessary to adequately protect investors. This is only given in case firms executing an AMP are subject to supervision by regulators. We consider that a restriction to supervised persons would be within the mandate of ESMA according to Article 13 (7) which requires ESMA to ensure consistent harmonisation of Article 13.
<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>
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<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>
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<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>
We agree with ESMA's position, but we find it incomplete as the necessity to establish automated surveillance systems should not rely only with firms and "market venues", but also with national supervisors so that they can immediately investigate suspicious signs and signals of a possible breach (e.g. strongly increasing or decreasing rates, deviating trade volumes, etc). The French supervisor acknowledged in its latest strategic plan that it was struggling to identify and sanction large market abuses. This challenge cannot be solved without national supervisors investing in automated surveillance tools, like the UK FCA has done since 2008. FCA has since then largely increased its number of market abuse cases.
<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>
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<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>
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Q16: Do you have any views on ESMA's clarification regarding "near misses"?

<ESMA_QUESTION_MAR_TS_16>
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<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 agree with this proposal, especially with ESMA's assessment that information made public either directly by the issuer by using only other ways of publication (issuer website, social media, newspapers etc.) or by publication on the competent authority's website only is not considered as meeting the requirements of a proper dissemination of inside information. We furthermore agree that similar requirements regarding means for appropriate disclosure should apply for issuers of MTF/OTF instruments in order to avoid confusion among investors as to which information channel they should use for their different financial instruments/securities.
<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>
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<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>
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<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. In cases where Member States do not make use of the provision in 17(4) (c) to provide for an explanation only upon request of the competent authority, we see, however, no need to allow issuers to provide the explanation as to how the conditions of Article 17(5) were met at a later stage than the information about the delay itself. The information on the reasons for the exemptions may be crucial both for investors and in insider-dealing investigations. Also, the issuer should be aware already at the time the decision is taking, if and why he fulfils the three conditions laid down in Article 17(5). Therefore we do not see an unnecessary burden for issuers to delay the disclosure of this essential information. We further consider that ESMA's approach may not be in line with the wording of Article 17 (5) which clearly states that issuers/emission allowance market participants "shall inform the competent authority specified under paragraph 3 that disclosure of the information was delayed **and** shall provide a written explanation of how the conditions set out in this paragraph were met, **immediately after the information is disclosed to the public**."
<ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>
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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>
Yes, we agree although we would want ESMA to verify that the information in the insider list does not violate any law of data protection (e.g. we have concerns regarding inclusion of the name of birth in the insider list if different from the surname). On the other hand we would like to suggest including the name and necessary contact details of the person(s) responsible for the record keeping to ensure a prompt and proper examination of the correctness of the insider list.
<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>
Yes we support ESMA's approach which gives clear guidance but leaves some flexibility to issuers both with regard to format of insider lists and to the way of delivery.
<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>
We agree with the proposed method to disclose not netted aggregated figures on a daily basis, including the weighted average price, the highest and the lowest price. It is necessary that the information provided to the investors and the public is readable, understandable and reliable and we consider that the proposed simplified option 3 best serves these interests.
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
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<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>
Yes we agree.
<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>
We do not favour the inclusion of the term "on a regular basis" in the list of characteristics that a person must have in order to qualify as expert. According to the draft technical standards, the term "experts" also covers a person who "holds himself out as having financial expertise or experience" which already contradicts the approach that regularity is necessary or connected to the characteristics of an expert. Furthermore we consider that the term "repeatedly proposes particular investment decisions" already narrows the set of circumstances significantly.
<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>
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<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>
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<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>
Yes we agree and strongly support ESMA's consideration to include potential conflicts of interest resulting from remuneration tied to the instruments covered by the recommendation produced. Conflicts of interest arising from monetary but also from non-monetary inducements are by far the most relevant with respect to potential harm for investors (since these could form a perverse incentive, resulting in a conflict of interest that is potentially detrimental to investors/not in the best interests of investors) and should therefore be clearly flagged in the investment recommendation.
<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>
We support the lower threshold in relation to the total issued share capital of the issuer proposed by ESMA.
<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>
Yes, especially if legal person(s) are concerned we consider that aggregated figures of the legal person/firm and any affiliated company should be used to assess whether the threshold has been reached.
<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>
Yes, see our comment to Q30.
<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>
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<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>
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<ESMA_QUESTION_MAR_TS_35>