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:	Audit/Legal/Individual
Country/Region	UK

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>
This response has been prepared jointly by the MAR Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales.
The City of London Law Society ("**CLLS**") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

The Law Society of England and Wales is the representative body of over 159,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The MAR Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on public markets.

We are taking this opportunity to comment generally on the relationship between the commentary in the CPs and the draft Regulations/technical advice; to comment on certain of the questions and to suggest drafting changes to the draft implementing Regulations and draft technical advice, where we would hope our contribution may be useful. We have not sought to comment on all the questions or on all the matters discussed in the CPs or on all the draft implementing Regulations and draft technical advice.

We are concerned that the burden proposed to be placed on issuers is disproportionate, costly on an on-going basis, and impractically burdensome and that not enough thought has been given to the different position of issuers and PDMRs compared to regulated firms. We urge ESMA to rethink its approach to this. We believe ESMA has underestimated the effect of some of its proposals on issuers, PDMRs and the non- regulated advisers of issuers and that the proposals create requirements which are not needed to prevent misuse of inside information.

We are not sure what the status is of text in the consultation paper which is not reflected in the draft Technical Advice or which appears to be inconsistent with it, but in practice we think it is possible that ESMA commentary outside the Technical Advice will influence the approach of supervisory authorities and so we believe that ESMA should take care that there are no inconsistences between the final text of the Technical Advice and ESMA's feedback in relation to it.

If you have any queries or would like to discuss please contact Victoria Younghusband: victoria.younghusband@speechlys.com.< 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[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>
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<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>
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<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>
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<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>
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<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>
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<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>
Broadly yes but subject to the following:

Paragraph 1

The draft Technical Advice does not refer to the requirement in Article 19(1) and 19(2) that the transactions required to be disclosed are transactions on the "own account" of the PDMR or person closely associated with a PDMR. This is the same test as that which is currently set out in the MAD regime. Regulators have interpreted the reference to "own account" in the MAD regime as excluding those transactions for which the PDMR or associated person has not given any instructions or consent or otherwise had any control over. Paragraph 1 of the Technical Advice should refer to the "own account" requirement and clarify its meaning.

Paragraph 2(b)

This mentions acceptance of stock options. It would be helpful to clarify (i) that this does not apply where the option is granted unilaterally and without acceptance by the PDMR (as is typically the case) and (ii) whether this applies to conditional awards granted to managers as part of their remuneration package.

Paragraph 2(m)

Inheritance should only trigger disclosure when received and vested in the PDMR. The fact that financial instruments may be gifted in a will does not necessarily mean that they will be received by the PDMR as they may have to be disposed of to pay inheritance tax, for example, or the estate may otherwise have a shortfall. A beneficiary under a will or other inheritance may not know of the gift. We think it is inappropriate to place an obligation to notify something before the person with that obligation is aware of the facts giving rise to the obligation to notify. <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>
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<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>
We consider that it is very unhelpful and will cause severe dislocation to the market if , as suggested by ESMA in paragraphs 114 and 115, all transactions executed in the context of a full discretionary asset / portfolio management mandate, where the PDMR has no possibility whatsoever to influence the asset / portfolio manager and to make any investment decision, should be included in the prohibition of trading during a closed period and that this should also apply in relation to collective investment undertakings in which the PDMR holds units whose portfolio includes securities in the PMDRs company. It appears from paragraph 116 that ESMA envisages that asset/portfolio managers of a PDMR may not deal in financial instruments linked to the relevant issuer's shares or debt instruments at all whether on behalf of the PDMR or a completely unrelated third party during a closed period. We do not agree that this is a proper interpretation of Article 19(11) of MAR as a PDMR with a fully discretionary account with an asset / portfolio manager cannot be said to be conducting transactions directly or indirectly for the account of a third party.

In addition in the UK, we have a particular problem with the definition of the closed period; as it is market practice for issuers to publish a preliminary announcement of annual results (containing information prescribed by the FCA's Listing Rules) before publishing the year-end report. This is beneficial for the market as it ensures that results are made publically available as soon as possible. It may not be possible to publish the year-end report at the same time as the preliminary announcement as it contains significantly more information of a narrative nature than the preliminary announcement (for example the corporate governance report) and it would not be beneficial to the market to delay the publication of the preliminary announcement in order to be able to publish it at the same time as the annual report.

Under the FCA's Model Code, the preliminary announcement triggers the end of the closed period as once the inside information has been published, there is no need to impose a prohibition on dealings. An inability to use a preliminary announcement as a trigger for the end of a closed period would mean that the 30 day prohibited period would not properly match the period prior to the release of the results to the market. This would not therefore reflect the purpose of the closed period. It would also make the lack of, for example, the takeover and rights issue exemptions referred to above more difficult – if a release of the results at the time of the announcement of the rights issue or takeover offer did not trigger an end to the closed period.

This problem would be resolved if the wording in bold underlined were inserted as shown below so that the closed period were referred to as "the 30 day period before the announcement of an interim financial report or a year end report **or if earlier the announcement of the results for the relevant period** which the issuer is obliged ….."
.<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>
We are disappointed that, whilst referring in paragraph 131 to the Model Code of the UK FCA, ESMA has declined to include any exemptions set out in the Model Code. In particular, it is regrettable that persons discharging managerial responsibilities (**PDMRs**) would not be permit-

ted to undertake the following dealings in circumstances when a rights issue or offer was made during a close period to all shareholders:

(a) undertakings or elections to take up entitlements under a rights issue or other offer (including an offer of financial instruments of the issuer in lieu of a cash dividend);

(b) the take up of entitlements under a rights issue or other offer (including an offer of financial instruments of the issuer in lieu of a cash dividend);

(c) allowing entitlements to lapse under a rights issue or other offer (including an offer of financial instruments of the issuer in lieu of a cash dividend);

(d) the sale of sufficient entitlements nil-paid to take up the balance of the entitlements under a rights issue;

(e) undertakings to accept, or the acceptance of, a takeover offer.

In all these cases, PDMRs are being treated in exactly the same way as other shareholders and there is therefore no need to subject them to restrictions on their dealings. It would be disproportionate to do so. It would also impose restrictions on these transactions during closed periods and might prevent them from being implemented. For example the transaction could be dependent on undertakings being obtained from one or more of the directors because those directors are also substantial shareholders of the issuer and so undertakings from them to accept a takeover offer or take up under a rights issue are required. As mentioned in relation to paragraphs 6-9 below, there is scope for providing for other exceptional circumstances in which dealings by PDMRs should be permitted and we regard these as being valid examples of such circumstances.

We also think that where a PDMR is acting as a trustee, but is not a beneficiary of the relevant trust, dealings should be permitted during a closed period where the decision to deal is taken by the other trustees or by investment managers on behalf of the trustees independently of the PDMR and without consultation to or other involvement of the PDMR (as permitted under the FCA's Model Code).

We have the following comments on the draft technical advice:

Paragraph 4

This refers to Article 19(12) permitting transactions during a closed period provided that the tests in three bullet points are set out. The third bullet point is that the PDMR "can demonstrate that a particular transaction cannot be executed at another moment in time than during the closed period". This is not something that appears in Article 19(12) as a requirement and so we think should be deleted.

Paragraphs 6-9

In relation to exceptional circumstances, the technical advice does not reflect the fact that Article 19(12)(a) gives financial difficulty as just an example (using the words "such as") of a case that can be treated as "exceptional circumstances". The commentary in paragraphs 6-9 does not acknowledge this.

It would be helpful to make clear that exercise of options granted to managers and employees as part of their remuneration package (as well as sales of shares) can be allowed where there are exceptional circumstances – this will ensure that financial hardship, for example, can be addressed even where the PDMR holds unexercised options but no shares.

Paragraph 10

In relation to other types of transactions falling within Article 19(12)(b), the introductory sentence in paragraph 10 refers to the list in paragraphs 11 – 16 as being "non-exhaustive" which is helpful, but then the exceptions themselves are very narrow and detailed in their wording suggesting that it would be difficult to look beyond them.

Paragraph 11(b)(ii)

It would be very unusual for an employee share scheme (particularly one in which PDMRs may participate) to set out 'the amount of financial instruments awarded or granted, or the basis on which such an amount is calculated' as this would severely limit an issuer's flexibility to tailor its remuneration package to its circumstances from year to year and to comply with legal requirements such as the remuneration provisions of the Capital Requirements Directives. However, such schemes will often set out limits on the amount of awards that can be granted to any one person. Could it be made clear that this will be sufficient?

Paragraph 12

In relation to paragraph 12, we suggest "*which is free from specific circumstances to such an extent that any inside information that may exist cannot play a part at the time of the award*" is amended by replacing the word "*cannot*" by "*does not*" so that the test depends on what actually happens and not on the possibility of what might happen.

Paragraph 13

Some schemes (particularly nil-cost option schemes) have very short exercise periods. One month is quite common. The requirement for four months' notice would mean that these options would lapse during a close period when it might be possible for options with a longer exercise period to be exercised. There is no obvious rationale under the MAR for this difference of treatment.

The requirement to irrevocably agree to exercise four months in advance – just in case the company might be in a close period on the expiry date - will produce arbitrary results. However, assuming that the four-month notice period will not be changed, could it be made clear that, while the decision should be irrevocable by the PDMR, it would be permissible for the exercise not to occur in pre-defined circumstances and without reference to the PDMR - e.g. if the price of the shares were more than the exercise price at that time?

The giving of the notice of intention to exercise could arguably be described as a transaction in shares under paragraph 2(b) of the proposed guidance on the basis that the notice is effectively exercise of the option – just with delayed settlement. Could it be made clear that this is not the case and so the notice can be given during a closed period?

Paragraph 14

We think that the reference in MAR 19(12)(b) to saving schemes is broader than envisaged in paragraph 14 and suggest that paragraph 14 is redrafted as follows:

“Purchases of the issuer’s financial instruments under a saving scheme by a person discharging managerial responsibilities purchased pursuant to a regular standing order or direct debit or by regular deduction from that person's salary, or where such issuer’s financial instruments are acquired by way of a standing election to re-invest dividends or other distributions received, or are acquired as part payment of the person's remuneration without regard to the provisions of Article 19 of MAR, if the following provisions are complied with:

(a) the person discharging managerial responsibilities does not enter into the scheme during a closed period, unless the scheme involves the part payment of remuneration in the form of the issuer’s financial instruments and is entered into upon the commencement of the person's discharging managerial responsibilities employment or in the case of a non-executive director his appointment to the board;

(b) the person discharging managerial responsibilities does not carry out the purchase of the issuer’s financial instruments under the scheme during a prohibited period, unless the person discharging managerial responsibilities entered into the scheme at a time when the issuer was not in a closed period and that person is irrevocably bound under the terms of the scheme to carry out a purchase of the issuer’s financial instruments (which may include the first purchase under the scheme) at a fixed point in time which falls in a closed period;

(c) the person discharging managerial responsibilities does not cancel or vary the terms of his participation, or carry out sales of the issuer’s financial instruments within the scheme during a closed period; and

(d) before entering into the scheme, cancelling the scheme or varying the terms of his participation or carrying out sales of the issuer’s financial instruments within the scheme, the person discharging managerial responsibilities has received authorisation from the issuer in advance.”

Paragraph 15

Article 19(12)(b) specifically includes a reference to an exception for circumstances in which "the beneficial interest in the relevant security does not change". This is not reflected in the examples given except in relation to paragraph 15, where there is a very narrow reference to transfer between two accounts of the PDMR. This should be amended to reflect the wording of Article 19(12)(b).<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>
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<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>
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<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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