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](http://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](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/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.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | European Investors-VEB |
| Activity | Other |
| Are you representing an association? |  |
| Country / Region | Netherlands |

# Questions

1. Do you agree with the definition of protracted processes provided?

<ESMA\_QUESTION\_LATA\_1>

VEB endorses the ESMA definition. The reason for this is that the subordinate clause within the definition ‘in order to achieve a pre-defined objective or result’ provides for clear demarcation. The consultation document proposes a non-exhaustive list of final events or circumstances related to protracted processes.

The result is that in all cases where circumstances are *capable of being subsumed within the list*, disclosure is conditional upon such circumstances being ‘definitive’. Put differently; the list informs us on the ‘pre-defined objectives or results’ from the (subordinate clause of the) definition.

Everything falling outside the listed circumstances or events pertains to the issuer’s discretion to assess but should a priori be considered a separate process. VEB moreover wishes to emphasise that the list needs to be read as creating exceptions to a rule. The rule follows inherently from the underlying system of the disclosure regime under MAR: the default position is that any information likely to be classified as insider information should be disclosed promptly.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

VEB notes that ESMA postulates that disclosure is required where there is *a degree of certainty regarding the outcome of the protracted process* which is sufficient not to mislead investors with information which is still subject to changes.

In principle, VEB concurs with this general principle but would note the following. The new text of article 17 MAR provides that the disclosure requirement does not apply to inside information related to intermediate steps in a protracted process where those steps are connected with bringing about or resulting in particular circumstances or a particular event. Thus, VEB wishes to emphasise that where the outcome of a process which may possibly be protracted is uncertain, in that the outcome is incapable of being defined from the outset, the process may not be subsumed within the category of protracted processes. From the consultation in its entirety some inferences may be inferred. In relation to financial processes, the consultation makes it clear that profit warnings or earning surprises cannot be considered part of processes aimed at producing financial reports. The reason is clear: they are not in line with what was previously expected.[[1]](#footnote-2) Where authorisation requests from biotech or pharmaceutical companies are concerned, the tests, medical trials and feedback collected from the scientific community are to be classified as separate processes. The reason given is that the test phase can be considered as a process on its own given its length, structure, complexity and the fact that the outcome can represent inside information on its own. Hence, VEB derives from this that internal investigations at issuers into corporate wrongdoing, should generically be classified as separate processes. To this, VEB adds that:

1. (such) internal investigations are not listed in the present ESMA consultation as a protracted process; and
2. often, internal investigations are triggered by regulatory authorities, or coincide with, or are followed up by involvement of regulatory authorities.

As to 1 – VEB takes this as an indication in itself that they do not qualify as protracted processes.

As to 2 – in essence, the situation is no different from that where the issuer conducts an internal investigation into wrongdoing. Whereas, from the outset, the outcome is unclear, the fact of the investigation is to be seen as a separate process.

On to ESMA’s grouping of the identified protracted processes into three main categories.

First, a general observation. There cannot be any doubt that the moment inside information is shared (intentionally) among the issuer and *any* third party, it will be difficult (if not impossible) for the issuer to prevent the inside information from becoming public through (unlawful) disclosure by that third party.

The third parties with whom such information is shared, are prohibited from disclosure under the normal regime from MAR. Such third parties should be deemed to know that the information that they possess is insider information, and they should be deemed to know that they are prohibited from disclosing the information.

It will be prudent for the issuer to bind any recipient third party of its insider information to strict confidentiality. Where market soundings are concerned, issuers are under the obligation to inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information. The issuer has no duty to disclose where it has shared or has had to share inside information if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on law, on regulations, on articles of association, or on a contract.

In this regard, VEB notes that the amended MAR clarifies that where inside information relating to intermediate steps in a protracted process has not been disclosed and the confidentiality may no longer be insured, the issuer must disclose promptly. Thus, should a leak occur, regardless of whether this is with the recipient third party or internally, the issuer must disclose the inside information regarding the process before the ‘final event or circumstance’ as defined in ESMA’s list.

With the provisos expressed here above, VEB endorses the general principles and the identified categories.

<ESMA\_QUESTION\_LATA\_2>

1. 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>

This should rather be approached somewhat differently, focusing on a substantive approach. There should be disclosure either as and when the decision is made, or, when this occurs before that moment, as and when actual execution occurs of the expected decision, or as and when preparatory steps are taken towards the execution of the (expected) decision. Thus, this should not be about the outcome of an internal process (which internal process is aimed at arriving at the decision). The internal process may be prone to unnecessary prevarication.

Besides, VEB notes that the terminology used in the question may be somewhat misleading. Whereas VEB agrees that it should be the ‘governing body’ (understood typically to be *the management board* which decision provides for a sufficient degree of certainty of the outcome of the process), the question refers to ‘the corporate body’. Thus, VEB believes using the term ‘governing body’ yields a rather more ‘practical’ distinguisher from other company organs.

<ESMA\_QUESTION\_LATA\_3>

1. 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>

VEB agrees to this, if construed as in ESMA’s explanatory text; thus, for ‘approval’ we read the gamut of approval, adoption, resolution, and decision, as the case may be.

<ESMA\_QUESTION\_LATA\_4>

1. 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>

VEB concurs in principles, but we emphasise that – in line with the suggestion made in paragraph 69 *CP* – both parties should indeed seek to coordinate their respective internal decision-making processes, in order that the issuer is not faced with a considerable period of uncertainty as to whether an agreement will eventually transpire. Equally, VEB would attract attention to the situation which arises when an issuer internally considers a hostile take-over.

<ESMA\_QUESTION\_LATA\_5>

1. 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>

We agree, if, and in so far that from the outset, the processes clearly envisage a final outcome in the form of a formal notification.

<ESMA\_QUESTION\_LATA\_6>

1. 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>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_7>

1. 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>

Where a hostile takeover situation arises, there may occur a process in which the takeover target is involved, but to all appearances no agreement will be reached. The bidder may then opt to publish the offer, prior to an agreement being reached, or an attempt to that effect having been made. The latter happens if the bidder may believe that an agreement is unlikely. So, in these scenarios, ESMA’s proposal works: the moment when the management board (‘the governing body’) takes the decision, that is the relevant moment for disclosure.

<ESMA\_QUESTION\_LATA\_8>

1. 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>

VEB is in perfect agreement with this approach

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

VEB agrees with the proposed approach – in view of ESMA’s 2022 guidance, there does not seem to be a need to revise. VEB equally understands that Article 28(1) of Commission Delegated Regulation 241/2014 sets aside the overall approach to processes triggered by the issuer (in this case the credit institution).

<ESMA\_QUESTION\_LATA\_10>

1. 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>

Before anything else, VEB should refer to its earlier observation on the specific rationale of this guidance – which VEB understands as adding to legal certainty and, thus, *comfort to issuers*. This is a natural sequel to the rationale of the amendment to MAR at issue: carving out intermediate steps in protracted processes. It is worthy of note that, failing this present amendment, MAR’s inherent system was based on the presumption that intermediate steps classifying as inside information fell under the obligation of prompt disclosure. Thus, to VEB, whereas we readily agree that identifying the (exact) moment when an event becomes final is not straightforward, we would not encourage expanding the list of protracted processes. Thus, everything falling outside the listed circumstances or events pertains to the issuer’s discretion to assess but should a priori be considered a separate process. The list is and remains to be read as creating exceptions to a rule.

Specifically, VEB should like to have ‘significant amendments to articles of incorporation’ struck from the list. Striking it would result in such significant amendments reverting to the default regime under MAR; the issuer being under the obligation to assess on a case by case basis whether any intermediate step within its (internal) process leading up to an intended amendment of its constitutional documents, classifies as inside information, and should, thus, be disclosed as soon as possible. Failing striking this example of a protracted process from the list, VEB finds it creates more uncertainty than comfort. The first reason for this is the interpretative uncertainty as to whether at all amendments to the constitutional documents classify as inside information. Although difficult to catch within an all-encompassing denominator, VEB moots that amendments to the constitutional documents only classify as inside information if they are *drastic* in that they have a potential strategic impact. Second, it will be extremely arbitrary to establish when the drafted proposals for the text, take the form the governing organ of the issuer is intent upon effectuating, especially under such circumstances as the governing organ availing itself to soundings with key (outside) stakeholders.

<ESMA\_QUESTION\_LATA\_11>

1. 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>

This is coherent indeed with recital 70 of the Amending Regulation, and makes perfect sense in general.

<ESMA\_QUESTION\_LATA\_12>

1. 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>

Overall, VEB concurs, but would mention that the category ‘written and oral communications in the context of the issuer’s shareholders meeting’ may lead to uncertainty since it may trigger interpretative misunderstandings. Please refer to our reply under **Q14** below.

<ESMA\_QUESTION\_LATA\_13>

1. 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>

Under point 9 the list refers to:

Inside information regarding a material change in the previously publicly announced issuer’s governance, including compensation arrangements, management structure and codes of conduct (e.g. decision to cancel a planned increase in the number of independent board members).

VEB should recommend it to be made clear that so long as there is no certainty that proposals for changes to the issuer’s governance will ultimately take the form the issuer is intent upon effectuating – this is especially the case where the issuer conducts soundings in the form of pre-AGM dialogues – these proposals in themselves do not classify as inside information. Hence, there cannot be any uncertainty with the issuer that it should avail itself of the possibility to delay disclosure. Making this clear may best be done by striking this situation numbered 9 from the list altogether. It will be highly counter productive for issuers and market participant alike were issuers to be rendered reluctant to stage pre-AGM soundings.

<ESMA\_QUESTION\_LATA\_14>

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

<ESMA\_QUESTION\_LATA\_15>

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<ESMA\_QUESTION\_LATA\_15>

1. 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>

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<ESMA\_QUESTION\_LATA\_16>

1. 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>

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<ESMA\_QUESTION\_LATA\_17>

1. 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>

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<ESMA\_QUESTION\_LATA\_18>

1. 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>

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<ESMA\_QUESTION\_LATA\_19>

1. 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>

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<ESMA\_QUESTION\_LATA\_20>

1. 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>

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<ESMA\_QUESTION\_LATA\_21>

1. 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>

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<ESMA\_QUESTION\_LATA\_22>

1. 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>

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<ESMA\_QUESTION\_LATA\_23>

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

<ESMA\_QUESTION\_LATA\_24>

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<ESMA\_QUESTION\_LATA\_24>

1. 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>

1. 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>

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<ESMA\_QUESTION\_LATA\_26>

1. *CP* par 88. [↑](#footnote-ref-2)