12 December 2024
ESMA74-1103241886-1094

Reply Form

to the Consultation Paper on Draft technical advice concerning MAR and MiFID II SME GM

Responding to this Consultation Paper

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

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

ESMA will consider all comments received by **13 February 2024.**

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

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type < ESMA_QUESTION_LATA_0>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA_CP1_ LATA_nameofrespondent.

  For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA_CP1_ LATA_ABCD.
- Upload the Word reply form containing your responses to ESMA's website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *'Your input - Consultations'.*

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Data protection'.

Who should read this paper?

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

1 General information about respondent

Name of the company / organisation	Deutsches Aktieninstitut e.V.
Activity	Issuer (Other than SME)
Are you representing an association?	☒
Country / Region	Germany

2 Questions

Q1 Do you agree with the definition of protracted processes provided?

<ESMA_QUESTION_LATA_1>

We acknowledge ESMA's great efforts to provide market participants with a comprehensive set of proposals for definitions and both lists.

However, we generally have concerns about the emphasis placed on Recital 67 of the EU Listing Act throughout the document. Instead, it would be more appropriate to adhere closer to the wording of the regulation and Art. 17(1) of the Market Abuse Regulation (MAR). Recital 67, in contrast, dilutes the Level 1 concept of disclosure occurring only after the real final event has occurred and thus adds unnecessary complexity.

We would like to recall that the underlying political objective of the EU Listing Act is to reduce bureaucratic burdens and improve legal certainty for companies, thereby enhancing the attractiveness of the European Capital Market for both companies and investors. We are concerned that these objectives may not be achieved if too much weight is placed on Recital 67 or if previous interpretations are maintained despite changes introduced in the Level 1 legislation.

A clear example of this issue is ESMA's proposal, which suggests that publication becomes due once the management board has made a decision, regardless of whether another corporate body needs to approve this decision. Assuming that the final event occurs with the management board's decision ignores the necessity for supervisory board approval that is frequently required in two-tier corporate governance systems. ESMA's proposal implies that issuers in a two-tier system will often need to delay disclosures after the management board's

decision to ensure orderly governance, leading to higher documentation requirements, compared to their peers in a one-tier board system (see also Q 4).

<ESMA_QUESTION_LATA_1>

Q2 Do you agree with the identified categories of processes and general principles?

<ESMA_QUESTION_LATA_2>

While we recognize ESMA's efforts to draft the list based on general principles (see item 52), we question whether all the categories are necessary. For instance, distinguishing between internal processes and processes involving external counterparties when it comes to the signing of contracts seems artificial, as the signing should always be the final event. Additionally, the distinction between internal and external processes for issuers may introduce more topics related to business strategy in Annex I of the Delegated Act.

Similarly, the concept laid out in paragraph 51 is unconvincing: "The disclosure is required when there is a degree of certainty … which is sufficient not to mislead the investors with information which is still subject to changes". Disclosure should generally occur only after the final event, when no further changes are possible. Information lacking a degree of certainty about the outcome is typically not "precise" and thus does not constitute inside information as defined in Art. 7(1) MAR.

We emphasize that the list is quite detailed, and many subcategories include scenarios that do not constitute inside information, such as when an issuer applies for a license from a public authority or when internal process or contracts are signed by general counsel. If ESMA retains these categories, we suggest clarifying that not every event listed automatically qualifies as inside information. This clarification appears to be made in item 24, it should however be clarified in any communication.

Furthermore, distinguishing who initiated a process with a public authority is not persuasive. It could lead to more disclosure topics and seems inappropriate to require disclosure both when an issuers applies for a public authority decision and when the public authority grants it, as this may create complex situations.

<ESMA_QUESTION_LATA_2>

Q3 **Do you agree that for protracted processes that are entirely internal to the issuer the moment of disclosure should be the moment when the corporate body having the decision power has taken the decision to commit to the outcome of the process?**

<ESMA_QUESTION_LATA_3>

While we agree that in most cases it would be misleading to wait for the decision of a general meeting (item 62), we disagree with the notion that the corporate body with decision-making power is always the management body in two tier systems (item 61). We do not believe that a sufficient degree of certainty regarding the outcome of a protracted process is achieved at that point. See also our comment on question 4.

However, internal processes should be strictly limited to issues that do not require the countersignature or approval of external third parties. Such cases should rather be categorised as processes involving external parties.

<ESMA_QUESTION_LATA_3>

Q4 **Do you agree that in presence of a governance structure that foresees the approval of another body further to the management body's decision, the disclosure obligation should take place as soon as possible after the decision of the first body?**

<ESMA_QUESTION_LATA_4>

We disagree with ESMA's proposal for several reasons.

Firstly, ESMA's proposal disadvantages issuers operating under a two-tier corporate governance system compared to their European peers using a one-tier system. Issuers with a two-tier board system will have to delay disclosure after a management board's decision to ensure orderly decision-making and avoid prejudicing the supervisory board's decision. In contrast, issuers with a one-tier board system do not need to delay and can disclose information immediately after finalising an orderly decision process. If issuers with a two-tier board system choose not to delay disclosure, they will risk publishing two ad hoc announcements, especially if the supervisory board disagrees with the decision of the management board. This highlights that publishing the management board's decision is merely preliminary and may mislead investors rather than benefit them.

Secondly, this approach contradicts the concept of finality outlined in the Level 1 text and undermines the political objectives of the EU Listing Act, which aims to reduce compliance

costs, ensure legal certainty and clarity for issuers of all sizes, and minimise the need for delayed disclosures. Given that two-tier systems will often require issuers to disclosures for important processes (see above), issuers in two-tier board systems will face significantly higher compliance burdens than their peers, contrary to the Listing Act's goal of creating a level playing field.

Despite our general criticism regarding the discrimination against two-tier systems, we understand ESMA's position in situations where consent from the general meeting is necessary. It would not be appropriate to wait for the general meeting's final decision in these cases, so that it appears reasonable that the duty to disclose arises when both the management board and (!) supervisory board have agreed to propose the respective measure or agenda item to the general meeting.

<ESMA_QUESTION_LATA_4>

Q5 Do you agree that for protracted processes involving the issuer and another party different from a public authority, the moment of disclosure should be when the competent bodies/persons of all parties involved, having the decision power under national law or bylaws, have taken the decision to sign off to the agreement?

<ESMA_QUESTION_LATA_5>

We strongly prefer that the final event be the signing of the agreement between the parties. As mentioned in item 67, the sign off represents the "explicit approval of the transaction".

The last sentence of item 70 is counterproductive to the idea of disclosure after a final event has occurred: "The moment may be the signing of the final agreement but may also be earlier in time in presence of a preliminary agreement or any other preliminary commitment…". This suggest multiple possible final events, which is confusing. The definitive final event is the signing, the process leading up to it is the protracted process and merely preparatory.

Additionally, the distinction between ordinary and extraordinary transactions in item 67 is vague. We generally believe that ordinary transactions do not constitute inside information thus do not require disclosure.

Also, in M&A transactions, for example, it is often unknown (or undisclosed for negotiation purposes) whether and when the other party has obtained the necessary board resolutions. Therefore, it is also difficult to determine if the core elements of the contract are agreed upon before signing. This clarity is achieved at the moment of signing.

Overall, for M&A transactions (Category A of the Annex I of the proposed Delegated Act, though for takeovers see Q 8), we firmly believe that the moment of signing should be the final event triggering the duty of disclosure. Only upon signing the contract does the final event actually occur. This is the moment when both parties commit to the agreement and become legally bound. Before this moment, it is not always clear to each party whether the other is fully committed to the core elements of the contract, and until the signing, there remains a possibility that the deal could be called off at the last minute.

<ESMA_QUESTION_LATA_5>

Q6 Do you agree that for protracted processes that are driven by a public authority with the involvement of the issuer, the moment of disclosure should be when the issuer has received the final decision from the public authority, even where the issuer and the public authority previously exchanged preliminary information that may on its own amount to inside information?

<ESMA_QUESTION_LATA_6>

Yes, we agree.

<ESMA_QUESTION_LATA_6>

Q7 Do you agree that for protracted processes that are triggered by the issuer and whose final outcome is decided by a public authority, two separate processes should be identified, and the moment of disclosure should occur upon completion of each of them as above outlined?

<ESMA_QUESTION_LATA_7>

We disagree with the idea that it should matter whether the issuer or the public authority initiated a process, leading to two separate processes with disclosure obligations.

The mere submission of an application by an issuer to a public authority, which initiates an official procedure, is a early step in a protracted process. It is comparable to the “official” start of pre-contractual negotiations between two private parties and in most cases even does not constitute inside information at this stage. Disclosure at such an early point might mislead investors rather than contribute to efficient price formation or address information asymmetry.

We believe administrative procedures should be treated similarly to public procurement processes (as described in No. 27 in the table). In these cases, the "award of contract" is appropriately used as the decisive date for the disclosure obligation, not merely the participation in the procurement process.

In any case, it should be clarified that ESMA's statements apply only to binding applications submitted by issuers to public authorities that “officially” initiate administrative procedures, not to preliminary inquiries addressed to a public authority by the issuer. In M&A processes, for example, issuers often seek a confidential preliminary assessment, such as for example from competition authorities, regarding its clearance assessment or possible clearance conditions, if the merger project remains confidential at this stage (pre-notification process). Such confidential preliminary inquiries should not be considered a “final event” requiring disclosure.

<ESMA_QUESTION_LATA_7>

Q8 Do you agree that a hostile takeover can be considered a one-off event? Do you agree with the moment for disclosure identified for takeover processes?

<ESMA_QUESTION_LATA_8>

Yes, from the perspective of the target company, it is reasonable to view a hostile takeover as a surprising, one-off event for both the company and its shareholders.

Regarding the timing of disclosures, we believe there is no real need to include public takeovers in the list, as they are already subject to specific disclosure rules for offers and reactions of the target companies due to (national) take over law. There is an overlap between MAR and Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (ToD): Art. 6 ToD establishes a specific information and disclosure regime for public takeover bids. Specifically, Art. 6(1)ToD provides:

“Member States shall ensure that a decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority must be informed before such a decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.”

This provision serves the same purpose as Art. 17 MAR and duplicating disclosure obligations for the same set of facts should be avoided. In German law, for instance, the disclosure obligation according to § 10 German Securities Acquisition and Takeover Act

(Wertpapiererwerbs- und Übernahmegesetz, WpÜG) prevails over Art. 17 MAR. According to § 10 WpÜG, the bidder must make public its decision to make an offer without undue delay, and § 10 para 6 WpÜG clarifies that Art. 17 MAR does not apply to decisions to make an offer if they have been made public according to § 10 WpÜG using the means of publication required for a disclosure according to Art. 17 MAR.

<ESMA_QUESTION_LATA_8>

Q9 Do you agree with the proposed approach in relation to financial reports, profit warnings, earning surprises and forecasts? In particular, do you agree that profit warnings and earning surprises are to be considered as one-off events and as such should not be included in the list of protracted processes?

<ESMA_QUESTION_LATA_9>

We very much welcome the acknowledgment that financial reports and forecasts are protracted processes. It is practical to consider the formal decision of the competent body on the respective financial information or forecasts as the relevant point in time, ensuring that the disclosure of both information can be part of the regular process of preparing and disclosing financial reports. Since issuers are usually requested to update their forecast in their periodic financial reports, the approval of the financial results and the approval of the forecast will happen at the same point in time and so should the disclosure.

For the sake of clarity, we suggest explicitly stating that both the creation and adjustment of forecasts are categorised as protracted processes. The conclusion that a forecast cannot be met or needs adjustment is an ongoing process requiring numerous internal discussions and verification of figures.

However, ESMA's proposal to treat earnings surprises and profit warnings as one-off events contradicts the general approach and introduces considerable legal uncertainty. As correctly described in items 83 - 87, share price relevant business figures develop in a protracted process as part of the closing process and culminate in a financial report. During the reporting period, issuers are often unable to sufficiently determine the financial effects of significant individual events. For example, counter-effects may emerge, or a thorough evaluation of the individual event may take more time. Premature publication without providing the full picture can be misleading. So, surprising results emerging during this process should not be disclosed before the final results are settled. Overall, we suggest treating earnings surprises and profit warnings as protracted process. If they emerge during the preparation of regular financial statements, issuers should be allowed to wait for the final approval of the accounts and forecasts to ensure legal clarity and a practical overall process.

For an extraordinary one-time event outside the reporting period with a significant financial impact on forecasted financial figures, there might still be a protracted process (albeit perhaps significantly shorter) as the issuer will still need some time to quantify the effects and has to involve competent board members in the decision making on it.

<ESMA_QUESTION_LATA_9>

Q10 Do you agree with the proposed approach in relation to recovery and resolution protracted process?

<ESMA_QUESTION_LATA_10>

See our response to Q 11

<ESMA_QUESTION_LATA_10>

Q11 Do you consider the list of protracted processes sufficiently comprehensive? Do you agree with the proposed moment of disclosure? Would you add or remove any process?

<ESMA_QUESTION_LATA_11>

The proposed approach regarding recovery and resolution protracted processes seems reasonable. It aligns with Article 28 para 1 of (EU) 241/2014 which prohibits any announcement prior to the approval of the Prudential Competent Authority in cases of redemption, reduction and repurchases of own funds instruments. This restriction applies even when the issuer and the Prudential Competent Authority have previously exchanged preliminary information that may be considered as inside information.

However, clarification is needed to determine the relationship between Article 28(1) of (EU) 241/2014 and Article 17(7) MAR to avoid legal uncertainty. In paragraph 29 of the consultation paper, ESMA references Article 17 (7) MAR stating that “where inside information relating to intermediate steps in a protracted process has not been disclosed in accordance with paragraph 1, and the confidentiality of that inside information is no longer ensured, the issuer or the emission allowance market participant shall disclose that inside information to the public as soon as possible”. The question arises whether Article 28 (1) of (EU) 241/2014 also applies in the unlikely event of rumours or, even worse, a leak. In other words, does Article 28 (1) of (EU) 241/2014 prevent the obligation to disclose such a recovery and resolution protracted process, or does the disclosure requirement under Article 17 (7) MAR take priority?

<ESMA_QUESTION_LATA_11>

Q12 Do you agree that the inside information to be delayed may in some cases be assessed against more than one announcement, whenever a clear conclusion about the issuer's position on the subject matter cannot be drawn exclusively on the basis of the very latest communication?

<ESMA_QUESTION_LATA_12>

We disagree. As ESMA notes in item 119, that the amending regulation's wording only refers to the latest announcement or communication. There is no need to delve further; if the latest announcement is not clear enough, it is not in contrast to the actual information. When recital 70 refers to "previous public statements or other types of communications by the issuer," it does not imply that the EU Commission had a series of communications in mind.

Only recent, specific and sufficiently precise public announcements and communications related to the facts underlying the inside information may be relevant. Considering anything else would lead to legal uncertainty for issuers.

<ESMA_QUESTION_LATA_12>

Q13 Do you agree with the list of communications presented in Article 4 of the draft delegated act? Do you consider it sufficiently comprehensive, or do you deem that any other cases should be added?

<ESMA_QUESTION_LATA_13>

We do not fully agree. The reference to "regulatory filings by the issuer" in Art. 4(f) is too broad. This should only pertain to filings that are already public and not confidential. It should be clarified that this only relates to public filings, such as annual financial reports.

Furthermore, we suggest removing Art. 4(h) as it is overly vague and extensive.

<ESMA_QUESTION_LATA_13>

Q14 Do you agree with the list of situations where there is a contrast between the inside information to be delayed and the latest announcement or

communication as presented by ESMA in [Annex II] of the proposed Delegated Act (Annex IV of this CP)? Do you consider it sufficiently comprehensive, or do you deem that any other situations should be added?

<ESMA_QUESTION_LATA_14>

We have comments regarding the following cases:

- No. 2: “Inside information regarding a material change to the environmental or social impact of a project or product previously publicly announced by the issuer (e.g. environmental targets which are likely not to be met).”

  We suggest deleting this case. ESG topics are already covered by numerous regulations such as ESG reporting (CSRD) and CSDDD, are included in the Sustainability Report, and are subject to periodic publishment.

- No. 6: “Inside information regarding a material change in a business strategy previously publicly announced by the issuer (e.g. sale of a business line after significant investments in that same business line).” We suggest deleting the example, as not every investment in a business line is strategic.

<ESMA_QUESTION_LATA_14>

Q15 Do you have any views on the methodology used to conduct the analysis?

<ESMA_QUESTION_LATA_15>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_15>

Q16 Do you agree that the methodology of calculation in Article 78(1) of CDR 2017/565 to assess if the SME GM meets the 50% criterion is suitable? Please explain.

<ESMA_QUESTION_LATA_16>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_16>

Q17 **Do you agree that the requirements in Article 78(1) of CDR 2017/565 ensure that the refusal to be registered as an SME GM does not simply occur as a result of a temporary failure to comply with the requirements specified in Article 33(3) of MiFID II? Please explain.**

<ESMA_QUESTION_LATA_17>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_17>

Q18 **Do you agree with the proposal not to specify further the requirements in Articles 78(2)(a) and 78(2)(b) of CDR 2017/565? Please elaborate.**

<ESMA_QUESTION_LATA_18>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_18>

Q19 **Do you agree with the proposal not to modify the requirements currently included in Articles 78(2)(c), (d) and (f) of CDR 2017/565? Please elaborate.**

<ESMA_QUESTION_LATA_19>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_19>

Q20 **Do you agree with the proposal to align the requirement in Article 78(2)(e) of CDR 2017/565 with those of the Growth Issuance Prospectus by requiring a statement on the working capital only for share issuances? Please elaborate.**

<ESMA_QUESTION_LATA_20>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_20>

Q21 Do you agree with the proposal to include in Article 78(2)(g) of CDR 2017/565 the requirement that the financial reports published by SME GM issuers should be subject to audits?

<ESMA_QUESTION_LATA_21>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_21>

Q22 Do you agree with the proposal not to modify Articles 78(2)(h) and (i) of CDR 2017/565? Please elaborate.

<ESMA_QUESTION_LATA_22>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_22>

Q23 Do you agree with the proposals to meet the first and the second requirements under Article 33(3a) (a) and (b)? Please explain.

<ESMA_QUESTION_LATA_23>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_23>

Q24 Do you agree with the proposals to meet the third requirement under Article 33(3a) (c)? Please explain.

<ESMA_QUESTION_LATA_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_24>

Q25 Do you agree that no specific amendments are required for Article 79? Please explain.

<ESMA_QUESTION_LATA_25>

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<ESMA_QUESTION_LATA_25>

Q26 Do you agree that the requirements in Article 79 of CDR 2017/565 ensure that an SME GM is not deregistered due to a temporary failure to comply with the criteria an Article 33 of MiFID II?

<ESMA_QUESTION_LATA_26>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_26>