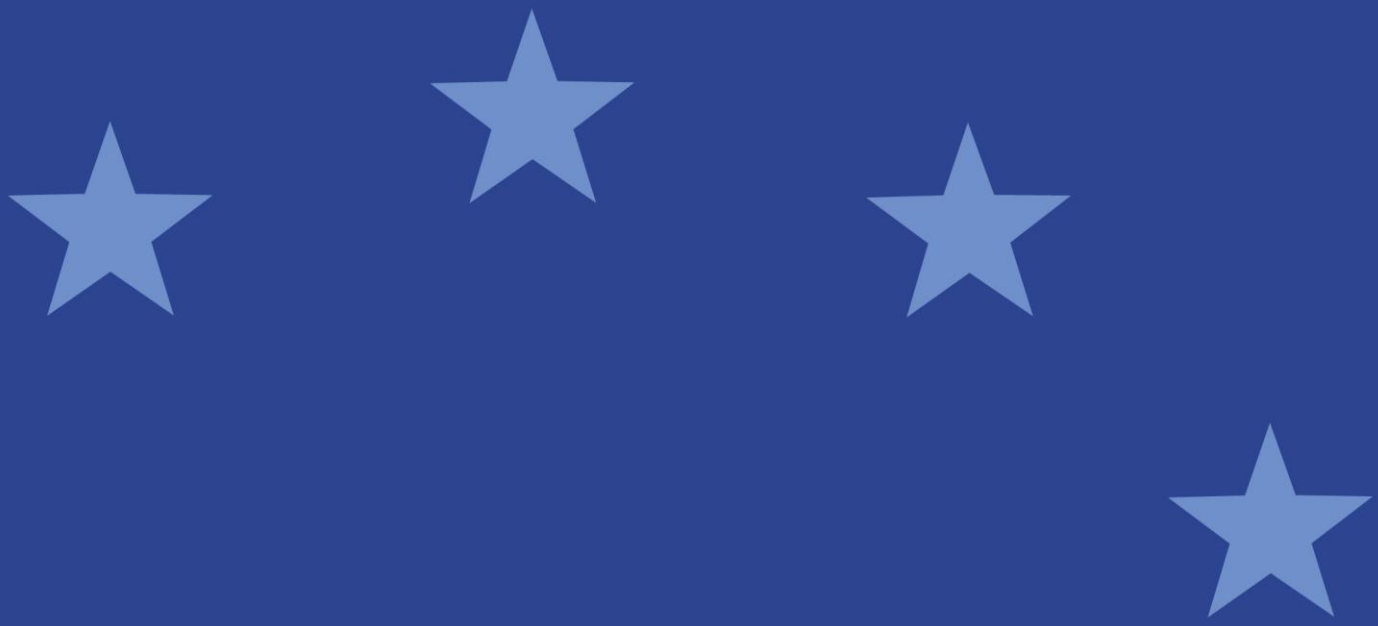
esma European Securities and Markets Authority

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 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 under the heading 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.

General information about respondent

Name of the company / organisation	European Banking Federation
Activity	Banking sector
Are you representing an association?	☒
Country/Region	Belgium

Please make your introductory comments below, if any.

<ESMA_QUESTION_MRGL_0>

As a matter of introduction, the European Banking Federation (EBF) would like to highlight the following key points of our response, which we will elaborate on under the various questions:

- Regarding the disclosure of **decisions regarding redemptions, reductions and repurchases of own funds instruments**, the EBF would like to state this information should only be treated as inside information once the authorisation of the Prudential Competent Authority has been granted, and, in addition, the institution has sufficient certainty that the redemption, reduction and repurchase of own funds will take place. The same reasoning should apply to other decisions where the approval of a committee, third-party or authority is still pending.
- Regarding the disclosure of **draft SREP decisions**, it should be noted that draft SREP decisions in the view of the EBF do not yet meet the requirement for precision to be qualified as inside information. It is only that they can be seen as representing precise information once the dialogue with the supervisor has been concluded and the final SREP letter is received, which also details the measures that the bank has to comply with in the end. Other supervisory measures (question 8 of the consultation paper) should be subject to a case by case assessment.
- Regarding the **disclosure of the Pillar 2 Requirement (P2R)**, the EBF would like to stress that there is already extensive disclosure of this information as part of the Pillar 3 disclosures. A case by case assessment about the actual price sensitivity of this information is a more appropriate approach.
- Regarding the **disclosure of Pillar 2 Guidance (P2G)**, the EBF considers that as a matter of principle P2G should not be considered as inside information, due to the fact that this is a non-binding requirement. P2G does not have any impact on the maximum distributable amount (MDA) of an issuer. Instead, a non-disclosure of this information would ensure that the P2G remains an important instrument in the supervisory dialogue. This is best accomplished if it remains confidential and also aligned with the spirit of the regulation. Finally, it is also important to remark that is a very common situation that institutions meet their P2G and that those situations should not be considered as exceptional.
- Lastly, **where information needs to be assessed on a case-by-case basis** regarding its potential status as inside information, it is important to also reflect on the issuer's responsibility to assess this. Therefore, we would hope that this could also be reflected better in the language of the ESMA communication.

<ESMA_QUESTION_MRGL_0>

Questions

Q1 : 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 understand the attempt to coordinate prudential supervision rules with MAR. However, we are concerned about the qualification as inside information of the decisions to redeem, reduce and repurchase own funds taken by the issuer and subject to the authorisation of the Prudential Competent Authority. In our view, the decision to redeem, reduce and repurchase own funds instruments subject to the Prudential Competent Authority's authorisation lacks the certainty, which is a prerequisite for the precision of the information required by MAR. The information cannot be precise before the issuer receives the authorisation. However, even in this case there may be uncertainty about the operation, for example, due to market conditions.
Decisions on the redemption, reduction and repurchase of own funds become concrete not once they have been authorised by the Prudential Competent Authority, but when, in addition

to it, the institution has sufficient certainty that reductions and repurchases will take place. For example, it is possible that an institution will not use the entire amount approved by the Prudential Competent Authority. It is only at this stage that such decisions can comply with the requirement of precision and take the characteristics of an inside information, with the following obligations of disclosure to the market or the activation of the delay procedure (if the conditions are met). ESMA should clearly state that the public disclosure should not occur automatically once permission of the Prudential Competent Authority has been obtained, but when there is concrete evidence that the redemption, reduction and repurchase of own funds will take place.
Moreover, it should be noted that, according to widespread best practices, issuers usually adopt organisational and procedural mechanisms aimed at extending the monitoring of the circulation of information to a phase preceding the qualification of such information as inside information. This ensures adequate protection against the issuer's risk of incurring a breach of MAR rules.
In view of the above, we believe that there is no reason, as proposed by ESMA, to supplement the guidelines.
<ESMA_QUESTION_MRGL_1>

Q2 : 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, if the implementation of a project, decision or transaction needs the approval of a committee, third party or authority, this information should not be considered as inside information as long as the decision is not final. 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>

Q3 : 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 this regard, while appreciating the acknowledgement by ESMA of the impact of immediate public disclosure of information constituting the draft SREP decision, we are concerned about the formation of inside information in the context of draft SREP decisions. This is due to the non-final nature of the resulting information and therefore the lack of the requirement of precision. The information become precise only as a result of an articulated dialogue between the Authority and the issuer, with the possibility, which cannot be excluded in advance, that the initial contents of the draft SREP letter could be amended, even significantly. More generally, the preliminary nature of the draft SREP decisions received by the issuer implies that they are not suitable for public disclosure. If the same information is disclosed and then changed at the end of the SREP, it could even be misleading for the market. This is also due to the confidentiality constraints imposed by the Authority itself and the possibility that relations with the Authority and the successful outcome of the ongoing discussion could be affected.
The outcomes of the SREP process, with which banks must comply, are only those indicated in the final SREP letter and it is the supervisor (the ECB Single Supervisory Mechanism in the scope of the Euro Area) that defines them precisely. Thus, only the final communication,

formally notified by the competent authority, determines the precision of the information and the related obligations to communicate it to the market or to activate the delay procedure when the conditions are met.
The concept of "preliminary information" introduced in the text of the guidelines also raises significant concerns. This is because if the information relating to draft SREP decisions lacks the requirement of precision, for the same reason neither can the related preliminary information be precise. We therefore stress that neither the draft SREP decisions nor the related preliminary information can potentially take the form of inside information.
As mentioned in answer Q1, the issuer also adopts organisational and procedural mechanisms based on well-established practices to map the evolution of relevant information to inside information.
In view of the above, we do not agree with ESMA's proposal to supplement the guidelines.
<ESMA_QUESTION_MRGL_3>

Q4 : Do you agree with the proposed amendments to the MAR Guidelines in relation to P2R?

<ESMA_QUESTION_MRGL_4>
P2R is eligible for qualifying as inside information, because of its binding nature. However, the actual price sensitivity of P2R and its consequent treatment under MAR is subject to the institution's case-by-case assessment.
In this view, we deem that the support of ESMA to a disclosure at the source of P2R by the Prudential Competent Authority (recital 103) is not appropriate.
In addition, we consider that this recommendation is not a necessary measure given that i) banks should already publish themselves this information to comply with markets regulation and/or Pillar 3 disclosure (this obligation has been reinforced since June 2021 by the CRR2 regulation), ii) it will create additional operational burden for the sector (in particular complex coordination between the banking supervisor and each bank) and iii) it could even be prejudicial to the investors and the bank if the latter is not in a position to adequately prepare its communication to the market, creating potentially unintended and unnecessary volatility in market prices.
Therefore, we strongly believe that the costs / benefits balance of this proposal is not positive.
<ESMA_QUESTION_MRGL_4>

Q5 : Do you agree with the proposed amendments to the MAR Guidelines in relation to P2G?

<ESMA_QUESTION_MRGL_5>
Without prejudice to the issuer's assessment of the specific case, it should be clarified that, in principle, only quantitative requirements (P2R) **that are binding** on the issuer should have the potential to possibly constitute inside information. We consider that qualitative requirements and recommendations (including P2G), which are not binding on the issuer, do not in themselves become inside information, simply because they are included in the final SREP decisions. Therefore, we do not agree with ESMA's proposed amendments to the MAR Guidelines in relation to P2G.
Furthermore, it is important to consider the intention of the co-legislators regarding P2G when designing the EU the regulatory framework and how P2G is incorporated into the ongoing supervision of banking institutions. As ESMA itself recalls, P2G is a recommendation and not part of binding capital requirements and, therefore, 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")). Therefore, it is on these bases that the European co-legislators have expressly indicated in the framework of Regulation (EU) 2019/876 of 20 May 2019 amending Regulation (EU) No 575/2013 ("CRR2") that the level of P2G should not be subject to a mandatory disclosure. Consequently, recital 64 of CRR2 states the following: "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."
The reasoning of the legislators was rightly the following: based on past experience, the disclosure of a guidance is typically translated by investors into a binding requirement. Furthermore, a disclosure would be in contradiction with the nature of the P2G, which aims at being a bilateral supervisory tool between the supervisor and the institution, to ensure an adequate level of the institution's own funds. As such, in order to keep a bilateral tool of this nature in their ongoing dialogue with the financial institutions, supervisors and regulators may need to reconsider part of the current supervisory process if the P2G is disclosed.
Furthermore, it may impact the recent legislative balance as set out in CRR 2 in relation to the Minimum Distributable Amount (MDA) framework given that, once disclosed, the P2G will be considered binding by the industry / investors, and therefore the distance to MDA would mechanically decrease, removing flexibility in the necessary dialogue between the banks and the supervisors. For the sake of consistency, a potential disclosure of the P2G would have to be considered only in the context of a new Capital Requirement Legislation's review.

In banking supervision, the ability to maintain the level of the P2G confidential between the institution and its competent authority is strictly linked to the nature of a capital target to address specific scenarios beyond risks covered by Pillar 2 (P2R). In addition, confidentiality is strictly related to non-binding guidance nature of P2G as it will aim at defining a capital target to capture forward-looking scenarios.
When setting P2G, different elements are taken into account in a holistic view (e.g. depletion of capital by the stress test in the hypothetical stress adverse scenario, specific risk profile of the institution and its sensitivity towards stress scenarios, interim changes in its risk profile and measures taken by the bank to mitigate sensitivities…). Given the variety of hypotheses and information taken into account to determine the P2G, as well as the fact that P2G is specific to the institution, it is questionable whether the level of the P2G in itself (i.e. knowing it is x%) is relevant when determining the price of securities issued by the institution. It could rather be the case that the disclosure of P2G data alone, could be misleading for the market as it does not reflect the full context and more complete information, which would be necessary to assess the soundness of issuers.
This is all the more so since the ECB Banking Supervision has indicated in 2021 that they will use a two-step bucketing approach to determine banks' individual P2G levels. This new methodology is based on new EU law (the Capital Requirements Directive – CRD V) and input from the European Banking Authority.
The basis for determining banks' P2G levels is how banks perform in the regular EU-wide stress tests, which place banks in one of the four determined buckets, according to the depletion of their capital ratios in the stress test. ECB has already shared information on the P2G range in basis point applicable to each bucket. In the second step, supervisors set the final P2G for each bank within the range of the bucket, or exceptionally outside that range, taking into account banks' individual situations, such as their risk profiles.

As such, the ECB provides a precise insight on the P2G and establishes a clear link between P2G levels and the EU-wide Stress Test results. Therefore, we strongly believe that the extensive disclosure of the Stress Test results already provides investors with most of the critical information embedded into the P2G (i.e. the bank capacity to withstand stress) and a range of outcome of applicable P2G for each bank.
In addition, each bank in its financial communication provides a precise target in terms of CET1 ratio (and/or capital ratio), which obviously includes the P2G relevant to it.
Regarding Minimum Distributable Amount (MDA), breaches of P2G do not trigger in automatic MDA restrictions. 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.
In conclusion, given all these elements, we strongly believe that in most cases the P2G in itself is not a price sensitive information for the market. Only in a very limited number of specific situations, the P2G could be of a price sensitive nature, subject to the institution's case-by-case assessment.
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 light of the above, the requirement to disclose the P2G could contravene the principle of proportionality[1] where each of the measures established by a provision of European law do not go beyond what is appropriate and necessary to achieve the desired goal, it being specified that "when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued"[2].
Therefore, for all these 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.
<ESMA_QUESTION_MRGL_5>

Q6 : 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>
The examples listed in paragraph 130 do not refer to exceptional situations but rather to common ones. That is one of the reasons why the P2G is not price sensitive. According to the answer to Q5, the P2G is and must remain a supervisory tool and the dialogue between the supervisor and the bank must remain confidential to protect the financial stability and the efficiency of the supervision.
As the stress tests results are already published and as far as the supervisor's adjustment (according to the two steps approach) should remain an item of the supervisory dialogue, we

[1] Article 5(4) of the Treaty on the Functioning of the European Union
[2] Judgment of the Court (Fifth Chamber) of 11 July 1989. - Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau

believe that publishing the P2G under market regulations might lead to a situation that the competent/prudential authority would rather want to avoid.
Promoting the disclosure of information which reflect the risk assessed by the supervisor may crystallize in the materialization of the risk.
<ESMA_QUESTION_MRGL_6>

Q7 : Do you see other cases where P2G may not be price sensitive?

<ESMA_QUESTION_MRGL_7>
As answered to question 5, we strongly believe that in most cases the P2G is not a price sensitive information for the market.
<ESMA_QUESTION_MRGL_7>

Q8 : Do you agree with the proposed approach in relation to other supervisory measures?

<ESMA_QUESTION_MRGL_8>
We believe that the other SREP measures should not be disclosed, because they should not be qualified as inside information.
However, according to the MAR and depending on the nature of the supervisory measure, the institutions will assess on a case by case whether or not the measure represents an inside information.
<ESMA_QUESTION_MRGL_8>

Q9 : Do you see any other element that ESMA should consider in a potential amendment to its MAR Guidelines?

<ESMA_QUESTION_MRGL_9>
While not being a new element, we would like to stress that it is important also to rely on the issuer's responsibility to assess on a case-by-case assessment whether or not information should be disclosed, unless there is no doubt that information is considered to be inside information. The wording in the paper in some cases, which relate to P2G and P2R, uses language such as "is expected to be considered as inside information" or "is highly likely to be of a price sensitive nature". In our view it would be more appropriate to use a softer language, also to ensure that it does not create an expectation on the side of the markets who may expect the disclosure of this information in any circumstances.
<ESMA_QUESTION_MRGL_9>