26 May 2026
ESMA24-229244789-5649

Securities and Markets Stakeholder Group

Advice to ESMA

SMSG advice to ESMA on its Consultation Paper on MAR Guidelines on delay in the disclosure of inside information

Table of Contents

1 Executive Summary

The SMSG broadly supports ESMA's proposed revisions to the MAR Guidelines on delayed disclosure of inside information, reflecting the changes introduced by the Listing Act (Regulation (EU) 2024/2809).

The SMSG recommends retaining point (b) of Guideline 1 (financial viability), supports the three proposed new legitimate interests with refinements, and proposes additional legitimate interests including internal investigations, pending regulatory inquiries, litigation/arbitration, and cross-border legislative conflicts.

The SMSG draws attention to a significant transitional guidance gap between 5 June 2026 and the expected publication of final Guidelines in Q4 2026, and recommends that ESMA provide interim guidance. The SMSG also underlines that the specific situations listed in the Guidelines should serve as illustrations of a broader principle, not as a closed catalogue.

2 Background

1. The Listing Act (Regulation (EU) 2024/2809), published in November 2024 and entering into application on 5 June 2026, amends Article 17 of the Market Abuse Regulation (MAR) in several material respects. In particular, intermediate steps in protracted processes are no longer subject to the obligation of disclosure of inside information until completion. Additionally, the condition that delay should "not mislead the public" has been replaced with a requirement that the information not be "in contrast" with the issuer's latest public announcement on the same matter.

2. In this context, ESMA published a Consultation Paper (ESMA74-268544963-1567) on 19 February 2026, proposing amendments to the MAR Guidelines on delay in the disclosure of inside information. The consultation period closes on 29 April 2026.

3. ESMA proposes to delete points (a), (c), (d), (e), (f), (g) and (h) from Guideline 1 — which lists specific situations that may constitute legitimate interests for delaying disclosure of inside information under Article 17(4)(a) MAR — as these are now covered by the European Commission's list of protracted processes. ESMA seeks views on retaining point (b), which addresses financial viability concerns, and proposes three new legitimate interests. ESMA also proposes to remove Guideline 2 — which currently provides guidance on the condition that delayed disclosure should "not be likely to mislead the public" — in its entirety, as this condition has been replaced by the new "not in contrast" test under amended Article 17(4)(b) MAR.

2.1 General observations

4. The SMSG broadly supports ESMA's approach to aligning the MAR Guidelines with the new legislative framework. The deletion of legitimate interests now covered by the EC list of protracted processes is logical and avoids unnecessary duplication.

5. The SMSG encourages ESMA to monitor whether any gaps arise in practice between the EC list and the revised Guidelines, and to address such gaps promptly through further guidance. In particular, the SMSG notes three areas where gaps could materialise:

(a) The EC list identifies specific final events (e.g. board approval of a merger, conclusion of a financing agreement), but commercial reality does not always follow a linear path towards a single identifiable final event. Where a process evolves in an unforeseen direction, is abandoned and restarted in a different form, or involves parallel tracks that converge unpredictably, issuers may face uncertainty as to whether they remain within the scope of a listed protracted process or have moved into territory requiring a separate assessment under Article 17(4) MAR.

(b) The boundary between an intermediate step (exempt from disclosure under the amended Article 17(1) MAR) and a final event (triggering disclosure) may not always be clear-cut. This is particularly the case in multi-party transactions, complex corporate restructurings involving several interdependent workstreams, or situations where a decision requires approval at multiple levels (e.g. board approval followed by regulatory clearance). The SMSG invites ESMA to provide guidance on how issuers should approach situations where the characterisation of a step as intermediate or final is genuinely ambiguous.

(c) The EC list is by design non-exhaustive, and new types of corporate processes may emerge that do not correspond to any listed category. Issuers engaging in novel transaction structures (such as token offerings, decentralised finance arrangements, or cross-border regulatory sandboxes) or responding to unprecedented market events should have clarity on whether and how the delay mechanism applies in such circumstances.

6. The SMSG emphasises that simplification should not undermine the core purpose of the disclosure regime: ensuring that investors have timely access to material information. The non-exhaustive nature of the list of legitimate interests, combined with the requirement for restrictive interpretation, provides an appropriate safeguard.

7. The SMSG underlines that the specific situations listed in the MAR Guidelines should be regarded as purely indicative and non-exhaustive. Issuers should be able to assess, under their own responsibility pursuant to Article 17(4) MAR, whether a delay is justified in light of the specific circumstances of each case. A legitimate interest for delay exists whenever immediate disclosure would be likely to prejudice the issuer's ability to protect or pursue a lawful objective, provided that: (i) the delay is necessary and proportionate to safeguard that objective; (ii) the issuer is not acting with the intent to mislead the market; and (iii) the issuer is able to ensure the confidentiality of the inside information during the period of delay. The examples provided by ESMA should serve as illustrations of this principle, not as a closed catalogue limiting the issuer's discretion.

3 Responses to consultation questions

3.1 Q1: Retention of point (b) of Guideline 1

8. The SMSG recognises that the exclusion of intermediate steps from the disclosure obligation under amended Article 17(1) MAR significantly reduces the situations in which point (b) of Guideline 1 would need to be relied upon. The SMSG nevertheless considers that point (b) should be retained as a safety net for situations that may not be captured by the new framework.

9. Items 24 and 25 of the Commission's list cover formal pre-insolvency restructuring proceedings and insolvency proceedings — that is, situations where a legal process has

been initiated or is about to be initiated under applicable insolvency law. Point (b) of Guideline 1 addresses an earlier and qualitatively different phase: the period in which the issuer's financial viability is in grave danger, but the issuer is pursuing informal rescue measures — such as emergency bridge financing, exploratory discussions with potential strategic investors, or confidential creditor consultations — that precede and may avert formal proceedings altogether. These situations fall outside the scope of the Commission's list precisely because no formal process has been initiated, yet the risk of premature disclosure is at its highest.

10. The SMSG acknowledges that the practical scope of this gap is uncertain, and that the simplification objective pursued by the Listing Act argues against maintaining provisions whose added value relative to the new framework is not clearly established. However, given the severity of the potential consequences — premature disclosure triggering a self-reinforcing crisis that destroys value for shareholders and creditors alike — the SMSG considers that a cautious approach is warranted. Point (b) should be retained as a residual safeguard, with its scope expressly confined to situations not already covered by the exclusion of intermediate steps or by the Commission's list of protracted processes.

11. There are genuine financial distress situations—such as emergency negotiations for bridge financing, exploratory discussions with potential strategic investors ("white knights"), or informal creditor consultations preceding any formal filing—that arise before the threshold for formal proceedings is met. It could be necessary to delay disclosure when the financial viability could be restored through a series of actions (such as loans, bond emissions, sales of assets) which refer to pre-insolvency situations, while the list of final events in the draft delegated act regards more formal proceedings.

12. As not all these situations are explicitly captured by the Commission's list, there is a risk of divergent interpretation. Removing point (b) might deprive some issuers of a recognised legitimate interest precisely where premature disclosure could be most harmful: triggering a self-reinforcing crisis (bank run, creditor panic, withdrawal of counterparty credit lines) that makes recovery impossible and destroys value for both shareholders and creditors.

13. At the same time, point (b) should be interpreted strictly and its scope explicitly confined to situations not already covered by the Commission's list.The delay is justified only for as long as the issuer is actively and demonstrably pursuing concrete informal rescue measures; it does not provide a general basis for withholding information about a deteriorating financial situation where no such steps are being taken. The SMSG recommends that the Guidelines clarify this boundary expressly. The investor protection rationale — preventinga disclosure-triggered spiral that harms the very stakeholders the transparency regime is designed to protect — should be highlighted as the principal justification.

14. The SMSG also notes that the wording "even though not within the scope of the applicable insolvency law" should be retained, as it clarifies the distinct and complementary scope of this legitimate interest relative to items 24–25 of the Commission's list.

3.2 Q2: Proposed new legitimate interests

14. The SMSG broadly supports the three proposed additions to Guideline 1 but recommends refinements to each.

3.2.1 Orders by a public authority to maintain confidentiality

15. This addition fills a gap in the current Guidelines. An issuer subject to a confidentiality order faces a direct legal conflict between the disclosure obligation under MAR and the confidentiality requirement. The Guidelines should recognise this as a legitimate interest.

16. However, the practical utility of this category may be limited. An issuer who receives an order from a public authority must comply with it, and would have no difficulty explaining compliance in any legal dispute.

17. The SMSG recommends the following refinements: First, the examples should be framed as illustrations of a broader principle, not a closed catalogue. Second, consideration should be given to including orders from third-country public authorities, at least where legally binding on the issuer or a material subsidiary. Third, the SMSG requests clarification on perpetual or open-ended non-disclosure orders: the Guidelines should clarify that the issuer remains under an obligation to disclose as soon as the confidentiality requirement ceases, and should actively monitor whether the grounds remain in force.

3.2.2 Need to collect further information

18. The SMSG supports this addition. In the case of major incidents, cyberattacks, or significant operational disruptions, premature disclosure of incomplete information may be more harmful to market integrity than a brief, well-managed delay.

19. The SMSG recommends that the word “exceptional” be reconsidered and that the example not be limited to cyberattacks. The SMSG suggests broader wording: “the case where the issuer needs to collect information on the effect of a major incident such as a climate or geopolitical issue or a cyberattack.”

20. The safeguard conditions are appropriate but should specify that the issuer is expected to proceed to an initial disclosure as soon as the market can form a broadly correct assessment, even if further details remain to be confirmed.

21. The SMSG notes that in many such situations, the information may lack the character of “precision” required under Article 7 MAR — which defines inside information by reference to, inter alia, the requirement that the information be sufficiently specific to enable a conclusion as to the likely effect on the price of the relevant financial instrument — until the information-gathering process has been completed. In such circumstances, the information would not yet qualify as inside information, rendering the question of delay not applicable. This should be clarified in the Guidelines.

22. However, explicit recognition may create a risk of divergent interpretations of what is allowed under “as soon as possible” disclosure pursuant to Article 17(1). The SMSG considers that MAR allows a certain level of fact-checking also when the issuer does not delay disclosure, and proposes that ESMA clarifies this in the Guidelines.

3.2.3 Parallel procurement processes

23. The SMSG supports the underlying principle but considers the formulation too narrow. First, the legitimate interest should extend to any competitive bidding or procurement process, whether public or private. Second, the specific scenario described by ESMA has limited practical relevance, given that public contracting authorities are typically subject to their own transparency obligations. The example provided is not sufficiently clear.

3.3 Q3: Other instances involving sensitive commercial information

24. The SMSG identifies the following additional situations:

- **Ongoing licence negotiations or technology transfers** where premature disclosure could allow competitors to submit rival offers.
- **Exclusivity arrangements under negotiation,** where disclosure may trigger competitive responses or termination of exclusivity.
- **Joint venture negotiations with competitors,** where disclosure may reveal strategic plans.
- **Strategic partnerships** including supply chain and co-development contracts with competitively sensitive terms.

25. The SMSG recommends that ESMA broaden the formulation to recognise, in general terms, that an issuer may delay disclosure where disclosure of sensitive commercial information would jeopardise a business opportunity by allowing competitors or counterparties to exploit the information.

3.4 Q4: Additional legitimate interests

26. The SMSG proposes the following additional legitimate interests, understood as illustrations of the overarching principle in section 2.1:

3.4.1 Internal investigations

27. Where an issuer has initiated an internal investigation—triggered by a whistleblower report under Directive (EU) 2019/1937, a compliance review, or an audit finding—premature disclosure could compromise the investigation's integrity, alert wrongdoers, or lead to destruction of evidence. The issuer should have a legitimate interest to delay disclosure for the time necessary to establish basic facts, ceasing as soon as a broadly correct assessment by the market is possible. This ensures coherence with the EU whistleblower protection framework.

3.4.2 Pending regulatory inquiries

28. Where an issuer has received an informal regulatory inquiry that has not crystallised into formal proceedings, premature disclosure could mislead the market by suggesting regulatory action that may never materialise.

3.4.3 Litigation and arbitration

29. Disclosure of legal strategy, exposure assessment, or settlement position could weaken the issuer's procedural position and prejudice shareholder interests.

3.4.4 Cross-border legislative conflicts

30. Third-country legislation may prohibit disclosure otherwise required under MAR (e.g. PRC State Secrets Law, US ITAR). The Guidelines should acknowledge that compliance with mandatory third-country restrictions can constitute a legitimate interest, subject to the issuer's ongoing obligation to disclose when the restriction ceases.

4 Additional observations

4.1 Temporal scope of "latest public announcement"

31. The new Article 17(4)(b) MAR requires that the inside information whose disclosure is delayed must not be "in contrast" with the issuer's latest public announcement on the same matter. Neither the Listing Act nor the Consultation Paper provides guidance on the temporal relevance of prior communications for the purposes of this assessment. The SMSG recommends that only communications within a reasonable temporal horizon be considered relevant for the "not in contrast" assessment, and invites ESMA to provide guidance on this point.

4.2 Transitional guidance gap

32. The SMSG does not object to the deletion of Guideline 2 (see paragraph 3 above). However, from 5 June 2026 — the date of application of the amended Article 17 MAR — issuers will be required to comply with the new conditions, including the "not in contrast" test, without any guidance until the Commission's delegated act and ESMA's final Guidelines are published (expected Q4 2026). The SMSG invites ESMA to acknowledge this gap and to consider interim guidance, including a common NCA approach during the transitional period.

4.3 CIR 2016/1055 and SME growth market issuers

33. The Consultation Paper does not address whether Commission Implementing Regulation (EU) 2016/1055 — which specifies the technical means for appropriate public disclosure of inside information and for delaying such disclosure — requires updates to reflect the lighter regime for SME growth market issuers introduced by the Listing Act. The SMSG invites ESMA to clarify this interaction.

4.4 Meaning of "as soon as possible"

34. The Guidelines should clarify that the disclosure obligation is triggered from the moment the issuer becomes aware, or ought reasonably to have become aware, of the final event's occurrence, not from some earlier or purely theoretical point in time.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 26 May 2026

[signed]

Giovanni Petrella
Chair
Securities and Markets Stakeholder Group

[signed]

Morten Kinander
Rapporteur