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SREP Exercise and Resolution Planning Outcomes as Inside Information under MAR

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SREP exercise and resolution planning outcomes as inside information under MAR

ABSTRACT

When it comes to banks, disclosure – as a means towards market discipline – can be considered from the standpoint of both Basel's Pillar 3 and (in case of listed banks) the Market Abuse Regulation.

Especially in the latter context, it is controversial whether the specific layer of information consisting of *a)* the ECB's measures taken when performing the yearly Supervisory Review and Evaluation Process (SREP), i.e. the so called SREP decision, and *b)* the resolution planning (including the setting of MREL levels), which the Single Resolution Board is responsible for, have to be considered as inside information under MAR. As it is apparent, this issue is highly critical when such disclosure reveals that a bank is in financial distress, as far as disclosure could potentially prompt a hydiosincratic crisis.

According to the ESMA's position, in both of the above-mentioned cases each credit institution has to assess, under its own responsibility, whether decisions taken by Supervision and Resolution Authorities, under SREP and resolution planning, actually have to be disclosed.

This paper focuses on SREP exercise and resolution planning (including MREL calibration) decisions, assessing their relevance as inside information under the requirements of precision and price-sensitivity set out in Article 7 MAR, and the subsequent existence of an obligation to disclose under Article 17 MAR. The relevance of the SREP's *draft letter* is also considered in this respect.

Moreover, the paper investigates whether, and to what extent, a single bank's stability concern can be considered as a «legitimate interest» for delaying disclosure, either under Article 17(5) MAR (that is, when there is a public interest in delaying disclosure in order to preserve the financial system's stability) or under Article 17(4) MAR (when delay meets the need of preserving the issuer's legitimate interests).

JEL Classification: G21, G28, K22, K23

Keyword: Supervision, SREP, Resolution, MREL, Market Abuse Regulation, Continuous information, Financial Stability

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* * *

1. Introduction.

1.1 For the first time since the Supervisory Review and Evaluation Process (SREP) is carried out in accordance with the Capital Requirements Directive, CRD IV (*i.e.*, since 2014), on January 30th, 2020, the European Central Bank (ECB) has disclosed the specific amount of own funds required to each Significant Institution (SIs) in order to cover risks – not covered by the general capital requirements (Art. 1 Capital Requirements Regulation, CRR) – emerging from the SREP exercise: the so-called Pillar 2 Requirement or P2R (Art. 104, CRD IV).

This move anticipates the entry into force of Article 438(b) CRR as amended by the CRR2, requiring banks to disclose «*the amount of the additional own funds requirements based on the supervisory review process as referred to in point (a) of Article 104(1) of Directive 2013/36/EU and its composition in terms of Common Equity Tier 1, additional Tier 1 and Tier 2 instruments*», which will be effective from June 28th, 2021.

In disclosing such bank-specific pieces of information, the ECB «*has recommended that significant institutions consider disclosing the amount of additional own funds and its composition as part of their disclosure practices*», also setting out that it has previously «*communicated its intention to publish the consolidated P2Rs of each bank or banking group, and invited banks that have not already disclosed their P2Rs to approve their publication by the ECB*».

The need for the central bank to obtain the consent to publication from institutions involved in the SREP exercise stems from the fact that, *on the one hand*, there is not any statutory conferral to the ECB of an express power to divulge such information, whereas according to Articles 53-54 CRD IV and Article 27 Single Supervisory Mechanism Regulation (SSMR), professional secrecy is imposed on the individuals working for the Supervision Authority; *on*

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the other hand, not all banks had made such information public beforehand (i.e. in the period of time between the SREP decision and January, 30th).

With reference to the latter aspect, it should be noted that - when the ECB mentions banks having «*already disclosed their P2Rs*», as set in the 2019 SREP decision - such disclosure arguably refers to the duties under the Market Abuse Regulation (MAR). In fact, given the short amount of time between the SREP decision and the date the ECB made the P2Rs public, there were no periodical financial statements, or other means of disclosure under Basel's Pillar 3 (Part VIII of the CRR), where such piece of information could have been disclosed. Conversely, in the perspective of the continuous disclosure, Art. 17 MAR requires disclosure to take place «*as soon as possible*» [Art. 17(1)].

In point of fact, it has to be said that the existence of a duty to disclose the level of P2R set by the SREP decision is just one specific aspect of the broader topic that puts into question which information originated within the activity of the banking sector authorities should be disclosed according to the Market Abuse Regulation.

From this standpoint, it is clear that the level of P2R does not exhaust the content of the SREP decision, whose scope is larger and involves other measures (quantitative and qualitative in nature), as well as other descriptive components. Besides, an identical problem arises with reference to the activity of the Single Resolution Board, in the framework of the Bank Recovery and Resolution Directive (BRRRD), with regard to the calibration of MREL (Minimum Requirement for own funds and Eligible Liabilities), as well as to the contents of the resolution strategy, as designed when the bank is not currently facing the crisis (*ex ante* or «peacetime» resolution strategy).

Of course, setting the perimeter of information to be disclosed, originating from the activity of prudential and resolution authorities is particularly sensitive when such information highlights a situation of distress in the supervised bank. Disclosure might in fact harm its reputation in terms of its performances, liquidity levels and capital base soundness. In some cases, this may cause negative reactions in the public, that could eventually put the bank's viability in danger.

These remarks point to a more general issue: i.e., the level and extent of transparency that, in the current regulatory environment, can be demanded to banks, considering the possible impact that the disclosure of «negative» information might have on the stability of the disclosing intermediary and, eventually, on the financial system as a whole[1].

[1] *Andrea Enria, The case for more transparency in prudential supervision*, speech at the EBI Global Annual Conference on Banking Regulation, Frankfurt am Main, 20 February

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1.2. For the sake of clarity, in approaching the analysis of MAR's continuous disclosure duties with respect to listed banks, it is helpful to remember that this regulation - which applies to all issuers (be they financial institutions or not) whose financial instruments are traded on a regulated market, on an Multilateral Trading Facility (MTF) or on an Organised Trading Facility (OTF) [Art. 2(1) MAR] - imposes a duty to disclose inside information, that is «information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments» [Art. 7(1)]; a piece of information is likely to significantly affect an instrument's price «if a reasonable investor would be likely to use [it] as part of the basis of his or her investment decisions» [Art. 7(4)].

This means, inter alia, that:

a) listed banks are subject to Article 17(1), which compels issuers to disclose inside information, as defined in Article 7, «as soon as possible»;

b) at the same time and as for any other kind of issuer, delay of disclosure is possible according to Article 17(4), that is when «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 or emission allowance market participant is able to ensure the confidentiality of that information»; also being stated that «where an issuer … has delayed the disclosure of inside information …, it shall inform the competent authority … that disclosure of the information was delayed and shall provide a written explanation of how the conditions set out in this paragraph were met, immediately after the information is disclosed to the public».

It has also to be pointed out that Article 17(5) MAR, in order to preserve the stability of the financial system, sets a further case for delay that is only applicable to credit and financial institutions.

1.3. Consistently with its general nature, MAR does not specifically address the question of whether, and to what extent, SREP decisions and the resolution planning activity should be disclosed as inside information.

This issue is briefly dealt with by the ESMA in its Q&A on MAR (March 29th, 2019, page 12), stating that «credit institutions [are] subject to the regime

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2020, in https://www.bankingsupervision.europa.eu/press/speeches/date/2020/html/ssm.sp200220~6f0ae3acde.en.html

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established under MAR, when at the same time they are also subject to the prudential supervision of the banking regulators. Consequently, in the context of the Supervisory Review and Evaluation Process (SREP) […], whenever a credit institution subject to the market abuse regime is made aware of information, notably the results of the exercise, it is expected to evaluate whether that information meets the criteria of inside information. Along the same line, in the context of the MREL exercise to be conducted by the Single Resolution Board in accordance with the Bank Recovery and Resolution Directive, whenever a credit institution subject to the market abuse regime is made aware of information, it is expected to evaluate whether that information meets the criteria of inside information».

Apparently, this clarification does not contribute much to the setting out of an operational standard in this field, because it simply calls for the application of the general rules on inside information (namely, the notion of inside information under Article 7).

This being noted, the purpose of this paper is to try to move a little further ahead, and set out some general criteria useful to assess which pieces of information, which are included in the SREP decisions and in resolution-planning activities, can meet the criteria of precision and price-sensitivity established by Article 7, MAR.

Before getting into the heart of this analysis, it must be underlined that in the last few months, the European Commission – in line with Art. 38 MAR – instructed ESMA to start a review of MAR, then presenting a final report to the European Institutions, together a legislative proposal to amend it, if appropriate. In this context, ESMA launched a consultation, which revealed itself to be largely participated by stakeholders. One issues that was often addressed related to the difficult interplay between MAR and the obligations arising from CRD IV, CRR and BRRRD. A lot of attention was gained, too, by the very notion of «inside information», as well as by the role and nature of delayed disclosure. I will get back later to these topics, but it's worth of being noted, starting from now, that some central issues regarding the market abuse framework are under serious discussion also among (and with respect to) non-financial issuers.

1.3. That said, the paper will proceed as follows.

Firstly, after a brief review of the contents of the SREP decision and the resolution planning activity, their relevance as inside information (also considering the SREP draft letter) will be discussed, arguing about the reasons for a possible delay of their disclosure following the general rule set out in Article 17 (4) [par. 2 and 3 for the SREP, par. 4 for the resolution planning].

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Afterwards, it will consider whether – and under which conditions – a bank can legitimately delay «negative» (*i.e.* harmful to its reputation) inside information, due to stability concerns, that is due to the expectation that disclosure would put the bank's viability in danger (par. 5 and 6).

2. - SREP decisions as inside information.

2.1.- In order to address the issue with reference to SREP decisions, it seems appropriate to start from their contents.

According to the EBA's guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing (EBA/GL/2014/13, July 19th 2018), SREP is made up of two main blocks: the diagnosis and the therapy.

On its turn, the first block is composed as follows: an overall SREP assessment and the «overall SREP score» (going from 1 to 4); scores relating to single elements of the SREP (business model, governance and risk management, risk to capital, risk to liquidity) and summaries of the findings thereof.

The second block consists of the «supervisory measures», that is the prescription or «suggestion» (so-called supervisory expectation) of action to be taken in order to properly address risks emerging from the SREP exercise. Measures that can be adopted by the supervisory authority are listed in Article 104 CRD IV. These measures are both «quantitative» and «qualitative».

In addition to the P2Rs, the former group includes: requiring institutions «*to apply a specific provisioning policy or treatment of assets in terms of own funds requirements*» (d), «*to limit variable remuneration as a percentage of net revenues where it is inconsistent with the maintenance of a sound capital base*» (g) or «*to use net profits to strengthen own funds*» (h); restricting or prohibiting «*distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution*» (i); imposing «*specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities*» (k).

Those measures include both requirements whose breach leads *ipso facto* to the adoption of further supervisory measures (i.e., P2Rs or liquidity measures), and others which do not have such binding nature (such as the so-called «*guidance*», P2G, whose setting is «*based on the outcomes of the adverse scenario of the relevant supervisory stress tests*»).

However, it is submitted that it would be improper to treat Pillar 2 guidance as mere «suggestions» or «pieces of advice» coming from the Supervisor, thereby implying they are non-binding to any effect. In fact, it appears from the relevant

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EBA's Guidelines that «*institutions are expected to incorporate P2G into their capital planning, risk management and recovery planning, and operate above P2G*», and that «*no automatic link between the level of own funds falling below P2G and specific supervisory measures, but would trigger enhanced supervisory dialogue and engagement with an institution, as there is a need to provide a credible capital plan*» (page 214). The drop of the institution's own fund below the P2G is indeed full of consequences. In fact, always according to the EBA Guidelines, «*when the institution's own funds drop, or are likely to drop, below the level determined by P2G, the competent authority should expect the institution to notify it and prepare a revised capital plan. In its notification, the institution should explain what adverse consequences are likely to force it to do so and what actions are envisaged for the eventual restoration of compliance with P2G as part of an enhanced supervisory dialogue*». Other alternatives, in terms of supervisory actions to be taken, are also set out in the Guidelines[2].

On the contrary, the latter group covers items such as: (i) requiring institutions «*to present a plan to restore compliance with supervisory requirements pursuant to this Directive and to Regulation (EU) No 575/2013 and set a deadline for its implementation, including improvements to that plan regarding scope and deadline*» (lett. c); (ii) restricting or limiting «*the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution*» (lett. e); (iii) requiring «*the reduction of the risk inherent in the activities, products and systems of institutions*» (lett. f); (iv) imposing «*additional or more frequent reporting requirements, including reporting on capital and liquidity positions*» (lett. j); (v) requiring «*additional disclosure*» (lett. l).

2.2.- As it appears from the above overview, SREP decisions contain several and diversified components. Looking at their relevance as "inside information"

[2] «*545. There are generally three situations to be considered by a competent authority in which an institution could fail to meet its P2G.*
a. Where the level of own funds falls below the level of P2G (while remaining above OCR) in institution-specific or external circumstances in which risks that P2G was aimed at covering have materialised, the institution may temporarily operate below the level of P2G provided that the competent authority considers its revised capital plan credible in accordance with the criteria set out in Section 7.7.3. The competent authority may also consider adjusting the level of P2G where appropriate.
b. Where the level of own funds falls below the level of P2G (while remaining above the OCR) in institution-specific or external circumstances as a result of the materialisation of risks that P2G was not aimed at covering, competent authorities should expect the institution to increase the level of own funds to the level of P2G within an appropriate timeline.
c. Where the institution disregards P2G, does not incorporate it into it risk management framework or does not establish own funds to meet P2G within the time limits set in accordance with paragraph 397, this may lead to competent authorities applying additional supervisory measures as set out in Sections 10.3 and 10.5. Where appropriate, the competent authority may decide to review the level of the additional own funds requirements, in accordance with Title 7.
546. Notwithstanding particular supervisory responses in accordance with the previous paragraph, competent authorities may also consider the application of the capital and additional supervisory measures set out in Sections 10.3 and 10.5, where these are deemed more appropriate to address the reasons for the own funds falling below the level determined by P2G».

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according to MAR – whose elements are, as already set out, the (*a*) non-publicity, (*b*) precision and (*c*) price-sensitivity –, the analysis needs to be carried out both individually and comprehensively.

Firstly, it must be noted that, under Art. 7 MAR, a piece of information is deemed as precise when it indicates either a «set of circumstances» or an «event», provided that one or the other 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*». As it was perspicuously clarified, «*while circumstances are basic conditions for something to happen, events are the happening itself*»; consequently, «*a single event conveys generally more information than isolated circumstances, which acquire significance only when combined with other factors*»[3].

Thereby, some components of the SREP seem to be self-sufficient in meeting the requirement of precision, while others might be more questionable.

Arguably, capital and liquidity requirements, as well as any other kind of quantitative measure, can be ascribed to the first group[4]. Besides, their price-sensitivity is in most cases automatically implied by the significant, direct financial impact they have on the issuer (e.g., restraints on distributions affect the stock price in the logic the discounted flows that are expected from the instrument; the provision of additional own funds implies a limitation of the lending business and also impacts on profitability, etc.).

Conversely, the relevance of the overall SREP assessment, with its score and summaries of the findings relating to the SREP's four building blocks, needs to be considered in the light of a «*set of circumstances*», if read altogether with other parts of the SREP letter.

As far as qualitative measures are concerned, they can be viewed as events or circumstances according to their actual content.

Elements of the SREP such as scores and assessments require further attention in evaluating their price-sensitive nature. In fact, it could be objected that the

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[3] *Chiara Picciau* and *Marco Ventoruzzo*, *Article 7: Inside information*, in *Market Abuse Regulation. Commentary and Annotated Guide*, edited by Ventoruzzo and Mock, Oxford, 2017, 190.

[4] Besides, it is submitted that single quantitative measures can meet the notion of inside information, not only if they are breached, but even if the bank is largely compliant with those measure. This depends on the fact that an information indicate that the bank has a large room for manoeuvre in respect to its business can be relevant as inside information (also when it confirms an existing trend). But, *contra*, see Consob's Communication no. 6, March 15th 2019 (relating to information regarding SREP to be made available in the prospectus and in the periodical financial disclosure), which, dealing with the contents of the prospectus, affirms that Pillar 2 Guidance have to be disclosed at least in the case of non-compliance.

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«diagnostic part» of the SREP letter does not contain any information in the proper sense (neither in the perspective of the «event», nor in the one of the «set of circumstances»), since it all boils down to a mere opinion – issued by a third party – formed on actual pieces of information regarding the bank, which are either already public (so that investors already have it), or private but should remain such (because, for instance, they are covered by industrial or property rights: see in fact *infra*, in this par.).

Nevertheless, this argument can be countered by observing that the evaluation of a bank's ability to face risks, resulting from the consideration of a set of existing pieces of information, is indeed a piece of information in itself - in terms of actual knowledge regarding the issuer – if not something more than the mere gathering of the informational inputs behind it. This is especially true in the case of the SREP letter because the subject originating the outcome is as highly specialised, resourceful and accountable as the ECB and the ECB itself uses, in its supervisory activity, several pieces of information which are not public but obtained by the ECB in force of its public function.

In any case, SREP assessments (both the general one and the one relating to single blocks) need to be considered in conjunction with the scores they refer to. The overall picture resulting from scores and assessments has an *inherently benchmarking nature* among supervised entities, which increases the relevance of this information for the market.

However, and notwithstanding the above, the fact remains that the disclosure of the SREP decision should not force an indirect disclosure of pieces of information that the issuer legitimately intends to keep private, and whose disclosure would therefore unjustly harm it. This is the case, for example, of information covered by industrial or property rights, commercially sensitive information, or information the banks is contractually obliged to keep secret.

Indeed, the suggested interpretation seems in line with the very nature of the delay in disclosure established by Article 17(4), that is when «*immediate disclosure is likely to prejudice the legitimate interests of the issuer*», provided that «*delay of disclosure is not likely to mislead the public*» and «*the issuer … is able to ensure the confidentiality of that information*». To this regard, it can be noted that the relevant ESMA's Guidelines draw a non-exhaustive list of situations of legitimate interest for delayed disclosure, which includes the case when «*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*» (page 5).

A broad interpretation can be given to this passage. In fact, it witnesses the existence of a general principle that grants issuers a safe harbour for information, relating to the organisation of their business, that are the outcome of specific investments aiming at enhancing the firm's efficiency, whose value would be

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destroyed by disclosure. In operational terms, this would mean that, whenever the disclosure on the actual content of some components of the SREP decisions implied disclosure of proprietary information or other confidential elements, a summary of the information should be provided.

Such an assumption also finds validation in the prudential framework (namely, in Part VIII of the CRR, implementing the Basel's third Pillar, dedicated to transparency to the market – market discipline), that allows non-disclosure of material information when they are proprietary, i.e. «*where disclosing it publicly would undermine their competitive position*», being now also specified that «*proprietary information may include information on products or systems that would render the investments of institutions therein less valuable, if shared with competitors*» or confidential, i.e. that «*the institutions are obliged by customers or other counterparty relationships to keep that information confidential*» (Art. 432 CRR).

3. SREP draft decision: obligation to disclose and legitimate reasons for delayed disclosure.

3.1.- One further issue regarding the SREP decision revolves around the possible qualification of the relative «draft» as inside information.

The question arises because of the procedural guarantees set out by Article 22 of the Single Supervisory Mechanism Regulation (SSMR), on whose basis «*before taking supervisory decisions in accordance with Article 4* [that is, supervisory measures], *the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard. The ECB shall base its decisions only on objections on which the parties concerned have been able to comment*». Procedural aspects of this «right to be heard» are set out in Article 31 of the Single Supervisory Mechanism Framework Regulation (SSMFR), which provides, *inter alia*, that the involved entity shall «*be given the opportunity to provide its comments in writing within a time limit of two weeks following receipt of a statement setting out the facts, objections and legal grounds on which the ECB intends to base the ECB supervisory decision*» (par. 3).

Innovating the previous framework, the Market Abuse Regulation now expressly deals – for the purpose of the disclosure regime - with the case of information originating by a process that lasts over a certain period of time, being composed of a number of steps («*zeitlich gestreckten Vorgang*»). Namely, Article 7(2) MAR – setting the notion of precise information as something «*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*» – provides that «*in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information*»; also clarifying

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that «*an intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information*» [Art. 7(3)][5].

In this context, the question arises as to whether the SREP draft letter meets or not the requirements under Article 7 MAR.

This issue is far from being obvious and, in fact, it is worth noting that the significance of the draft letter has received some attention during last fall's ESMA consultation on MAR review, thus confirming the relevance of the topic.

3.2.- Amongst others, the Italian Banking Association (ABI) has taken a clear stance on the topic. Moving from a recent communication of the Italian market authority (Consob Communication No. 5 of 15 March 2019), which drew the issuers' attention on the need to assess the nature of the SREP draft letter as inside information,, ABI noted there were «*misgivings about the arrangement of inside information in view of the SREP draft letter, by reason of the non-definitive nature of the document and its content, which is formed only as the outcome of a structured comparison process between the Authority and the issuer*». It is argued, therefore, that «*there is thus a possibility, which cannot be excluded a priori, that the initial content may undergo significant changes»*. Finally, it is also submitted that «*the draft nature of the preliminary document received by the issuer is not suitable for disclosure to the public and, where it is amended in the ECB's final SREP letter, it could even be misleading for the market. This is also because of the confidentiality constraints imposed by the Authority and the possibility that relations with the latter and the successful outcome of the ongoing discussion could be adversely affected*».

This position cannot be entirely agreed upon, at least as it is set out.

On the one hand, it is apparent indeed that the draft letter is not the final administrative measure. In fact, the non-definitive nature of the draft letter depends, from a formal point of view, on the fact that the draft letter is an act coming from the ECB's Supervisory Board (which is not legally entitled to express the discretionality of the ECB on the outside), while the final decision is formally deriving from the ECB's Governing Council. However, the main

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[5] It is commonly taken that the said provision embeds in the regulation the position envisaged by the European Court of Justice in the case *Markus Geltl v. Daimler AG* [2012] ECLI:EU:C:2012:397, where it was ruled that «*in the case of a protracted process intended to bring about a particular circumstance or to generate a particular event, not only may that future circumstance or future event be regarded as precise information within the meaning of those provisions, but also the intermediate steps of that process which are connected with bringing about that future circumstance or event*»; and that «*the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur*».

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reason of the non-definitive nature depends on the fact that amendments are possible after the exercise of the right to be heard.

Still, the argument of the non-definitive nature of the draft letter cannot be sufficient to exclude its possible relevance as inside information, since in Article 7(2) and (3) MAR, it all comes to assessing if it actually meets the requirements of precision and price-sensitivity under the reasonable investor test [Art. 7(4): «*information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments … shall mean would be likely to have a significant effect on the prices of financial instruments, … shall mean* information a reasonable investor would be likely to use as part of the basis of his or her investment decisions» (emphasis added)].

This being provided, the draft decision, even if neither binding nor definitive, can meet the requirements of inside information.

In fact, if changes in the adopted supervisory measures can occur as a consequence of the right to be heard, still it is highly likely that the core of the ECB's evaluation on the bank's ability to face its risks will not change. This leads to qualify the draft letter as «*a set of circumstances … which may reasonably be expected to come into existence*». In fact, even if some part of it could change, it can reasonably be assumed that the information comprehensively conveyed will regularly be confirmed, so that it can be deemed that, in general, the requirement of precision would be met if jointly considering its building blocks as one set of circumstances. As far as price-sensitivity is concerned, it is argued that the core of the SREP letter is something that would be helpful to a reasonable investor in order to take an investment decision.

3.3.- This being said with regard to the nature of information itself, it is still true that disclosure of the draft letter could in fact prejudice the bank's legitimate interests: this calls for the possible recourse to the delay under Article 17(4) MAR.

In this respect, the existence of a case for delayed disclosure under par. 4 cannot be directly derived from arguing the confidential nature of the SREP exercise. Indeed, Articles 53-54 CRD IV, as well as Article 27 SSMR, only set out duties of professional secrecy referring to individuals acting as «*members of the Supervisory boards, staff of the ECB and staff seconded by participating Member States carrying out supervisory duties*». In other terms, there is no conferral upon the ECB of a power to impose secrecy to a supervised entity; neither is there a ban on disclosure implied by any relevant regulation.

Rather, the reasons for a delayed disclosure can be found in the interest of preserving the proper course of the SREP's exercise administrative procedure:

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in particular, the necessity of not hampering the effectiveness of the bank's right to be heard (Art. 22 SSMR and Art. 31 SSMFR).

More broadly, it can also be argued that delaying disclosure of the draft until the decision becomes definitive and legally binding is instrumental to the purpose of avoiding any undue pressure upon the Supervisory Authority. Such interest can find legal coverage under the principle of loyal cooperation between Supervisors and supervised entities which, according to the common opinion, stems from Article 41 Charter of fundamental rights («*1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions*»).

The specific question of the draft letter leads to a more general MAR issue which, as it has just been said, has been one of the most discussed of ESMA consultation: the controversial relationship between the inside information, referred to in Article 7, and the delay, referred to in Article 17 (4).

As many stakeholders - different from banks – have highlighted, the problem arises from the fact that the definition of inside information affects not only the prohibitions of insider dealing but also a positive duty of disclosure to the market. It is often argued that a piece of inside information could be precise enough to trigger the prohibition to dealing, but not necessarily precise enough to be disclosed as too early and incomplete disclosure might mislead the public. In this scenario, in which a onefold definition in envisaged, the presence of the delay could play a very important role, but the rules in force (and, even more, ESMA's approach in their implementation) appear consider the delay as an exception, rather than as a general counterweight to protect the legitimate interests of the issuer and investors.

Against this backdrop, it is obvious that the issue regarding delayed disclosure of the draft letter is inevitably affected by such a general ambiguity. As a matter of fact, arguing that disclosure of the draft letter is legitimately delayed, until the final decision has come into force, equals to argue – from an operational standpoint – that the draft letter has not to be disclosed at all: indeed, when the time for delay has expired, the information is not relevant anymore, provided that the final decision has been disclosed.

4.- Resolution planning and inside information.

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4.1.- According to the BRRD framework, the resolution authority (Single Resolution Board, SRB) is involved in the pursuit of each single bank's resolvability in a twofold, but related, way.

On the one hand, the resolution authority is in charge of drafting resolution plans (Article 10 BRRD), which «*shall provide for the resolution actions which the resolution authority may take where the institution meets the conditions for resolution*» (par. 1). The plan «*shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure of the institution or to its business or its financial position that could have a material effect on the effectiveness of the plan or otherwise necessitates a revision of the resolution plan*» (par. 4).

On the other hand, Article 45(6) BRRD [now, Article 45(c) BRRD2] confers to the resolution authority the power to set the amount the level of liabilities: «*The [MREL] of each institution […] shall be determined by the resolution authority, after consulting the competent authority, at least on the basis* [of] *the need to ensure that the institution can be resolved by the application of the resolution tools including, where appropriate, the bail-in tool, in a way that meets the resolution objectives*». There is, therefore, a clear interplay between the resolution strategy, as set out in the resolution plan, and the calibration of the MREL, which needs to make the resolution strategy viable.

4.2.- Seemingly, the need for disclosure on the former aspect is easily affirmed, in respect of both calibration and composition. As a matter of fact, MREL works as a further layer of capital requirements: from a structural standpoint (and with all the due differences with respect to its function), it is no different from P2Rs. Moreover, the inclusion of a group of liabilities in MREL, signaling that, according to the existing resolution strategy, liabilities are primarily intended to finance internal recapitalization, needs to have an impact on the price of the instrument *ceteris paribus*.

Periodical disclosure on resolution planning under the prudential framework's third pillar (market discipline: part VIII of the CRR), as amended by the CRR 2, requires disclosure on Own Funds and Eligible Liabilities. More specifically, Article 437a CRR II, which applies to G-SIIs, requires credit institutions to disclose on a semi-annual basis: (a) the composition of their own funds and eligible liabilities, their maturity and their main features; (b) the ranking of eligible liabilities in the creditor hierarchy; (c) the total amount of each issuance of eligible liabilities instruments; (d) the total amount of excluded liabilities.

Also eligible liabilities' «add-ons», even if not considered by the CRR's rules on disclosure, might be inside information to be disclosed (at least) according to Article 7 MAR.

Actually, also non-globally systemic institutions are now compelled to disclose information regarding MREL. Such an obligation arises from the resolution

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framework, by effect of the amendments recently introduced by BRRD2. In particular, Article 45(i) requires to disclose, on an annual basis: «(*a) the amounts of own funds that, where applicable, meet the conditions of point (b) of Article 45f(2) and eligible liabilities; (b) the composition of the items referred to in point (a), including their maturity profile and ranking in normal insolvency proceedings; (c) the applicable requirement*».

4.3. The issue relating to disclosure of information relating to «peace-time» resolution strategies is more articulated.

Looking at the topic from the prudential and resolution perspective, it can be said that the envisaged approach has not yet embraced the path of transparency.

In fact, while – on the one hand – CRR2 and BRRD2 are silent on the disclosure of resolution plans, on the other hand the SRB has expressed no expectation that banks make public disclosure of any kind, nor that they disclose any contents of their resolution planning, or of their actual level of resolvability[6].

The authorities' reluctance towards firm-specific disclosures on resolution planning and resolvability has indeed some justification. As the Financial Stability Board has correctly set out in a recent paper, (Public Disclosures on Resolution Planning and Resolvability, June 3rd 2019), the preservation of the authority's optionality (against market expectations and, possibly, even legal risks) can often be at stake: it is argued, in particular, that «*authorities may also wish to preserve optionality and their ability to respond flexibly to the nature of the crisis at hand, particularly since authorities' decisions on the choice of resolution tools or approaches that best support orderly resolution and achieve the resolution objectives can only be made at the point of failure. Market expectations built upon ex-ante disclosed information, in case different from the actual course of action, could constrain available options or increase the risk of legal challenge*» (pages 2 f.).

Still, the exclusion of the duty of listed banks to disclose firm-specific information on resolution planning and resolvability is hard to be argued. In fact, information that enables investors and perspective investors to come to a view on the firm's resolvability meets the requirements of precision, in the perspective of the draft and update of the resolution strategy being an existing «*set of circumstances*» «*enabl[*ing *a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments*». In most – but probably not all – cases the information is price sensitive as well. As it was effectively set out, «disclosure is essential in making resolution scenarios credible, and bringing market discipline to bear on individual firms. Information on resolution scenarios needs to be shared with market participants ex ante, well ahead of any financial stress. Only once investors and other stakeholders can anticipate that

[6] Neither the issue of disclosure on resolution planning is addressed by the SRB's public consultation on «Expectation for banks».

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resolution is credible, and which parts of a failing bank would not be deemed critical, will they offer funding at pricing that reflects such risks». In summary, «transparency of scenarios for individual firms is also in the public interest because it will make market discipline more effective»[7].

This being said, the precautions that were already set out with reference to the SREP letter should apply. Namely whenever the disclosure on the actual content of some components of the SREP decisions would imply disclosure of proprietary information, the disclosure statement needs to be formulated in a way that is able to convey the inside information within the boundaries set by the need of protecting proprietary data.

In the same way as with respect to the SREP exercise, delayed disclosure cannot be argued on the basis of the confidential nature of information in respect to the Article 84 BRRD (just like Articles 53-54 CRD IV, as well as Article 27 SSMR) that imposes a rule on professional secrecy to individuals, but does not confer to the SRB a power to impose secrecy to a supervised entity. A different issue is the presence of information that the issuer is legally obliged to keep secret in favour of other subjects.

In light of all the above, the solution adopted by UK's and US's prudential authorities is probably a fair point of balance also in the perspective of market abuse.

Under the UK regime, banks are in fact required to provide disclosure of a concise summary of its report on its assessment of its preparations for resolution[8]. Eventually, the PRA also publishes a statement on each institution's resolvability.

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[7] *Alexander Lehman*, *Impediments to resolvability of Banks*, paper requested by the Economic Governance Support Unit (EGOV) Directorate-General for Internal Policies PE 634.360 - December 2019, page 21.

[8] See the Bank of England's Supervisory Statement | SS4/19 Resolution assessment and public disclosure by firms, July 2019 «*The PRA [Prudential Regulation Authority] expects a firm's public disclosure to be a concise summary of its report on its assessment of its preparations for resolution. … The PRA expects a firm's public disclosure to: - summarise its understanding of its resolution strategy and the steps the firm would take to facilitate resolution by the Bank … This should assist a user to understand how the resolution strategy of the firm works, what it means for its financial and operational counterparties, clients (including depositors) and investors; - describe the capabilities, resources and arrangements currently in place at the firm … that have been implemented to improve its resolvability, including how these achieve the resolvability outcomes ... The PRA also expects a firm to include a summary of its group structure, a summary of any testing it has carried out, and the governance processes it has in place for performing its assessment. The firm's public disclosure should be designed to help users come to a view of the quality of the firm's existing capabilities, resources and arrangements for resolution; - describe any outstanding steps that a firm is planning to undertake to remove or reduce any gaps in their capabilities, resources and arrangements for resolution. These should include an*

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As far as the US are concerned, prudential rules require larger banks to disclose a public section of the plan[9]; besides, prudential authorities issue a statement on each institution's resolvability. Apart from that, listed banks disclose some information on their resolution strategy as material pieces of information according to general securities law disclosure duties.

5.- Disclosure of SREP exercise, MREL decisions and resolution planning contents as a cause of financial instability? The role of Article 17(5) MAR.

5.1.- Given the extent according to which SREP exercise and resolution planning outcomes arguably meet the notion of inside information, the question arises whether any kind of protection can be granted to the issuer, when there is an actual risk that disclosure could trigger adverse reactions in the public, and among them depositors in particular, that could lead to the intermediary's crisis and, possibly, to a systemic crisis.

As it is known, this was indeed the case of what happened to Northern Rock in 2008, where the disclosure (under the market abuse discipline) of the credit institution having received emergency liquidity assistance from the Bank of England prompted an idiosyncratic crisis, that forced the bail out of the bank by the UK government's, as an alternative to its failure.

According to the legislation then in force [Directive 2003/6/EC on insider dealing and market manipulation (market abuse), MAD], the issue of the legitimacy of delaying disclosure of a piece of information, such the granting of

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anticipated timeline for completion and details of the controls that exist in the firm to oversee its execution of these steps. The public disclosure should enable users to assess the feasibility and credibility of the firm's plans for removing or reducing gaps in its capabilities, resources and arrangements for resolution. Users should also be able to assess how the firm's financial and operational counterparties, clients and investors might be impacted over time as the firm implements its outstanding steps».

[9] «*The public sections of Title I resolution plans for the eight domestic G-SIBs and for a number of foreign G-SIBs with operations in the US are published on the websites of the US authorities. The public sections include information on – amongst other things – the firm's resolution strategy as well as information on assets, liabilities, capital and funding sources. The Federal Reserve Board of Governors and the FDIC issue a joint press release when the resolution plan assessment is complete, which notes any determination by those authorities on the full Title I resolution plan, including whether it is not credible or would not facilitate an orderly resolution under the U.S. Bankruptcy Code. In the US, G-SIBs that are publicly listed and traded also make public disclosures regarding, among other things, the firm's resolution strategy and TLAC issuances as required under the US federal securities laws. These disclosures are not made pursuant to any resolution-specific requirements of the US federal securities laws, but rather pursuant to the requirement that all material information about the firm be made available to investors*».

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extraordinary public financial support to a bank, had to be dealt by resorting to the rule on legitimate interest [what is now Article 17(4), then Article 3(1) MAD]. Conversely, in the Market Abuse Regulation, the existence of an element of specificity of credit and financial institution in respect to non-financial issuers, under the perspective of the systemic risk inherent in their field of business, is now recognized: this is, namely, Article 17(5) and (6) of MAR.

According to this provision, which becomes relevant when issuers deem the general delay regime under par. 4 inapplicable [see Article 17(6)(4): «*This paragraph shall apply to cases where the issuer does not decide to delay the disclosure of inside information in accordance with paragraph 4*»], banks and other financial institutions can resort to a different hypothesis of delayed disclosure (further than the one under par. 4 which remains *per se* applicable to financial institutions), which revolves around the possible risk for the financial system's stability that may arise from disclosure. In particular, Article 17(5) «*In order to preserve the stability of the financial system, an issuer that is a credit institution or a financial institution, may, on its own responsibility, delay the public disclosure of inside information, including information which is related to a temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort, provided that all of 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 specified under paragraph 3 has consented to the delay on the basis that the conditions in points (a), (b) and (c) are met*».

According to Article 17(6), the procedure to be followed in order to request and obtain the authorisation to delay disclosure involves not only the market authority (that has the final say on the issue), but also the prudential authority: «*For the purposes of points (a) to (d) of paragraph 5, an issuer shall notify the competent authority* [i.e. the national market authority] *of its intention to delay the disclosure of the inside information and provide evidence that the conditions set out in points (a), (b) and (c) of paragraph 5 are met. The competent authority specified under paragraph 3 shall consult, as appropriate, the national central bank or the macro-prudential authority, where instituted*».

With respect to the latter provision, it is surprising that the institution consulted by the national market authority is always the national central bank or the national macro-prudential authority, where instituted, regardless of the size and relevance of the involved institution and on the magnitude of the effects that would be prompted by disclosure. This being said, one may wonder whether there is here any room for involving the ECB (which seems to be the most appropriate Authority to gauge the exiting risk to financial stability) in this process, perhaps by requiring the national authority to resort, on its turn, to the ECB itself.

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Eventually, it is also provided that, in case of the authority's consent, *«the competent authority … shall ensure that disclosure of the inside information is delayed only for a period as is necessary in the public interest. The competent authority … shall evaluate at least on a weekly basis whether the conditions set out in points (a), (b) and (c) of paragraph 5 are still met*»; while in case of denial, «*the issuer shall disclose the inside information immediately*».

5.2.- The existence of a rule as the one set out in Article 17(5) MAR, which grants an additional hypothesis for delayed disclosure by reason of financial stability concerns, raises the issue of understanding the interaction between this provision and the rest of the framework on continuous disclosure, with special reference to the interplay between the case for delay under par. 4 and the one under par. 5.

In particular, the issue is whether, and under which conditions, information relating to the SREP exercise and resolution planning can be legitimately delayed under Article 17 MAR, *either* according to its par. 4 *or* to its par. 5.

As a matter of fact, the basic difference between Article 17(5) MAR and Article 17(4) MAR rests on three key elements: *i)* first of all, delay under par. 5 requires, as a precondition, the existence of a risk for the «*financial stability of the issuer* and *of the financial system*» (emphasis added) stemming from disclosure; *ii)* secondly, in one case the delay meets a «*public interest*» (par. 5), while in the other it is intended as a way not to «*prejudice the legitimate interests of the issuer*» (par. 4); *iii)* finally, delay under par. 4 is legitimate only if it «*is not likely to mislead the public*», while no such requirement can be found in the delayed disclosure under par. 5.

With reference to the issue *sub i)*, the question arises whether the risk of an idiosyncratic crisis (*i.e.* a «bank-run») is to be *ipso facto* considered as a threat to the financial system as a whole.

In this respect, too little help comes from recital 52 of the MAR, according to which «*in order to protect the public interest, to preserve the stability of the financial system and, for example, to avoid liquidity crises in financial institutions from turning into solvency crises due to a sudden withdrawal of funds, it may be appropriate to allow, in exceptional circumstances, the delay of the disclosure of inside information for credit institutions or financial institutions*». Recital 52 also states that «*in particular, this may apply to information pertinent to temporary liquidity problems, where they need to receive central banking lending including emergency liquidity assistance from a central bank where disclosure of the information would have a systemic impact*», and that «*this delay should be conditional upon the issuer obtaining the consent of the relevant competent authority and it being clear that the wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information which is subject to delay*».

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The quotation is not perspicuous at all. It is unclear, in fact, whether any automatism between the risk of a bank run, and the existence of a case for delayed disclosure under par. 5, is intended. While the outset of the recital seems to suggests that the risk of liquidity is sufficient to trigger the application of par. 5, the following part of the sentence calls for assessing if disclosure would have a «*systemic impact*», and also seems to require a separate and somehow autonomous assessment of the fact that «*the wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information which is subject to delay*».

Little help also comes from ESMA's Q&As on MAR that, dealing with the public interest assessment to be met under Article 17(5) MAR, set out that «*it is important to consider interests beyond the direct economic impacts and other non-financial interests of the public. All of these interests would need to be considered, and none of them should be considered in isolation. If there are divergent interests of the public, the credit/financial institution should assess on a case-by-case basis if the prevailing public interest(s) is to delay the disclosure of inside information. For example, a potential loss to investors who have made or may make an investment decision should be weighed against the adverse effect of public disclosure on other groups, such as depositors and consumers*» (Q&A on MAR, page 14).

As a matter of fact, delay of disclosure always implies a comparison between investors' and other constituencies' (other bank's stakeholders) interests. What is unclear, however, is the criterion according to which such a comparison should be performed.

In order to fill this gap, the concept of «*risk of undermining the financial stability of the issuer and of the financial system*» can be interpreted by aligning it to the notion of *contagion* that is set out in the resolution framework, namely in Article 44(3)(c) BRRD, regarding the exclusion of eligible liabilities from bail-in in order «*to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium sized enterprises, which would severely disrupt the functioning of financial markets, including financial market infrastructures*, in such a way that could cause a serious disturbance to the economy of a Member State or of the Union» (emphasis added)[10].

The suggested interpretation appears to be the most consistent at a general systematic level. In fact, a conceptual parallel seems to be drawn between Article 44(3)(c) BRRD and Article 17(5) MAR, since both provisions deviate – the former *ex post*, the latter *ex ante* – from the core principles of market discipline, which is the core driver of both the resolution, and the market abuse framework.

Such interpretation seems also capable of justifying the difference between par. 4 and par. 5 of Article 17 MAR, on the misleading nature of the delay (as already

[10] See also ESMA Q&A on MAR, page 14, quoted *supra*, par. 3.3.

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set out *supra*, par. 4 requires that the delay is not able to mislead the public, while this requisite is not included in par. 5). This difference can in fact be explained only assuming that the risk that makes a delay legitimate under par. 5 is so relevant that even a serious damage to market integrity is then justifiable.

6.- A bank's legitimate interest for delaying disclosure of a «negative» piece of information under Article 17(4) MAR.

6.1.- If the risk of an intermediary's crisis (not potentially causing a serious disturbance "to the economy of a Member State or of the Union") as a consequence of disclosure is not self-sufficient to trigger the application of par. 5, then such a hypothesis needs to be addressed under par. 4.

Therefore, the question arises as to how the «legitimate interest» test should be carried out, and how it differs from the «public interest» one.

To this regard, the difference between the notion of «public interest» and the one of an issuer's «legitimate interest» rests on the fact that the former just looks *at the effects* that disclosure would have on – both the involved bank and – a Member State's economy, while the latter gives relevance *to the reasons* why it would be appropriate to delay disclosure: reasons that need *by definition* to be conceived as something different from the issuer's intention to avoid reputational damage coming from disclosure.

In fact, if this were the case, any negative inside information could be delayed, calling for a legitimate interest. However, this would be in direct contradiction with the very core principles underpinning the market abuse regulation: a negative piece of information is, most of the times, the one that current and perspective investors most need to have. As a matter of fact, rules that would allow issuer to delay the disclosure of negative information, based on the mere fact of potential adverse consequences of the disclosure, would be unfit to preserve the public's confidence on the efficiency of the market.

This conclusion remains valid notwithstanding the magnitude of the expected effects of disclosure, even to the point of the potential failure of the credit institutions.

One could then argue that financial stability, as an overarching public interest, should interfere with the principle of market integrity, as embedded in MAR, thus affecting the notion of «legitimate interest», and the way in which it is interpreted and applied. More specifically, according to this line of reasoning, the need to protect financial stability would call for a looser interpretation of the notion of legitimate interest, when it comes to banks in distressed situations. Otherwise, obliging a bank to disclose a piece of information that could seriously

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damage its reputation, even to the point of triggering its solvency, would be inconsistent with one of the fundamental policy goals of banking regulation.

However, such an objection can be countered by two arguments.

First of all, the existence of a specific provision relating to threats to financial stability, such as the one under par. 5, suggests that the general rule on delayed disclosure needs to be applied consistently with how it is applied to non-financial issuers.

Secondly, it can be argued that the idea of a double standard in the application of MAR, as a way to protect financial stability, completely overlooks the political choice underlying the implementation of the resolution framework (BRRD and SRMR), as a fundamental part of the Banking Union.

In fact, the explicit purpose of the resolution framework (and especially the statement of a *burden-sharing* principle) is to counteract moral hazard through market discipline *operating even when the survivance of the credit institution is at stake*. The idea of «softening» market discipline, due to concerns about the negative effects of disclosing material information, would actually contradict this basic assumption.

Given this normative context, when the deterioration of a bank's financial situation takes place, it is no longer possible to just try to keep the situation quiet by «sweeping things under the rug», while arranging, in one way or another, its possible rescue.

On the contrary, the proper response to these situations is now entrusted to the effective functioning of the recovery and resolution framework: that is, *on the one hand*, the timely implementation of recovery plans by banks (Art. 5 ff. BRRD); *on the other*, the prompt and timely intervention of the European Central Bank through the exercise of its extensive early intervention powers (Art. 27 ff. BRRD).

From this standpoint, it is therefore argued that banks and competent authorities should include - in their recovery plan indicators (Art. 9 BRRD) and trigger-points for the adoption of early intervention measures (Art. 27 BRRD) - the existence of a negative piece of information, whose disclosure would reasonably prompt a serious deterioration of the bank's financial situation.

6.2.- The prudential framework does not contradict, but rather confirms, the assumption that, in the current legislation, no «safe harbour» from market discipline is granted to financial institutions.

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Indeed, not even within the CRR framework there is any normative basis that can legitimately lead to the conclusion that there is any room for avoiding disclosure of a material information, due to the fear that making such information public would entail a prejudice for the disclosing bank.

According to the prudential framework, banks have to disclose a detailed list of information (Part. VIII of the CRR), but also need to «*have policies in place to verify that their disclosures* convey their risk profile comprehensively to market participants» (emphasis added) [Art. 431(3)]. Also «*where institutions find that the disclosures required under this Part do not convey the risk profile comprehensively to market participants*», then «*they shall publicly disclose information in addition to the information required to be disclosed*» [Art. 431(3)], provided it is: (*a*) material, i.e. «*where its omission or misstatement could change or influence the assessment or decision of a user of that information relying on it for the purpose of making economic decisions*», (*b*) non-proprietary, i.e. «*where disclosing it publicly would undermine their competitive position*», which «*may include information on products or systems that would render the investments of institutions therein less valuable, if shared with competitors*»; (*c*) non-confidential, i.e. that «*the institutions are obliged by customers or other counterparty relationships to keep that information confidential*» (Art. 432 CRR).

As these quotations show, the concept of «material information» under Article 432 CRR, like the one of «inside information» under Article 7 MAR, focuses on the information being useful to take an economic decision by a bank's stakeholder. Furthermore, exemptions to the obligation to disclose granted by the CRR («proprietary» or «confidential» nature of the information) arguably do not include the case of disclosure being harmful to the institution in terms of the «reputation» relating to its performances and soundness.

It is worth noting, in this perspective, that CRR 2 amended the original definition of proprietary information under Article 432 CRR («*where disclosing it publicly would undermine their competitive position*») by adding that «*proprietary information may include information on products or systems that would render the investments of institutions therein less valuable, if shared with competitors*». This clarification removes any doubt on the nature of the notion of proprietariness, that conceptually lies in the field of trade or commercial secrets[11], and thus cannot work as a loophole to exclude from

[11] See recital (14) of Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure: «It is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation. Such definition should therefore be constructed so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such know- how or information should have a commercial value, whether actual or potential. Such know-how or information should be considered to have a commercial value, for example, where its unlawful

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disclosure a piece of information only because of its expected effects on the issuer.

On its part, the notion of «confidentiality» has always been clear in its meaning, postulating that «*the institutions are obliged by customers or other counterparty relationships to keep that information confidential*». Apparently, this is not the case.

6.3. Given the need for applying par. 4 to banks just according to the same governing principles which applies to any listed issuer, it is now useful to consider how the notion of legitimate interest is spelt out by ESMA.

The Guidelines on delay of disclosure issued according to Article 17(11) MAR[12] are the relevant piece of regulation in this respect. At point 8 of these Guidelines, a non-exhaustive list of circumstances is provided, which includes, *inter alia*, the following cases: «*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*»; «*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*».

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acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete. The definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question»; see also Art. 2(1), according to which trade secret «means information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret».

[12] ESMA shall issue guidelines to establish a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in point (a) of paragraph 4, and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in point (b) of paragraph 4.

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Given the above (and especially point b, according to which when «*the financial viability of the issuer is in grave and imminent danger*» delay is allowed provided that «*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*»), it is argued that the «legitimate interest» test under par. 4 is met only when it relates to some positive action taken by the issuer in order to tackle the deteriorated situation signaled by the negative information whose disclosure is intended to be delayed, whose success would be prevented by disclosure.

However, this is legitimate only as far as the bank is *currently* and *actually engaged in* arranging operations aimed at restoring the bank's situation at a level whose disclosure would (reasonably) not trigger a solvency or a liquidity crisis, and for the *time that is necessary* for the negotiation to be concluded and/or the operation to be successfully carried out.

Of course, in some cases it can be difficult to set the moment up to when delay is allowed. For example, in the famous case of Northern Rock, information on the Central Bank having granted emergency liquidity assistance was disclosed before the loan was repaid. Seemingly, the communication led to an idiosyncratic crisis. In light of the above, it is argued that disclosure should have been delayed for a longer, period consistently with the rule under par. 4; also it would not be necessary to resort to par. 5 (had such a provision existed at that time), in order to effectively address such kind of situation[13].

Finally, one may wonder what happens when par. 4 requirements are met, but disclosure would arguably entail «*a risk of undermining the financial stability of the issuer and of the financial system*» [Art. 17(5)(a) MAR]. The question can be answered by noting that par. 5 sets a *residual* hypothesis for delayed disclosure [Art. 17(6)(4) MAR]. Consequently, when a set of circumstances meets the notion of «*legitimate interest*» (and the other requirements of par. 4 other than the existence of a legitimate interest – no deception of the public and preservation of confidentiality – are met), there is no need to assess if the disclosure would entail a risk for the financial system's stability.

7. Conclusions.

Supervision and resolution planning activities originate a relevant number of regulatory outputs. Such outputs can be relevant to banks' stakeholders (be they

[13] On this topic, see *Joris Latui*, *Disclosure of inside information and troubled financial institutions: a critical analysis of Member State practice*, in *Law and Financial Markets Review*, 2011, 66 ff., who also addresses the UK's gold-plating of the relevant MAD provisions as one possible cause for not delaying disclosure of that piece of information.

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investors or other kinds of stakeholders) as far as they have a direct impact on how banks will behave in the future (from either a financial or an industrial standpoint), or embed the assessment on supervised entities' state of "health", coming from the Supervision or Resolution Authorities and being based on a comprehensive set of private information gained by those public bodies in the exercise of their respective functions.

The banking prudential framework (CRD IV, CRR and BRRD) and listed companies' market integrity regulation (MAR) both rely on disclosure of relevant information as a means of fostering and maintaining a high level of public confidence in the financial sector. If the latter is keen on ensuring the smooth functioning of the price-formation mechanism as the consequence of public availability of all relevant information, the former conceives disclosure as one pillar of a more articulated regulatory strategy (also composed by capital requirements and supervisory review) whose main focus is on financial stability.

Still, disclosure of supervisory outputs can highlight a bank's situation of distress, which may prompt negative reactions in the public of depositors and investors, with all the consequences that this might entail.

Nevertheless, in a context where the need for providing credit institutions with an appropriate capital base relies on private financial resources that are eventually subject to a burden-sharing principle, a high level of market disclosure becomes crucial as to an effective pursuit of financial stability. Conversely, a situation of opaqueness with reference to supervisory outputs is harmful to the purpose of financial stability, discouraging the inflow of capital towards banks in favour of other industries.

Against this backdrop, it is submitted that the idea of treating listed financial institutions under a lower standard of disclosure, if in the short period can appear a quick solution to single cases of distressed institutions, in the long run would be likely to prejudice the financial system's stability. As a matter of fact, such an approach would be inconsistent with the current prudential framework, that relies on market discipline as a main driver of financial stability, and entrust the ECB and the SRB with roles and powers, whose exercise should be able to ensure response to situations of single institutions' financial distress without harming market confidence.

Of course, excluding any room for double standards in the application of MAR to financial institutions does not imply that banks should be stripped of any chance of protecting themselves (and their investors and depositors) from disclosure that would be either premature or unjustly detrimental, as it could be for the case of disclosure of the SREP draft letter, or of ongoing operations/transactions arranged in order to address a situation of financial

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distress (perhaps emerging from supervisory measures taken as the outcome of the SREP exercise).

Indeed, envisaging the need for a strict enforcement of market discipline *also with reference to (troubled) financial institutions* would work as an incentive towards timely intervention by supervision authorities; whereas non-disclosure of relevant – even if «negative» – information, paired with inaction by the involved institutions and supervisors (that lack of disclosure would surely encourage), will both prejudice the affected banks (letting their situation further deteriorate) and weaken the confidence in the ability of the existing financial regulation framework to properly face risks the system is exposed to.

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