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| Response Form to the Consultation Paper on Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision  |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **27 August 2021.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_MRGL\_1>. **Your response to each question has to be framed by the two tags corresponding to the question.**
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_MRGL\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_MRGL\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

All interested stakeholders are invited to respond to this consultation paper. This consultation paper is primarily of interest to the banking sector, but responses are also sought from any other market participant including trade associations and industry bodies, institutional and retail investors, consultants and academics.

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**General information about respondent**

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| Name of the company / organisation | Dutch Banking Association |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | Netherlands |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_MRGL\_0>

1.) As a general comment on the timing of the consultation, it should be noted that the publication of this consultation within the peak of the holiday season and the response period of six week do not contribute to generating responses from the industry and other stakeholders.
2.) A second general observation is that we believe it could be questioned whether the review of MAR, which resulted in the MAR Review report dated 23 September 2020 | ESMA70-156-2391, has resulted in clear indications that require an amendment of these ESMA Guidelines.

Under 226 of 5.3.1.1 of this MAR Review report it is stated: *“ESMA deems that no amendments to the conditions to delay disclosure of inside information are necessary.”*

Although under 228 of 5.3.1.1 ESMA indicated: *“… In light of this and considering the outcome of the consultation, ESMA is keen to consider a revision of its guidelines, in order to provide further clarity on the conditions that need to be met to delay disclosure of inside information and provide further practical examples in which disclosure may be delayed.”,* ESMA concluded under 244 of 5.3.2.2 as follows: *“With reference to the interaction between the obligation to disclose inside information under MAR and other requirements set out in the regulatory framework for credit institutions and investment firms, as indicated above, no major points were raised in the consultation. Considering the relevance of this topic, ESMA is conducting further research together with other European authorities, in order to assess if further guidance to market participants is needed.”*3.) Furthermore, we would like to emphasize that the authorization of ESMA to issue these Guidelines is pursuant to article 17 paragraph 11 limited to establishing a non-exhaustive list of legitimate interest of issuers, and of situations in which delay of disclosure of inside information is likely to mislead the public, as referred to in article 17 paragraph 4 under (a.) respectively under (b.). Therefore, ESMA is not authorized to pre-determine (or introduce very strong assumptions) what information qualifies as inside information as meant in article 7 MAR.

We therefore ask ESMA to explain the legal basis for amending the Guidelines as consulted in relation to the qualification of information as inside information.

<ESMA\_QUESTION\_MRGL\_0>

**Questions**

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

<ESMA\_QUESTION\_MRGL\_1>

We consider the proposed guideline on this point a helpful clarification.

In general we agree that the requirement to ask for an ad-hoc prior permission of the competent authority may be considered as a legitimate interest of the issuer for delaying disclosure of inside information in case the issuer is an institution subject to the CRR, an (early) redemption, reduction, repurchase, repayment or call of own funds instruments or a reduction, distribution of another own funds instrument is contemplated.

We noticed that the consultation paper and proposed guidelines do not discuss and cover the prior permission regime in relation to early redemptions and/or buybacks of MREL eligible liabilities instruments. This may be due to the assumption that price sensitive inside information is less likely to play a role for MREL eligible liabilities instruments (in most circumstances), but whether or not this is the reason for ESMA to not mention these instruments in the proposed guidelines is not made clear by ESMA.

Although ESMA does not propose a guideline that the early redemption or buyback of an Own Funds instrument should be presumed to be inside information, we are concerned that ESMA’s reasoning in the consultation paper could potentially be construed as such.

As mentioned above, we believe that it should remain to be assessed by the issuer on a case-by-case basis whether the early redemption or buyback should be regarded as inside information or not. The qualification as inside information may presumably be the outcome of the assessment in most cases of buybacks of shares and other equity instruments. However, this may be entirely different for example in the situation of a call of an Own Funds instrument when that call is already expected by the market and the instrument is trading at a price level which is around the price to be paid in case of an exercise of this call.

It would be helpful if ESMA explicitly states in the Guidelines that qualification of the decision to carry out redemptions, reductions and repurchases of own funds instruments as inside information should remain to be assessed by the issuer on a case-by-case basis.

<ESMA\_QUESTION\_MRGL\_1>

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

<ESMA\_QUESTION\_MRGL\_2>

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<ESMA\_QUESTION\_MRGL\_2>

1. : Do you agree with the proposed amendment to the MAR Guidelines in relation to draft SREP decisions and preliminary information related thereto?

<ESMA\_QUESTION\_MRGL\_3>

In general we agree that if the issuer is an institution subject to the Pillar 2 SREP and has received a draft SREP decision or preliminary information related thereto which will become final at a later stage upon completion of the decision-making process of the Prudential Competent Authority, there is a legitimate interest for the issuer for delaying disclosure of inside information. ESMA concludes (see 143) that *“The institutions receiving their SREP decision will have to assess on a case-by-case whether any other supervisory measure received from their Prudential Competent Authority represents inside information, going through the limbs of the relevant MAR definition.”*

<ESMA\_QUESTION\_MRGL\_3>

1. : Do you agree with the proposed amendments to the MAR Guidelines in relation to P2R?

<ESMA\_QUESTION\_MRGL\_4>

Guideline 3, as now proposed by ESMA, introduces an unnecessary strong presumption that P2R should be regarded as inside information. We believe it goes beyond the ESMA’s authority to introduce such presumptions and that the question whether P2R concerns inside information should be assessed on a case-by-case basis by the issuer.

<ESMA\_QUESTION\_MRGL\_4>

1. : Do you agree with the proposed amendments to the MAR Guidelines in relation to P2G?

<ESMA\_QUESTION\_MRGL\_5>

From a conceptual perspective P2G is not a requirement and not formally tied to for example the MDA/L-MDA/M-MDA framework. Guideline 4, as now proposed by ESMA, introduces an unnecessary strong presumption that P2G should be regarded as inside information. We believe it goes beyond the authority of ESMA to introduce such presumptions and that whether P2G concerns inside information should be assessed on a case-by-case basis by the issuer. We emphasize that it’s important that P2G should continue be regarded as guidance. P2G as a supervisory practice was only relatively recently codified and is not and has never been intended as a requirement, nor should it be construed as such. We also note that unlike P2R, at this moment it is not considered market practice to disclose P2G. Our concern is that what ESMA is proposing here does not contribute to a good understanding and application of the intended differences between P2R and P2G.
<ESMA\_QUESTION\_MRGL\_5>

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

<ESMA\_QUESTION\_MRGL\_6>

See our response to Q5 above.

<ESMA\_QUESTION\_MRGL\_6>

1. : Do you see other cases where P2G may not be price sensitive?

<ESMA\_QUESTION\_MRGL\_7>

See our response to Q5 above.

<ESMA\_QUESTION\_MRGL\_7>

1. : Do you agree with the proposed approach in relation to other supervisory measures?

<ESMA\_QUESTION\_MRGL\_8>

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<ESMA\_QUESTION\_MRGL\_8>

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

<ESMA\_QUESTION\_MRGL\_9>

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<ESMA\_QUESTION\_MRGL\_9>