

Response Form to the Consultation Paper

Revision to Guidelines and Recommendations on the Scope of the CRA Regulation



Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex III. 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 **1 April 2022**.

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. Please do not remove tags of the type <ESMA_QUESTION_PCR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. 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.
4. When you have drafted your response, name your response form according to the following convention: ESMA_PCR_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_PCR_ABCD_RESPONSEFORM.
5. 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 the Revision to the Guidelines and Recommendations on the Scope of the CRA Regulation”).

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 publicly 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. In particular, this paper may be specifically of interest for rated entities, issuers of debt instruments, users of credit ratings, credit rating agencies and entities interested in applying to be a registered CRA, as well as other financial market participants not in the scope of the CRA Regulation.

General information about respondent

Name of the company / organisation	ARC Ratings, S.A.
Activity	Other Financial service providers
Are you representing an association?	☒
Country/Region	Portugal

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_PCR_00>

Please find attached ARC Ratings, S.A. response to the Consultation Paper on Revisions of Guidelines and Recommendations on the Scope of the CRA Regulation.

<ESMA_COMMENT_PCR_00>

Questions

Q1 : Do you agree with ESMA's interpretation of "produced pursuant to an individual order"? If you do not agree, please explain.

<ESMA_QUESTION_PCR_01>

ARC Agree with the interpretation to provide a private credit rating on the explicit request for it and through a written agreement between both parties. ARC would not conduct any rating without an explicit order and understand that from the outset that the rating will be classed as private.

<ESMA_QUESTION_PCR_01>

Q2 : Do you agree with ESMA's interpretation of "provided exclusively to the person who placed the order"? If you do not agree, please explain.

<ESMA_QUESTION_PCR_02>

ARC agree that each private credit rating should be subject to a separate contract with the person/entity who placed the order, but we also think that two separate persons/institutions can each have an 'exclusive' contract to the same rating. Analysis would be carried out for each order placed and outcome provided to the person who placed the order. If the two requests are simultaneous and identical the results should also be identical.

<ESMA_QUESTION_PCR_02>

Q3 : Do you agree that setting a 150 natural persons limit for sharing the private credit rating with third parties would be adequate? If you do not agree, please explain.

<ESMA_QUESTION_PCR_03>

The Prospectus Regulation states that the requirement for a prospectus does not apply if the rating communication is "addressed to fewer than 150 natural or legal persons per member state, other than qualified investors". The wording within "Guidelines and Recommendations on the Scope of the CRA Regulation" should therefore reflect the same, given the justification for selecting the current proposal is to be in line with the prospectus regulation, i.e 150 per natural or legal persons **per member state**.

If it does not tie back to this regulation, then further discussions, consultations and market studies should be held, to determine a suitable number based on the regulatory and market needs.

<ESMA_QUESTION_PCR_03>

Q4 : Do you agree with the onus on the rating producer to monitor the distribution of the private credit ratings to third parties? If you do not agree, please explain.

<ESMA_QUESTION_PCR_04>

Definitely not, the onus for this has to be on the placer of the order, as he is the one who has the interest in that limited distribution, that has the direct contact with the investors / persons who might be interested in receiving the distribution and no rating agency has the capacity to monitor which contacts his clients make and which information they disclosed to those contacts. Under the proposed rules, the responsibility of the producer to monitor the investors/persons on distribution would be impossible, as they would not necessarily have a direct relationship with them.

In our view, a more balanced approach would be to have the onus of monitoring the distribution of the private rating always with the placer of the order (for the reasons stated above), but give the producer of the rating the sole right to distribute the private rating to the entities that the placer of the order requests. This means, it would be regulatorily forbidden to the placer of the order to disseminate the rating in any form. If he wanted the rating disclosed it would have to be through the rating agency. This would have the additional very important benefit of avoiding the dissemination of outdated, partial or manipulated information – all the market agents would know that they could only become aware of a private rating through the rating agency that has assigned it and would have access to complete and updated information. In this context, the rating producer obligations should be:

- To never disclose a private rating, unless requested and authorized by the placer of the order to make it public or to disclose it to a specific natural person, or as part of the actions to be taken in case the placer of the order turns the rating public without the prior knowledge and authorization of the CRA;
- To have a detailed contractual agreement with the placer of the order that includes:
 - o the intention of the placer of the order that he is requesting a private rating, with a clear definition of the meaning and limitations of a private rating;
 - o a non-disclosure undertaking, precluding the dissemination of the rating to more than 150 natural persons, and always done through the rating agency;
 - o the definition of the document, prepared by the CRA, that could be used for the limited dissemination of the rating;
- To have a clearly defined written policy on what would be the CRA actions in the case where the requester of a private rating turns it public without the knowledge and authorization of the CRA; and
- Regularly monitor the eventual dissemination/unauthorised publication of any private rating through the internet and placer's website.

Again, the precise definition of the limit – beyond 150 in total or beyond 150 per member state – is crucial. But the producer should not be expected to monitor this, only to react to information it receives which indicates public distribution.

What would be the regulatory implications if this happened, both to the placer and producer?

<ESMA_QUESTION_PCR_04>

Q5 : Do you agree that ESMA's proposed approach is reflective of your interactions with rating producers and that the market would benefit from such a clarification?

<ESMA_QUESTION_PCR_05>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_PCR_05>

Q6 : Do you have any comments on the CBA outlined under the preferred option?

<ESMA_QUESTION_PCR_06>

It is difficult for ARC to make full comment, as costs would be incurred if certain responsibilities which it believes, for the reasons stated above, should rest with the entity placing the rating are transferred to the producer, as monitoring the recipients of the private credit ratings would be a huge undertaking.

<ESMA_QUESTION_PCR_06>