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

FINANCE DENMARK

Memo

August 27, 2021
Doc: FIDA-1344658213-687796-v1
Contact Kirsten Hjortshøj Bederholm

Introduction

Finance Denmark[1] welcomes the opportunity to respond to ESMA's consultation on Guidelines on legitimate interests to delay disclosure of inside information and situations in which the delay of disclosures is likely to mislead the public.

We welcome that ESMA has taken the initiative to analyze whether certain specific situations should be included in the MAR Guidelines. Unfortunately, we do not agree with the conclusions in the Consultation Paper which are further elaborated under each of the below questions.

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

The first subject that ESMA touches upon is whether an institution's intention to carry out redemptions, reductions and repurchases of own funds, pending regulatory authorization falls within the definition of inside information and if so, whether it can be subject to delayed disclosure.

We are of the opinion that a piece of information cannot qualify as inside information if it is subject to authorization from the Competent Authority. This is due to the mere fact, that the relevant piece of information does not meet the criteria in MAR regarding precision, until the Competent Authority has made a final decision and informed the issuer about the decision.

Until the final decision from the Competent Authority is received such information should be handled as confidential information.

[1] Finance Denmark is a business association for banks, mortgage institutions, asset management, securities trading and investment funds in Denmark. EU Transparency Register – registration number 20705158207-35

Based on the above, we do not agree with ESMA on the notion that a decision to redeem, reduce and repurchase own funds taken by an issuer qualifies as inside information. Since such a decision is subject to authorization from the Prudential Competent Authority it cannot qualify as inside information until such an authorization has been granted.

In general, we are of the opinion that as long as s decision from a Competent Authority is not final it cannot qualify as inside information. If banks are to disclose preliminary and ongoing discussions with a Competent Authority, there is a risk of mis-leading the markets.

Further, it is not given that a bank, when it has received an authorization from the Competent Authority, will carry out the decision to redeem, reduce or repurchase own funds. Until the bank has made the final decision whether to carry out the redemption, reduction or repurchase or not or has decided on the amount, the information is not specific.

We suggest that ESMA instead clarifies in their Q&A on MAR that an issuer's decision to carry out redemptions, reductions and repurchase of own funds does not qualify as inside information until the final authorization from the Competent Authority has been granted and received.

Q2: Do you see other areas of interactions between MAR transparency and other supervisory frameworks where the same approach should be pursued?
With reference to our response to Q1, we do not believe that the approach suggested by ESMA should be pursued.

Finance Denmark believes that it is very important to distinct between actions/decision that are solely within the issuer's control and actions/decisions that depend on a third party. When a decision/action is not solely within the control of an issuer one should be very cautious with qualifying such as inside information. First and foremost, it does not meet the criteria in MAR for inside information (it is not precise) and secondly because it potentially can mislead the market if it is published at a premature stage.

Instead, we would like to support that the MAR Guidelines is further developed to include different types of issuers, as well as examples of other situations in which inside information may arise and there may be a legitimate reason for the issuer to delay the disclosure. Such situations could for example include ongoing, protracted, inspections or reviews by public authorities in which the outcome of such investigations or reviews would likely be jeopardized by immediate public disclosure. It could also be situations where an issuer is listed on multiple venues in different time zones and where delayed disclosure would be beneficial to protect the integrity of the financial markets.

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

Draft SREP decisions and preliminary information related thereto is by notion not final decisions and therefore it cannot be qualified as precise information in accordance with MAR. Draft SREP decisions are still up for dialogue between the Competent Authority and the issuer and therefore it is not precise. Additionally, an issuer is not obliged to act in accordance with draft SREP decisions and preliminary information related thereto. Therefore, such information cannot be defined as inside information simply due to the fact that it is not final.

We rather see that ESMA in the Q&A on MAR clarifies that draft SREP decisions and preliminary information related thereto are not inside information.

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

As ESMA also states, banks are already required to disclose the P2R information in accordance with CRR2. CRR2 regulation even stipulates when the P2R is to be disclosed.

We are of the opinion that there is no need for an additional requirement for disclosure of P2R in accordance with MAR, since a disclosure requirement are already in place in the CRR2 regulation. Adding an extra requirement will create additional administrative and operational burdens

for the banks. We find it difficult to see the benefits of such an additional requirement, especially when a disclosure requirement is already in place in the specific regulation.

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

As ESMA states, the P2G is not part of the 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) for the issuer.

When the P2G is not part of the binding capital requirement we find it difficult to see that it can be considered as price sensitive, hence it does not qualify as inside information. If the institution repeatedly fails to establish or maintain an adequate level of capital to cover the P2G the Competent Authority may convert it into a Pillar 2 requirement (P2R) which is a binding capital requirement.

Further, CRR2 recital 64 states that given that P2G reflects supervisory expectations, it should not be subject to mandatory disclosure, i.e., it is and has not been the intention from the legislator that the P2G should be subject to disclosure.

Based on the above we do not support the proposal from ESMA.

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?

As we have answered to Q5 we do not agree with ESMA that P2G meets the qualifications as being inside information. The examples listed in paragraph 130 are in our view not exceptional situations and should not be treated as such – in contrary they are common situations.

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

Please see our answer to Q4.

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

We support a case-by-case approach and with the pre-requisite that drafts and preliminary information do not qualify as inside information.

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

Please see our answer to Q2.