Review of MAR Guidelines on the delay in the disclosure of inside information and interactions with prudential supervision. International Bulletin of November 2021.

Article 17 of Regulation (EU) 596/2014 on market abuse (MAR) establishes that issuers must publicly disclose any inside information that directly concerns them as soon as possible.Pursuant to the aforesaid regulation, inside information is considered to be that of a precise nature that has not been made public, that refers directly or indirectly to one or more issuers or to one or more financial instruments or their derivatives and that, if made public, could have a significant effect on the prices of these instruments or related derivative instruments.
When certain conditions set forth in the standard are met, issuers may, at their own risk, delay the disclosure of inside information. Section 4 of Article 17 allows delay if (1) the immediate disclosure is likely to prejudice the legitimate interests of the issuer, (2) the delay is not likely to mislead the public, and (3) the issuer is able to ensure the confidentiality of information.

Section 5 of the same article meanwhile provides for the delay of information disclosure in order to preserve the stability of the financial system.

In this regard, the current ESMA Guidelines on Delay in Disclosure of Inside Information (MAR Guidelines) are under review, in particular within the context of the interaction between the prudential supervisory framework and MAR transparency obligations regarding inside information. The consultation document, published in July 2021, proposes to add to the list of legitimate interests that justify delay in the disclosure of inside information cases where institutions intend to carry out a reduction in Tier 1 (CET1 and AT1) and Tier 2 capital, when the operation is pending authorisation and in the case of draft decisions and preliminary information related to the Supervisory Review and Evaluation Process (SREP). It also proposes the incorporation of two new guidelines related to the final SREP decisions regarding capital requirements (P2R and P2G).

Supervisory authorisation for the reduction of own funds

ESMA proposes that the MAR Guidelines consider as one of the cases where the legitimate interests of the institution are likely to be prejudiced (and may therefore delay disclosure), cases where inside information relates to redemptions, reductions and repurchases of instruments that are own funds which, in turn, require the mandatory authorisation of the relevant prudential authority under Article 77 of Regulation (EU) 575/2013 on the prudential requirements for credit institutions and investment firms (CRR).The proposed text suggests an expansion of Guideline 1 on legitimate issuer interests to delay the disclosure of inside information. It is specifically suggested that the case of issuers (institutions subject to CRR) that are going to reduce, call, repay, redeem or repurchase own funds instruments – Tier 1 (CET1 and AT1) and Tier 2 – be included, where authorisation by the competent authority has not yet occurred.
ESMA has also indicated that Article 28 of Delegated Regulation 241/2014, which complements the CRR, stipulates that redemptions, reductions and repurchases of own funds instruments by institutions subject to prudential supervision will not be announced to the holders of the instruments until the institution has obtained prior authorisation from the competent authority.

Therefore, while it is not public, ESMA considers that, in principle, an institution's decision to carry out redemptions, reductions and repurchases of own funds instruments could qualify as inside information, which would generate the obligation to disclose it publicly as soon as possible.

However, it also considers that a public announcement prior to the authorisation of the supervisor would generate expectations in the markets and could prevent the rating of the instruments that are going to be redeemed, reduced or repurchased – Tier 1 (CET1 and AT1) and Tier 2 – as own funds, according to the definitions provided in CRR, which would damage the legitimate interest of the institution. Among other criteria, prudential regulations require, that for financial instruments to be classified as Tier 1 or 2, the provisions governing them shall not explicitly or implicitly indicate that the instruments would be reduced or redeemed other than in the case of liquidation, nor may the institution have made any such indication.

Supervisory Review and Evaluation Process (SREP): Pillar 2

Draft SREP decisions

The result of the analysis carried out by the competent prudential authorities in relation to SREP and any necessary corrective actions are often anticipated by the institutions through interim information exchanges and draft letters before the final decision.Given the current formulation of MAR, ESMA considers that the information contained in the draft SREP decisions may have the character of inside information, which would imply compliance with the disclosure obligation. More precisely, MAR stipulates that even an intermediate stage of a lengthy process will be considered inside information if, in and of itself, it meets the established criteria. ESMA nevertheless recognises the likely impact that the immediate public disclosure of any possible inside information from the draft SREP decisions and the accompanying preliminary information would have on institutions. It should be taken into account that institutions have the opportunity to argue and provide clarifications prior to the final SREP decision. In addition, the possible effect that this disclosure could have on the price of financial instruments and related derivatives issued by an institution needs to be considered, as does the consequent impact on their financing, irrespective of the fact that the final SREP decision could ultimately be otherwise.
ESMA therefore proposes the inclusion in Guideline 1 of an instruction that the inside information contained in SREP draft decisions and their preliminary information be considered as one of the cases in which the legitimate interests of the institution may be disadvantaged, meaning that disclosure may be delayed.

SREP decisions: P2R

P2R (Pillar 2 Requirements) are the capital requirements whereby institutions are required to adjust to the common minimum capital requirements of Pillar 1 and thus cover the underestimated risks, based on the capital needs that stem from each institution's individual risk profile. Their determination in SREP, calculated each year by the competent prudential authorities, is binding on institutions.

Institutions should consider whether the information contained in P2R meets the definition of inside information on a case-by-case basis and, if that is the case, should be publicly disclosed as soon as possible pursuant to MAR requirements, unless the institution is of the view that the conditions for the delay thereof have been met. In any case and in general (with limited exceptions), the ESMA consultation document deems that P2R has the character of inside information and should therefore be disclosed as soon as possible.

ESMA thus proposes to include a specific section in its MAR Guidelines that covers SREP decisions regarding P2R (new Guideline 3), stipulating its consideration as inside information as it conforms to the existing definition in MAR. The application of the public disclosure requirement will also be reflected in the guideline. It should be noted that since June 2021, entities have to disclose their P2R annually as part of each SREP cycle, pursuant to CRR2[2]. However, there is no uniform disclosure schedule in this regard, rather publication has to coincide with the publication of the institution's annual financial statements (or, at least, should do as soon as possible). This time for mandatory disclosure may not coincide with when entities receive final decisions from

SREP.

It is significant that, unlike the disclosure promoted by CRR2, and provided that P2R is considered as inside information, MAR stipulates public disclosure as soon as possible, i.e. at the moment in which an institution is informed of its specific P2R, on the condition that the conditions for the disclosure delay are not met. ESMA takes the view that a disclosure at source of P2R by the competent prudential authority, at the same time as the communication to supervised entities, could guarantee a fully standardised approach at a European Union level.

SREP decisions: P2G

P2G (Pillar 2 guidelines) is a supervisory monitoring metric that indicates to entities the appropriate level of capital to maintain in order to provide a sufficient cushion that can withstand stressful situations. It is a supervisory instrument that creates an expectation on the part of the competent prudential authorities that entities duly incorporate the provisions of P2G into their own risk management and capital planning. Although it is not mandatory, in the event of repeated or prolonged breaches of P2G, the competent prudential authority may also consider the application of the measures provided for in Article 104 bis (1)(e) of CRD[2] which requires entities to maintain additional capital and reserves in excess of CRR requirements.

As with P2R, the institution has to consider whether the information contained in P2G meets the definition of inside information. In this regard, ESMA considers that this information meets most of the required conditions. However, regarding the criterion considered by MAR on the possibility of having a significant effect on the prices of the financial instruments issued by the institution and the related derivatives, there is a need to specify certain assumptions that would imply situations where the influence on prices is not clear, meaning that P2G would therefore no longer qualify as inside information.

Consequently, ESMA proposes the addition of a new guideline (Guideline 4) to the MAR Guidelines that incorporates the assumption related to P2G. Specifically, it requires that institutions carry out an assessment of the impact that P2G may have on the prices of financial instruments issued by the institution or related derivatives. This exercise should assess whether the difference between the institution's current level of capital and that indicated in P2G requires a capital increase to comply with the latter, similarly establishing the most appropriate time for this to be performed. However, it may also be the case that the institution's current level of capital is higher than that indicated in P2G. In short, once the timely assessment has been undertaken and compliance with all the conditions contained in MAR duly verified, if P2G definitively qualifies as inside information, it should be disclosed as soon as possible once the decision of the competent prudential authority has been received.

SREP decisions: Other supervisory measures

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

With respect to liquidity requirements, the CRD provides a series of measures that include the possibility of 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. In qualitative terms, the competent prudential authority may also require the institution to strengthen its risk management and control agreements or its governance agreements, limiting or prohibiting dividend distributions and interest payments, as well as potentially imposing additional information requirements.

However, unlike P2R and P2G, it is difficult for ESMA to draw a general conclusion regarding the specific nature and effect on the prices of the decisions contained in other supervisory measures of SREP in advance.

Consequently, ESMA has indicated its intention not to include any specific guidelines on this matter in the consultation document, notwithstanding the obligation to perform a specific assessment of the institutions in order to identify the presence of inside information in the Other Supervisory Measures section. In this situation, the institution should proceed with its disclosure, pursuant to the provisions of MAR and its Guidelines.

[1] Regulation (EU) 2019/876 of the European Parliament and of the Council, of 20 May 2019, amending Regulation (EU) 575/2013.

[2] Directive 2013/36/EU of the European Parliament and of the Council, of 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions.

Useful link:

ESMA consults on amendments to MAR Guidelines on delayed disclosure of inside information