

28/5/2014

REQUEST TO ESMA FOR TECHNICAL ADVICE ON IMPLEMENTING ACTS  
CONCERNING THE REGULATION ON INSIDER DEALING AND MARKET  
MANIPULATION (MARKET ABUSE) ((EU)No XXX/2014)

With this mandate to ESMA, the Commission services seek ESMA's technical advice on implementing acts concerning the Regulation (EU) XXX/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (the "**Regulation**", "**MAR**").<sup>1</sup> These implementing acts should be adopted in accordance with Article 291 of the Treaty of the Functioning of the European Union (TFEU).

The Commission services reserve the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The mandate follows the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**").<sup>2</sup>

This request for technical advice will be made available on DG Internal Market's website once it has been sent to ESMA.

The mandate focuses on technical issues which follow from the **Regulation**. The Commission services are of the view the concerned implementing acts provided for by Article 32 (5) of this Regulation should be adopted so that they enter into application by 24 months following the entry into force of the Regulation in order to specify the procedures to enable reporting of actual or potential infringements of this Regulation to competent authorities, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data.

\*\*\*

The European Parliament and the Council have been duly informed about this mandate. The powers of the Commission to adopt implementing acts are subject to Article 36 of the Regulation and Regulation 182/2011/EU. Following these provisions, the Commission shall be assisted by the European Securities Committee with preparing the implementing acts.

## 1. Context

### 1.1 Scope

On 20 October 2011, the Commission published its proposal for a Regulation on insider dealing and market manipulation (market abuse). On 25 July 2012, the Commission published its Amended proposal for a Regulation on insider dealing and market manipulation (market abuse) (submitted in accordance with article 293(2) TFEU). On 24 June 2013 the European Parliament and the Council reached political agreement on a compromise text of the regulation in the trilogue. This compromise text was endorsed by COREPER on 26 June 2013. The Regulation was adopted by the European Parliament on 10 September 2013. The text of the Regulation, following the jurist linguists' revision, was

<sup>1</sup> Regulation (EU) XXX/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ, xx/xx/2014, <http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2078%202013%20REV%201>.

<sup>2</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. OJ L331/84, 15.12.2010, p. 84.

adopted by the Council on 9 April 2014 and was signed by the European Parliament and the Council on 16 April 2014.

The Regulation aims to update and strengthen the existing framework to ensure market integrity and investor protection provided by the Market Abuse Directive. The new framework will ensure regulation keeps pace with market developments, strengthens the fight against market abuse across commodity and related derivative markets, reinforces the investigative and administrative sanctioning powers of regulators and harmonises certain key elements while reducing administrative burdens on SME issuers where possible.

As for this formal mandate, certain elements of the Regulation need to be further specified in implementing acts to be adopted by the Commission. The implementing acts shall specify the procedures to enable reporting of actual or potential infringements of this Regulation to competent authorities, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data. The Commission services have already asked ESMA for technical advice regarding other aspects of the Regulation and issued an according mandate on 08/10/2013.

## **1.2 Principles that ESMA should take into account**

On the working approach, ESMA is invited to take account of the following principles:

- It should take account of the principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- The proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and create uniform conditions for the implementation of the Regulation by national competent authorities.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the implementing acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the implementing acts to better ensure their effectiveness. Moreover, where relevant it may indicate how the implementing act should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.
- ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by ESMA.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult interested parties (including financial market participants, practitioners, consumers and users of financial services, employees' representatives and non-governmental organisations) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the interested parties during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- ESMA is invited to justify its advice by identifying, where relevant, a range of technical options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its impact assessment. Where administrative burden and more generally compliance costs on the side of the industry could be significant, ESMA should aim at quantifying these costs.
- The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the implementing acts.
- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the implementing powers included in the relevant provision of the Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, which is accompanied by sufficient and detailed explanations for the advice given.
- ESMA should address to the Commission any question they might have concerning the clarification on the text of the Regulation, which they should consider of relevance to the preparation of its technical advice.

## **2. Procedure**

The Commission services would like to request the technical advice of ESMA in view of the preparation of the implementing acts to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

The mandate follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the Regulation 182/2011/EU and the ESMA Regulation.

The Commission services reserve the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The Commission services have duly informed the European Parliament and the Council about this mandate. The powers of the Commission to adopt implementing acts are subject to Article 36 of the Regulation and Regulation 182/2011/EU. Following these provisions, the Commission shall be assisted by the European Securities Committee with preparing the implementing acts.

**3. ESMA is invited to provide technical advice on the following issue:**

**3.1. The specification of procedures to enable reporting of actual or potential infringements of this Regulation to competent authorities, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data (Article 32(5) MAR)**

Article 32 of MAR addresses the reporting of infringements of MAR. In particular, it is provided that for the purposes of the Regulation, "*Member States shall ensure that competent authorities establish effective mechanisms to enable reporting of actual or potential infringements to competent authorities. These mechanisms referred to in Article 32 (1) MAR shall include at least:*

- (a) specific procedures for the receipt of reports of infringements and their follow up, including the establishment of secure communication channels for such reports;*
- (b) within their employment, appropriate protection for persons working under a contract of employment, who report infringements or are accused of infringements, against retaliation, discrimination or other types of unfair treatment at a minimum; and*
- (c) protection of personal data both of the person who reports the infringement and the natural person who allegedly committed the infringement, including protection in relation to preserving the confidentiality of their identity, at all stages of the procedure without prejudice to disclosure of information being required by national law in the context of investigations or subsequent judicial proceedings".*

According to Article 32(5) of the Regulation, the Commission shall be empowered to adopt implementing acts in accordance with Article 36(2), specifying procedures for competent authorities to establish effective mechanisms to enable reporting of actual or potential infringements of this Regulation to competent authorities, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data.

ESMA is therefore invited to provide its technical advice on how these procedures should be specified to meet all the stated objectives. The technical advice should take into account

national and EU legislation in this area, if any, and existing national and EU guidance and good practices, in particular but not exclusively:

- Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime of the Article 29 Data Protection Working Party under Directive 95/46/EC and

- the Communication from Vice-President Šefčovič to the Commission on Guidelines on Whistleblowing (SEC[2012] 679 final).

Some Member States as well as third countries have already legislation in place covering similar protection for persons being involved in the reporting of infringements which might also serve as valuable bases for the technical advice. Additionally, stakeholders (in particular non-governmental organisations and financial trade unions) have also voiced opinions on related topics in the past and could provide useful input to the technical advice.

A broad consultation on all possible aspects of reporting mechanisms and appropriate protective measures is necessary to allow for substantiated technical advice and hence for an implementing act covering all relevant topics. The Commission services therefore invite ESMA to consult – among others – on the following aspects:

(a) clear, complete and easily accessible information and advice, in particular about external possibilities to report infringements (i.e. outside an organisation, to competent authorities); secure communication channels for such reports: e.g. hotlines, online portals, compliance offices, ombudspersons; mechanisms to ensure thorough and timely follow-up on the report and to provide the reporting person with feedback on his or her report; possible further participation of the reporting person in the follow-up procedures; distinction between meaningful reporting of possible infringements as opposed to information already available in the public domain, unsubstantiated rumours or hearsay and abusive or malicious reports; possible consequences of unsubstantiated, abusive or malicious reports; handling of anonymous reports;

(b) common forms of retaliation, discrimination or other types of unfair treatment, such as dismissal, punitive transfers, harassments, reduction or loss of duties, status, benefits, salary or working hours, withholding of promotions, trainings, and threats of such actions; possible protection mechanisms against such actions: e.g. mechanisms for fair procedures and remedies (for both the reporting and reported person) including appropriate rights of defence; benefit from a waiver of liability for reporting (including the possibility to disregard loyalty oaths, confidentiality agreements and the like); sanctions and penalties for persons responsible for retaliation, discrimination or other types of unfair treatment;

(c) mechanisms to ensure the necessary confidentiality of identity of the reporting and reported person; proportionality and accuracy of data collected and processed through mechanisms of infringement reporting; compliance with data retention periods and notification requirements for data processing; protection of rights related to data processing (information about the collection of data, as well as rights of access, rectification and erasure of data); security aspects of the data processing operation; conditions for the management of reporting mechanisms (including limitations of cross-border data transferral).

#### 4. Indicative timetable

This mandate takes into consideration the expected date of application of the Regulation, the fact that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the implementing acts according to Article 291 of the TFEU. The powers of the Commission to adopt implementing acts are subject to Article 36 of the Regulation.

The Commission services are of the view that the implementing acts provided for by this Regulation and addressed in this mandate should be adopted so that they enter into application by 24 months following the entry into force of the Regulation. Therefore it is important to start preparatory work on these measures as soon as possible.

ESMA is invited to deliver the technical advice within eight (8) months after the entry into force of the Regulation.

The establishment of the deadlines for the work set out in this mandate is based on the following timetable.

<b>Deadline</b>	<b>Action</b>
Publication in the Official Journal of the European Union on 12 June 2014 (estimated)	Entry into force of the Regulation (the twentieth day following that of its publication in the Official Journal of the European Union).
8 months after the entry into force	ESMA provides its technical advice.
9 months after the delivery of the technical advice by ESMA (17 months after the entry into force of the Regulation)	Preparation, adoption of the implementing acts: In the preparation of the implementing acts, the Commission shall be assisted by the European Securities Committee.
At the latest 23 months following the entry into force of the Regulation	Publication in the Official Journal of the European Union (entry into force twenty days later).
24 months following the entry into force of the Regulation	Date of application of the Regulation and the implementing acts.