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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 | European Association of Public Banks |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | Europe |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_MRGL\_0>

We welcome the opportunity to comment on the proposed expansion of ESMA’s MAR Guidelines to treatment of outcomes of the SREP process. Also, we support the approach to take this as an opportunity to review the existing MAR Guidelines on the delay of disclosure of inside information.

That said and without pre-empting our more detailed responses to the specific questions raised in the CP we would like to alert ESMA not to assume inside information too schematically with respect to certain typical pieces of information resulting from the SREP process. While there may indeed be information that one would usually expect to constitute inside information, the guidelines should be drafted in a way that still allows to take a case-by-case assessment that may result in an exemption from the rule with a view to the specific peculiarities of the individual case. Furthermore, we feel that the proposed amendments to the guidelines result in unreasonable outcomes for issuers which are subject to the MAR disclosure regime but have not issued shares admitted to trading on a regulated market. Such outcomes are likely to impose additional administrative burden on such issuers.

Also, P2R and P2G should not be declared to be per se inside information. Where an institution fulfils all requirements in that respect and no supervisory action is required, we do not see a need to impose a strict requirement to disclose that fact according to Art. 17 MAR.

We believe that ESMA should appropriately acknowledge in the MAR Guidelines that when it comes to P2R and P2G, price sensitivity in respect of different types of instruments is different. And accordingly they should build in more flexibility to take into account issuers who are subject to MAR disclosure regime but are not issuers of listed shares.

<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 generally agree with the amendment. In particular, we believe that the explicit prohibition of an announcement of redemptions, reductions and repurchases of own funds instruments prior to the approval of the Prudential Competent Authority makes it obvious that compliance with such a legal requirement must constitute a “legitimate interest of the issuer”. This is even more required with regard to the understanding that the CRR definition of own funds implies that institutions should not even raise any expectation to redeem those instruments in the market (such as announcing such a redemption with a proviso such as “subject to regulatory approval”.

However, in light of the foregoing it appears hardly conceivable that *delaying* the publication of the intention to redeem own funds instruments as long as the approval by the Prudential Competent Authority is pending could ever mislead the public – where, on the contrary, it results from the prudential, regulatory framework that *disclosure* of a proposed redemption is generally deemed to be misleading as long as it is not approved.

Therefore, paragraph 41 of the CP – being a nearly verbatim repetition of Art. 17 (4) (b) MAR appears to us being misleading itself. We believe that the scenario described in paragraph 41 of the CP is not possible in light of the foregoing regulatory requirements. Therefore paragraph 41 should be corrected in ESMA’s forthcoming final report.

Furthermore, it should be considered in the guidance that generally the information that the institution considers a redemption, reduction or repurchase of own funds is not yet of a precise nature if the approval of the competent authority is still pending. Pending such approval it cannot be assumed that, when and to what extent the proposed redemption (et cetera) may reasonably be expected to come to occur and, hence, it is not specific enough to enable a conclusion to be drawn as to its possible effect on the prices of the respective financial instruments or related derivatives. By the same token, even if the preparation of such a redemption were to be seen as a protracted process, the mere plan would, by itself (Art. 7(3) MAR), hardly satisfy the criteria of inside information as set ut in Art. 7 MAR, notably as referred it cannot be deemed to be sufficiently precise information. Therefore, in most of these cases a delay of the publication of inside information will not be required. This is in line with the CRR requirements which do unconditionally not allow a public announcement prior to the approval of the competent authority; i.e. irrespective of any market rumours (which are not uncommon in the context of a redemption of capital instruments, e.g. prior to a specific call date of an AT1 or T2 instrument). Due to the fact that in practice it is difficult to determine whether a rumour is sufficiently accurate to indicate that the confidentiality of the information is no longer ensured, there is a significant risk that the issuer has to announce the redemption plans prior to the approval of the competent authority when relying on Art. 17(4) MAR. Also, it should be considered that the application for approval to the competent authority shall be submitted at least three months (or even four months based on the new EBA RTS) prior to the announcement to the holders of the respective instruments. Should the decision to send an application for approval to the competent authority already be considered as inside information (i.e. sufficiently precise information) the issuer would have to delay disclosure of the proposed redemption to the public for three/four months. This would prevent any issuance activity of the issuer during this entire period. Such a restriction of capital markets funding would constitute a disproportionate limitation for the issuer, which in practice would not be manageable. In light of this and based on the definition of inside information, particularly the requirement of inside information to be of a precise nature, it should, therefore, clearly be the exception that plans to redeem capital instruments are considered to be inside information prior to the approval of the competent authority.

<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>

Generally, where the implementation of a project, decision or transaction is dependent on the approval of a committee, third party or authority, it appears appropriate to consider expressly permitting a delay in accordance with Art. 17 (4) MAR. Otherwise pre-mature disclosure before such approval is granted may mislead the market and put unjustified pressure on the party whose approval is being sought<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 principle, we agree that the amendment provides a useful clarification. It may also give the opportunity to revisit the MAR Guidelines in terms of the delay relating to decisions taken by the management body of an issuer which need the approval of another body of the issuer in order to become effective. <ESMA\_QUESTION\_MRGL\_3>

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

<ESMA\_QUESTION\_MRGL\_4>

P2R are already published at the earliest convenience. This indicates that obligation to publish P2R is not a problem as P2R is regularly published already. The requirement to treat P2R as inside information would however result in additional administrative burden, whereas with respect to bond issuers P2R does not necessarily constitute price sensitive information and therefore inside information. The additional administrative burden is because MAR sets out very specific procedures for delaying the publication of insider information. There would also be a need to ensure that all individuals privy to inside information prior to its publication are entered into an insider list. Conceptually, we support the view that P2R *can* constitute inside information. However, we do not think the generality of the proposed amendments of the guidelines and of the underlying considerations is appropriate. Rather we are of the view that generally assuming a “high likelihood” that P2R are price sensitive and, hence, deemed inside information except for an unspecified very limited number of cases should be reconsidered.

Where the CP points out in paragraph 107 “*As to the price sensitivity, P2R are of binding nature and linked to automatically triggered supervisory measures in the case of a breach, and with the potential to directly impact the maximum distributable amount (MDA) of dividends and certain specific coupons. Therefore, ESMA is of the view that P2R is highly likely to be of a price sensitive nature*.” it seems to mix various stages of a P2R assessment. Firstly, a P2R assessment by the competent authority should not per se constitute inside information or likely constitute inside information. Rather, it only has the potential to constitute inside information of the P2R assessment as determined by of the competent authority if it deviates from the current assessment by the institution itself. Even in the case of such a deviation, it appears more likely than not that the P2R assessment is not price sensitive if the deviation is minor, does not have a relevant impact of the required capitalisation and the institution’s current level of capital is still sufficient. In this case there is no breach of P2R and no supervisory measures are triggered.

If - despite the capital still being sufficient - the change in P2R is significant, an assessment would become necessary on a case-by-case basis if such new P2R constitutes inside information. However, if that change is just the reflections of the development of the economic situation of the institution and such development is already known to the public, P2R adjusted to that development seem unlikely to constitute inside information for themselves.

The assumption made by ESMA that P2R is “highly likely” to be price sensitive, and therefore to constitute inside information only seems correct if, as a result, the institution’s level of capital actually is insufficient and supervisory measures are triggered.

ESMA’s considerations in connection with P2G (especially in item 130) indicate a more differentiated approach to Art. 7 (1) MAR than in the context of P2R and should also be applied to P2R.

In our view, the main issue with the proposed amendments in respect of P2R and P2G is that the guidelines seem to introduce a very one-size-fits-all approach for the evaluation of price sensitivity. Although it is not explicitly mentioned in the draft guidelines, ESMA seems to assume that when assessing whether information (if made public) is likely to have a significant effect on the price of the issuer’s financial instrument, the relevant financial instruments in all cases would be shares. This assumption appears e.g. in paragraphs 108 and 125-126 of the Consultation Paper. As we know, the disclosure requirements in MAR apply to issuers of all financial instruments admitted to trading on a regulated market. There are issuers (including several EAPB members) which are in scope of MAR only because they have issued listed bonds but do not have their shares listed on any regulated market. For these issuers, the proposed amendments can result in outcomes that are not reasonable or well-reasoned. This is because financial instruments are not created equal when it comes to price sensitivity. Information can be deemed to have a significant impact on share price whereas that same information may have no impact at all on bond prices. In other words, share prices are generally (a great deal) more sensitive to new information than bond prices.

In the context of P2R, the proposed amendments to the MAR Guidelines would seem to make it rather difficult for an issuer to reach a conclusion that P2R does not constitute price sensitive information and therefore inside information. For many a bond issuer such a conclusion might not reflect reality very well. For example under circumstances where a bond issuer's capital adequacy exceeds its P2R, it would be unlikely that the P2R, when made public, would have a significant impact on the price of the bonds issued by that issuer. The likelihood would become smaller still if the issuer's capital adequacy exceeds its P2R with a significant margin. Under the current MAR disclosure regime, it could be considered rather reasonable for a bond issuer to reach a conclusion where it does not consider its P2R to constitute inside information. The proposed amendments to the MAR Guidelines would change that.

<ESMA\_QUESTION\_MRGL\_4>

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

<ESMA\_QUESTION\_MRGL\_5>

Conceptually, the proposed amendments to the MAR Guidelines in relation to P2G (draft Guideline 4) seems much more differentiated and, hence, appropriate and fit for purpose than draft Guideline 3. However, the way rule and exceptions are drafted seems misleading. Firstly it does not appear correct to generally state that P2G should (always) be considered inside information. Like with P2R, P2G is not per se inside information. Rather it only has the potential to constitute inside information if the criteria of Art. 7(1)(a) MAR are met – which is not necessarily the case, but should rather be the subject of a case-by-case analysis. This is rightly stated in paragraph 119 of the CP, but not so reflected in the first paragraph of draft Guideline 4.

Similarly, ESMA’s view expressed in paragraph 123 stating that P2G is likely to be of a price sensitive nature appears too undifferentiated. If the P2G of an institution is as it had been determined by the institution itself and/or as expected by the market, it is not price sensitive.

Even in the case of a deviation from the actual capitalisation and P2G as determined by the competent authority, P2G should not generally constitute inside information. In this respect the second paragraph of Guideline 4 referring to a case-by-case analysis is useful. The remainder of Guideline 4, in particular the first paragraph, should be adjusted and made consistent therewith. This would also be in line with paragraph 125 of the CP pointing out that even in the case of a breach (i.e. undercapitalisation compared to P2G) the impact thereof would very much depend on the circumstances, especially the reaction by the competent authority, the underlying reasons and any potential supervisory actions as well as their expected impact on the institution’s share price.

The third paragraph of Guideline 4 “*Price sensitivity should not be excluded even where the institution’s current level of capital is higher than its P2G*” in our view addresses a rare exception, if any. The related elaborations in paragraph 129 of the CP appear misleading. Firstly, having a higher capitalisation than the P2G is not a breach. Secondly, the extent to which market participants perceive a higher capitalisation as an “overcapitalisation” and, thirdly, the extent to which this will be relevant for their investment strategy or even be potentially price sensitive, will depend on the circumstances, particularly the amount of the capital exceeding P2G. Also, whether *an(y) individual* investor would likely use such information as part of its investment strategy is not the crucial criterion under Art. 7 MAR. Rather Art. 7 (4) MAR states that information would be likely to have a significant effect on the prices of financial instruments […] if a *reasonable* investor would be likely to use such information as part of the basis of his or her investment decisions.

In the context of P2G, the underlying problem (the failure to recognize differences in price sensitivity between shares and bonds) seems to be the same as with P2R. With respect to P2G bond issuers could face additional obligations under MAR by the amendment of the Guideline, whereas the information might not qualify as inside information at all based on the criteria in MAR. The proposed amendments however include helpful aspects to mitigate this effect, such as that the draft states that P2G might not be price sensitive information where "the P2G is in line with the institution’s current level of capital and the market price of the financial instruments already reflects this".

In the specific case of national promotional banks, where they are bond issuers, there would be an additional negative effect when P2G has to be considered as inside information per se where this is not the case on the basis of the MAR criteria. In the case of highly-capitalised NPBIs, the P2G at first sight is at odds with the P2R and needs thorough explanation to be understood by investors and other market participants. The explanation will be very technical and chances of misinterpretation are high. The obligation to disclose this type of information under MAR, is only justified when the MAR criteria for inside information are factually met.

However, if the draft amendment results in expectation that P2G should in any case be considered as inside information, immediate publication is likely to prejudice our legitimate interest when there is no time to prepare and provide proper explanation.

<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>

It seems useful to publish the examples in paragraph 130. Hence, we welcome that they are also expressly mentioned in Guideline 4. That said, the framing of the list of examples should be clarified. Firstly, we object to the notion that “there is a general expectation that P2G is price sensitive.” In our view this is not in line with the definition of inside information under MAR. Moreover, we do not think that a reasonable investor (Art 7 (4) MAR) would specifically use P2G as basis for his investment decision if the issuer is in compliance with P2G and its capitalisation is also in line with market expectations. Further, for the same reason, we object to the statement “*Outside of those exceptional cases, P2G is expected to be considered as inside information*”, as set out above. In addition, apart from the question of price sensitivity this sentence does not consider the fact that the definition of inside information in Art. 7 (1) MAR requires that such information has not been made public. By the same token, the general assessment of these „exceptional circumstances” should be made stronger as these situations would usually not be price sensitive and, hence, “may not” should be replaced by “are in general not deemed price sensitive”. Lastly, we would like to add to these examples that in the case of specific business models, such as public development credit institutions, there should be room for proportionality in immediate disclosure when it comes to possible differences between the P2R and the P2G that are difficult to explain.

<ESMA\_QUESTION\_MRGL\_6>

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

<ESMA\_QUESTION\_MRGL\_7>

Generally, we believe that the concept of the guidelines should be amended. P2R and P2G should not in itself be deemed inside information, but rather only if an institution’s actual capitalisation falls significantly short thereof and supervisory action is taken with a view to such gap being closed.

<ESMA\_QUESTION\_MRGL\_7>

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

<ESMA\_QUESTION\_MRGL\_8>

Generally, we believe that the concept of the guidelines should be amended. P2R and P2G should not in itself be deemed inside information, but rather only if an institution’s actual capitalisation falls significantly short thereof and supervisory action is taken with a view to such gap being closed.

<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>

We welcome the opportunity to review and comment on the existing MAR Guidelines and to propose amendments. In particular, we see a need of amendment with regard to (i) the approval of a corporate organ other than the management body in a “two-tier board structure” , (ii) ongoing negotiations between the issuer and supervisory authorities, especially in the case of cartel law infringements and (iii) the recovery and resolution of credit institutions and investment firms.

Firstly, for issuers incorporated in jurisdictions that follow a so-called “two-tier board structure” such as Germany or Austria the ability to delay the public disclosure of inside information with a view to a pending approval of a corporate organ other than the management body (especially the supervisory board of a German or Austrian stock corporation) is important not only to avoid the risk that a projects or agreement that is the subject of such pending approval may be jeopardised as a result of the issuer being forced to pre-mature disclosure. Therefore, it is generally helpful that this situation is already addressed in the existing MAR Guidelines, but in our view the guidelines should expand the ability to delay publication.

Currently, the way this example for a situation where “immediate disclosure is likely to prejudice the legitimate interests of the issuer” appears to be drafted too narrowly. The wording of condition paragraph 8 lit. c item “i” is obviously aligned to Recital 50 MAR. However, we do not believe that the wording of a recital should necessarily limit the interpretation of “legitimate interests of the issuer”. Moreover, we believe it is important that the disclosure requirement under Art. 17 MAR does not hinder the members of a supervisory board to fulfil their duties under applicable corporate law with due care. The supervisory board must be able to properly analyse the proposal to be approved, to take expert advice if it deems that necessary and to have a discussion before taking a decision. Forcing the supervisory board to rubber stamp a decision of the management board in a rush would not be appropriate.

Also, we believe that the emphasis on “the correct assessment of the information *by the public*” should not be perceived as being a conclusive description of the “legitimate interests of the issuer”. If a project or agreement were disclosed before the supervisory body could take a decision, such decision would inevitably be prejudiced by a prior disclosure. The expectation by the public that an announced project will be implemented and the reputational and potentially also economic damage for the issuer if it nevertheless failed or were delayed because the supervisory body does not approve it would result in an inappropriately high hurdle for the supervisory body to object or to postpone its decision (e.g. in order to seek further clarification or information). Hence, disclosure prior to the decision by the supervisory body would set an incentive for that body to waive the project through.

As a result, the way paragraph 8 of the MAR Guidelines is drafted could impair the proper function of the supervisory body in the issuers as it is provided in the applicable corporate governance system.

Therefore, we would welcome if paragraph 8 of the MAR Guidelines were clarified in a sense that enabling a dutiful and proper decision making process of the supervisory body is legitimate interests of the issuer to delay disclosure of inside information according to Art. 17 (4) MAR, it being understood that the issuer should take the necessary organisational measures to enable the members of its supervisory body taking their decision in due course, it being recognized that such decision has to be taken on an informed basis and upon due consideration of necessary expert advice.

Secondly, we would like to take the opportunity to refer to a difficulty in the application of the obligations under Article 17 MAR in the context of a resolution scenatio and the obligations arising from the BRRD. Article 81 et seq. BRRD provide for detailed notification and communication obligations of institutions and authorities in a resolution scenario, including the requirement of the resolution authority to publish the resolution order or a notice summarising the effects of the resolution action after the resolution action has been taken (Article 83 (4) BRRD). This communication framework outlined in the BRRD is required to ensure the effectiveness of resolution actions. Article 17 MAR, in particular a publication requirement prior to a decision of the resolution authority on resolution actions, conflicts with these provisions. Although MAR provides the possibility to delay publication of inside information to preserve financial stability with the approval of the competent regulator (Article 17 (5) MAR), this possibility of delay ceases once there appear to be precise rumours in the market. Thus, Article 17 MAR could amount to an impediment to resolution as soon as rumours around the financial soundness and the likelihood or reaching the point of non-viability arise. In such a situation a strict application of Article 17 MAR may result in a disruotion of the financial market the integrity of which it is supposed to protect. In light of this, the specific notification and communication provisions in the BRRD should prevail in a resolution scenario and Article 17 MAR should not apply in these special cases.

<ESMA\_QUESTION\_MRGL\_9>