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EACB comments on ESMA draft Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision (ESMA70-156-3934)

General comments

The EACB welcomes the opportunity to comment on the ESMA draft Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision.

As a general comment we would like to underline that the timing of the consultation, with publication and deadline within the peak of the holiday season for six weeks, greatly affects the possibility for the industry and other stakeholders to provide input on a rather relevant issue.

We would also question the fact that the review of MAR GL, 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 indicates: "*… 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 then concludes 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.*"

Furthermore, we would like to emphasize that the mandate 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 mandated to pre-determine (or introduce very strong assumptions) what information qualifies as inside information as meant in article 7 MAR. We therefore believe the proposed new Guidelines go beyond ESMA's mandate.

Q1 *Do you agree with the proposed amendment to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds?*

We consider the proposed guideline on this point a helpful clarification and in line with the revised Commission delegated Regulation on own funds and eligible liabilities. According to Art 32b para 1 of EBA/RTS/2021/05, "*Calls, redemptions, repayments and repurchases of eligible liabilities instruments shall not be announced to holders of the instruments before the institution has obtained the prior permission of the resolution authority*".

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

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the issuer is an institution subject to the CRR, when an (early) redemption, reduction, repurchase, repayment or call of own funds instruments or a reduction, distribution of another own funds instrument is contemplated.

At the same time, we notice 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 explicitly suggest 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 will 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.

Q2 *Do you see other areas of interactions between MAR transparency and other supervisory frameworks where the same approach should be pursued?*

Our members do not identify other areas of interactions.

Q3 *Do you agree with the proposed amendment to the MAR Guidelines in relation to draft SREP decisions and preliminary information related thereto?*

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.*"

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

Guideline 3, as currently 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. Banks are already subject to disclosure obligations. Additional disclosure(s) from other market participants or from authorities would in the best case only duplicate, in the worst case bring confusion. For example, it could even be prejudicial to the investors and the bank, if the latter is not in a position to adequately prepare the communication to the market, creating potentially unintended and unnecessary volatility in market prices.

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

We are strongly opposed to ESMA's proposal regarding P2G.

From a conceptual and legal 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 whether P2G concerns inside information should be assessed on a case-by-case basis by the issuer. Furthermore, as long as P2G does not impact MDA, P2G cannot be considered as price sensitive information and therefore shall not be considered as inside information either.

We emphasize that it is extremely important that P2G continues be regarded as **guidance**, as clearly stated in Art. 104b CRD V. P2G as a supervisory tool was only relatively recently codified and is not and has never been intended as a hard 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 in this regard does not contribute to a good understanding and application of the intended differences between P2R and P2G.

In addition, it does not seem appropriate to treat both P2R (capital requirement) and P2G (guidance) the same. This holds true especially in light of the power of the competent authority to decide to convert the Guidance into a Pillar 2 Requirement, if and where an institution repeatedly failed to meet the capital target. Therefore, it can only be up to the institution to assess the inside information character, this is certainly not necessary at the point of P2G communication.

According to recital 16 of CRD V, the P2G reflects supervisory expectations, therefore CRD and CRR should "*neither set out mandatory disclosure obligations for the guidance nor prohibit competent authorities from requesting disclosure of the guidance*". Therefore, no mandatory disclosure of P2G was intended by the Co-legislators. As for the power for competent authorities to request P2G disclosure, this is up to the respective micro-prudential supervisor, it is not ESMA the competent authority. Finally, as to the possibility to require disclosure this would be done where necessary based on case-by-case assessment of an institution, and not as a general rule.

Q6 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?

See our response to Q5 above, P2G is not price sensitive.

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

See our response to Q5 above, P2G is not price sensitive.

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

We do not agree with ESMA's proposal.

We believe that the P2R and distribution of dividends restrictions or prohibition are the only SREP requirements that are price sensitive. Consequently, the other SREP measures should not be disclosed.

In addition, P2R, distribution, profits etc. are already disclosed by the banks: they cannot be qualified as inside information.

At any rate, with specific regard to Guideline 1 point h, we believe it should not only be assumed that issuers have a legitimate interest for delaying disclosure of inside information in case of a draft decision, but that this

legitimate interest for delaying should be extended to the point in time where the supervisory measure comes into effect (e.g., where the competent authorities require institutions "*to apply a specific provisioning policy or treatment of assets in terms of own funds requirements*" according to Art. 104 (1)(d) CRD V). This would be necessary for the implementation of the supervisory measure, as an immediate disclosure might undermine the usefulness of the measure.

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

In general, we strongly believe that the ESMA GL should not interfere with the bilateral discussion between the bank and its prudential supervisor.

Contact:

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