

ESMA's Consultation paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation

AMAFI's contribution

I. Introduction

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI has been following closely the revision of the Market Abuse Directive and welcomes the opportunity to answer ESMA's consultation on its consultation paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation.

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?*

AMAFI agrees that these examples are useful. Obviously, each of them will need to be considered in light of the specific circumstances of each case to determine if they should give rise to a suspicion.

AMAFI welcomes the classification of examples and practices according to each indicator, as it facilitates their use by firms. It however does not always agree with the choice made as to which examples pertain to which indicator (for e.g. example 1 of indicator 7, example 2 of indicator 6, examples 1 and 2 of indicator 4).

Example s) of § 13 refers to "qualified holding" without explaining its meaning. This concept should be explained or the wording clarified.

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?

AMAFI is of the view that examples specific to the commodities markets could have been provided, based on competent authorities' experience.

Q3: Do you consider that the practice known as "Phishing¹" should be included in the list of examples of practices set out in the draft technical advice?

No, AMAFI considers that it is not per se a market abuse practice, even if the information obtained through phishing could theoretically be used afterwards to commit a market abuse (we are unsure however if this has already been experienced by competent authorities). It is a fraudulent behaviour that should be sanctioned as such, not a market abuse behaviour.

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)?

These are in scope of MAR so, even though it is challenging to monitor OTC transactions, it is relevant to consider them in the context of inter-venue manipulation.

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.

AMAFI has not examined this question.

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?

AMAFI has not examined this question.

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.

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?*

AMAFI has not examined this question.

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?*

AMAFI has not examined this question.

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?*

AMAFI has not examined this question.

V. Managers' transactions

Q10: *Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?*

AMAFI has not examined this question.

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.*

AMAFI has not examined this question.

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.*

AMAFI has not examined this question.

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?*

AMAFI has not examined this question.

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)?*

AMAFI has not examined this question.

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?*

AMAFI has not examined this question.

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*

AMAFI has not examined this question.

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)?*

AMAFI has not examined this question.

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.*

AMAFI has not examined this question.

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.*

AMAFI has not examined this question.

