EFET Comments on Discussion Paper
ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

EFET Market Supervision Committee **27th January 2014**

The European Federation of Energy Traders (EFET)[1] welcomes the commencement of work on implementing measures to the Market Abuse Regulation (MAR) and is keen to engage with the European Securities and Markets Authority (ESMA) on this issue. In the paragraphs below we offer some comments on the ESMA Discussion Paper, which is open to stakeholder consultation.

Chapter II: Market Soundings

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

We consider Option 3 to be undesirable, because it calls for maintaining a list of a potential investor's 'general wishes', which seems redundant if there is also a requirement to ask for consent in relation to each individual transaction. We consider Option 1, which is transaction-based and therefore, always up-to-date, to be the best option.

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

In the context of carbon emissions it is very unlikely that one would receive inside information as a result of market sounding. In this market prices are mainly influenced by macro-economic information and EU Member States' policy decisions (e.g. ETS revision, nuclear phase out). To the extent that inside information has been a major concern in the carbon markets, those concerns have largely related to the release of verified emissions data after the first year of the scheme. Maintaining sounding lists and requiring post-sounding confirmations would impose a significant burden with very little benefit.

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

In the context of a recipient of information who has expressly stated that he does not wish to receive inside information, and who is already bound not to trade on any inside information he receives, it seems disproportionate to impose another burden to report the potential disclosure of inside information to the regulator. This is particularly true given that there are already requirements to report suspicious activity. Furthermore, this could generate a number of false-positives or reports which prove to be invalid.

Chapter III: Specification of the indicators of market manipulation laid down in Annex I of MAR

Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

The indicators in (f) and (g) should include an element of intent in order to indicate market manipulation, in the same way as 'activity' in Annex III (d) is a signal of market manipulation

[1] The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent, sustainable and liquid wholesale markets, unhindered by national borders or other undue obstacles. We currently represent more than 100 energy trading companies, active in over 27 European countries. For more information, visit our website at www.efet.org.

only if done 'in an effort to' manipulate, or if it is done, as in Annex IV (d), 'with no other apparent justification'.

Q48: Do you agree with the approach suggested in relation to OTC trading?

There is no reason why over-the-counter (OTC) markets should be seen as less transparent than regulated markets (RMs), multilateral trading facilities (MTFs) or organised trading facilities (OTFs), particularly since all derivatives transactions are reportable under EMIR, regardless of the marketplace. As such, when reviewing market practices, the Competent Authorities should consider AMPs in the same way, regardless where the traded activity occurs. To do otherwise will create different regimes which will increase uncertainty and could distort decisions on where and how firms trade.

Chapter IV: Accepted Market Practices

Q49: Do you agree with ESMA's approach in relation to entities which can perform or execute an AMP?

No. We do not agree with the argument that only the activities of firms covered by the Markets in Financial Instruments Directive (MiFID) are under sound supervision. In each specific market we see no difference between MiFID and non-MiFID firms with regard to detection of market abuse. Firms operating under a MiFID exemption are still regulated by their national Competent Authority and should therefore be included in the AMP provisions.

Chapter V: Suspicious Transaction and Order Reports

Q61: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

We are concerned that the two-week timeframe for submission of reports could result in over-reporting and could conflict with the provision in Paragraph 211, which suggests that the content of the report should be accurate and should allow the regulator to assess the validity of the suspicion. More time may be needed in certain circumstances to ensure accuracy of content.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?

Yes. The proposed information seems comprehensive. It may, however, be difficult to accurately compile information to such a level of detail in only two weeks' time.

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

A common template is welcome as it simplifies the compilation process. This can take the form of an electronic template or a set of guidance to be followed by the issuer. We would prefer ESMA to develop a common electronic template, provided that this does not cause delays or does not reduce the scope for standardisation.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

We agree with ESMA's five-year record-keeping requirement. However, we believe that the application of this requirement to near-misses adds a further level of complexity for reporting parties which has little added value. It will not remove the element of subjectivity, which is inherent in STR, but may substantially increase the number of records to be kept.

Chapter VI: Public disclosure of inside information and delays

Q70: Do you agree with this general approach? If not, please provide an explanation.

Yes. We support in particular the harmonisation of disclosure requirements for issuers and emission allowance participants.

Q71: Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

This solution seems reasonable. However, we firmly believe that information to be published under both the Regulation on Wholesale Energy Markets Integrity and Transparency (REMIT) and MAR by firms subject to these regulations should be disclosed only once. Disclosure under REMIT should discharge the firm of any disclosure obligations under MAR in relation to the same 'event' and vice versa.

Q72: Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.

Yes.

Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?

Yes.

Q74: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?

Whilst all could work if ESMA made the requirement sufficiently clear, we believe that the one identified under the Prospectus Directive would be simpler and less prone to ambiguity and misinterpretations.

Q75: What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by emission allowances market participants?

We consider that the emissions allowance market participants should report to their local regulator, in accordance with the provisions of other financial legislation, e.g. MiFID, and that it should be the regulators' responsibility to share information amongst themselves.

Q76: Do you agree with the approach to the ex post notification of general delays and the ways to transmit the required information? If not, please explain.

We consider that the notification ought to simply refer to the fact that there was a delay. Additional clarifications could be provided upon request from the Competent Authority. A written e-mail notification, using a template, would be practicable.

Q80: Do you consider necessary that common template for notifications of delays be designed?

It could probably facilitate the processing of notifications for both the issuer and the Competent Authority. However, it should not be too rigid and it should not preclude flexibility that may be necessary to ensure accurate disclosure.

Chapter VII: Insider list

Q84: Do you agree with the information about the relevant person in the insider list?

There is no added value in including personal details such as home address, mobile numbers and personal e-mail addresses. Indeed, this raises Data Protection issues. ESMA should also define more tightly the individuals that could be insiders, as potentially anyone has the scope to become a holder of inside information.

Q85: Do you agree on the proposed harmonised format in Annex V?

Yes, pending suggestion to remove some personal details, as discussed in Q84 above.

Q86: Do you agree on the proposal on the language of the insider list?

Yes. Use of English, in addition to the local language(s), in all communications between issuers and Competent Authorities should be required.

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

MS Excel is a simple and easily accessible solution.

Chapter IX: Investment Recommendation

Q107: Do you think that further disclosure on previous recommendations should be given?

The requirement to maintain and disclose a list of previous disclosures might make sense in the context of providing specific price-related investment banking recommendations to clients, but it would not be appropriate in the context of general market views expressed to counterparties.

Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

In the context of providing recommendations to professional and eligible counterparties who are sophisticated investors, a disclaimer stating that one may hold positions which are inconsistent with the recommendations provided should be sufficient to put the client on notice of potential conflicts. Traders should not be required to give more details of their positions which, in fast traded markets, may be immediately out of date anyway.