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 | White & Case LLP, Frankfurt |
| Activity | Consultant |
| Are you representing an association? |  |
| Country / Region | Germany |

# Questions

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

<ESMA\_QUESTION\_LATA\_1>

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<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>

In order to reflect governance structures with a two tier board system, the moment of disclosure for protracted processes that are entirely internal to the issuer should be the moment when **all** competent corporate bodies have taken the decision to commit to the outcome of the process. This wording would acknowledge the dualistic structure of listed companies in Germany.

The prevalent legal form of listed companies in Germany is a stock corporation (Aktiengesellschaft). Under German stock corporation law, the management is handled by the management board, which is supervised by the supervisory board (so-called dualistic system). Even when listed companies in Germany are organized as European companies (Societas Europaea, "SE"), they are primarily dualistically structured.

In a dualistic stock corporation, the decision-making authority in principle lies with the management board and in defined cases with the supervisory board. However, the bylaws of stock corporations (and in some cases the articles of association or the law itself) typically stipulate that decisions of high importance must be approved by the supervisory board before they can be executed. In practice, this means that decisions of the management board in a protracted process such as a M&A transaction only become effective upon approval by the supervisory board.

The intended benefit of the reform, i.e. reducing the need for delays of disclosures of inside information, would tend to zero if the supervisory board approval would not be viewed as integral part of the internal decision-making process. In such event, most issuers would resolve on a delay of the disclosure until the supervisory board has taken his decision to avoid any mislead to the public. Experience shows that the supervisory board may often request modifications of a transaction; prior to supervisory board, a deal is not “done” (or “final” in the terminology of MAR).

Thus, from a German perspective, it is essential that **both** the management board **and** the supervisory board are regarded as integral to the final decision in protracted processes.

<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>

As outlined in our response to Q3, ESMA's proposal stipulates that the "moment of disclosure" is triggered by the final decision of the management board, even if subsequent approval by a supervisory body is required. For companies with a dualistic management structure, this requirement would de facto eliminate the benefit of the reform, as previously discussed. It would result in a disadvantage for market participants with a dualistic governance structure compared to those with a monistic governance structure and contradicts the objectives of the Listing Act to provide relief for market participants.

Therefore, we strongly suggest that the disclosure obligation should occur only after the approval of **all** decision-making bodies involved.

<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>

Yes, we agree. All parties involved (different from a public authority) should be taken into account. However, as outlined above, we would like to emphasize that the disclosure obligation should only occur once in a two tier governance structure all decision making bodies have agreed to sign-off to the agreement.

<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>

Yes, we agree.

<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>

We do not agree. Practice shows that there is no clear definition of “hostile take-over”. In some instances, a bidder initially approaches a target company in a hostile manner, however, without triggering formal takeover proceedings, and subsequently the nature of the approach shifts to a friendly or negotiated transaction before the transaction gets formally announced under the takeover rules. Frequently, before the bidder's decision to publish an offer is made public, the parties negotiate a business combination agreement. In such cases, the relevant moment of disclosure should occur when (i) the transaction has been finally negotiated with the approval of the decision-making bodies, and (ii) the parties have agreed to enter into a binding agreement regarding the key parameters of the transaction. In practice a ”one-off event” only occurs if a bidder already has the firm intention to immediately launch a takeover offer. This, however, usually already triggers disclosure obligations under the takeover laws.

<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>

Yes, we agree with financial reports, profit warnings, earning surprises and forecasts being considered as one-off events and refer to the current German market practice as reflected in the issuers’ guidelines of the German Federal Financial Supervisory Authority.

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

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<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>

Referring to our answers to Q3 and Q4, the definition for the proposed moment of disclosure in the list of protracted processes needs to be adjusted accordingly.

The proposed wording in ANNEX I No. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 26, 27, 36 will reflect our proposal if the last part of these paragraphs (“*even where another body of the issuer(s) may have to give its final approval*.”) will be deleted.

<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>

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<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>