

27 August 2021

The European Securities and Markets Authority (ESMA)
201-203 rue de Bercy
CS 80910
75589 Paris Cedex 12
France

Submitted electronically

Re: ESMA Consultation – Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision

Dear Sir / Madam,

AFME and our members appreciate the opportunity to provide comments on this important consultation. However, we found the timing of this consultation period to be an issue given the proposals cover a wide area of important matters with comments requested in six weeks only in July and August, when many staff including from our member firms are on leave. This constituted a real operational challenge and could have impaired the quality and the exhaustiveness of our response.

Some of the proposals could have material impacts on banks and would constitute a significant policy change in determining whether certain information is price sensitive. In particular, we find the proposals in relation to P2G problematic, as mandatory publication could lead to misinterpretation by the market and reduce the relative capital buffers against what the market deems to be the binding requirement. The issue was well understood by the co-legislators in Capital Requirements Regulation 2, with Recital 64 specifically stating that the P2G is a capital target that reflects supervisory expectations and therefore should not be subject to mandatory disclosure.

A forced disclosure of P2G would trigger a change of view from the industry and investors. It could make P2G binding by way of market expectations, which could reduce the effective distance to the maximum distributable amount (MDA) (Article 104b paragraph 6 of Directive 2013/36/EU amended by Directive (EU) 2019/878 of 20 May 2019 ("CRD V")). This can further result in undesired outcomes and remove supervisory flexibility in defining the amount of P2G a bank needs to hold or to allow banks to operate under the P2G levels during exceptional circumstances. Binding disclosure could also reduce the flexibility banks have in managing their capital and adjusting to the changing P2G recommendations and targets set internally. In essence, it could become a market determined binding requirement above which banks would need to maintain a management buffer and therefore disclosure of it may result in a significant increase in effective capital requirements.

Until now, banks have not generally published their P2G targets because supervisory and regulatory authorities have publicly declared P2G to be non-binding. This means that a breach of P2G has no immediate consequences on banks' distributions and strategy. Specifically, it does not have any direct effect on triggering the automatic restrictions of the distributions nor on calculating the MDA. Therefore, AFME and our members disagree with the presumption developed in paragraph 3.4.4 that P2G is of a price sensitive nature and that it may not be price sensitive only in exceptional situations.

Finally, we note that the consequences of a prolonged P2G breach including from the supervisory dialogue should be regarded as a separate issue, independent of P2G. Changes of the bank's strategy require a separate test for disclosure under respective rules. Similarly, Article 124a(1)(e) does not make P2G price-sensitive per se, but only when executed through a P2R increase which is covered under the P2R section. The reference is therefore misleading in paragraph 124. Our key recommendations are to

delete the second sentence of the paragraph and to revise the entire section 3.4.4. under the presumption that the breach of P2G is not inside information but only conclusions from the supervisory dialogue.

Yours faithfully,

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Consultation response

ESMA Consultation – Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision

27 August 2021

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on **Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision**. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

AFME Responses to questions

Question 1: Do you agree with the proposed amendment to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds?

We agree with the proposed amendment (set out in point g of the list in Guideline 1) to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds.

We agree with the statement in paragraph 27 of the consultation that “the decision to carry out redemptions, reductions and repurchases of own funds instruments and the related share premium accounts directly relate to the institution’s financial instruments and, at a certain point in time in the decisional process, is to become precise information”.

We would, however like to make two important clarifications in respect of paragraphs 27 to 29:

- the request for authorisation may be made some months before the authorisation is received, and in practice there will typically be a further decisional process within the bank to decide whether and how to proceed. The decision as to whether to proceed may take into account a number of factors, including market trading levels and general market conditions. Accordingly, we consider that it is probable that the information only becomes precise when that further decisional process has been completed. The analysis of whether the information has become precise is any case highly fact dependent and will need to be assessed carefully by each institution on a case by case basis; and

The decision to carry out redemptions, reductions and repurchases of own funds instruments may or may not have a significant effect on the prices of those instruments. The analysis is highly fact dependent and will need to take into account multiple factors, including market expectations as to such redemptions, reductions and repurchases. It will therefore need to be assessed carefully by each institution on a case-by-case basis.

Question 2: Do you see other areas of interactions between MAR transparency and other supervisory frameworks where the same approach should be pursued?

We have not identified other areas of interaction between MAR transparency and other supervisory frameworks.

Question 3: Do you agree with the proposed amendment to the MAR Guidelines in relation to draft SREP decisions and preliminary information related thereto? [Art.17(4), point a, of MAR].

We support the proposed amendment (set out in point h of the list in Guideline 1) to MAR Guidelines.

We would, however, like to make similar points to those we have raised in our response to question 1. Whether or not a draft SREP decision is inside information is a highly fact dependent analysis which would take into account multiple factors, including the content of the draft SREP decision itself and any market expectations, and would, therefore, need to be assessed carefully by each institution on a case by case basis. It should be noted that institutions already assess whether draft SREP decisions constitute inside information on a case by case basis, as part of their ordinary course procedures.

Question 4: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2R?

Overall, we agree with the proposed amendments in relation to P2R, as set out in Guideline 3.

By way of background, AFME has a long-standing position of supporting P2R disclosure under prudential regulation as a means to increase transparency, and to standardise publication dates and formats. Moreover, P2R is already disclosed by SIs and its disclosure became mandatory for large institutions with the application of CRR2 in June 2021. We would, however like to comment on the suggestion in paragraph 103 regarding disclosure by the relevant Prudential Competent Authority. We consider that it is important that institutions are warned in advance prior to publication by the Prudential Competent Authority, in order to determine if further communication to the market by the institution is necessary. For example, in case the P2R and the SREP assessment remains unchanged, a publication by the Prudential Competent Authority might suffice. In case of unexpected changes to the SREP assessment, a more detailed supplementary disclosure by the bank may be necessary. As such, we would suggest excluding the word “simultaneous” from the wording in the consultation to avoid unnecessary requirements on banks.

Question 5: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2G?

We do not agree with the proposed amendments in relation to P2G for the following reasons. Firstly, and on the consistency between MAR and the prudential framework, it is worth highlighting that the Recital 64 of the Capital Requirements Regulation 2 explicitly states that the P2G is a capital target that reflects supervisory expectations and therefore should not be subject to mandatory disclosure.

Recital (64): Given that the guidance on additional own funds referred to in Directive 2013/36/EU is a capital target that reflects supervisory expectations, it should not be subject either to mandatory disclosure or to the prohibition of disclosure by competent authorities under Regulation (EU) No 575/2013 or that Directive.

Unlike the Pillar 1 and Pillar 2 requirements, the P2G is a non-binding supervisory recommendation. It provides guidance to banks, based on qualitative and quantitative supervisory assessment, how much capital supervisors expect banks to maintain to be able to withstand situations of severe financial stress. Since the stress-tests are already in the public domain, AFME and our members do not see a reason why the subsequent non-binding supervisory recommendations would also need to be made public. Until now,

banks do not generally publish P2G because supervisory and regulatory authorities have publicly declared P2G to be non-binding. This means that a breach of P2G has no immediate consequences on banks' distributions and strategy. Specifically, it does not have any direct effect on triggering the automatic restrictions of the distributions nor on calculating the maximum distributable amount (MDA) (Article 104b paragraph 6 of Directive 2013/36/EU amended by Directive (EU) 2019/878 of 20 May 2019 ("CRD V")). The consequences of a prolonged P2G breach including from the supervisory dialogue should be regarded as a separate issue, independent of P2G. Changes of the bank's strategy require a separate test for disclosure under respective rules. Similarly, Article 124a(1)(e) does not make P2G price-sensitive per se, but only when executed through a P2R increase which is covered under the P2R section. The reference is therefore misleading in paragraph 124. The second sentence of the paragraph should be deleted. Furthermore, the entire section 3.4.4. should be revised under the presumption that the breach of P2G is not inside information but only conclusions from the supervisory dialogue.

Secondly, we believe that MAR was not designed with the specific intent of making P2G public information. A forced disclosure of P2G would trigger a change of view from the industry and investors. It could make P2G binding by market expectations, reducing the effective distance to MDAs. This can further result in undesired outcomes and remove supervisory flexibility in defining the amount of P2G a bank needs to hold or to allow banks to operate under the P2G levels during exceptional circumstances. Binding disclosure could also reduce the flexibility banks have in managing their capital and adjusting to the changing P2G recommendations and targets set internally. In essence, it could become a market determined binding requirement above which banks would need to maintain a management buffer and therefore disclosure of it may result in a significant increase in effective capital requirements.

This would contradict the aim of the SSM to allow banks flexibility to operate below the P2G levels. For example, under the current conditions the ECB is determined to *"allow banks to operate below the P2G and the combined buffer requirement until at least the end of 2022, as clarified in July 2020. This leeway should continue to provide temporary capital and operational relief to banks during the coronavirus pandemic, enabling them to absorb losses and support the economy by providing credit to households, small businesses and corporates"*¹. Disclosure of P2G may therefore necessitate a review of the capital requirements legislation, which we do not believe could be the intention.

Thirdly, and regarding price sensitivity, paragraph 123 of the Consultation states that "As to the price sensitivity, despite P2G not being of a binding nature and not impacting the MDA of dividends and certain specific coupons, ESMA is of the view that it remains likely to be of a price sensitive nature". While AFME acknowledges that P2G *could* be price sensitive, we believe that ESMA goes too far in stating that P2G is "likely to be price sensitive", as highlighted under point d of Guideline 4. The assumption that P2G is inside information does not seem right and the principle and exception set by the updated guidelines should be reversed, i.e. the common situation is that P2G is not an inside information. In this context, we want to point out that:

- Given that (i) the EBA stress-tests' results, which serve as a basis for the determination of the P2G, are published and (ii) there is a significant move towards more transparency on the methodology of the P2G2, the market already knows the range of P2G a bank may be given by its NCA. As a result, the publication of P2G should not be price sensitive, unless there are unusual circumstances whereby the P2G level set by the relevant NCA substantially departs from the previous guidance and stress-test results.

¹https://www.bankingsupervision.europa.eu/press/publications/newsletter/2021/html/ssm.nl210818_4.en.html?utm_source=newsletter&utm_medium=email&utm_campaign=basu_newsletter_August_2021&utm_term=article_capital&utm_content=link

² ECB guide available at:

https://www.bankingsupervision.europa.eu/press/publications/newsletter/2021/html/ssm.nl210818_4.en.html

- The situations which are listed in paragraph 130 are not exceptional and represent the most common case:
 - On the 2nd bullet point as an example (“the breach of P2G is minor (...)”): for the vast majority of banks, which are well capitalised, they operate well above their P2G levels and, as a result, are not even close to breaching their P2G.
 - On the 3rd bullet point (“the communicated P2G is fully in line with market expectations”), this should be the case for nearly all banks since the P2G is supposed to be directly related to the stress-tests’ results which are public.

Therefore, the strong presumption developed in paragraph 3.4.4 by ESMA that P2G is of a price sensitive nature and that it may not be price sensitive only in exceptional situations appears to be incorrect. As a consequence, the ESMA proposal would result in disclosure constraints relevant only to a limited number of banks’ specific situation being imposed onto the whole sector. The cost / benefit of this approach is not justified in our view.

In case of a breach of P2G, the dialogue initiated between the supervisor and the bank may lead to measures whose nature and extent cannot be precisely determined at the time when the P2G is breached. Consequently, the initiation of the dialogue with the supervisor does not constitute in itself a Material Non-Public Information or inside information. The outcome of the dialogue (i.e. the measures taken to restore P2G) may be of very different natures depending on the circumstances. Whether this outcome eventually constitutes an inside information should only be assessed on a case-by-case basis according to Regulation (EU) 596/2014.

To summarise, for all the above reasons, but also and above all in order to respect the spirit and the wording of the European text of level 1 (“CRR2”), any obligation to publish P2G should be set aside and P2G should not be considered per se as an insider information. Therefore, we believe that additional guidance on this point is unnecessary. If ESMA nevertheless considers that guidance is necessary, AFME proposes to amend the wording in Guideline 4, point d, from “likely to be price sensitive” to “potentially price sensitive”. The stress-test results are already made public and AFME and our members believe that the results provide market with sufficient information. Additional disclosure of the P2G recommendations would in our view potentially result in undesired outcomes for both supervisors and banks, as we have described above.

Question 6: With regard to the examples listed in paragraph 130, do you agree with the examples of cases when P2G may not be price sensitive, and do you consider it useful to list these examples in the MAR Guidelines?

In these cases, we agree that the information is probably not price sensitive, although this would need to be assessed on a case-by-case basis.

We consider that it is useful to list these examples, noting that the list is non-exhaustive.

However, we think it is not right to state that these are exceptional situations. Indeed, the examples listed do not refer to exceptional situations but rather to common ones. That is one of the reasons why we think that only in exceptional cases is the P2G price sensitive; in most cases the P2G is not price sensitive.

Consequently, we propose to amend paragraph under Guideline 4 with the wording in italics below:

“Examples of situations where the information is probably not price sensitive:

- a. the P2G is in line with the institution’s current level of capital and the market price of the financial instruments already reflects this;
- b. the breach of P2G is minor and is unlikely to involve a major reaction by the institutions, such as a capital increase, as it can be addressed through other tools;

c. the institution's P2G is fully in line with market expectations, so no price impact is expected
These are illustrations and they do not constitute an exhaustive list".

Question 7: Do you see other cases where P2G may not be price sensitive?

As we stated under Question 6, the list is non-exhaustive.

Accordingly, there may be other cases and banks would need to assess them on a case-by-case basis.

Question 8: Do you agree with the proposed approach in relation to other supervisory measures?

We agree with the proposed approach.

Question 9: Do you see any other element that ESMA should consider in a potential amendment to its MAR Guidelines?

We have not identified any other element that ESMA should consider in a potential amendment to its MAR Guidelines.

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