



European Securities and
Markets Authority

Opinion

Draft Implementing Technical Standards on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information



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Glossary and acronyms

EAMP	Emission allowances market participant as defined in Article 3(1)(20) of Regulation (EU) No 596/2014
ESMA	European Securities and Markets Authority
ITS	Implementing Technical Standards
MAR	Regulation (EU) No 596/2014 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
MTF	Multilateral trading facility
OTF	Organised trading facility
REMIT	Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency
RM	Regulated market
TD	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

1 Legal Basis

1. In accordance with Article 17(10) of MAR, ESMA shall develop draft implementing technical standards to determine:
 - a. the technical means for appropriate public disclosure of inside information by issuers, including SMEs growth market issuers, and by EAMPs; and
 - b. the technical means for delaying the public disclosure of inside information under Articles 17(4) and (5) of MAR.
2. This mandate was developed in the draft Implementing Technical Standard on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information that was submitted by ESMA to the European Commission in September 2015.

2 Background and Procedure

3. On 28 September 2015, ESMA submitted the draft implementing technical standard on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information (the ITS) to the European Commission pursuant to Article 15(1) of Regulation No (EU) 1095/2010 (the ESMA Regulation) and Article 17(10) of MAR.
4. In a letter of 25 May 2016, the European Commission indicated to ESMA its intention to endorse the draft ITS subject to certain amendments being made in accordance with Article 15(1) of the ESMA Regulation.
5. The letter presents the following modifications to be introduced in the draft ITS:
 - a. Article 2(2) of the draft ITS: deletion of the reference "*...in accordance with paragraph 1*" and the insertion of "*relevant media*" as appropriate dissemination channels (see Annex).
 - b. Recital 2 of the draft ITS: aligning the recital of the draft ITS with the reference to the "*relevant media*" that are mentioned in Article 2(2).
6. ESMA notes that the letter from the European Commission was received in excess of the three-month period foreseen in Article 15(1) of the ESMA Regulation.
7. Pursuant to Article 15(1) of the ESMA Regulation, further to this notification from the European Commission, within a period of six weeks ESMA may amend its draft ITS on the basis of the European Commission's proposed amendments and resubmit it in the form of a formal opinion. ESMA has to send a copy of its formal opinion to the European Parliament and to the Council.
8. In the interest of avoiding delays to the MAR implementation process ESMA has been able to submit this opinion ahead of the expiry of the six week deadline following the formal notification of 25 May 2016.
9. The Board of Supervisors has adopted this formal opinion in accordance with Article 44(1) of the ESMA Regulation.

3 Executive Summary

10. In the draft ITS on the technical means for disclosure of inside information under MAR submitted 28 September 2015, ESMA adopted an approach based on the active dissemination to the media of inside information in order to ensure orderly markets and

the protection of investors. ESMA also specified that, for the particular case of inside information concerning emission allowances or auctioned products based thereon, the technical means for disclosure of inside information under REMIT are appropriate for MAR disclosure purposes insofar as these means allow the communication to the media in accordance with the same requirements as the ones applicable to the technical means for the disclosure of inside information by the issuers of financial instruments.

11. In a letter dated 25 May 2016, the European Commission is questioning the ESMA approach in relation to EAMPs and is suggesting amendments to the draft ITS. The Commission is taking the view that the draft ITS submitted by ESMA is imposing an undue double disclosure of inside information on those EAMPs who will be subject to disclosure requirements under both REMIT and MAR and fails to consider the REMIT disclosure requirements as sufficient for the disclosure of inside information under MAR.
12. ESMA opposes the amendments suggested by the Commission. ESMA considers that these amendments would eliminate two essential features of the system: the active dissemination of inside information and the marking of that information as inside information under MAR. The absence of those features would damage the disclosure regime under MAR, which is aimed at protecting investors who will be investing in emission allowances and financial instruments related to them compared to if they were investing in any other financial instruments. The proposed amendments will expose investors in emission allowances and financial instruments related to them to more risks, notably in terms of accessibility of the information and confusion with regards to the information disclosed.
13. ESMA remains convinced that the initial wording of the draft ITS should be maintained and is therefore not proposing a revised draft ITS.

4 ESMA Opinion

14. ESMA understands that the Commission considers that the proposed amendments to Article 2(2) and to the related Recital 2 of the draft ITS on the technical means for disclosure of inside information by EAMPs, are necessary to avoid undue "double disclosure" by EAMPs, as they are also covered by the disclosure obligation under REMIT referred to in Recital 51 of MAR. That recital states that "*Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011, the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content.*"
15. In substance, ESMA understands that the proposed amendments to the draft ITS should ensure that the channels for disclosure of inside information concerning wholesale energy products used for REMIT purposes are sufficient to ensure compliance with the requirements of Article 17(2) of MAR to disclose publicly, effectively and in a timely manner inside information concerning emission allowances. The Commission stated that EAMPs' website-based disclosure would meet both the disclosure requirements under REMIT and MAR, arguing that Article 10(1) of Regulation (EU) No 1348/2014 on data reporting under REMIT provides that "web feeds" must be put in place for disclosure purposes.
16. On the latter argument, ESMA would like to note that the above mentioned Article 10(1) of Regulation (EU) No 1348/2014 only makes reference to the obligation for market participants disclosing inside information on their website or through service providers disclosing such information on their behalf, to provide "web feeds", for the purpose of the efficient collection of data by ACER.

17. However, in ESMA's view, Article 10(1) referred to above does not extend this obligation concerning "web feeds" to parties falling within the scope of Article 17 of MAR. Indeed, such an extension would not make sense, as in particular, Article 10(1) of Regulation (EU) No 1348/2014 is aimed mainly at facilitating ACER collecting inside information for the performance of its tasks and hence is not meant to serve the purpose of disclosure of inside information to the public in the context of MAR.
18. In addition, ESMA notes the argument of the Commission's letter that "*web feeds enable financial media, such as Bloomberg or Reuters to report the inside information contained on EAMPs websites in news sections*". In this regard, ESMA considers that the mere existence of financial media reporting on inside information disclosed on the EAMPs' websites and collected through web-feeds in place on these websites cannot be considered as a substitute to the obligation that the EAMPs have, in the first place; to disseminate either directly or indirectly, notably through the communication to media, with the view to reach a public as wide as possible.
19. As already highlighted in the final report on the draft technical standards under MAR (ESMA/2015/1455), the draft ITS is not meant to impose any double disclosure requirements. Moreover, ESMA remains fully convinced that the disclosure regime must ensure a high level of protection for investors.
20. In light of this, in the draft ITS submitted by ESMA in September 2015 it was considered appropriate to apply disclosure requirements and standards compatible to those set out in the TD to all issuers of financial instruments falling within the scope of MAR, irrespective of the type of trading venues on which such issuers requested admission or agreed to the trading of their financial instruments, i.e. RM/MTF/OTF. This would allow capitalising on the existing and reliable channels, already known by the market and the various actors involved in the dissemination of the inside information, and would avoid important resources being allocated to developing new and specific mechanisms for disclosure by MTF/OTF issuers.
21. ESMA notes that the draft ITS submitted outlines two elements which can be considered different compared to the basic REMIT regime: (1) the requirement to use disclosure channels that feature active dissemination; and (2) the requirement to identify the information as inside information under MAR.
22. With regard to the disclosure channels for inside information on emission allowances, noting that these instruments are now covered under the MAR, ESMA still considers that the standards for disclosure of inside information should be equivalent to the ones for issuers of financial instruments. This would allow investors not to be subject to different levels of transparency depending on the type of instruments concerned.
23. A crucial characteristic of the disclosure regime proposed by ESMA is that a channel of disclosure under MAR must have the ability to actively distribute the information with the goal to reach the public at large. In this respect, while MAR requires that inside information is actively disseminated to investors through the media (including regulatory information systems), REMIT does not require the dissemination of the information; the information can therefore be posted on a system without any active dissemination to the media. Therefore, the information concerning the publication of the inside information may either not reach the investors or reach only some of them. This situation can give rise to serious information asymmetries that cannot be accepted in developed financial markets from an investor protection perspective.
24. In addition to the need to ensure the important principle of equal treatment for investors, ESMA also considers that implementing active dissemination should not be regarded as a problematic issue. In this respect, from a technological point of view the vast majority of the platforms offer or are in position to offer at no extra cost the active dissemination element. This can simply consist of the forwarding of an automated email to a number of

recipients disseminating financial information every time new inside information enters the system. ESMA is of the opinion that this would not impose any disproportionate burden on the few dozens of companies subject to this requirement.

25. ESMA would like also to stress that the requirement to identify the information as inside information under MAR is an essential feature of the disclosure regime laid down in MAR as it provides investors with the ability to effectively distinguish the inside information under MAR from the information to be disclosed under REMIT. This is of the utmost importance considering the potentially large numbers of investors that, in the future, may invest in emission allowances and financial instruments linked to them (e.g. derivatives; investment funds units/shares; etc)
26. ESMA would like to point to the different nature of certain characteristics of inside information set forth in MAR and in REMIT. According to Article 7(1)(c) of MAR, one of the characteristics of the inside information is that, *“if it were made public [it] would be likely to have a significant effect on the prices”* of *“emission allowances or auctioned products based thereon”*. On the other hand pursuant to REMIT the relevant effect referred to above has to be assessed on *“the prices of wholesale energy products”*. For these reasons inside information under REMIT may not necessarily fulfil the criteria to be also classified as MAR inside information, and inside information within the scope of MAR related to the emission allowances or auctioned products based thereon may not be necessarily considered inside information according to REMIT.
27. ESMA notes that by deleting in paragraph 2 of Article 2 of the draft ITS the reference to paragraph 1 of the same article, the Commission intends not to include the need to identify the information as inside information for the purposes of MAR. The EAMPs that disclose under REMIT will not be required to mark some of their REMIT disclosures as inside information under MAR. Investors in emission allowances and derivatives thereof will thus not be able to differentiate inside information from all the other types of REMIT disclosures (technical incidents or changes without impact on the prices). Therefore, their assessment of available information will become more costly and complex and the clarity about what is the real inside information they should take into account will be reduced. This, in turn, will create a disadvantage between these investors and those investing in other financial instruments.
28. The inclusion of that requirement does not, in ESMA’s views, entail any “duplication of mandatory disclosures with substantially the same content” within the meaning of Recital 51 of MAR. Given the nature of the requirement described in paragraph 1 of Article 2 of the draft ITS is different from the one already provided under REMIT, ESMA is of the view that the use of the disclosure channels as proposed in the draft ITS does not constitute a duplicative reporting.
29. ESMA considers that no double disclosure requirement is being imposed and that EAMPs should disseminate inside information in accordance with the same standards as those applicable for the dissemination of inside information by issuers of financial instruments. In line with this approach, only an EAMP disclosing inside information under REMIT to a platform that also provides an active dissemination, and marking the information as inside information for the purposes of MAR, would fulfil the MAR disclosure requirements by reporting only once and would ensure an equal treatment of all EAMPs.
30. Finally, ESMA notes that among the circa 70 entities that will be considered as EAMPs under MAR, around 35 are large energy companies who are also subject to REMIT. From the perspective of orderly markets and investor protection, which are two of the three main objectives ESMA is mandated to pursue, the possible limited extra burden (i.e. selecting a REMIT platform that provides also an active dissemination and marking the information as inside information under MAR) for these few large companies should not prevail over the severe damage to the protection of a large numbers of investors that, in



the future, might invest in emission allowances and in products and financial instruments linked to them.

31. Consequently, ESMA does not agree with the amendments proposed by the Commission and considers the initial wording in the draft ITS as essential to ensure the objectives of orderly markets and investor protection that ESMA is mandated to pursue. Therefore ESMA maintains the drafting proposed in September 2015 as it fully takes into account the respective objectives of MAR and REMIT.