



European Securities and  
Markets Authority

# Final Report

**Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision**



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## Acronyms and definitions used

<b>AIF</b>	Alternative Investment Fund
<b>AT1</b>	Additional Tier 1
<b>BRRD</b>	Bank Recovery and Resolution Directive – Directive 2014/59/EU of the European Parliament and the Council
<b>Commission Delegated Regulation 241/2014</b>	Commission Delegated Regulation (EU) No 241/2014 with regard to regulatory technical standards for Own Funds requirements for institutions
<b>CET1</b>	Common Equity Tier 1
<b>Commission Implementing Regulation 2016/1055</b>	Commission Implementing Regulation (EU) 2016/1055 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information
<b>CP</b>	ESMA Consultation Paper on Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision (ESMA70-156-3934)
<b>CRD NCA</b>	National Competent Authority as defined under Article 3(1)(36) of CRD IV
<b>CRD IV</b>	Capital Requirements Directive - Directive 2013/36/EU of the European Parliament and of the Council
<b>CRR</b>	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council
<b>CRR2</b>	Regulation (EU) 2019/876 of the European Parliament and of the Council amending amending CRR
<b>EBA</b>	European Banking Authority
<b>EBA Guidelines</b>	EBA Guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing (EBA/GL/2014/13)



<b>ECB</b>	European Central Bank
<b>ESMA</b>	European Security and Markets Authority
<b>EU</b>	European Union
<b>Institutions</b>	Credit institutions and institutions as defined under Article 4(1) and (3) of CRR respectively, combined with Article 11(2) of CRR
<b>LSI</b>	Less Significant Institutions
<b>MAR</b>	Market Abuse Regulation - Regulation 596/2014 of the European Parliament and of the Council
<b>MAR Guidelines</b>	MAR Guidelines on delay in the disclosure of inside information (ESMA/2016/1478)
<b>MDA</b>	Maximum Distributable Amount
<b>NCA</b>	National Competent Authority as defined under Article 3(1)(12) of MAR
<b>OTC</b>	Over-the-Counter
<b>Prudential Competent Authorities</b>	CRD NCAs and ECB
<b>P2G</b>	Pillar 2 Capital Guidance
<b>P2R</b>	Pillar 2 Capital Requirements
<b>Second Company Law Directive</b>	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law
<b>SI</b>	Significant Institutions
<b>SREP</b>	Supervisory Review and Evaluation Process
<b>SSM</b>	Single Supervisory Mechanism
<b>SSM Regulation</b>	COUNCIL REGULATION (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

## Executive Summary

### Reasons for publication

Article 17 of Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (MAR) provides that issuers should publicly disclose as soon as possible any inside information that directly concerns them.

Where the relevant conditions are met, issuers may, on their own responsibility, delay the disclosure of inside information under Article 17(4) of MAR (ordinary delay) and Article 17(5) of MAR (financial stability delay).

According to Article 17(4) of MAR, issuers can delay the disclosure of inside information under the following conditions:

- immediate disclosure is likely to prejudice an issuer's legitimate interest;
- delay of disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of the information.

In line with the mandate under Article 17(11) of MAR, ESMA issued its 2016 MAR Guidelines. The MAR Guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and a list of situations where delay of disclosure is likely to mislead the public.

This Final Report presents the amended version of the MAR Guidelines, specifically in the context of the interaction between the MAR transparency obligations vis-à-vis inside information and the prudential supervisory framework. In cooperation with ECB and EBA staff, ESMA is keen to promote a convergent and more consistent supervisory approach on this topic, with the view to fostering harmonisation and a level playing field at EU level.

In light of the above, ESMA has amended its MAR Guidelines by adding:

- to the existing list of legitimate interests, the case where institutions intend to carry out redemptions, reductions and repurchases of own funds, pending regulatory authorisation;
  - to the existing list of legitimate interests, the case of draft Supervisory Review and Evaluation Process (SREP) decisions or preliminary information related thereto; and
  - a separate section to the MAR Guidelines clarifying that: (i) Pillar 2 Capital Requirements (P2R) are highly likely to meet the definition of inside information under MAR; (ii) Pillar 2 Capital Guidance (P2G) may be inside information under MAR, whenever assessed as price sensitive. The Guidelines provide examples of situations where P2G is expected to be price sensitive. Where assessed to be inside
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information, P2G would require public disclosure as soon as possible, unless the conditions for a delayed disclosure under MAR are met.

## **Content**

Section 1 provides the current legal framework for the identification and handling of inside information under MAR.

Section 2 deals with redemptions, reductions and repurchases of own funds, and details the proposal ESMA has put forward in the consultation paper and includes an assessment of the feedback received by stakeholders. The section outlines the final approach taken by ESMA, which consists of including the case of redemptions, reductions and repurchases of own funds, pending regulatory authorisation, within the list of cases where the institution's legitimate interests may be prejudiced, and hence, if all the other conditions are met, disclosure can be delayed.

Section 3 deals with the Pillar 2 SREP. In particular, Section 3.1 provide background information on the process and Section 3.2 an overview of the transparency requirements under MAR and its application across the EU.

Section 3.3 deals with draft SREP decisions and preliminary information related thereto, communicated to the supervised institutions ahead of the final SREP decisions. After assessing the feedback received from the consultation, that section explains the final approach to add the case of draft SREP decisions to the list of cases where a legitimate interest of the institution may be prejudiced by immediate disclosure, and hence, if all the other conditions are met, disclosure can be delayed.

Section 3.4 deals with the content of the SREP decisions and discusses the feedback received to the proposal put forward in the consultation paper to provide guidance to institutions on their assessment about whether their P2R and P2G could represent inside information. It also details ESMA's final approach which consists in adding a section to the MAR Guidelines specifying that: (i) P2R is highly likely to be price sensitive, and institutions should make their assessment considering the magnitude of the difference between the institution's P2R and the current level of capital, (ii) P2G may be price sensitive, and a list of cases where P2G is expected to be price sensitive is provided.

Annex I contains the final high-level Cost-Benefit Analysis (CBA) for the Guidelines.

Annex II contains the final amendments to the MAR Guidelines, highlighting specifically the additions introduced.

## **Next Steps**

A translation procedure will follow after the publication of this Final Report. The regular comply or explain procedure will be carried out ahead of full application of the Guidelines.

# 1 Legal framework: MAR transparency

1. The general definition of inside information is set out in Article 7(1)(a) of MAR, which defines it as information that:
  - is not public;
  - directly or indirectly relates to one or more issuers or financial instruments;
  - is of a precise nature;
  - if made public, would be likely to have a significant effect on the relevant prices of those financial instruments or related derivative financial instruments.
2. For clarification purposes, Article 7(2) of MAR states that information is of a precise nature if it “indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances”.
3. In addition, Article 7(4) of MAR clarifies that information would be likely to have a significant effect on the price if reasonable investors would be likely to use it as part of their investment decision. Moreover, Article 7(3) of MAR clarifies that the intermediate steps in protracted processes shall be deemed inside information if, by themselves, they satisfy all the criteria of inside information referred to above.
4. When issuers possess information which directly concerns them and that fulfils all of the above conditions, Article 17(1) of MAR requires them to disclose such information as soon as possible, in a manner which enables fast access and a complete, correct and timely assessment of the information by the public.
5. Article 17(4) of MAR sets forth that issuers may, on their own responsibility, delay disclosure of inside information to the public provided that all the following conditions are met:
  - a) immediate disclosure is likely to prejudice the legitimate interests of the issuer;
  - b) delay of disclosure is not likely to mislead the public; and
  - c) the issuer can ensure the confidentiality of that information.
6. In the case of a protracted process that occurs in stages, an issuer may delay the public disclosure of the inside information relating to that process, provided that the above three conditions are met.

7. When an issuer has delayed disclosure of inside information under Article 17(4) of MAR, it should inform the NCA explaining how the relevant conditions were met, immediately after the information is disclosed to the public<sup>1</sup>.
8. In exceptional circumstances, where the issuer is also a credit or financial institution, Article 17(5) of MAR provides for another possibility to delay the public disclosure of inside information to preserve the stability of the financial system, provided that all the following conditions are met:
  - a) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;
  - b) it is in the public interest to delay the disclosure;
  - c) the confidentiality of that information can be ensured; and
  - d) the competent authority has consented to the delay on the basis that the conditions in points a), b) and c) are met.
9. Commission Implementing Regulation 2016/1055, adopted on the basis of ESMA's draft Implementing Technical Standards, specified the technical means for appropriate public disclosure of inside information by issuers and for delaying the public disclosure of inside information.
10. As required under Article 17(11) of MAR, ESMA has issued the MAR Guidelines to establish a non-exhaustive and indicative list of legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information, as well as situations in which delay of disclosure is likely to mislead the public, as referred to in respectively point (a) and point (b) of Article 17(4) of MAR<sup>2</sup>.
11. In the MAR Guidelines ESMA clarified that the cases where the legitimate interests of the issuer are likely to be prejudiced by immediate disclosure could include but are not limited to the following circumstances:
  - a) The issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure.
  - b) The financial viability of the issuer is in grave and imminent danger and immediate public disclosure of that information would seriously prejudice the conclusion of the negotiations designed to ensure the financial recovery of the issuer.
  - c) The inside information relates to decisions taken by the management body of an issuer which need the approval of another administrative body of the issuer, provided

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<sup>1</sup> As an alternative, Member States may provide that such explanation is to be provided only upon request of the NCA.

<sup>2</sup> ESMA/2016/1478 of 20 October 2016.

that immediate public disclosure before such a definitive decision would jeopardise the correct assessment of the information by the public and the issuer arranged for the definitive decision to be taken as soon as possible.

- d) The issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer.
- e) The issuer is planning to buy or sell a major holding in another entity and the disclosure of such an information would likely jeopardise the implementation of such plan.
- f) A transaction previously announced is subject to a public authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction.

12. The MAR Guidelines also specify that delayed disclosure of inside information is likely to mislead the public at least when the inside information whose disclosure the issuer intends to delay:

- a) Is materially different from the previous public announcement of the issuer on the subject.
- b) Regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced.
- c) Is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market (e.g. interviews, roadshows or any other types of communication organized by the issuer or with its approval).

13. Finally, it should be recalled that whenever disclosure of inside information is being delayed, the confidentiality of that information should be ensured at all times. Whenever the confidentiality is no longer ensured, disclosure as soon as possible should take place.

14. In that context, Article 17(7) of MAR clarifies that whenever a rumour in the market is sufficiently accurate to indicate that confidentiality is no longer ensured, disclosure should take place as soon as possible, even in the absence of an identified leak within the issuer.

## **2 Reductions of own funds**

### **2.1 Background Information**

15. Article 77(1) of CRR on the conditions for reducing own funds laid down the obligation for institutions to require the prior permission of the Prudential Competent Authority to:

- a. reduce, redeem or repurchase Common Equity Tier 1 (CET 1) instruments issued by the institution in a manner that is permitted under applicable national law;
  - b. reduce, distribute or reclassify as another own funds item the share premium accounts related to own funds instruments;
  - c. effect the call, redemption, repayment or repurchase of AT1 instruments or Tier 2 instruments as applicable, prior to the date of their contractual maturity.
16. Article 28(1) of Commission Delegated Regulation 241/2014 on the process for an institution to carry out redemptions, reductions and repurchases - for the purposes of Article 77 CRR - provides that redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior approval of the Prudential Competent Authority. It should be noted that the provision is currently under revision to expand its scope of application to also include the reduction, distribution or reclassification as another item of own funds of the share premium accounts related to own funds instruments, (described under point b) above), to align it with Article 77 of CRR, as amended by CRR2<sup>3</sup>.
17. As the information regarding redemptions, reductions and repurchase programs may be qualified as inside information, the disclosure obligations set forth in MAR should coordinate with the prohibition to disclose information regarding the mentioned transaction contained in Article 28(1) of Commission Delegated Regulation 241/2014.
18. As explained in the CP, Article 4(1)(118) of CRR defines own funds as the sum of Tier 1 and Tier 2 Capital, which are categories applied by the CRR to establish the requirements for capital adequacy of financial institutions.
19. **Tier 1** is determined by the CRR regime as CET1 capital plus AT1 capital. According to Article 26 of CRR, CET1 items consist of capital instruments<sup>4</sup> and the relevant share premium accounts, retained earnings, accumulated other comprehensive income, other reserves and funds for general banking risk. AT1 corresponds to capital instruments that are not CET1 but can nevertheless be included in Tier 1 because of some similarities with shares. This is the case, for example, with contingent convertible or hybrid securities, which are perpetual (i.e. with no maturity date) and can be either converted into ordinary shares or have their principal amount written down upon the occurrence of a trigger event (e.g. capital decrease).

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<sup>3</sup> On 26 May 2021 the EBA published its Final Report on Draft Regulatory Technical Standards on own funds and eligible liabilities amending Commission Delegated Regulation 241/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions (EBA/RTS 2021/05). In addition to align existing provisions to changes introduced in the revised CRR in the area of own funds, the proposed amendments align the regime for the call, redemption, repayment of repurchase of eligible liabilities with rules for reductions of own funds.

<sup>4</sup> Article 28 CRR lists the conditions for capital instruments to qualify as CET1, which include, just as example (a) being directly issued by the institution, (b) being entirely paid up, and (e) being perpetual.



20. **Tier 2** capital includes subordinated instruments, the related share premium accounts, and other capital items resulting from the application of the prudential framework as set out in Article 62 of the CRR<sup>5</sup>.

## 2.2 Proposal in the CP

21. Firstly, in the CP, ESMA expressed the view that the issuer's decision to carry out redemptions, reductions and repurchases of own funds instruments and the related share premium accounts can meet the conditions to be qualified as inside information.

22. In this respect, ESMA noted that such decision (i) relates directly to the institution's financial instruments, (ii) at a certain point in time in the decisional process the information therein contained is likely to become precise, and (iii) can be price sensitive.

23. Therefore, insofar as it is not public, the issuer's decision to carry out redemptions, reductions and repurchases of own funds instruments, including shares, as well as AT1 and Tier 2 instruments and related share premium accounts, could qualify as inside information as defined in Article 7 of MAR, therefore triggering an obligation to publicly disclose it as soon as possible under Article 17(1) of MAR.

24. Secondly, ESMA analysed whether the conditions set forth in Article 17(4) of MAR to delay the public disclosure of inside information, under the issuer's responsibility, could be met in relation to the institution's decision to carry out redemptions, reductions and repurchases of own funds.

25. In this respect, ESMA noted that the CRR definition of own funds (CET1, AT1 and Tier 2) and the conditions attached thereto imply that institutions should not raise any expectation to redeem those instruments in the market. Article 28(1) g) of the CRR identifies as a condition for capital to be qualified as CET1 instruments that "*the provisions governing the instruments do not indicate expressly or implicitly that the principal amount of the instruments would or might be reduced or repaid other than in the liquidation of the institution, and the institution does not otherwise provide such an indication prior to or at issuance of the instruments*".

26. Similarly, in relation to AT1 instruments, Article 52(1)(j) of CRR requires that the provisions governing the instruments "do not indicate explicitly or implicitly that the instruments would be called, redeemed or repurchased, as applicable, by the institution other than in the case of the insolvency or liquidation of the institution" and that "the institution does not otherwise provide such an indication", creating a general prohibition for the institution to announce such type of transactions until approved by the Prudential Competent Authority.

27. With respect to Tier 2 instruments, Article 63 letter (k) of CRR provides that "the provisions governing the instruments do not indicate explicitly or implicitly that the instruments would

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<sup>5</sup> For a more complete description of the different capital categories see Article 26(1) CRR for CET1, Article 51 CRR for AT1 and Article 62 CRR for Tier 2.

be called, redeemed, repaid or repurchased early, as applicable, by the institution other than in the case of the insolvency or liquidation of the institution and the institution does not otherwise provide such an indication”.

28. Under these rules, a public announcement before the supervisor’s authorisation, even if described as pending and uncertain, could be seen as an indication from the issuer that the instruments are subject to call, redemption, repayment or repurchase. That would prevent the relevant instruments from meeting the conditions to qualify as CET1, AT1 and Tier 2, set forth in the respective definitions under the CRR, ultimately impeding the qualification of the relevant instruments as own funds.
29. Additionally, ESMA noted that Article 28(2) of Commission Delegated Regulation 241/2014 laid down the obligation for the institution to deduct the amounts to be redeemed, reduced or repurchased from the corresponding elements of its own funds to occur only when reductions and repurchases are expected to take place with sufficient certainty, and once permission of the Prudential Competent Authority has been obtained
30. In the CP, ESMA expressed the view that a redemption, reduction, or repurchase, repayment or call of own funds instruments or a reduction, distribution or reclassification as another own funds item of the share premium accounts related to own funds instruments, not yet authorised by the Prudential Competent Authority, may constitute a case where immediate disclosure could prejudice the institution’s legitimate interest.
31. In addition to the above, for an institution to delay public disclosure, the other conditions set forth in Article 17(4) of MAR apply.
32. In particular, whenever an institution should find itself in any of those cases where delayed disclosure is likely to mislead the public<sup>6</sup>, delayed disclosure should not be possible.
33. Additionally, for the institution to be able to delay the disclosure of inside information, confidentiality must be ensured. Therefore, any rumour which is sufficiently accurate to indicate that confidentiality is no longer ensured whilst disclosure of inside information is being delayed should trigger disclosure as soon as possible under Article 17(7) of MAR, even if the authorisation by the Prudential Competent Authority is still pending.
34. In light of the above, in the CP ESMA proposed to review its MAR Guidelines to specify that immediate public disclosure of inside information about redemptions, reductions and repurchases of own funds instruments and the related share premium accounts before the Prudential Competent Authority’s authorisation pursuant to Article 28 of Commission Delegated Regulation 241/2014 is one of the cases where the institution’s legitimate interests may be prejudiced.

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<sup>6</sup> Article 17(4)(b) of MAR and ESMA Guidelines on delay in the disclosure of inside information, where it is contained a list of cases in which delay of disclosure of inside information is likely to mislead the public.

35. In particular, ESMA proposed to add to its MAR Guidelines another case of legitimate interest to Section 5, point 1, as highlighted in Annex III.
36. In addition, ESMA consulted on whether there is any need to clarify the existence of a legitimate interest to delay public disclosure under MAR in respect of other supervisory regimes.

## 2.3 Feedback to the consultation

37. The great majority of respondents supported the proposal to clarify that the pending authorisation for redemptions, reductions and repurchases of own funds instruments and the related share premium accounts, can be a legitimate interest to delay the disclosure, whereas only few respondents opposed it.
38. A general observation made by several respondents was that preciseness and price sensitive of the information may arise well after the authorisation for redemption, reduction and repurchase is granted, especially considering the length of the authorisation process (4-6 months) and the developments occurring on the markets in the meanwhile. On this assumption, these respondents stressed the need to assess preciseness and price sensitivity of the information on a case-by-case basis.
39. In this respect, it was suggested to explicitly state in the MAR Guidelines that qualification as inside information of the decision to carry out redemptions, reduction or repurchases of own funds, should remain to be assessed by the issuer on a case-by-case basis, regardless the possible delay conceded.
40. The respondents opposing the proposals argued that:
- (i) there is no inside information before the authorisation occurs, given the uncertainty about the transaction at that time; and
  - (ii) the proposal implies an activation of the delay mechanism even in case the issuer may find it no longer worthwhile to exercise the option to redeem/repurchase when granted the authorisation.
41. When asked about additional areas of interactions between MAR transparency and other supervisory frameworks which would call for a clarification regarding the existence of a legitimate interest, respondents proposed different topics.
42. Few respondents suggested to consider the delay mechanism in the context of resolution. In particular, it was suggested taking into consideration (i) occurrence of failing or likely to fail conditions and (ii) measures taken by the resolution authority in the run-up to the resolution, and (iii) minimum requirement for own funds and eligible liabilities (MREL)<sup>7</sup>.

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<sup>7</sup> On MREL see Article 45 of BRRD.

43. Other suggestions related to:

- (i) the case where the decision or the transaction depends on the approval of a committee, third party or an authority;
- (ii) conflict to fundamental principles of law or confidentiality obligations under other legislation (with a specific reference to the "preparation and implementation of a national or European antitrust leniency program<sup>8</sup>"); and
- (iii) ongoing, inspections by public authorities the outcome of which would be jeopardized by immediate public disclosure.

## 2.4 ESMA's assessment and final approach

44. In view of the general strong support by stakeholders for the amendment to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds, ESMA maintained the proposed amendment unchanged.

45. For completeness, ESMA points out that the argument used to oppose the proposal stating there is no inside information before the authorisation is granted, given the uncertainty on the transaction that can exist at that point in time, moves from an incorrect interpretation of the preciseness of the information.

46. Article 7(2) of MAR states that an information should be deemed to be of a precise nature when it indicates a "set of circumstances that exist or that may reasonably be expected to come into existence, or an event that has occurred or that may reasonably be expected to occur".

47. Thus, the definition of preciseness under MAR allows for a certain degree of flexibility with respect to the events or set of circumstances indicated by the information. Moreover, it implies that the assessment on preciseness takes place on the basis of what is "*occurred or that may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn [...] on the price of the financial instruments*". It follows that subsequent events going in the opposite direction, e.g. authorisation denial or developments on the markets adverse to the transaction, do not prevent the information from being qualified as precise when it first came into existence.

48. Similarly, the argument that the proposal implies an activation of the delay mechanism even where the issuer may find it no longer worthwhile to exercise the option to redeem/repurchase when granted the authorisation fails to take into consideration that the

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<sup>8</sup> See the Commission webpage on leniency here: [https://ec.europa.eu/competition-policy/cartels/leniency\\_en](https://ec.europa.eu/competition-policy/cartels/leniency_en)



obligation to disclose inside information arises when inside information comes into existence, regardless of the occurrence of subsequent events.

49. Regarding the suggestion from some respondents to clarify that any assessment needs to take place on a case-by-case basis, ESMA notes that the CP did not suggest diverging from the case-by-case approach in the assessment of inside information and whether or not the decision to perform redemptions, reduction and repurchase of own funds can be qualified as inside information remains an issuer's responsibility.
50. ESMA noted the interest from the stakeholders in considering the delay regime in the context of resolution and agrees with them on the relevance of the topic to enhance convergence in the MAR application.
51. However, due to the relevance of the topic and the several aspects to be considered, ESMA is of the view that the resolution element should be the subject of a dedicated assessment, the opportunity of which should be carefully considered on its own within a dedicated exercise.
52. With respect to the suggestion to consider delayed disclosure more in general for any case where the decision or the transaction depends on the approval of a committee, third party or an authority, ESMA does not consider that as a case where immediate disclosure could prejudice a legitimate interest of the issuer, and standard practice would be to disclose the information with the caveat the authorisation is still pending.
53. As to the respondents' proposal to include in the MAR Guidelines the interest to delay the disclosure in relation to fundamental principles of law or confidentiality obligations, ESMA notes that such suggestion is too far reaching and cannot be assessed solely in the context of the interactions between MAR and the prudential supervisory framework.
54. On the point, ESMA nevertheless would like to reiterate that the obligation to disclose information regards only information which qualifies as inside information pursuant to the criteria contained in Article 7(1) MAR, and that the delay in the disclosure is permitted only where all conditions under Article 17(4) MAR are met.
55. As to the point made by one respondent about the existence of a legitimate interest to delay the disclosure with respect to ongoing investigations by a public authority, ESMA does not believe that immediate disclosure would actually jeopardise an issuer's legitimate interest.
56. The mere interest of the issuer to keep the investigation confidential in consideration of potential reputational damage does not qualify as legitimate interest under MAR.

## 3 Pillar 2 Supervisory Review and Evaluation Process (SREP)

### 3.1 Background information

57. Since 2004, the revised Capital Accord, Basel II, has outlined the three pillars to support a stable banking sector: rules on minimum capital requirements (Pillar 1), supervisory review process (Pillar 2) and market discipline disclosure (Pillar 3).
58. As the objective of achieving sound financial institutions that are capable of absorbing liquidity and economic shocks is mainly connected with the adequacy of the bank's capital structure, **Pillar 1** sets out the rules for mandatory minimum capital requirements.
59. **Pillar 2** promotes a stable banking sector through supervision. Rules on mandatory capital requirements and supervision interact with one another, the assumption being that regulation builds the foundations for supervisors to carry out their assignment.
60. Therefore, Pillar 2 is conceived to build up on the capital requirements provided for by Pillar 1 and to leverage on supervisors' skills and experience, in order to take into account the specificities of the single banks and overcome a "one size fit all" approach.
61. **Pillar 3** of the Basel framework is market discipline, to be achieved through regulatory disclosure requirements.
62. The idea behind Pillar 3 is to rely on market forces to keep banking risks in check, i.e. leveraging on the prospect of incurring a negative market response to limit the banks' risk appetite. In that sense, the market discipline contained in Pillar 3 provides for various disclosure requirements for banks' risk exposure, risk assessment processes and capital adequacy that investors can take into account when making their own investment decisions.
63. In the EU, the supervisory activities performed in accordance with Pillar 2 consist primarily in the SREP carried out in accordance with the CRD and the relevant Level 2 and Level 3 measures, including in particular the EBA Guidelines.
64. In practical terms, the SREP involves the Prudential Competent Authorities performing a comprehensive assessment of banks' strategies, processes and risks, and takes a forward-looking view to determine quantity and quality of the capital each bank needs to cover its risks, in addition to the capital requirements applying to all institutions under the Pillar 1.
65. In the Banking Union, a distinction is made between significant institutions (SIs) and less significant institutions (LSIs). The criteria to determine whether an institution is significant or less significant are (i) size, (ii) importance for the economy of the Union or any participating Member State, (iii) significance of cross-border activities, (iv) request for or receipt of public financial assistance directly from the ESM and (v) the fact that it is one of the three most significant credit institutions in a participating Member State. A more

detailed description can be found in Article 6(4) of the SSM Regulation. Moreover, the list of SIs is public and can be consulted on the website of the SSM<sup>9</sup>. In other EU jurisdictions outside the Banking Union institutions are supervised by their CRD NCAs.

66. In the SSM, for SIs, the SREP is performed by the Joint Supervisory Teams, while for LSIs it is performed by the CRD NCAs under the overall oversight of the ECB. The ECB does not oversee the SREP performed by the CRD NCAs outside the Banking Union. However, in the context of cross-border groups, both within and outside the Banking Union, SREP decisions are taken jointly, based on the applicable framework for the functioning of colleges and joint decisions. For SIs, while the process is carried out on a continuous basis, **individual SREP decisions are in principle taken once a year**. For LSIs in the Banking Union, as well as for institutions in other EU jurisdictions, the SREP is often carried out less frequently, with SREP decisions being taken every two or three years<sup>10</sup>.
67. It is worth noting that on substance, the SREP is similar for all institutions across the EU since for all it is carried out in accordance with the CRD, the relevant Level 2 measures and the EBA Guidelines and Opinions. The SSM and the CRD NCAs transpose the EBA SREP Guidelines and other relevant guidance into more specific supervisory methodologies. , In this context it can be noted that the ECB has published separate methodology booklets for the assessment of SIs<sup>11</sup> and LSIs<sup>12</sup>.
68. SREP decisions are tailored to each individual bank, and the supervisor may require the single bank to hold additional capital and/or set qualitative requirements, e.g. in relation to the bank's governance structure or its management.
69. The individual SREP decisions “support other supervisory activities and contribute to a thorough and continuous monitoring of banks. They feed into the strategic and operational planning for the upcoming supervisory cycle and have a direct impact on the frequency and depth of off-site and on-site supervisory activities for a given bank”<sup>13</sup>.
70. According to Article 97 of CRD “competent authorities shall review the arrangements, strategies, processes and mechanisms implemented by the institutions [...] and evaluate:
- a. risks to which the institutions are or might be exposed; and

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<sup>9</sup> <https://www.bankingsupervision.europa.eu/banking/list/html/index.en.html>

<sup>10</sup> EBA Guidelines define classification of institutions into 4 categories, depending on their size and complexity. While SREP is performed annually for category 1 institutions, the frequency may be lower for other banks (see Title 2 of SREP GLs and the minimum engagement model specified there).

<sup>11</sup> [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep\\_methodology\\_booklet\\_2018~b0e30ced94.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_2018~b0e30ced94.en.pdf)

<sup>12</sup> [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep\\_methodology\\_booklet\\_lsi\\_2020.en.pdf?eb5bd834eff4d97e8be0063ff2c8a15e](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_lsi_2020.en.pdf?eb5bd834eff4d97e8be0063ff2c8a15e)

<sup>13</sup> <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html>

- b. risks revealed by stress testing taking into account the nature, scale and complexity of an institution's activities.”.

71. According to the EBA Guidelines, the SREP has to focus on:

- i. the viability and sustainability of the business model;
- ii. the governance and risk management assessment;
- iii. the assessment of **risks to capital**; and
- iv. the assessment of risks to liquidity and funding.

72. Each of those separate assessments leads to a score being given, ranging from 1 (best performance) to 4. Partial scores will have to be carefully considered in the overall SREP assessment and will form the basis for subsequent supervisory measures.

73. In the SREP within the assessment of risks to capital and capital adequacy, **three different perspectives** are considered: the supervisory perspective (that considers in particular credit risk, market risk, operational risk, IRRBB), the bank’s perspective (including a comprehensive review of the bank’s Internal Capital Adequacy Assessment Process (ICAAP) and a forward-looking perspective (combining the information obtained from both the internal and the supervisory stress tests)<sup>14</sup>.

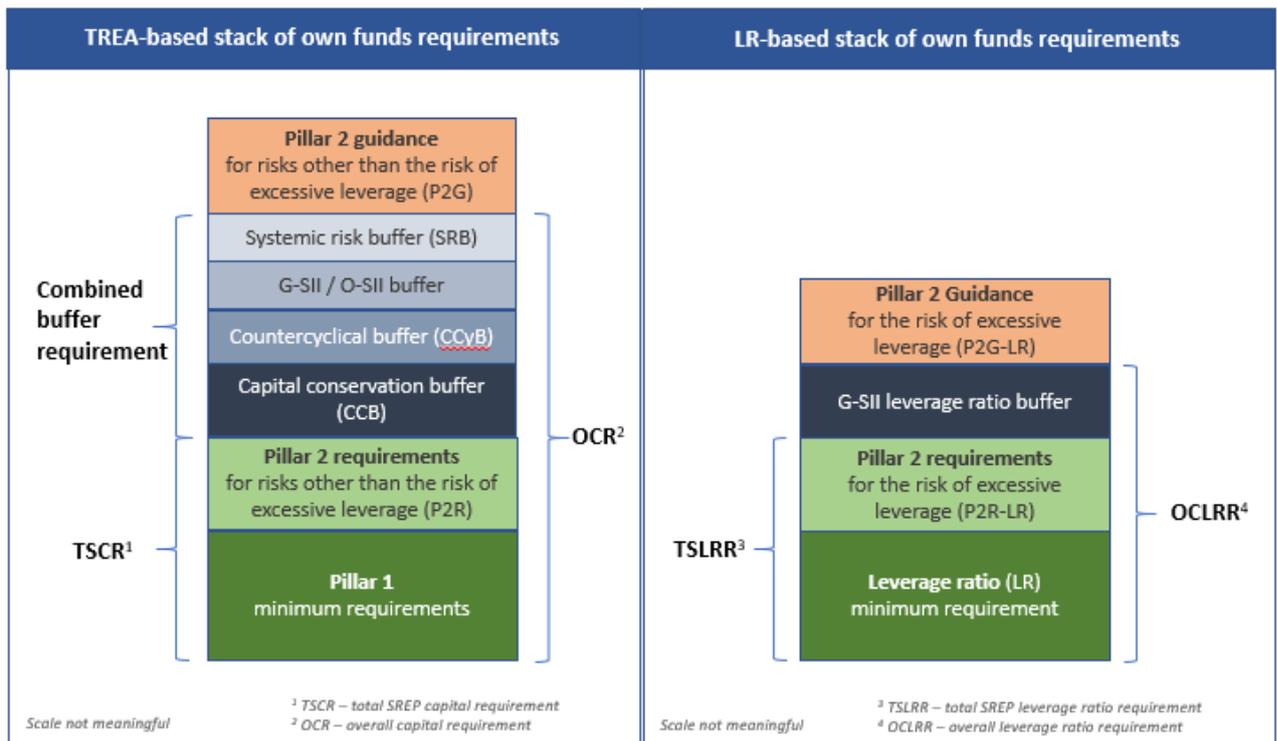
74. The same three-perspectives apply in relation to the assessment of risks to liquidity and funding and liquidity adequacy, where the supervisory perspective is represented by the analysis of - liquidity and funding sustainability, the bank’s perspective includes a comprehensive review of the bank’s Internal Liquidity Adequacy Assessment Process (ILAAP) and the forward-looking perspective combines the information obtained from the internal and the supervisory stress tests.

75. Overall, the bank’s capital stack may be graphically represented as follows in the table 1. The total requirements result from the higher of two capital stacks below determined in relation to both the capital requirements that are expressed as a percentage of the total risk exposure amount (TREA) of institutions and in proportion to the total exposure measure of institutions (e.g. leverage ratio).

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<sup>14</sup> SSM SREP Methodology Booklet, 2018 edition, ECB, p 21

TABLE 1 - INSTITUTIONS' CAPITAL STACK



76. Based on all the information reviewed and evaluated during the SREP, the Prudential Competent Authorities make the overall assessment of the credit institution and prepares SREP decisions, that may also include qualitative measures, e.g. to deal with shortcomings in institutions' risk management. SREP decisions may include:

- i. bank specific quantitative **capital measures**, in the form of Pillar 2 capital requirements (P2R) and Pillar 2 capital guidance (P2G);
- ii. bank specific quantitative **liquidity measures**;
- iii. **other qualitative supervisory measures** e.g. requirements to reinforce internal arrangements, processes, mechanisms and strategies, or to present a plan to restore compliance with supervisory requirements, the restriction or prior approval to distribute dividends, the imposition of additional or more frequent reporting obligations.

77. The SREP exercise ends with an overall SREP score on the same scale of the partial scores, and performances below "4", expressed with an overall SREP score of 'F', identify an institution that is "failing or likely to fail" and may therefore be subjected to resolution according to the BRRD).

78. The CRD sets out a wide array of supervisory actions that Prudential Competent Authorities may use whenever, as a result of the SREP, a financial institution is not in compliance with CRD, CRR, or the relevant level 2 Regulations and Guidelines.



## 3.2 MAR transparency and SREP: application across the EU

79. As already explained in the CP, ESMA carried out a Survey for NCAs, aiming to understand how institutions have reacted in each Member State when confronted with SREP draft and final decisions.
80. The survey covered four main areas: i) General information; ii) Disclosure of **draft** SREP Decisions; iii) Disclosure of **final** SREP Decisions; iv) Application of delayed disclosure of inside information. The scope of the survey covered only SIs supervised by the SSM in relation to the period 2018-2020.

### 3.2.1 SREP Survey: General information

81. Out of 30 NCAs involved, 10 NCAs reported not to have any SI in their jurisdictions. Table 2 below provides an overview of the number of SIs under each jurisdiction as at December 2020, and whether those SIs are included in the main national indices.
82. ESMA has also gathered input on the number of disclosures of inside information as per Article 17 of MAR carried out by SIs between 1 January 2018 and 31 December 2020. The results collected by ESMA show that the number of disclosures varies greatly across the EU.
83. Additionally, to appreciate the context beyond the scope of SREP, ESMA collected information on the overall number of cases of delayed disclosure of inside information carried out by SIs between 1 January 2018 and 31 December 2020, as per Article 17(4) and Article 17(5) of MAR (financial stability delay).
84. While no NCA reported delayed disclosure of inside information in case of threats to the financial stability under Article 17(5) of MAR, the outcome is different in relation to the delays under Article 17(4) of MAR. The number of delayed disclosures of inside information occurred in 2018, 2019 and 2020 is presented in Figure 1, Figure 2, and Figure 3 where the number of Member States is aggregated in six different ranges based on the numbers of disclosures (i.e., 0, 1-2, 3-5, 6-10, 11-20, 20+). Member States with no SIs under their jurisdiction are classified as NA<sup>15</sup>.
85. As displayed in the Figures 1, 2 and 3 the number of disclosures varies across the EU, with a relevant number of NCAs having SIs in their jurisdictions reporting no disclosure across the relevant period. This indicates that diverse practices with respect to such disclosures take place in the EU.

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<sup>15</sup> It should be noted that one NCA with at least one SI in its jurisdiction has been classified as NA due to the impossibility for that NCA to extract the requested information.

**TABLE 2 - NUMBER OF SIs PER JURISDICTION AND NUMBER OF SIs PER JURISDICTION INCLUDED IN MAIN NATIONAL INDICES**

<b>Member State</b>	<b>Number of SIs</b>	<b>Number of SIs included in main national indices</b>
AT	8	3
BE	1	1
BG	0	-
CY	3	2
CZ	0	-
DE	21	2
DK	0	-
EE	3	0
ES	12	6
FI	3	1
FR	11	3
GR	4	4
HR	4	3
HU	0	-
IE	7	2
IS <sup>16</sup>	0	-
IT	11	5
LI <sup>17</sup>	0	-
LT	1	1
LU	5	0
LV	2	0
MT	3	2
NL	5	2
NO	0	-
PL	0	-
PT	3	1
RO	0	-
SE	0	-
SI	7	1
SK	3	3

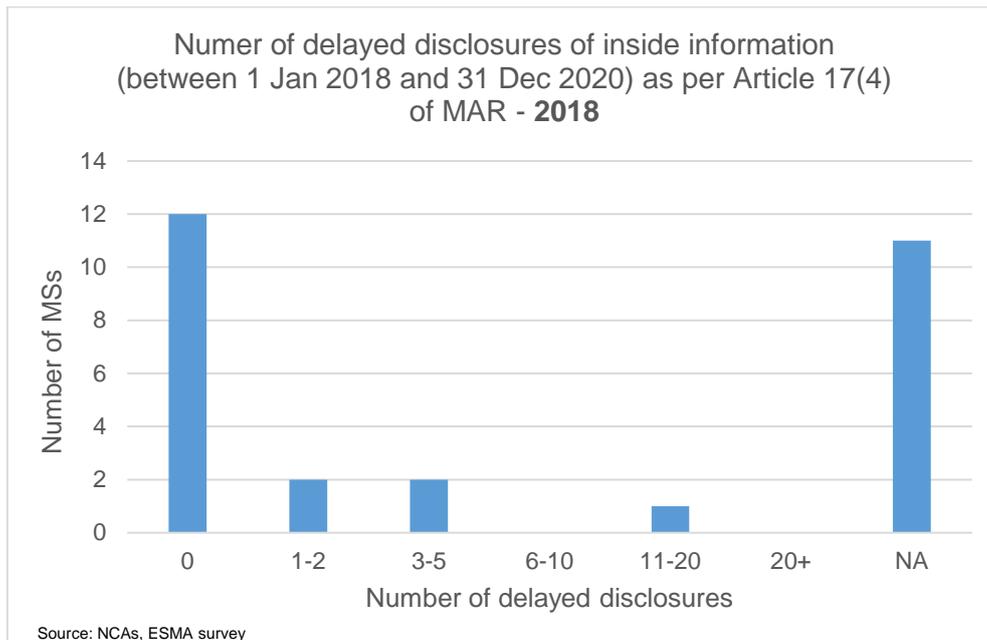
<sup>16</sup> The NCA reported that MAR is not yet implemented and that delays of disclosure of inside information take place under the old Market Abuse Directive regime.

<sup>17</sup> The NCA reported that the complete MAR framework (including all relevant Level 2 texts) entered into force in Liechtenstein on 1 January 2021. No information could be provided to ESMA as the SREP Survey refers to the cycle 2018, 2019 and 2020.

Member State	Number of SIs	Number of SIs included in main national indices
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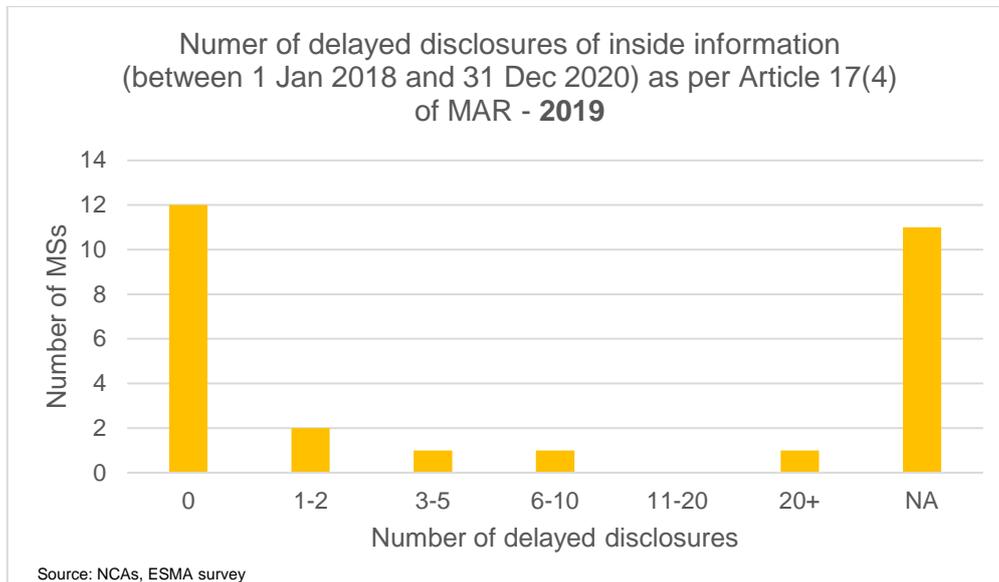
Source: NCAs, ESMA survey

**FIGURE 1 – NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2018<sup>18</sup>**

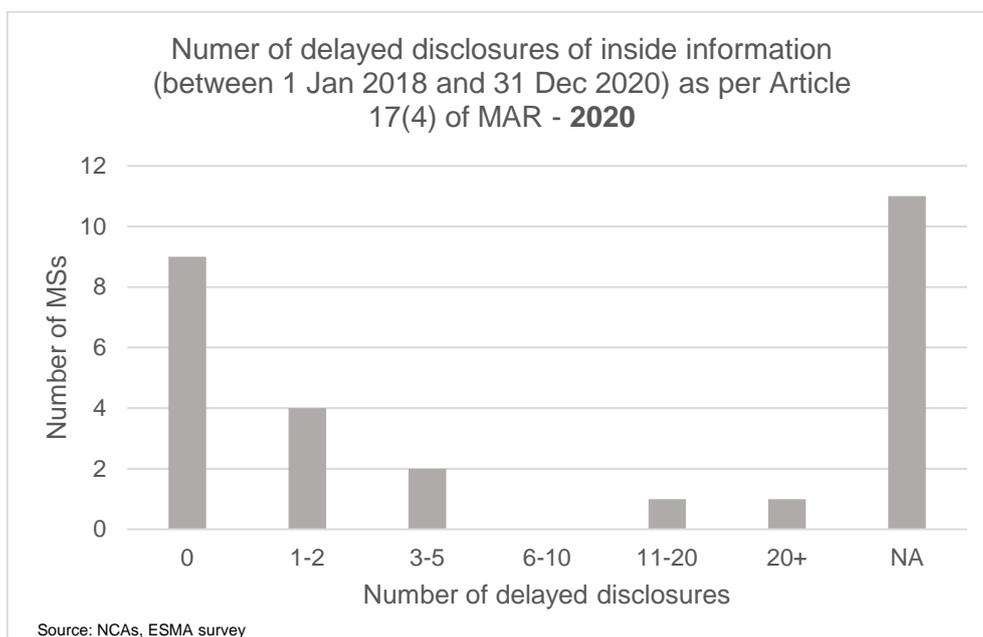


<sup>18</sup> ESMA notes that the data provided by two NCAs were not included in the Figure as the NCAs did not provide the breakdown per year but the total number of delayed disclosures of inside information over the 2018-2020. The number of disclosures in those two cases were respectively 2 and 11.

**FIGURE 2 - NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2019<sup>19</sup>**



**FIGURE 3 - NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2020<sup>20</sup>**



<sup>19</sup> See note 18.

<sup>20</sup> See note 18.

### 3.2.2 Disclosure of draft SREP Decisions

86. The second section of the survey covered the disclosure of the **draft** SREP decisions. In particular, ESMA has gathered information from NCAs on the disclosure of those decisions as per Article 17 of MAR.
87. It should be noted that 10 NCAs do not have SIs in their jurisdictions and hence did not report any disclosures.
88. Two NCAs reported one disclosure from an SI, as per Article 17 of MAR, in relation to draft SREP decisions in the reference period. The remaining NCAs with at least one SI in their jurisdiction reported that no such disclosure occurred.

### 3.2.3 Disclosure of final SREP Decisions

89. A similar analysis to the one related to draft SREP decisions has also been carried out by ESMA in relation to the disclosure of the **final** SREP decisions, i.e. on whether SIs disclosed any inside information related to final SREP decisions, as per Article 17(1) of MAR, over the observation period.
90. Nine NCAs (in addition to those with no SIs in their jurisdiction) noted that no such disclosure occurred, whereas the remaining NCAs stated that disclosure of **final** SREP decisions occurred at least once, with one NCA reporting eleven disclosures in both 2018 and 2019 and another NCA reporting five disclosures in 2020.
91. All the NCAs which reported that disclosures occurred, stated that such disclosures took place at the institution's initiative, and none was solicited by the NCA.
92. In terms of the type of information disclosed, most NCAs reported that the information most commonly disclosed concerned the overall capital requirements and its compositions (P2R) and the changes compared to the P2R in previous SREP decisions.
93. Additionally, a few NCAs reported that Tier 1 capital Ratio (CET1), SREP total capital adequacy ratio (TSCR), overall capital adequacy ratio, combined capital buffer requirement, Pillar 1 minimum requirements and references to no limitations in dividend distributions were made public in some disclosures.
94. Only two NCAs reported that the information disclosed concerned P2G related elements.

### 3.2.4 Delayed disclosure of draft or final SREP related inside information

95. No NCAs reported case of delayed public disclosure of SREP related inside information in their jurisdictions, with respect to both draft of final SREP decisions.

### 3.3 Draft SREP decisions

#### 3.3.1 Proposal in the CP

96. The outcome of the assessment carried out by the Prudential Competent Authorities in relation to the SREP and any necessary corrective actions are often anticipated to institutions by exchanges of preliminary information and draft SREP letters ahead of the final SREP decision.
97. For instance, in the process established by the SSM, the credit institution “is given the opportunity to comment in writing to the ECB on the facts, objections and legal grounds relevant to the ECB’s supervisory decision. Where appropriate, specific meetings can be organised with the credit institution to discuss the outcomes and corrective actions to be taken”<sup>21</sup>. This step in the process is a legal requirement which reflects the right to be heard (see Article 31 of Regulation (EU) No 468/2014<sup>22</sup>).
98. As a result, further to the interactions with the credit institution, the final SREP decision may differ from the draft decision initially exchanged between the supervisor and the institution, because the latter may provide additional relevant information for the Prudential Competent Authority to consider. Such additional relevant information could also be provided to the Prudential Competent Authority in a supervisory dialogue carried out prior to the adoption of the SREP decision.
99. Given the current formulation of MAR, even draft decisions and preliminary information related thereto may be inside information. More precisely, according to Article 7 of MAR even an “*intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article*”. In presence of inside information directly relating to the institution, the disclosure obligation under Article 17(1) of MAR should apply in principle.
100. As pointed out in the CP, whenever an issuer has to request a public authority’s approval or opinion on a project or an act that has direct consequences for the issuer, if that request is assessed to be inside information on its own, in the absence of the conditions for a delay, disclosure as soon as possible should take place with the caveat that the public authority’s decision is still pending.
101. However, unlike other cases where an authority is called to express its opinion or to approve a project or an act that has direct consequences for the issuer, the exchanges of information that take place within the SREP are more similar to a supervisory dialogue between the supervisor and the supervised institution than a filing process, where at least from the issuer side the information has reached a certain degree of finalisation.

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<sup>21</sup> ECB Guide to banking supervision, p. 25.

<sup>22</sup> OJ L 141, 14.5.2014, p. 1.

102. In light of the above, in the CP ESMA acknowledged the impact on institutions of immediate public disclosure of any potential inside information contained in the draft SREP decisions and the preliminary information related thereto.
103. The rationale is that disclosure of such information may be in contrast with the SREP procedure and, in particular, with the right of institutions to be heard and provide for clarifications and additional information before the final SREP decision is adopted. This may also have an immediate and undue impact on the price of the bank's financial instruments and its credit rating, making its financing through a capital increase or debt issuance more costly, while the final SREP decision may be different and result in price corrections that may be detrimental to the institution.
104. Therefore, ESMA publicly consulted on a proposed change in its MAR Guidelines by clarifying that public disclosure of the inside information potentially included in draft SREP decisions or the preliminary information related thereto, ahead of the final SREP decisions, may be prejudicing a legitimate interest of the institution.
105. ESMA noted that the MAR Guidelines adopted according to Article 17(11) of MAR already mentioned a case of draft decisions and preliminary information as a case where publication as soon as possible is likely to prejudice the issuer's legitimate interests. Such a case is where the inside information relates 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.
106. With regards to the other conditions set forth in Article 17(4) of MAR for a delayed disclosure, the current regime applies.
107. In particular, to delay the disclosure of inside information under Article 17(4) of MAR, the public should not be misled<sup>23</sup> and confidentiality must be ensured. Therefore, any rumour which is sufficiently accurate to indicate that confidentiality is no longer ensured whilst disclosure of inside information is being delayed should trigger disclosure as soon as possible under Article 17(7) of MAR.
108. In light of the above, ESMA proposed to amend the MAR Guideline by adding another case of legitimate interest.

### **3.3.2 Feedback to the Consultation**

109. ESMA received twelve responses in respect of draft SREP decisions and preliminary information related thereto, all of them supportive of non-disclosure. However, the reasoning as to why this should be the case differed and can be broadly put together in two main groups.

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<sup>23</sup> Article 17(4)(b) of MAR and ESMA Guidelines on delay in the disclosure of inside information, where it is contained a list of cases in which delay of disclosure of inside information is likely to mislead the public.

110. The first group includes respondents who were supportive of ESMA's proposal and who agreed that there is a legitimate interest in this case for the issuer to delay the disclosure, and hence welcome the proposed addition to the list of legitimate interests in the current Guidelines.
111. The other group of respondents disagreed with the inclusion in the list of legitimate interest, mainly stating that it unlikely that draft SREP decisions would meet the definition of inside information in the first place, due to the lack of the requirement of precision. Respondents argued that a draft SREP decision may be unlikely to be sufficiently precise because, given its preliminary nature, it appears unlikely that a reasonable investor would use it for his or her investment decisions (Art. 7 (4) MAR) so that it cannot be assumed that this stage of the SREP process can be expected to have a significant effect on the prices of the financial instruments of the respective institution. They argue that information becomes precise only as a result of an articulated dialogue between a Prudential Competent Authority and an issuer, with the possibility, which cannot be excluded in advance, that the initial content of the draft SREP letter could be amended, even significantly.
112. In addition, they argued that draft SREP decisions would not be suitable for public disclosure: if the same information is disclosed and then changed at the end of the SREP process, it could even be misleading for the market.
113. Finally, one respondent disagreed with the inclusion, arguing in favour of a clarification that the inside nature of information based on the characteristics in Article 7 of MAR (such as precision and materiality) should be assessed on a case-by-case basis.

### **3.3.3 ESMA's assessment and final approach**

114. ESMA takes note of the broad support by respondents not to have draft SREP decisions disclosed. ESMA would also like to reiterate that, in all cases, institutions will have to carry out a case-by-case assessment as to whether the information contained in the draft SREP decisions may constitute inside information, taking into account the guidance given in the MAR Guidelines.
115. However, ESMA is of the view that, given the current formulation of MAR, even draft decisions and preliminary information related thereto may be inside information. More precisely, according to Article 7 of MAR even an "*intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article*". In presence of inside information directly relating to the institution, the disclosure obligation under Article 17(1) of MAR applies.
116. ESMA does acknowledge the possible impact on institutions of immediate public disclosure of any potential inside information contained in the draft SREP decisions and the preliminary information related thereto, also as elaborated by certain respondents.
117. To address this, ESMA remains of the same view that the proposal to include draft SREP decisions and preliminary information related thereto in the list of legitimate interests

of issuers remains appropriate, so that in presence of the other conditions under Article 17(4) of MAR institutions would be able to delay the disclosure until the draft SREP decisions become final.

### 3.4 Content of the SREP decision: P2R, P2G and other supervisory measures

118. This section deals with the content of the SREP decisions, both in the form of draft decisions (and preliminary information related thereto) and final decisions, with the aim to provide guidance to the institutions in their assessment as to whether that information represents inside information.

#### 3.4.1 P2R: proposal in the CP

119. As previously described, P2R is a capital requirement which applies in addition to, and covers risks which are underestimated or not covered by, the minimum capital requirements applicable to all institutions under Pillar 1, in line with the capital needs that stem from the individual risk profile of an institution.

120. It is the result of the SREP carried out by the prudential competent authorities: the ECB for SIs and CRD NCAs for LSIs and other institutions outside of Banking Union. The **P2R is binding** and hence breaches can have direct legal consequences for institutions.

121. Institution-specific P2Rs were not systematically published until January 2020, when the ECB published them for the first time for those institutions under its direct supervision. ESMA welcomes the significant improvement of transparency that made P2R-related information both easily as well as systematically available to the wider public.

122. **Since June 2021**, in line with the relevant requirements introduced by CRR2<sup>24</sup>, institutions **are required to disclose their P2Rs annually**, irrespective of any other legislative obligations and considerations, MAR included.

123. There is no uniform disclosure timetable in that respect. Rather, the publication has to take place on the same date as the publication of the institution's annual financial statements, or as soon as possible thereafter<sup>25</sup>.

124. This in turn means that the timing of the compulsory CRR-driven disclosure may not be synchronised with the timing of the final SREP decisions (including P2R) being received by institutions.

125. This is of relevance as, unlike the CRR-driven disclosure, whenever P2R is assessed to be inside information, the MAR obligation to publicly disclose it as soon as possible

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<sup>24</sup> According to Articles 431(1), 433a(1) and 438(b) of CRR as amended by CRR2, which applies from 28 June 2021 (see Article 3 of CRR2 for the relevant exceptions).

<sup>25</sup> Article 433(2) of CRR.



**arises the very moment** an institution is informed of its specific P2R, unless the conditions for a delayed disclosure are met.

126. In that respect, in the CP ESMA expressed its support for a disclosure at the source of P2R by the Prudential Competent Authority which, if simultaneous to its communication to the supervised institutions, would be apt to ensure a completely uniform approach at EU level.
127. To assess whether they are in possession of inside information, institutions need to consider, on a case-by-case basis, if the information meets the definition inside information and if that is indeed the case, it should be publicly disclosed as soon as possible in line with MAR requirements, unless the institution assesses that the MAR conditions for its delay are met.
128. According to MAR, inside information must be non-public, directly or indirectly relating to one or more issuers or financial instruments, of a precise nature and likely, if it were made public, to have a significant effect on the relevant prices of those financial instruments or related derivative financial instruments.
129. The supervisory information relating to P2R is **non-public** and by definition institution-specific. Additionally, as P2R is in essence a figure representing the required supervisory level of capital, it is also to be considered of a **precise** nature.
130. 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, in the CP ESMA expressed its view that **P2R is highly likely to be of a price sensitive nature**.
131. This is due to the fact that the automatically triggered supervisory measures in case of breach of P2R will be likely to have an immediate impact on the institution's share price as investors will be able to incorporate it in their trading decision making.
132. According to the CP, a price impact cannot be excluded even where the institution's comfortably meets its P2R, as market participants may also see overcapitalisation as information that they would be likely to use as part of their investment strategy.
133. Upon assessment that all the conditions contained in Article 7(1)(a) of MAR are fulfilled, P2R would qualify as inside information, to be disclosed as soon as possible once received from the Prudential Competent Authority, unless the relevant conditions for a delayed disclosure apply.
134. Overall, in the CP ESMA proposed that, with exceptions in a limited number of cases as a result of a thorough assessment by the institution, P2R will be expected to be considered as inside information and, once final, disclosed as soon as possible.

### 3.4.2 P2R: feedback to the Consultation

135. There were thirteen responses that ESMA received to the question asked in the CP in relation to P2R. One third of the respondents were supportive of the proposal, and some of them agreed that a disclosure at the source of P2R by the Prudential Competent Authority would be welcome, as it would ensure a uniform approach at EU level. However, those respondents highlighted that the simultaneous communication to the institution and to the market could be, on some occasions, challenging, with the consequence that, where the private communication should arrive first, there would be a continued need for the institution's assessment as to whether they are in possession of inside information.
136. Nevertheless, two thirds of the responses that ESMA received opposed the proposal, mostly focusing on the sensitivity component. They stressed that P2R may have the potential to constitute inside information only if it deviates from the current assessment by the institution itself. Even in the case of such deviation, they consider it more likely that the P2R is not price sensitive. Alongside the discussion with the Prudential Competent Authority, when such situation arises, then the issuer should agree with the Authority the proper timing and the content of the communication. This approach, in their view, remains proportionate, pragmatic while aligned with MAR principles and removes the strong presumption that is introduced by the current proposal.
137. All respondents opposing the proposal supported a case-by-case assessment of whether P2R constitutes inside information. In that context, it was requested specifically that ESMA does not assume a "high likelihood" that P2R is price sensitive and, hence, deemed inside information.
138. Lastly, some respondents stated that, conceptually, they would support the view that P2R can constitute inside information if ESMA's considerations and exceptions in connection with P2G are to be applied also to P2R.

### 3.4.3 P2R: ESMA's assessment and final approach

139. ESMA takes note that the majority of the respondents oppose the proposal contained in the CP. While the assessment of the potential nature of inside information remains on a case-by-case basis, ESMA is nevertheless of the view that some guidance is needed to ensure a more uniform approach across the EU.
140. As to ESMA's view that a disclosure at the source of P2R by the Prudential Competent Authority, ESMA takes note of the difficulties associated with the coordination between public disclosure and private notification, but remains of the view that such solution would ensure a complete approach at EU level. In any case, the feasibility and the implementation of that solution goes beyond the scope of the ESMA Guidelines.
141. P2R is of binding nature and linked to automatically triggered supervisory measures in the case of a breach, with the potential to directly impact the MDA of dividends and certain specific coupons. Therefore, ESMA remains of the view that **P2R is highly likely to be price sensitive**. This is due to the fact that the presence of automatically triggered

supervisory measures in case of breach of P2R will be likely to be immediately taken into account by investors, with a direct impact on the institution's share price.

142. Therefore, in presence of price sensitivity and given that the other conditions of inside information are usually met, ESMA believes that the MAR obligation to publicly disclose P2R as soon as possible **arises the very moment** an institution is informed of its specific P2R, unless the conditions for a delayed disclosure are met.

143. Taking into account the responses that argued in favour of extending to P2R some of the considerations expressed in relation to P2G, in the final guidelines ESMA has added that, also in relation to P2R, institutions should assess the price sensitivity considering the magnitude of the difference between the institution's P2R and the current level of capital. At the same time, the guidelines clarify that price sensitivity should not be excluded even where the institution's current level of capital is higher than its P2R.

#### **3.4.4 P2G: proposal in the CP**

144. P2G is a capital guidance which applies in addition to the overall capital requirements (OCR), in turn composed of (i) Pillar 1 minimum requirements applicable to all institutions, (ii) bank-specific P2R and (iii) the combined buffer requirements.

145. P2G is therefore a type of supervisory monitoring metric that indicates to banks the adequate level of **capital** to be maintained to provide a sufficient buffer to withstand stressed situations. It is a tool to monitor early warning signals to take supervisory actions and enter into an enhanced dialogue with the supervised institutions and, as such, Prudential Competent Authorities expect credit institutions to incorporate their P2G into their risk management and capital planning.

146. P2G may take into account the quantitative outcome of the EU-wide stress tests carried out by EBA every two years, or the supervisory stress tests performed by Prudential Competent Authorities, and assesses whether institutions may not be able to meet their applicable capital requirements under the assumed stressed conditions.

147. The P2G is expected to be met on top of the legally binding capital requirements (e.g. a bank with a capital requirement of 11.5% could receive a total capital guidance, including P2G, of 12.5%). That means that, where the P2G is not met, the institution is expected to present a plan to recover a capital level in line with the guidance. The Prudential Competent Authority may impose specific supervisory requirements regarding the implementation of this plan and, only in case where P2G is repeatedly not met, may consider applying the measures foreseen in Article 104a(1)(e) of the CRD.

148. Within the SREP decisions, not only will the Prudential Competent Authority inform institutions of their P2G, but also what quality of capital they are expected to hold in order to meet the P2G.

149. **P2G is 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). However, Prudential Competent Authorities will engage in an enhanced supervisory dialogue with the institution in order to investigate the underlying reasons and, should the situation require, take necessary actions or supervisory measures that are appropriate to the particular institution, also in light of the external economic circumstances.

150. In the CP ESMA explained that to assess whether an institution possesses inside information, that institution needs to consider, on a case-by-case basis, if the information meets the definition of inside information and, if that is indeed the case, it should be publicly disclosed as soon as possible in line with MAR requirements, unless the institution assesses that the MAR conditions for its delay are met.
151. Inside information must be non-public, directly or indirectly relating to one or more issuers or financial instruments, of a precise nature and likely, if it were made public, to have a significant effect on the relevant prices of those financial instruments or related derivative financial instruments.
152. The supervisory information relating to P2G is **non-public** and by definition institution-specific.
153. Additionally, as P2G is in essence a figure representing the adequate level of capital to withstand stressed situations, it is also to be considered of **precise** nature.
154. As to the **price sensitivity**, in the CP ESMA expressed its views that, despite not being of a binding nature and not impacting the MDA of dividends and certain specific coupons, P2G remains likely to be of a price sensitive nature.
155. This is because Prudential Competent Authorities expect supervised institutions to incorporate their P2G into their risk management and capital planning. The Prudential Competent Authority may impose specific supervisory requirements regarding the implementation of the institution's capital planning and, in case of an institution repeatedly not meeting its P2G, may even consider applying the measures foreseen in Article 104a(1)(e) of the CRD.
156. The CP highlighted that, even in the absence of automatic regulatory measures in response to institutions not meeting their P2G, and considering the generally longer timeframe for institutions to meet again their P2G vis-à-vis their P2R, it is known that Prudential Competent Authorities will engage in an enhanced supervisory dialogue with the institution not meeting its P2G in order to understand the underlying reasons and take the necessary supervisory actions that may in turn have an impact on the institution's share price.
157. Moreover, among the actions that the institution could take to restore their compliance with P2G is a capital increase, which is also likely to have an impact on the institution's share price.

158. In presence of supervisory expectations that institutions react and meet their P2G, also market participants carry that expectation, that in turn can translate into a price impact on the institution's financial instruments.
159. In the CP ESMA suggested that the price sensitivity of P2G is to be assessed considering both the magnitude of the difference between the institution's P2G and the current level of capital, but also the impact of the actions that the institution needs to take to restore the compliance with P2G (e.g. a capital increase), and the relevant timing to complete them.
160. Therefore, the price impact of an institution not meeting its P2G may vary, but in the CP ESMA expressed its view that it is likely to be present. According to the CP's proposal, a price impact cannot be excluded even where the institution's current capital level is higher than its P2G, as market participants may see overcapitalisation as information that they would be likely to use as part of their investment strategy.
161. ESMA consulted upon a proposal of amendments of the MAR Guidelines according to which there is a general expectation that also P2G is price sensitive, except for exceptional situations, for instance where:
- the institution's current level of capital is in line with the institution's P2G and the market price of the financial instruments already reflects this;
  - the breach of P2G is minor and does not involve a major reaction by the institution, such as a capital increase, as it can be addressed through other tools;
  - the communicated P2G is fully in line with market expectations, so no price impact is expected.

### **3.4.5 P2G: Feedback to the Consultation**

162. All the responses received are opposing ESMA's proposal regarding P2G.
163. The great majority of respondents consider that, given its non-binding nature, P2G should normally be considered as non-price-sensitive, except for exceptional cases, e.g. where the corporate measures adopted in response to the institution's assigned P2G are price sensitive.
164. A couple of respondents even consider that that P2G should never be seen as price sensitive information on its own. They believe that repeated fails to meet P2G in the long run may push the prudential competent authority to turn P2G into P2R, which is a binding measure and therefore likely to be price sensitive.
165. Additionally, some respondents highlighted that encouraging to systematically publish P2G could trigger a change of view from the market and the investors, which may therefore turn P2G into a quasi-binding measure and remove the flexibility in the necessary dialogue between the banks and the supervisors.

166. A respondent also noted that the exceptions to the price sensitivity of P2G listed in the CP are not exceptional, but rather the normality, which seems to be in contrast with the general expectations set out by the guidelines that P2G is likely to be price sensitive.
167. Some respondents also stressed that the guidelines do not differentiate the case of institutions with debt only instruments traded on a EU trading venue, for which the price sensitivity of P2G is in their view not present.
168. Lastly, some respondents recalled that P2G is largely based on the outcome of the stress tests, for which disclosure is made. Others stressed that publishing P2G only without the broader and more complete context concerning the institution itself could be misleading for the market and could damage the perception of the issuer's soundness.
169. Overall, many respondents agree that in the examples listed in the CP P2G is not to be considered price sensitive. One respondent argued in favour of adding to the list of cases where price sensitivity should be excluded the example where the institution level of capital is above its P2G.
170. Two market participants suggested to revisit the list of cases where price sensitivity should be excluded to include only where P2G (but also P2R, in their view) is not met by a significant amount.
171. No other examples of situations where price sensitivity should be excluded were provided.

#### **3.4.6 P2G: ESMA's assessment and final approach**

172. ESMA takes note that the responses received did not support the proposal included in the CP.
173. ESMA does not agree with the fact that only binding supervisory measures may be price sensitive, as also P2G may lead to a corporate reaction and the knowledge of that information may be considered by the investors in their trading decisions.
174. For the same reasons, one cannot consider that only repeated failures to meet their P2G, with the prudential competent authority potentially turning P2G into P2R, are price sensitive information.
175. However, ESMA acknowledges that P2G is a different typology of supervisory measure compared to P2R, which may warrant a different approach.
176. For that reason, ESMA agreed to amend the approach proposed in the CP and departed from the assumption that P2G is likely to be price sensitive, except for exceptional cases, to stating that **P2G may be price sensitive**.
177. The final version of the guidelines provides examples where P2G is expected to be price sensitive, i.e. where:

- a) the difference between the P2G and the institution's level of capital is not minor and is likely to involve a major reaction by the institution, such as a capital increase;
- b) the institution's P2G is not in line with market expectations, so a price impact can be expected.

178. According to that approach, letter a) is expected to cover those cases where the institution's level of capital is significantly lower than its P2G, so that a corporate reaction is expected to reduce the gap.

179. Differently, letter b) is expected to cover not only those cases where the institution's level of capital is lower than its P2G, but also when it is higher, provided that the difference is not in line with the market expectations.

180. When assessing whether P2G is in line with the markets expectations, institutions should consider all publicly available information, including the results of the relevant stress tests, i.e. EU-wide stress tests published by EBA<sup>26</sup>, or the stress tests results and the methodological elements regarding the determination of the P2G published by the ECB<sup>27</sup> or by CRD NCAs.

### **3.4.7 Other supervisory measures contained in the SREP decisions: proposal in the CP**

181. In addition to P2R and P2G, the SREP decisions may also require institutions to adopt liquidity measures and other qualitative measures.

182. As for the liquidity measures, Article 104 of CRD IV point (k) assigns to the Prudential Competent Authority the power "*to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities*".

183. Article 105 CRD IV adds to the list of liquidity measures that can be adopted by the Prudential Competent Authority "administrative penalties or other administrative measures, including prudential charges, the level of which broadly relates to the disparity between the actual liquidity position of an institution and any liquidity and stable funding requirements established at national or Union level".

184. As for the qualitative measures, Article 104 CRD IV provides the Prudential Competent Authority with the powers to adopt a number of measures in the SREP decision. For example, the Prudential Competent Authority may require the institution to reinforce its risk

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<sup>26</sup> <https://www.eba.europa.eu/risk-analysis-and-data/eu-wide-stress-testing>

<sup>27</sup> <https://www.bankingsupervision.europa.eu/banking/srep/html/p2g.en.html>



management and control arrangements or its governance arrangements, restrict or prohibit the distributions of dividends and interest payments or impose additional reporting requirements.

185. MAR rules on inside information and its management apply to all types of information, including the one regarding other supervisory measures potentially included in the SREP decisions.
186. According to MAR, inside information must be not public, directly or indirectly relating to one or more issuers or financial instruments, of a precise nature and likely to have a significant effect on the prices of those financial instruments or related derivative financial instruments.
187. The information relating to any other potential supervisory measure is non-public and by definition institution-specific.
188. In the CP ESMA noted that, unlike P2R and P2G, the other supervisory measures potentially contained in the SREP decisions may vary greatly in form and substance. For this reason, ESMA concluded that it is difficult to draw any upfront general conclusion as to their preciseness and price sensitivity.
189. Therefore, in the absence of evidence of supervisory convergence issues across Member States in this respect, ESMA stated in the CP its intention not to issue guidance to cover any other supervisory measure potentially contained in the SREP decisions. Rather, ESMA reiterated that in such instances 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 elements of the relevant MAR definition.
190. Where the institution concludes that it is in possession of inside information, it should publicly disclose it as soon as possible in line with MAR requirements, unless the institution assesses that the MAR conditions for a delay are met.

#### **3.4.8 Other supervisory measures contained in the SREP decisions: feedback to the consultation**

191. ESMA received feedback from eleven respondents, most of them fully supporting the case-by case assessment proposed by ESMA with respect to other supervisory measures potentially included in the SREP decisions.
192. A minority of respondents expressed disagreement with respect to ESMA's proposed approach. One respondent stated that in his view it can be stated ex-ante that that P2R and distribution of dividends restrictions or prohibition are the only SREP requirements that are price sensitive. Therefore, in their view, other information contained in the SREP decisions should not be disclosed, implying that a case-by-case analysis would not be needed.

### **3.4.9 Other supervisory measures contained in the SREP decisions: ESMA's assessment and final approach**

193. Taking into account the support of stakeholders for the case-by-case approach proposed in the CP with respect to other supervisory measures potentially contained in the SREP decisions, ESMA confirms its intention not to issue guidance in this respect, but rather to leave to the institutions to assess on a case-by-case whether any other supervisory measure received represents inside information and applying public disclosure (or delayed disclosure) where applicable.
194. With respect to the comments received by stakeholders regarding the fact that P2R and distribution of dividends are the only price sensitive requirements contained in SREP decisions, ESMA reiterates the view that the other supervisory measures potentially contained in the SREP decisions may vary greatly in form and substance. For this reason, it is not possible to determine ex-ante if any of the information related to such measures might be price sensitive and a case-by-case assessment is needed in order to ensure the disclosure (or potential delayed disclosure) of inside information to the public, as per MAR relevant requirements.

### **3.4.10 Other issues raised by respondents to the CP**

195. In the CP ESMA asked the stakeholders to provide any further suggestion they might have with respect to other elements that ESMA should consider in a potential amendment to its MAR Guidelines.
196. Some respondents provided more general comments regarding MAR provisions. One respondent highlighted that the requirement that the delayed disclosure of information should not mislead the public poses problems of interpretation. The respondent suggests clarifying that, in principle, information which does not contradict previous statements by the same issuer is not misleading.
197. One respondent stated that when a decision/action is not solely within the control of an issuer one should be very cautious with qualifying such as inside information, as such information would likely not meet the MAR criteria regarding precision and could potentially mislead the market if it is published at a premature stage.
198. Two respondents highlighted that the public disclosure requirement under Article 17 or MAR, in the context of a resolution scenario, would conflict with some obligations of the BRRD. The respondents noted that the delayed publication under MAR ceases in presence of precise rumors in the market. In such instances, in the respondent's view, the application of the disclosure requirement, may constitute an impediment to the institution's resolution. The respondent suggests that the specific notification and communication provisions in the BRRD should prevail over Article 17 of MAR in a resolution scenario.
199. With more focus on the amended guidelines, one respondent, with specific regard to Guideline 1 point h, stated that in his view the legitimate interest for delaying disclosure

should be contemplated not only in case of draft decisions, but also extended in cases 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 IV. The rationale is that an immediate disclosure might undermine the usefulness of the supervisory measure to be implemented.

200. Three respondents commented with respect to Guideline 1.c, i.e. the “*two-tier board structure*”, which contemplates a legitimate interest to delay the public disclosure of inside information where the approval of a corporate body other than the management body (especially the supervisory board) is pending. Such respondents stressed the importance of allowing delayed disclosures in such instances. Additionally, the respondents proposed that the guidelines should expand on the ability to delay publication in cases of “*two-tier board structure*” as the current drafting might not allow a dutiful and proper decision-making process of the supervisory body.

### **3.4.11 Other issues raised by respondents to the CP: ESMA’s assessment and final approach**

201. ESMA acknowledges the various points raised by respondents but, on a general note, considers that some of them, despite raising relevant issues which deserve consideration, are not in direct scope of the MAR Guidelines. With specific reference to the issue raised by some respondents related to the potential conflict, in the context of a resolution scenario, between the public disclosure requirement under Article 17 or MAR and some obligations of the BRRD ESMA acknowledges the interest from the stakeholders in the public disclosure regime in the context of resolution, which however represents a sensitive topic that needs further and dedicated consideration (see Section 2.3). ESMA takes note of the matter and will consider whether further guidance is needed at a later stage.

202. Other comments did relate to the scope of the Guidelines but are not directly targeting the proposed amendments to the current ESMA Guidelines. For example, with respect to the comment on Guideline 1(c), i.e. “*two-tier board structure*”, ESMA takes note of the points raised by stakeholders. However, ESMA believes that the current drafting is deliberately making the possibility to delay the disclosure in presence of a two-tier governance subject to precise conditions. Where those conditions are not met, the fact that the supervisory body is still to endorse the decision of the management body should not be seen, per se, as a legitimate interest to delay the disclosure.

203. ESMA acknowledges the point raised on Guideline 1(h), which suggests that a legitimate interest for delaying disclosure should be present not only in case of draft decisions, but also in those cases where the competent authorities require institutions “*to apply a specific provisioning policy or treatment of assets in terms of own funds requirements*”.

204. While the list of legitimate interests included in the MAR guidelines is to be seen as non-exhaustive, ESMA is of the view that not all the cases where public disclosure of a



supervisory measure may render the execution of the measure more difficult may involve an issuer's legitimate interest to delay the disclosure.

205. Given that this exercise is focussed on the interactions between MAR and the framework of prudential supervision, ESMA is not amending its guidelines in that respect, but takes note of the point raised and will consider further guidance in the future.

206. A similar situation is already covered by Guideline 1(f), in the case of a transaction subject to a public authority's approval which is conditional on additional requirements whose immediate disclosure will affect the issuer's ability to meet them.

## Annexes

### Annex I - Preliminary high-level cost-benefit analysis

#### Additional cases of legitimate interests of the issuer for delaying public disclosure of inside information and the proposed new section to the MAR Guidelines

207. Article 17(1) of MAR sets forth that issuers should inform the public as soon as possible of inside information which directly concern(s) them. Article 17(4) of MAR specifies that issuers may, on their own responsibility, delay disclosure to the public of inside information provided that: a) immediate disclosure is likely to prejudice the legitimate interests of the issuer; b) delay of disclosure is not likely to mislead the public; c) the issuer is able to ensure the confidentiality of that information. Article 17(11) of MAR requires ESMA to issue Guidelines to establish a non-exhaustive indicative list of: i) legitimate interests of the issuer that are likely to be prejudiced by immediate disclosure of inside information and ii) situations in which delay of disclosure is likely to mislead the public.

208. In line with the mandate under Article 17(11) of MAR, ESMA issued its 2016 MAR Guidelines. The MAR Guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and a list of situations where delay of disclosure is likely to mislead the public. The draft proposals in this paper build and expand on the part of the MAR Guidelines that deals with legitimate interests, focusing specifically on various aspects of the interaction between the MAR transparency obligations vis-à-vis inside information and the prudential supervisory framework.

	Qualitative Description
Benefits	<p>The Guidelines are aimed at providing clarity, enhancing legal certainty and fostering supervisory convergence, by adding certain cases to the list of legitimate interests of issuers for delaying public disclosure of inside information. Although the said list continues to be non - exhaustive and is meant to be indicative, the additions should assist issuers that are also institutions subject to prudential supervision under the CRD regime in conducting their assessment as to whether they meet the conditions to delay inside information according to MAR.</p> <p>The Guidelines also provide guidance on the institutions' case-by-case assessment as to whether they would be in possession of inside information as defined in Article 7(1)(a) of MAR, in relation to the institution-specific SREP decisions received from their prudential competent authority, with particular reference to P2R and P2G. The Guidelines are aimed at highlighting that P2R is highly likely to be inside information while providing cases where P2G is expected to be</p>

	<p>inside information, therefore subject to be publicly disclosed as soon as possible, unless the conditions for a delay are met.</p> <p>These Guidelines should help institutions in their assessment in the application of the MAR transparency requirements vis-à-vis the prudential supervisory framework and minimise the number of controversial cases of delay in the disclosure of inside information. It should also assist the NCAs in the context of their supervisory activities, particularly in this area of interaction with the prudential supervisory framework.</p> <p>Overall, the main benefit arising from the Guidelines would be a clearer and more uniform application of the MAR provisions on inside information and its transparency requirements in the European Union.</p>
Costs to regulators	None
Compliance costs	<p>In respect of the additional legitimate interests to delay the disclosure of inside information - as well as in relation to the points made with respect to content of the SREP decision, more specifically P2R and P2G, it should be noted that the Guidelines are not expected to burden the issuers with any additional costs, as they do not set forth any additional requirements for them. Issuers are already expected to have systems and controls, and a process in place, to comply with the disclosure requirements under MAR if and when necessary.</p>
Costs to other stakeholders	None
Indirect costs	None



## Annex II – Guidelines on delay in the disclosure of inside information (the amendments compared to the previous version are in red)

### 1. Scope

#### Who?

1. These guidelines apply to Competent Authorities **designated under Article 22 of MAR** and issuers.

#### What?

2. These guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and situations in which delay of disclosure is likely to mislead the public, according to Article 17(11) of Regulation (EU) No 596/2014 **of the European Parliament and Council**. In addition, these guidelines provide, according to Article 16(1) of the ESMA Regulation, clarifications concerning the existence of inside information in relation to Pillar 2 Capital Requirements and Capital Guidance.

#### When?

3. These guidelines apply from **20/12/2016** [2 months after publication of translations].

### 2. **Legislative** references, abbreviations and definitions

#### Legislative references

CRD	Capital Requirements Directive – Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC <sup>28</sup>
CRR	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential

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<sup>28</sup> OJ L 176, 27.6.2013, p. 338.



requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012<sup>29</sup>

MAR Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC<sup>30</sup>

ESMA Regulation Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC<sup>31</sup>

### Abbreviations

CRD NCA National Competent Authority as defined under Article 3(1)(36) of CRD

ECB European Central Bank

ESFS European System of Financial Supervision

P2G Pillar 2 Capital Guidance

P2R Pillar 2 Capital Requirements

Prudential Competent Authorities CRD NCAs and the ECB

SREP Supervisory Review and Evaluation Process

### Definitions

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<sup>29</sup> OJ L 176, 27.6.2013, p. 1.

<sup>30</sup> OJ L 173, 12.6.2014, p. 1.

<sup>31</sup> OJ L 331, 15.12.2010, p. 84.



Institutions	Credit institutions and institutions as defined under Article 4(1) and (3) of CRR respectively, combined with Article 11(2) of CRR
Issuer	A legal entity as defined in Article 3(1)(21) of MAR and that is subject to the transparency obligations under Article 17(1) of MAR.

### 3. Purpose

~~4. The purpose of~~ These guidelines ~~is to~~ are based on Article 17(11) of MAR and on Article 16(1) of the ESMA Regulation. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure common, uniform and consistent application of Articles 7(1), 17(1) and 17(4) of MAR. In particular, these guidelines provide guidance by giving examples to assist the issuers in their decision to delay public disclosure of inside information under Article 17(4) of MAR, through a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and situations in which delay of disclosure is likely to mislead the public. In addition, these guidelines provide clarifications concerning the existence of inside information in relation to P2R and P2G.

## 4. Compliance and reporting obligations

### 4.1 Status of the guidelines

~~5. This document contains guidelines issued under Article 17(11) of MAR.~~ In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines ~~and recommendations~~.

6. Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

### 4.2 Reporting requirements

7. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA (to [MARguidelinesGL3@esma.europa.eu](mailto:MARguidelinesGL3@esma.europa.eu)) whether they (i) comply, (ii) do not comply, but ~~or~~ intend to comply, or (iii) do not comply and do not intend to comply with the guidelines. ~~within two months of the date of publication by ESMA to [MARguidelinesGL3@esma.europa.eu]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant.~~



8. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for non-compliance. A template for notifications is available ~~from~~ on ESMA website. Once the template has been filled in, it shall be transmitted to ESMA.

9. Issuers are not required to report whether they comply with these guidelines.

## **Guidelines on legitimate interests of issuers to delay the disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public**

### **1. Legitimate interests of the issuer for delaying disclosure of inside information**

#### **Guideline 1:**

10. For the purposes of point (a) of Article 17(4) of MAR, the cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests could include but are not limited to the following circumstances:

- a. the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure. Examples of such negotiations may be those related to mergers, acquisitions, splits and spin-offs, purchases or disposals of major assets or branches of corporate activity, restructurings and reorganisations.
- b. the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders by jeopardising the conclusion of the negotiations designed to ensure the financial recovery of the issuer;
- c. the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's bylaws, the approval of another body of the issuer, other than the shareholders' general assembly, in order to become effective, provided that:
  - i. immediate public disclosure of that information before such a definitive decision would jeopardise the correct assessment of the information by the public; and
  - ii. the issuer arranged for the definitive decision to be taken as soon as possible.
- d. the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer;

- e. the issuer is planning to buy or sell a major holding in another entity and the disclosure of such an information would likely jeopardise the implementation of such plan;
- f. a transaction previously announced is subject to a public authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction-;
- g. the issuer is an institution subject to the CRR and a decision to carry out a redemption, reduction, repurchase, repayment or call of own funds instruments or a reduction, distribution or reclassification as another own funds item of the share premium accounts related to own funds instruments has been taken but not yet authorised by the competent authority as defined under Article 4(1)(40) of CRR, pursuant to Article 77 of CRR;
- h. the issuer is an institution subject to prudential supervision under the CRD 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. In such case, a premature announcement of any inside information constituting the draft SREP decision or preliminary information related thereto would be in contrast with the SREP procedure and in particular with the institution's right to be heard, potentially unduly prejudicing the institution's interest for a fair appreciation of the impact of that information by the market.

11. ESMA recalls that, pursuant to Article 17(7) of MAR, even in those cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests, whenever the confidentiality is no longer ensured the issuer shall disclose that inside information to the public as soon as possible.

## **2. Situations in which delay of disclosure of inside information is likely to mislead the public**

### **Guideline 2:**

12. For the purposes of point (b) of Article 17(4) of MAR, the situations in which delay of disclosure of inside information is likely to mislead the public includes at least the following circumstances:

- a. the inside information whose disclosure the issuer intends to delay is materially different from the previous public announcement of the issuer on the matter to which the inside information refers to; or
- b. the inside information whose disclosure the issuer intends to delay regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or

- c. the inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organized by the issuer or with its approval.

### 3. P2R and P2G and inside information

#### Guideline 3:

13. For the purposes of the assessment of whether draft or final P2R constitutes inside information according to Article 7(1)(a) of MAR, issuers that are institutions subject to prudential supervision under the CRD should verify that their **P2R** is:

- a. non-public information;
- b. directly relating to the institution that has received it;
- c. of precise nature.

14. P2R is also highly likely to be price sensitive. Institutions should assess the price sensitivity of P2R considering the magnitude of the difference between the institution's P2R and the current level of capital. Price sensitivity should not be excluded even where the institution's current level of capital is higher than its P2R.

15. Except for a very limited number of cases and as a result of a thorough assessment by the institution, P2R is expected to be considered as inside information.

#### Guideline 4:

16. For the purposes of the assessment of whether draft or final P2G constitutes inside information according to Article 7(1)(a) of MAR, issuers that are institutions subject to prudential supervision under the CRD should verify that their **P2G** is:

- a. non-public information;
- b. directly relating to the institution that has received it;
- c. of precise nature.

17. P2G may also be price sensitive. Institutions should assess the price sensitivity of P2G also considering the magnitude of the difference between the institution's P2G and the current level of capital, whether a corporate reaction is expected to be necessary to meet the P2G and the relevant timing to launch it and complete it.

18. Examples of situations where P2G is expected to be price sensitive are where:



- a. the difference between the P2G and the institution's level of capital is not minor and is likely to involve a major reaction by the institution, such as a capital increase;
- b. the institution's P2G is not in line with market expectations, so a price impact can be expected.