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 | Association of German Banks |
| Activity | Trade Association |
| Are you representing an association? |  |
| Country / Region | Germany |

# Questions

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

<ESMA\_QUESTION\_LATA\_1>

**General remarks:** The Association of German Banks welcomes ESMA’s consultation on draft technical advice concerning MAR and MiFID II SME GM. We are focusing only on some of the proposed provisions supplementing MAR in accordance with the EU Listing Act. ESMA’s technical advice is well calibrated and takes current market practices into consideration. Therefore, we only comment on a few questions of this consultation paper.

**In particular:** In principle, the definition of a protracted process in Article 17(1) MAR seems to be sufficient. In paragraph 34 of the consultation paper, ESMA provides for a definition of one-off events. It refers to Recital 67 of the Amending Regulation ((EU) 2024/2809) where *“a one-off event […] notably […] does not depend on the issuer”*. By contrast, it should be noted and to be made clear that the issuer is at least partially involved in the event or circumstances of a protracted process. Such a reference is missing in paragraph 35 of the consultation paper and could lead to misinterpretation.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

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<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>

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<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>

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<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>

In principle the approach taken by ESMA has some logic. That said it appears challenging to be implemented. It requires a close coordination among the parties involved. More specifically an issuer being a party to the respective process has to make sure that he is informed as soon as possible by all the other parties about the status of their respective decision-making process. Therefore, it appears preferable in the case of agreements to make the actual binding execution of the agreement the final event as such execution is visible to all parties.

<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>

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<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>

In order to reduce bureaucracy, it should be considered to understand a protracted process triggered by the issuer and to be decided by a public authority as a single process. Consequently, the moment of disclosure should only occur as soon as the public authority has given its authorization or expressed its determinations.

The proposed approach by ESMA may be appropriate for the examples given in no. 75 of the consultation paper. However, making the application to a public authority with a view to achieving a decision or determination a final event does not appear appropriate where this process is part of a transaction the execution of which has not yet been decided at this point in time. This would particularly be the case for the first filing of a draft prospectus with the national competent authority with a view to have it approved for its subsequent publication. This point in time appears to be premature and significantly earlier than customary in current market practice. Based on practical experience, especially in a volatile market environment, an announcement under Article 17 MAR could give the market the misleading impression of a likelihood of the actual offering (for which the draft prospectus has been prepared) which in most cases does not exist.

Rather, the filing of a draft prospectus appears to be a typical intermediate step that, as a rule, should no longer have to be disclosed or trigger the ordinary delay procedure according to Article 17(4) MAR. That delay process has been perceived as cumbersome and costly for issuers (particularly bearing in mind the decision-making process and the related documentation). To avoid this burden has been one of the major advantages of the Listing Act reform. It should not be thwarted in the case of securities issuances, notably proposed share issues. Conversely, in the case of prospectus approval processes the specific publication requirements existing under Regulation 2017/1129 (Prospectus Regulation) with respect to the prospectus appears sufficient – bearing in mind that a securities issuance is a separate protracted process with the actual decision by the issuer’s competent body being the relevant final event, if any (see, in the case of a capital increase item B. 8 of Annex I of the consultation paper). That should be clarified.

<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>

We would like to point out the overlap between MAR and Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (ToD).

Article 6 ToD provides for a specific information and disclosure regime for public takeover bids. In particular, Article 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.”*

The application of this provision serves the same purpose as Article 17 MAR. A duplication of disclosure obligations relating to the same set of facts should be avoided. The implementation of the ToD into German law provides that the disclosure obligation for a takeover bid (according to § 10 German Securities Acquisition and Takeover Act, Wertpapiererwerbs- und Übernahmegesetz, WpÜG) prevails over Article 17 MAR. Accordingly, the bidder has to make public its decision to make an offer without undue delay. § 10 (6) WpÜG clarifies that Article 17 MAR does not apply to decisions to make an offer provided they have been made public according to § 10 WpÜG using the means of publication required for a disclosure according to Article 17 MAR.

To avoid duplicative disclosure and the related administrative burden it appears recommendable to reflect such a concentration of the disclosure requirements for the bidder relating to a public takeover offer in the forthcoming delegated regulation.

<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>

While the proposed approach appears sensible in general, it might be misunderstood in a sense that any annual or interim financial report has to be published according to Article 17 MAR prior to it being published as scheduled in the financial calendar and to comply with the reporting obligations under the Transparency Directive and national law. Such a prior publication is only required if that financial report constitutes or contains inside information as defined in Article 7 MAR. This is not necessarily the case, particularly not if the respective financial results for the reporting period are in line with the market’s expectations and, hence, would not be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. That should be clarified.

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

The proposed approach in relation to recovery and resolution protracted processes seems reasonable so far. It reflects in general the provision set out in Article 28(1) of (EU) 241/2014 whereas any announcement to holders in the event of redemption, reduction and repurchases of own funds instruments prior the approval of the Prudential Competent Authority is not allowed. This applies also in cases where the issuer and the Prudential Competent Authority have previously exchanged preliminary information that may considered as inside information.

In paragraph 29 of the consultation paper ESMA refers to Article 17(7) MAR and recalls 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”*. In this respect, the question arose whether the provision of Article 28(1) of (EU) 241/2014 also applies in the unlikely event of rumors or, even worst, a leak. Does Article 28(1) of (EU) 241/2014 prevent the obligation to disclose such a recovery and resolution protracted process in accordance with MAR, especially in accordance with Article 17(7) MAR? In our opinion, it should be clarified with regard to the prudential regime whether the issuer is required to disclose the decision of a recovery and resolution transaction or not. Otherwise, this could lead to legal uncertainty.

<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>

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<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>

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<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>

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<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>

We suggest to specify what counts as *“a material change to the environmental or social impact of a project or product”* as stated in number 2. After all, the phrase *“environmental or social impact”* without any reference to concrete regulatory requirements leaves a very large scope for interpretation.

<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>