



Technical advice on possible delegated acts for the development of level 2 dispositions of the Market Abuse Regulation. March 2015.

On 3 February 2015, ESMA published a technical advice to the European Commission on possible delegated acts for the development of level 2 of Market Abuse Regulation No. 596/2014 (hereinafter "MAR"), in response to two formal requests (October 2013 and June 2014) by the European Commission (hereinafter "EC"). With the aim of enhancing market integrity and investor protection, MAR has wider scope than Directive 2014/57/EU on criminal penalties relating to market abuse or Market Abuse Directive (hereinafter "MAD"), as it includes more products, markets and trading strategies. The final position of the EC is not dependent on this advice, which has the same structure as the previous consultation on MAR (July 2014) and sometimes reflects the responses received, of which a summary has been added as Annex III, as well as ESMA's comments on those responses.

The document specifies the following aspects: indicators of market manipulation, minimum thresholds for the purpose of the exemption from the requirement to publicly disclose inside information, determination of the competent authority for notification of delays in public disclosure of inside information, types of managers' transactions subject to notification, and procedures for reporting of infringements.

1.- Indicators of market manipulation. (Art. 12.5 MAR)

Preliminarily, ESMA believes that the term "orders to trade" encompasses all types of orders, including initial orders, modifications, updates and cancellations, irrespective of whether they have been executed or not.

ESMA clarifies the practices and elements of the non-exhaustive list of market manipulation indicators laid down in Annex I of MAR, taking into account the technical development in financial markets and the new and broader scope of MAR. For this purpose, ESMA has prepared a non-exhaustive list of examples of practices deviating from usual practice and lacking apparent economic rationality. These practices should not be considered to constitute market manipulation per se but are indicators of such practice, and to analyse them, a proportionate approach should be followed, taking into account the nature and specific characteristics of the financial instruments and markets concerned. For some practices additional indicators have been identified, as they can relevantly clarify and illustrate them.

Their non-exhaustive nature means that other unspecified circumstances should be taken into account which may be considered to be potential market manipulation. On the other hand, some of these examples of practices might be considered legitimate if a person who enters into transactions or issues orders to trade may be able to establish that his/her reasons were legitimate and that they were in conformity with an accepted practice on the market concerned.

The manipulation of benchmarks is closely associated to the manipulation of benchmark underlyings, although specific examples of practices or indicators cannot be provided at this stage. As post-trade transparency becomes more widely available and consolidated with MiFID II, cross-product and cross-market manipulation

detection will be more successful.

2.- Minimum thresholds for the exemption of certain participants in the emission allowance market from the requirement to publicly disclose inside information. (Art. 17.2 MAR).

These thresholds, based on an external study commissioned by the Directorate-General Climate Action are set at 6 million tonnes of CO₂eq a year, or 2,430 MW rated thermal input. These thresholds are reviewed on a regular basis.

3.- Competent authority for notification of delays in public disclosure of inside information. (Art.17.3 MAR)

The competent authority for notification of delays in public disclosure of inside information is the Member State where the issuer is registered: a) if and as long as the issuer has equity securities which are admitted to trading in that Member State; or b) if and as long as the issuer does not have equity securities which are admitted to trading, provided that the issuer has any other financial instruments which are admitted to trading in that Member State. For an issuer not having equity securities which are admitted to trading in the Member State where the issuer is registered, or is from a third country, the competent authority is that of the Member State where: a) the issuer has equity securities which are admitted to trading for the first time; or b) the issuer has any other financial instruments which are admitted to trading if and as long as the issuer does not have equity securities admitted to trading in any Member State. Where the issuer has several financial instruments which are admitted to trading on several trading venues in more than one Member State, the competent authority is the competent authority of the most relevant market in terms of liquidity.

4.- Types of managers' transactions subject to notification. (Arts. 19.13 and 14 MAR)

Transactions in instruments related to indices or baskets (of indices or securities), and transactions in shares from Undertakings for Collective Investment in Transferable Securities (UCITS) and from Alternative Investment Funds (AIFs), will be subject to notification if the weight of the issuer's shares or debt instruments represents 20% or more of the composition of the index, basket or investment fund at the time of the transaction. In the case of funds (UCITS and AIF), it is necessary that clients know, or could have the knowledge of, the composition of the portfolios. Transactions by an AIF manager investing in that AIF are also subject to notification where that AIF manager does not act with full discretion.

Authorisations to trade on their own account or for the account of a third party during a closed period (30 calendar days before the announcement of the financial report) will be based on a case-by-case assessment of the reasoned written request demonstrating and describing the series of particular circumstances under which the sale of shares is the only reasonable alternative to obtain the necessary financing.

5.- Procedures for reporting of infringements. (Art. 32.5 MAR).

The mechanisms for reporting of infringements to the competent authorities include: a) secure procedures for the receipt of reports, to be described in the website of the competent authority, including information on the receiving person (telephone numbers, including whether conversations are recorded or unrecorded, confidential e-mail and post addresses); b) procedures for the protection of confidentiality of information and personal data according to EU law, although the reporting person should be informed that, exceptionally, confidentiality may not be ensured, for example in the context of judicial proceedings; c) procedures for the appropriate protection of employees against retaliation, discrimination or other types of unfair treatment. A regular review should be carried out, at least, every two years of the above procedures, taking into account the experience of other competent authorities.

Relevant links:

[ESMA's technical advice to the European Commission on possible delegated acts of the Market Abuse](#)

Regulation

Market Abuse Regulation (MAR)

First formal request for technical advice

Second formal request for technical advice