



European Securities and
Markets Authority

Consultation Paper

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



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **[27 August 2021]**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading '[Data protection](#)'.

Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. This consultation paper is primarily of interest to the banking sector, but responses are also sought from any other market participant including trade associations and industry bodies, institutional and retail investors, consultants and academics.

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Acronyms and definitions used

AIF	Alternative Investment Fund
AT1	Additional Tier 1
BRRD	Bank Recovery and Resolution Directive – Directive 2014/59/EU of the European Parliament and the Council
CDR 241/2014	Commission Delegated Regulation (EU) No 241/2014 with regard to regulatory technical standards for Own Funds requirements for institutions
CET1	Common Equity Tier 1
CIR 2016/1055	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
CP	Consultation Paper
CRD NCA	National Competent Authority as defined under Article 3(1)(36) of CRD IV
CRD IV	Capital Requirements Directive - Directive 2013/36/EU of the European Parliament and of the Council
CRR	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council
CRR2	Capital Requirement Regulation - Regulation (EU) 2019/876 of the European Parliament and of the Council amending Regulation (EU) No 575/2013
EBA	European Banking Authority
EBA Guidelines	EBA Guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing (EBA/GL/2014/13)
ECB	European Central Bank
ESMA	European Security and Markets Authority
EU	European Union



LSI	Less Significant Institutions
MAR	Market Abuse Regulation - Regulation 596/2014 of the European Parliament and of the Council
MAR Guidelines	MAR Guidelines on delay in the disclosure of inside information (ESMA/2016/1478)
MDA	Maximum Distributable Amount
NCA	National Competent Authority as defined under Article 3(1)(12) of MAR
OTC	Over-the-Counter
Prudential Competent Authorities	CRD NCAs and ECB
P2G	Pillar 2 Capital Guidance
P2R	Pillar 2 Capital Requirements
Second Company Law Directive	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law
SI	Significant Institutions
SREP	Supervisory Review and Evaluation Process
SSM	Single Supervisory Mechanism
SSM Regulation	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.

The purpose of this Consultation Paper (CP) is to build and expand on 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 is consulting on proposals to amend 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 any preliminary information thereof; and
 - a separate section to the MAR Guidelines clarifying that Pillar 2 Capital Requirements (P2R) and Pillar 2 Capital Guidance (P2G) are likely to meet the definition of inside information under MAR and would in turn require public
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disclosure as soon as possible, unless the conditions for a delayed disclosure are met.

Content

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

Section 2 details the rationale behind ESMA's proposal to include 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 provides additional background about the Pillar 2 SREP and outlines ESMA's proposal to include the public disclosure of the inside information potentially included in draft SREP decisions or preliminary information thereof, ahead of the final SREP decisions, in the list of cases where a legitimate interest of the institution may be prejudiced, and hence, if all the other conditions are met, disclosure can be delayed.

Section 3 also contains the proposal to add a specific section to the MAR Guidelines to provide guidance to institutions on their assessment about whether their P2R and P2G could represent inside information. Whilst of the view that both P2R and P2G are likely to be inside information, Section 3 also outlines some examples where, in relation to P2G specifically, that could not be the case.

Annex I sets out a summary of the questions contained in the CP.

Annex II provides a draft high-level Cost-Benefit Analysis (CBA) for the proposed amendments to the MAR Guidelines.

Annex III contains the proposed amendments to the MAR Guidelines, highlighting specifically the additions proposed for consultation.

Next Steps

ESMA will consider the responses it receives to the CP and expects to publish a final report including its amended MAR Guidelines at the end of 2021.

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;
 - is likely, if made public, 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 will likely 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 public¹.
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. CIR 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 MAR².
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 that immediate public disclosure before such a definitive decision would jeopardise

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

² ESMA/2016/1478 of 20 October 2016.

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 CDR 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 CRR, which was amended by CRR2³.
17. The requirement contained in Article 28(1) of CDR 241/2014 should be coupled with the disclosure obligation under Article 17(1) of MAR, as the information regarding redemptions, reductions and repurchase programs may be qualified as inside information and may therefore be subject to public disclosure as soon as possible.
18. ESMA analysed the two requirements and, for this purpose ESMA staff were in contact with EBA staff and ECB staff.
19. ESMA would like to highlight that, in the context of its work for the MAR Review, it had already considered this topic and requested the views of market participants on whether they have encountered issues in the assessment of the obligation to disclose an inside information coupled with the abovementioned provisions⁴.
20. As stated in the Final Report on the MAR Review Advice, ESMA found that no major points were raised in the consultation by market participants on the obligation to disclose inside information under MAR and its interaction with other requirements set out in the regulatory framework for credit institutions. Nevertheless, ESMA highlighted that, given the relevance of the topic, further research was ongoing, in cooperation with other European authorities, to assess the need for further guidance⁵.

³ On May 26 2021 the EBA published its Final Report on Draft Regulatory Technical Standards on own funds and eligible liabilities amending Delegated Regulation (EU) No 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.

⁴ MAR Review Report, 23 September 2020, ESMA70-156-2391, Page 68, available at https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf.

⁵ ESMA MAR Review Report 20 September 2020 ESMA70-156-2391, page73, available at <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-outcomes-mar-review>

2.2 Redemptions, reduction and repurchase of own funds

21. 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.
22. **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 instruments⁶ 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).
23. **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 CRR⁷.
24. Pursuant to Article 77 CRR, a prior permission of a Prudential Competent Authority is needed when CET 1 instruments are the target of reduction, redemption or repurchase, as well as when AT1 and Tier 2 instruments are subject to a call, redemption, repayment or repurchase as applicable. In addition, a permission under Article 77 CRR is needed when share premium accounts related to CET1, AT1 and Tier 2 instruments are reduced, distributed or reclassified.

2.3 Qualification of redemptions, reduction and repurchase of own funds as inside information

25. The definition of inside information set forth in Article 7 of MAR, describes it as non-public, precise, relating directly or indirectly to one or more issuers or to one or more financial instruments, and price sensitive.
26. The Second Company Law Directive provides that acquisitions of own shares and reductions of capital need to be expressly approved by the shareholders' meeting. Further to the shareholders' authorisation⁸, the management will carry out the acquisitions of own shares and the reductions of capital under the terms and the conditions specified in the shareholders' decision. Similarly, with respect to redemptions,

⁶ 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.

⁷ 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.

⁸ Article 60 of the Second Company Law Directive specifies that the decision of the management body to carry out a repurchase of own shares must be firstly authorised by the shareholders meeting, which determines the terms and conditions of such acquisitions and, in particular, the maximum number of shares to be acquired. The duration of the period for which the authorisation is given shall be determined by national law without, however, exceeding five years.

the relevant provision in the company's statute only envisages the possibility for the company to carry out the redemption, whereas it is for the management to define the terms of the transactions.

27. By definition, the decision to carry out redemptions, reductions and repurchases of own funds instruments and the related share premium accounts directly relate to the institution's financial instruments and, at a certain point in time in the decisional process, is to become precise information.
28. That information is also likely to be price sensitive, with a price impact whose magnitude depends on different factors such as the size of the transaction and of the institution, the execution venue (on venue or OTC), duration, purpose and price. Whilst some procedural aspects and conditions may vary if the above transactions regard shares or other instruments, the overall considerations made so far can apply, *mutatis mutandis*, to all own funds instruments, and the related share premium accounts, depending on how the process is regulated by national law and carried out in practice.
29. 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.

2.4 Pending authorisation from the Prudential Competent Authority as a legitimate interest to delay disclosure of inside information

30. Article 17(4) of MAR offers to issuers the possibility to delay the public disclosure of inside information, under their own responsibility, if (i) the immediate disclosure is likely to prejudice the issuer's legitimate interests, (ii) delayed disclosure is not likely to mislead the public and (iii) the issuer can ensure the confidentiality of the information. As indicated above, the MAR Guidelines provide a non-exhaustive and indicative list of legitimate interests and situations where delayed disclosure is likely to mislead the public.
31. Therefore, when the institution's decision to redeem, reduce and repurchase own funds instruments and the related share premium accounts is assessed to be inside information, unless the conditions for a delay apply, under MAR the institution should disclose the information as soon as possible, specifying that the Prudential Competent Authority's authorisation is still pending.
32. At the same time, the requirements of the CRR regime apply. Firstly, 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.
33. 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”.

34. 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 decided by the institution and approved by the Prudential Competent Authority.
35. 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 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”.
36. In this context, a public announcement before the supervisor’s authorisation, even if described as pending and uncertain, would inevitably raise expectations in the markets and could therefore impede the qualification of the relevant instruments as own funds according to definitions provided under the CRR.
37. Secondly, Article 28(2) of CDR 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. In case an institution announces its intention to undertake any action listed in Article 77(1) CRR, sufficient certainty is assumed at that time. Furthermore, in case of a general prior permission, institutions are required to deduct the corresponding predetermined amount at the time the Prudential Competent Authority has given its permission.
38. In light of the above, with a view of establishing consistent, efficient and effective supervisory practices within the relevant competent authorities and to ensure common, uniform and consistent application of the MAR transparency obligations together with the mentioned CRR related requirements, ESMA is assessing whether in the case of redemptions, reductions and repurchases of own funds instruments and the related share premium accounts by institutions, the conditions to delay the disclosure under Article 17(4) of MAR may be satisfied.
39. In particular, ESMA is considering whether 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 be seen as a case where immediate disclosure may prejudice the institution’s legitimate interest.



40. In addition to the above, for an institution to delay public disclosure, the other conditions set forth in Article 17(4) of MAR apply.
41. In particular, whenever an institution should find itself in any of those cases where delayed disclosure is likely to mislead the public⁹, delayed disclosure should not be possible.
42. 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.

2.5 Proposed amendment to the MAR guidelines

43. ESMA is consulting on the possibility 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 CDR 241/2014 is one of the cases where the institution's legitimate interests may be prejudiced.
44. In light of the above, ESMA proposes to amend its MAR Guidelines by adding another case of legitimate interest to Section 5, point 1, as highlighted in Annex III.

Question 1: Do you agree with the proposed amendment to the MAR Guidelines in relation to redemptions, reduction and repurchase of own funds?

Question 2: Do you see other areas of interactions between MAR transparency and other supervisory frameworks where the same approach should be pursued?

⁹ 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

3 Pillar 2 Supervisory Review and Evaluation Process (SREP)

3.1 Background information

45. 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).
46. 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.
47. **Pillar 2** to promote a stable banking sector is 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.
48. 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.
49. **Pillar 3** of the Basel framework is market discipline, to be achieved through regulatory disclosure requirements.
50. 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.
51. 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.
52. In practical terms, it 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.
53. 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.¹⁰

54. 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. While the process is carried out on a continuous basis, **individual SREP decisions are in principle taken once a year**¹¹.
55. It is worth noting that on substance, the SREP is similar for SIs and LSIs since for both it is carried out in accordance with the CRD, the relevant Level 2 measures and the EBA Guidelines and Opinions. However, the ECB has published separate methodology booklets for the assessment of SIs¹² and LSIs¹³.
56. 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.
57. 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"¹⁴.
58. 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
 - b. risks revealed by stress testing taking into account the nature, scale and complexity of an institution's activities."
59. 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;

¹⁰ <https://www.bankingsupervision.europa.eu/banking/list/html/index.en.html>

¹¹ 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).

¹² https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_2018~b0e30ced94.en.pdf

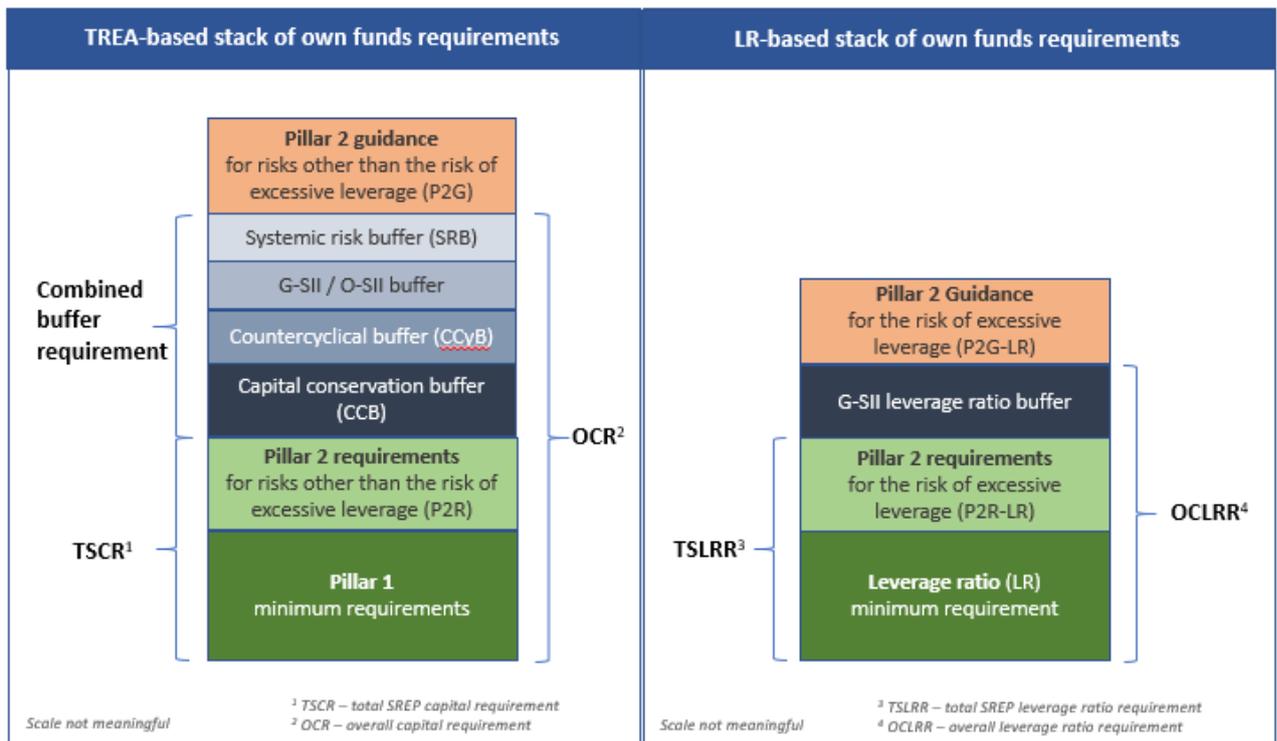
¹³ https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_lsi_2020.en.pdf?eb5bd834eff4d97e8be0063ff2c8a15e

¹⁴ <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html>

- iii. the assessment of **risks to capital**; and
 - iv. the assessment of risks to liquidity and funding.
60. 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.
61. In the SREP conducted by the ECB, within the assessment of risks to capital, **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)¹⁵.
62. The same three-perspective approach is adopted in the SSM in relation to the assessment of risks to liquidity, where the supervisory perspective is represented by the analysis of short-term 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.
63. 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).

¹⁵ SSM SREP Methodology Booklet, 2018 edition, ECB, p 21

TABLE 1 - INSTITUTIONS' CAPITAL STACK



64. 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.
65. In the SSM, the ECB Supervisory Board proposes the complete draft **SREP decisions to the ECB Governing Council for adoption** in accordance with Article 26(8) of the SSMR. SREP decisions may include:
1. bank specific quantitative **capital measures**, in the form of Pillar 2 capital requirements (P2R) and Pillar 2 capital guidance (P2G);
 2. bank specific quantitative **liquidity measures**;
 3. **other qualitative supervisory measures** stemming from Article 16(2) of the SSM Regulation, 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.
66. 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).

67. 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

68. 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.

69. 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.

70. The results presented in the following sub-sections cover only the first three areas of the survey as for the last one (i.e., application of delayed disclosure of inside information) ESMA identified data quality issues which requires a more in-depth analysis.

3.2.1 SREP Survey: General information

71. Out of 30 NCAs involved, 10 NCAs reported not to have any SI in their jurisdictions and therefore could not provide additional information for the purpose of the survey. 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.

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

Member State	Number of SIs	Number of SIs included in main national indices
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 ¹⁶	0	-
IT	11	5
LI ¹⁷	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

¹⁶ 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.

¹⁷ 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.

72. 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.
73. Additionally, ESMA collected information on the 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 (where disclosure as soon as possible would undermine the financial stability of the institution and of the financial system).
74. 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). 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 NA¹⁸.
75. 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.

¹⁸ It should be noted that one NCA with at least one SI in its jurisdiction has been classified as NA due to the impossibility to extract the data required.

FIGURE 1 – NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2018¹⁹

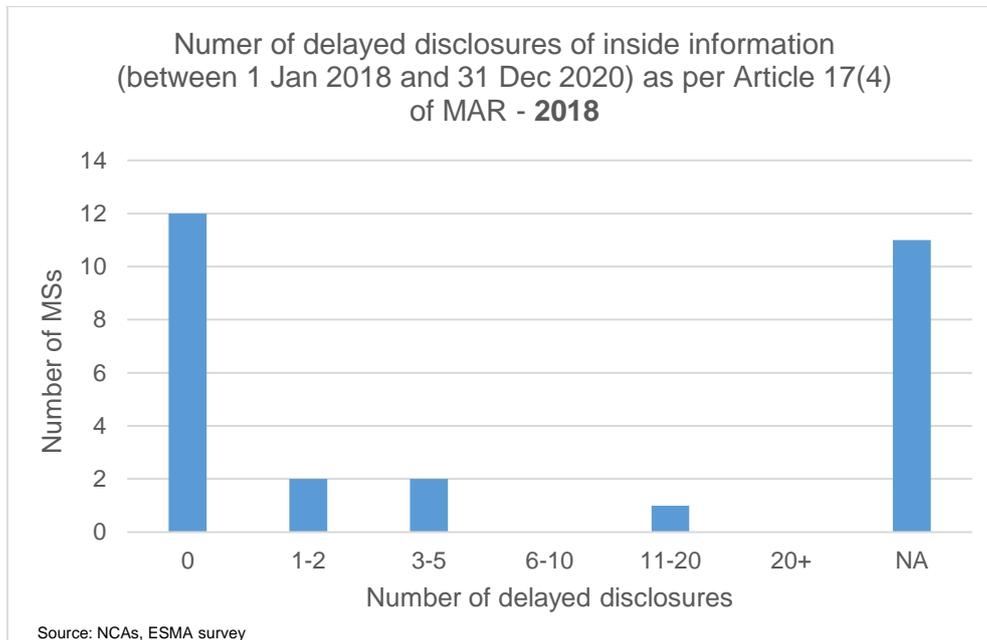
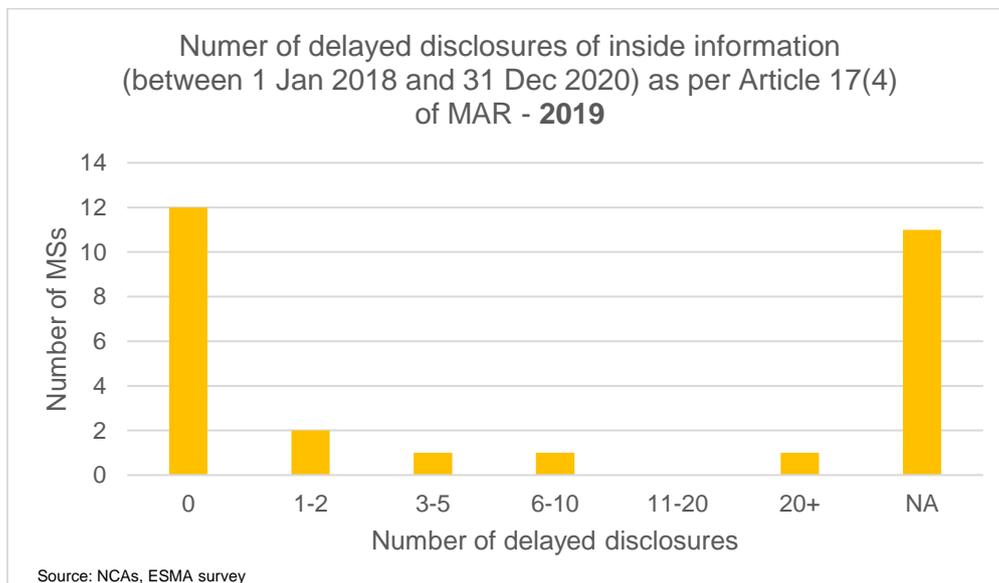


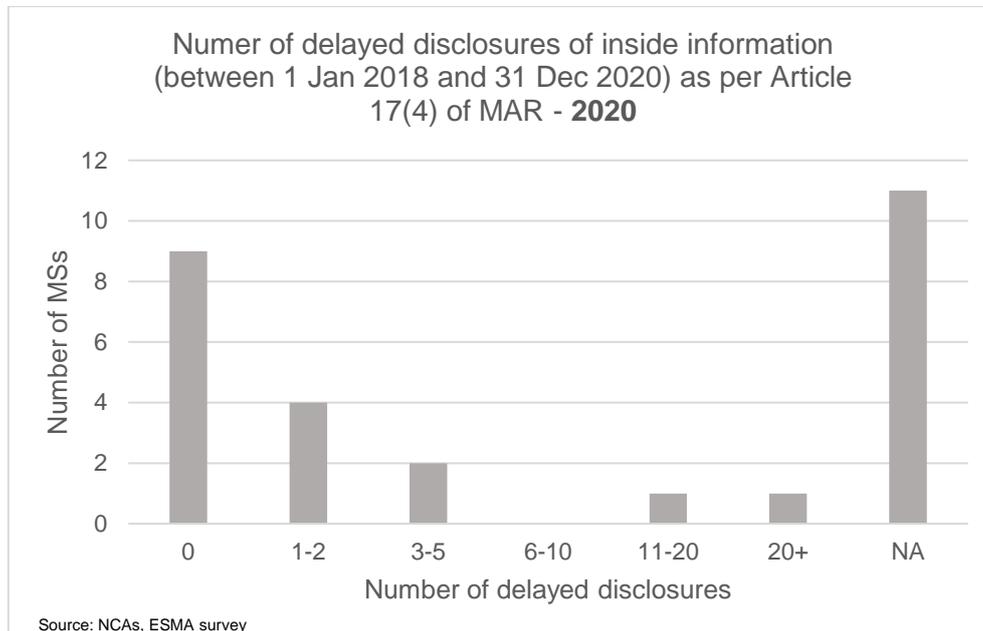
FIGURE 2 - NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2019²⁰



¹⁹ 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.

²⁰ See note 19.

FIGURE 3 - NUMBER OF DELAYED DISCLOSURES OF INSIDE INFORMATION AS PER ARTICLE 17(4) OF MAR - 2020²¹



3.2.2 Disclosure of draft SREP Decisions

76. 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.
77. Firstly, it should be noted that 10 NCAs do not have SIs in their jurisdictions and hence did not report any disclosures.
78. Additionally, only two NCAs stated that one disclosure from an SI occurred, as per Article 17 of MAR, in the reference period considered. The remaining NCAs with at least one SI in their jurisdiction noted that no such disclosure occurred.

3.2.3 Disclosure of final SREP Decisions

79. 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.
80. 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

²¹ See note 19.

decisions occurred at least once, with one NCA reporting a maximum of eleven disclosures in 2018 and 2019 and another NCA reporting a maximum of five disclosures in 2020.

81. 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. In terms of the type of information disclosed, most NCA reported that the information most commonly disclosed concerned the overall capital requirements and its compositions (P2R) and changes compared to P2R in previous SREP decisions.
82. Few NCAs reported additionally 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. Only two NCAs reported that the information disclosed concerned P2G related elements.

3.3 Draft SREP decisions

83. The outcome of the analysis 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 tentative information and draft SREP letters ahead of the final SREP decision.
84. 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"²². This step in the process is a legal requirement which reflects the right to be heard (see Article 31 of Regulation (EU) No 468/2014²³).
85. 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.
86. Given the current formulation of MAR, even draft decisions and tentative information thereof 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

²² ECB Guide to banking supervision, p. 25.

²³ OJ L 141, 14.5.2014, p. 1.

presence of inside information directly relating to the institution, the disclosure obligation under Article 17(1) of MAR should apply in principle.

87. 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.
88. 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.
89. In light of the above, ESMA acknowledges the impact on institutions of immediate public disclosure of any potential inside information constituting the draft SREP decisions and preliminary information thereof.
90. 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.
91. Therefore, ESMA would like to publicly consult 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 thereof, ahead of the final SREP decisions, may be prejudicing a legitimate interest of the institution.
92. ESMA notes that the MAR Guidelines adopted according to Article 17(11) of MAR already mention 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.
93. With regards to the other conditions set forth in Article 17(4) of MAR for a delayed disclosure, the current regime applies.
94. In particular, to delay the disclosure of inside information under Article 17(4) of MAR, the public should not be misled²⁴ and confidentiality must be ensured. Therefore, any rumour

²⁴ 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.

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.

95. In light of the above, ESMA proposes to amend the MAR Guideline by adding another case of legitimate interest to Section 5, point 1, as highlighted in Annex III.

Question 3: Do you agree with the proposed amendment to the MAR Guidelines in relation to draft SREP decisions and preliminary information related thereto?

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

3.4.1 P2R

96. 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.
97. It is the result of the SREP carried out each year by the prudential competent authorities: the ECB for SIs and CRD NCAs for LSIs. The **P2R is binding** and hence breaches can have direct legal consequences for institutions.
98. 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.
99. **From June 2021** onwards and in line with the relevant requirements introduced by CRR2²⁵, institutions **will be required to disclose their P2Rs annually** as part of each SREP cycle, irrespective of any other legislative obligations and considerations, MAR included.
100. 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 thereafter²⁶.

²⁵ 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).

²⁶ Article 433(2) CRR

101. This in turn means that the timing of the compulsory CRR2-driven disclosure may not be synchronised with the timing of the final SREP decisions (including P2R) being received by institutions.
102. This is of relevance as, unlike the CRR2-driven disclosure, whenever P2R is assessed to be inside information, the MAR obligation to publicly disclose it 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 (see section 3.3 on draft SREP decisions).
103. In that respect, ESMA would support 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.

3.4.2 Qualification of P2R as inside information

104. 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.
105. 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, if it were made public, to have a significant effect on the relevant prices of those financial instruments or related derivative financial instruments.
106. 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.
107. 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, ESMA is of the view that **P2R is highly likely to be of a price sensitive nature**.
108. 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.
109. 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.
110. 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 (see section 3.3 for draft SREP decisions).

111. Overall, 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.
112. Along those lines, ESMA would like to publicly consult about a proposal to add to the existing MAR Guidelines a **separate section** dealing with the content of the SREP decisions. Such proposal is highlighted in Annex III.

Question 4: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2R?

3.4.3 P2G

113. 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.
114. 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.
115. P2G may take into account the quantitative outcome of the EU-wide stress tests carried out by EBA every two years and assesses whether institutions may not be able to meet their applicable capital requirements under the assumed stressed conditions.
116. 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 breached, 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 of repeated or prolonged breaches of the P2G, may consider applying the measures foreseen in Article 104a(1)(e) of the CRD.
117. 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.
118. **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.

3.4.4 Qualification of P2G as inside information

119. On the same line as in relation to P2R, 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 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.
120. Inside information must be not 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.
121. The supervisory information relating to P2G is **non-public** and by definition institution-specific.
122. 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.
123. As to the **price sensitivity**, despite P2G not being of a binding nature and not impacting the MDA of dividends and certain specific coupons, ESMA is of the view that it remains likely to be of a price sensitive nature.
124. This is due to the fact that 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 repeated or prolonged breaches of the P2G, may even consider applying the measures foreseen in Article 104a(1)(e) of the CRD.
125. Even in the absence of automatic regulatory measures in response to breaches of P2G and considering the generally longer timeframe for institutions in breach 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.
126. 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.

127. 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.
128. 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.
129. The price impact of a breach of P2G may vary, but in ESMA's view it is likely to be present. 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.
130. Notwithstanding the general expectation that also P2G is price sensitive, ESMA is of the view that in exceptional situations it may not be, 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.
131. Upon assessment that all the conditions contained in Article 7(1)(a) of MAR are fulfilled, P2G 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 (see section 3.3 for draft SREP decisions).
132. Overall, with exceptions in a limited number of cases as a result of a thorough assessment by the institution, P2G will be expected to be considered as inside information and, once final, disclosed as soon as possible.
133. Along those lines, ESMA would like to publicly consult about a proposal to add to the existing MAR Guidelines a **separate section** dealing with the content of the SREP decisions. Such proposal is highlighted in Annex III.

Question 5: Do you agree with the proposed amendments to the MAR Guidelines in relation to P2G?

Question 6: With regard to the examples listed in paragraph 130, do you agree with the examples of cases when P2G may not be price sensitive, and do you consider it useful to list these examples in the MAR Guidelines?

Question 7: Do you see other cases where P2G may not be price sensitive?

3.4.5 Other supervisory measures contained in the SREP decisions

134. In addition to P2R and P2G, the SREP decisions may also require institutions to adopt liquidity measures and other qualitative measures.
135. As for the liquidity measures, Article 104 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*”.
136. 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”.
137. 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 management and control arrangements or its governance arrangements, restrict or prohibit the distributions of dividends and interest payments or impose additional reporting requirements.

3.4.6 Qualification of the other supervisory measures as inside information

138. 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.
139. 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, if it were made public, to have a significant effect on the relevant prices of those financial instruments or related derivative financial instruments.
140. The information relating to any other potential supervisory measure is non-public and by definition institution-specific.
141. However, unlike P2R and P2G, the other supervisory measures potentially contained in the SREP decisions may vary greatly in form and substance and it is difficult to draw upfront any general conclusion as to their preciseness and price sensitivity.



142. Therefore, in the absence of evidence of supervisory convergence issues across Member States in this respect, ESMA is not intending to issue guidance to cover any other supervisory measure potential contained in the SREP decisions.

143. The institutions receiving their SREP decision will have to assess on a case-by-case whether any other supervisory measure received from their Prudential Competent Authority represents inside information, going through the limbs of the relevant MAR definition.

144. 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.

Question 8: Do you agree with the proposed approach in relation to other supervisory measures?

Question 9: Do you see any other element that ESMA should consider in a potential amendment to its MAR Guidelines?



Annexes

Annex I - Summary of questions

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

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

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

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

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

Q6: With regard to the examples listed in paragraph 130, do you agree with the examples of cases when P2G may not be price sensitive, and do you consider it useful to list these examples in the MAR Guidelines?

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

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

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

Annex II - 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

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.

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 in conducting their assessment as to whether they meet the conditions to delay inside information according to MAR.</p> <p>The Guidelines also introduce clarifications 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. This specific section is aimed at highlighting that those latter are likely to be inside information and are expected, once final, to be publicly disclosed as soon as possible.</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</p>

	<p>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	In respect of the additional cases that would allow for reliance on the grounds of a legitimate interest to delay inside information - as well as the points made with respect to 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.
Costs to other stakeholders	None
Indirect costs	None



Annex III – Guidelines on legitimate interests to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public (the proposed amendments for consultation are in red)

1. Scope

Who?

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

What?

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**. **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?

These guidelines apply from **[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
CRR	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council
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/EC²⁷

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/EC²⁸

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

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.

²⁷ OJ L 173, 12.6.2014, p. 1.

²⁸ OJ L 331, 15.12.2010, p. 84.



3. Purpose

These guidelines 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

In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines.

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

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 intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

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 on ESMA website. Once the template has been filled in, it shall be transmitted to ESMA.

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: 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 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 not yet been 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 the Pillar 2 SREP and has received a draft SREP decision or preliminary information related thereto which will become final at a later stage upon completion of the decision-making process of the Prudential Competent Authority. 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.

ESMA recalls that 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 should 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: 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: For the purposes of Article 7(1)(a) and Article 17(1) of MAR, issuers that are also institutions subject to the Pillar 2 SREP should consider their **P2R** as:

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



- d. highly likely to be price sensitive.

Price sensitivity should not be excluded even where the institution's current level of capital is higher than its P2R.

Unless in 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: For the purposes of Article 7(1)(a) and Article 17(1) of MAR, issuers that are also institutions subject to the Pillar 2 SREP should consider their **P2G** as:

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

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

Price sensitivity should not be excluded even where the institution's current level of capital is higher than its P2G.

Notwithstanding the general expectation that P2G is price sensitive, examples of exceptional situations where it may not be the case are where:

- a. the P2G is in line with the institution's current level of capital and the market price of the financial instruments already reflects this;
- b. the breach of P2G is minor and is unlikely to involve a major reaction by the institutions, such as a capital increase, as it can be addressed through other tools;
- c. the institution's P2G is fully in line with market expectations, so no price impact is expected

Outside of those exceptional cases, P2G is expected to be considered as inside information.