



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](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:	Non-financial counterparty
Country/Region	Sweden



## **Introduction**

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

< ESMA\_COMMENT\_MAR\_TA\_1 >

Nordic Financial Unions (NFU) is the voice of the employees in the Nordic financial sectors. We are an organisation for co-operation between trade unions in the banking, finance and insurance sectors of the Nordic countries. Through our seven affiliated unions in Denmark, Sweden, Norway, Finland and Iceland we represent 150 000 members – a vast majority of the employees in the Nordic financial sectors. < 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>

---

<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>  
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>

The basis for reporting of infringements must be that employees can provide the information in an orderly and secure fashion which is why the national supervisors must be able to create reliable systems. NFU considers that the whistle blowers should be given the opportunity to be anonymous when reporting breaches. Employees who denounce potential or actual breaches must be protected against retaliatory actions and it should be prohibited to inquire his or her identity. NFU supports the general measure for the protection of persons under contract of employment found under para. 136 & point 24 of the Draft Technical Advice. It serves as a protection from liability for employees disclosing information given that they report a potential breach in good faith.

NFU is positive to the analysis of the internal reporting and believes that internal reporting within a company is an important mechanism as well as the external. That financial institutions have to introduce internal procedures for whistle blowing is a very positive step forward. NFU has also held that the internal procedures can include the possibility to notify your employee representatives of potential infringements. The company or national supervisor could also consult with employee representatives in a suitable fashion, be it through anonymous “hot-lines” or scheduled, consultative meetings with trade unions. It is important to stress that employees have to be able to provide this information in an orderly fashion. However, the right to notify authorities through an external mechanism should not be made dependent on a preceding internal notification. The fear of retaliation from your employer is one of the main reasons why employees choose not to report a potential or actual infringement. NFU therefore agrees with ESMA’s analysis under paragraph 140.

Regarding paragraph 142 and whether it is helpful or not to provide explanations about the meaning of “persons working under a contract of employment”, NFU wants to emphasize the importance that the legal protection includes all employees, including those on a short-term or temporary contract, as well as persons outside the traditional employee relationship (such as consultants and interns). These groups of employees should all be protected from retaliatory action and covered by dispute resolution rules, as well as compensation rules. More people today work under short-term or temporary contracts or as consultants hired via staffing agencies. This means that they are placed in a more peculiar situation where they may choose not to report a fault as they fear losing their contract or are unsure whether they are protected from retaliation or not. There is therefore a value to clarify and provide for a wide interpretation of the meaning of persons working under a contract of employment in order for more employees to feel confident in using the whistle blowing mechanisms.

The Market Abuse Regulation ensures that employees should be able to report both potential and actual infringements. ESMA writes in its analysis (para. 144) that notifications should be based on reasonable suspicion and that hard evidence and supporting information is encouraged. In this aspect it is important not to focus too much on the need of providing hard evidence from the reporting person as it may deter the person from making the report.

<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>

Regarding the communication channels proposed under the Draft advice, point 4, NFU proposes that also an online reporting system should be available on the authority’s homepage. An online system is however

dependent on a secure system that can guarantee that the identity and the information given by the reporting person not can be accessed by others than relevant persons at the authority. <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>

In Denmark, the following provisions, measures and procedures apply with regards to protection of personal data:

- Notification must be submitted to the Danish Data Protection Agency and the company must obtain authorization from the Agency prior to commencement of the whistle blower system. As far as the retention period is concerned, the data collected may not be kept in a form which makes it possible to identify the data subject for a longer period than is necessary for the purposes for which the data are processed.
- The Data Protection Agency conducts an annual series of inspections of public authorities and private companies that have received the agency's authorization to process personal data. The Agency inspects whether the processing of data is carried out in accordance with the Act on Processing of Personal Data. If the Agency discovers punishable violations of the Act in connection with handling a complaint or an inspection, the Agency is authorized to issue a ban or enforcement notice or report the violation to the police. The Agency can also take up cases of its own initiative if, e.g. due to a citizen enquiry or newspaper article, the agency suspects a violation of the regulations of the Act.
- Individuals, companies etc. performing work for the controller or the processor and who have access to data may process these only on instructions from the controller unless otherwise provided by law or regulations. The controller shall implement appropriate technical and organizational security measures to protect data against accidental or unlawful destruction, loss or alteration and against unauthorized disclosure, abuse etc. The same applies to processors.
- The management conditions are comprehensive and include, i.a., abiding by good practices for the processing of data, performing data collection only for specified, explicit and legitimate purposes. Data must be adequate, relevant and not excessive in relation to the purposes for which the data are collected and the purposes for which they are subsequently processed. The processing of data must be organized in a way which ensures the required up-dating of the data. Furthermore, necessary checks must be made to ensure that no inaccurate or misleading data are processed. Data which turn out to be inaccurate or misleading must be erased or rectified. Cross border transferal: Transfer of data to a third country may take place only if the third country in question ensures an adequate level of protection, unless e.g. the data subject has given explicit consent or the data transfer is legally required.

In Norway, the Personal data act applies which reads; Personal data may only be processed if the data subject has consented thereto, or there is statutory authority for such processing, or the processing is necessary in order:

- a) to fulfil a contract to which the data subject is party, or to take steps at the request of the data subject prior to entering into such a contract,
- b) to enable the controller to fulfil a legal obligation,
- c) to protect the vital interests of the data subject,
- d) to perform a task in the public interest,
- e) to exercise official authority, or
- f) to enable the controller or third parties to whom the data are disclosed to protect

a legitimate interest, except where such interest is overridden by the interests. Regarding security aspects of data processing the following is provided; The controller shall ensure that personal data which are processed a) are processed only when this is authorized pursuant to sections 8 and 9, b) are used only for explicitly stated purposes that are objectively justified by the activities of the controller c) are not used subsequently for purposes that are incompatible with the original purpose of the collection, without the consent of the data subject. <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>

Regarding forms of unfair treatment as retaliation measures, we find that the most common ones are; dismissal, degradation, freeze in pay, ostracism, bullying at the work place and denial of development or promotion which would otherwise have been granted. Due to the problems of proving a connection between whistleblowing and unfair treatment it should be considered to reverse or ease the burden of proof in relation to the whistle blower. This is also known from several countries in relation to, e.g. unfair treatment of pregnant employees. Likewise, compensation must be sufficient to compensate the unfairly treated whistle blower, and at the same time deter employers from unfair treatment of whistleblowers.

Secure channels for the reporting persons is the basis for protection against unfair treatment. The employees must feel secure that their identity is protected.

NFU holds that adequate protection of employees would entail:

1) The legal protection should include all employees, including those on a short-term or temporary contract, as well as persons outside the traditional employee relationship (such as consultants and interns). It should also include a prohibition on retaliatory action, dispute resolution rules, as well as compensation rules. If the whistle blower, despite a prohibition, has been subjected to retaliation, he or she should be able to claim compensation without regard to the fault of the employer.

2) The protection should be designed as a principal rule with a positive right to blow the whistle, complemented with indirect, adequate protection for the person who reports the potential or actual breach. (Cf. *Heinisch v Germany* 28274/08)

3) The employer must be prohibited from inquiring the identity of the whistle blower. Full protection of the whistle blower’s identity should apply both when reporting to an external authority and through internal channels within the company.

4) It should be possible to report breaches anonymously to competent authorities, who is responsible for setting up appropriate technical solutions to enable such a procedure. Such a protection is fully in line with international conventions (Council of Europe and ILO).

5) Employees should be informed about the rules on reporting of breaches and the potential consequences. Employees should also be informed about the value of reporting, in order to curb illegal practices and misconduct. <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>

In Sweden there is for example a prohibition for employers in the public sector to inquire the identity of the whistle blower. This is an effective measure to increase protection of employees and can encourage more employees, to in a secure manner, report possible and actual infringements. <ESMA\_QUESTION\_MAR\_TA\_19>