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 | AssoNEXT |
| Activity | SMEs Association |
| Are you representing an association? |  |
| Country / Region | Italy |

# Questions

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

<ESMA\_QUESTION\_LATA\_1>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

Yes, we agree.

<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>

We agree. We believe that when processes are entirely internal to the issuer, the disclosure should occur at the moment when the corporate body with decision-making authority has made the final decision to commit to the outcome of the process.

<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>

Yes, we agree as per the Italian dualistic governance system.

<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>

For protracted processes involving the issuer and a counterparty other than a public authority, disclosure should occur at signing of the agreement with the last counterparty. This signing represents the final event that follows the moment when the decision has been taken. We refer specifically to the execution of a binding agreement by all parties. Therefore, any reference in the Consultation Paper (par. 70) to the “decision to commit to the agreement” or a “preliminary agreement or any other preliminary commitment according to the applicable law” should be avoided, as it could undermine the legislative amendment to Article 17.1 and introduce uncertainty.

Regarding Annex 1:

- 1-4-6 (Acquisitions, disposals, material agreements): The final event should be the signing of the agreement, including the signing of a termination agreement by both the issuer and the third party.

- Where an agreement is not required to be signed (e.g. a merger or demerger regulated solely by draft terms of merger/demerger), the final event should be the formal approval of the draft terms by the board of directors. The same principle applies to 5 (Major corporate reorganisations) and 7 (Voluntary termination of a material agreement).

- 8-9-10: The moment of disclosure should coincide with the final approval of the transaction.

- 15 (Departure of a key people): It should be clarified that a director’s departure does not automatically constitute inside information. Whether it qualifies as such depends on the circumstances of departure. The final event should be, in the case of an appointment, the formal decision of the competent body. In the case of dismissal, it should be the notification to the competent body.

<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. In the case of legal proceedings, the disclosure obligation should arise upon notification of the decision, even if it remains subject to appeal.

<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>

No, we disagree.

Where there is an exclusive relationship with the Public Authority (e.g. an application for a licence/patent/authorization), the final event should be solely the formal notification by the Public Authority to the issuer at the end of the procedure. Conversely, a denial by the Public Authority should not be disclosed. Consequently, items 17, 19, 21, and 23 of Annex 1 should be removed.

In cases where acquisitions or disposals require authorisation from a Public Authority (e.g. antitrust or golden power approval) before the transaction can be executed, it should be clearly stated that two separate processes exist, each triggering a separate disclosure obligation. The first is the signing of the agreement (first final event), while the second is the completion of the transaction (closing/second final event) following clearance by the Public Authority. If clearance is not granted before the agreed long-stop date, the issuer should disclose at that point that the transaction has been aborted (abortion final event).

<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 acknowledge the complexity of the issue regarding takeover bid received by the issuer and the absence of formal legal definitions of hostile and friendly takeovers. Given this, we suggest differentiating between situations where the issuer (as the target) is involved in the takeover process and those where it is not.

We agree that from the perspective of the target issuer, a hostile takeover (where the bidder announces an offer without prior engagement with the target) can be seen as a one-off event. In such cases, the target issuer does not possess inside information related to the takeover before the public announcement, and as a result, there is no disclosure obligation at the issuer level under the MAR.

Conversely, when the bidder engages with the target before making the offer public, the takeover process differs. In this scenario, the target issuer is actively involved (e.g., through due diligence or negotiations) and may possess inside information, triggering a protracted process. The final event in such a process should be: (a) if an agreement is reached between the bidder and the target (or the target’s shareholders), the final event occurs at the moment of signing such an agreement, which serves as the basis for the bid. This approach is aligned with broader M&A disclosure rules, where the signing of a binding agreement is the final step; (b) if no agreement is reached, the bidder may either publicly announce the bid unilaterally or abandon the transaction. In both cases, the inside information ceases to exist, and the protracted process ends without creating a disclosure obligation for the target issuer.

Regarding takeover bid made by the issuer, for the bidder issuer, the takeover process involves preparation and decision-making leading up to the bid announcement, which constitutes a protracted process. The key moment marking the end of this process is the public announcement of the bid, at which point all relevant information becomes public.

When the issuer is the bidder, we recognize two different scenarios: scenario 1: Target or Target Shareholders are involved. If the bidder issuer engages with the target (or its shareholders) before announcing the takeover bid the final event in this case is the signing of an agreement between the bidder issuer and the target or its shareholders. At this point, the agreement itself constitutes an inside information, triggering disclosure obligations; scenario 2: Target is not involved. If the bidder issuer launches the bid unilaterally without any prior engagement with the target or its shareholders, the takeover process remains a protracted process only from the bidder’s perspective. The final event occurs at the moment of the public announcement of the bid, as all relevant information is made public at that time.

 For the bidder issuer, the takeover process involves internal strategic deliberations, financial planning, and regulatory considerations. However, disclosure obligations will differ depending on the level of engagement with the target:  in Scenario 1, where the target is involved, the disclosure obligation arises upon signing the agreement with the target or its shareholders; in Scenario 2, where the target is not involved, disclosure is naturally fulfilled through the announcement itself.

This distinction provides clarity on the moment at which inside information ceases to exist and ensures consistency with MAR disclosure obligations.  This framework aligns with established market practices in M&A transactions, where disclosure obligations typically arise upon the signing of a binding agreement.

Finally, given that the Takeover Directive does not specify the exact moment when a bid should be publicly disclosed, additional guidance is needed to ensure clarity and a harmonized approach at the EU level would be beneficial to provide clarity to issuers regarding when the obligation to disclose inside information arises.

<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>

The preparation of a financial report is a typical protracted process, where the outcome is not necessarily price-sensitive. The financial report is published in accordance with the issuer’s financial calendar and within the deadlines set by legislation or market regulation. We agree with ESMA’s proposal that the final event to be disclosed should be the acknowledgment or approval of the report by the competent body.

Regarding profit warnings or earnings surprises, we do not believe they should automatically be classified as one-off events. Even if their cause is external (e.g. tariffs or analysts market expectations), they are still subject to an internal process of verification and acknowledgment. Disclosure should therefore occur only after approval by the competent body, as this process may involve a series of actions to confirm the information. However, once the information is approved, disclosure cannot be delayed.

Issuers need clarifications if forward-looking statements may constitute inside information, considering also diverging approaches on the topic among NCAs. Namely, CONSOB stated in a consultation paper that business plans may be inside information as their disclosure is likely to have a significant effect on the prices of issuer’s financial instruments and estimates from commentators or institutions according to recital 28 of MAR can be considered inside information. The AMF, under the previous MAD regime, noted that the information contained in Forward-looking statements, other than the financial information on the first year covered, is not be precise enough to be considered inside information. In this respect, we ask ESMA to clarify if third persons receiving the information must be added to a specific section of the Insider lists, for how long, if Articles 9 and 4 of MAR would apply, and to clarify, if in a bonds placement Forward-looking statements are disclosed to the subscribers of the notes, whether the bondholders would be able to freely trade the financial instruments.

We believe that the process related to dividends, currently classified under financial information in ESMA’s proposed list, should be removed from this category and instead placed under a new category called corporate actions, including postponement and cancellation of interest payments or redemption payments.

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

<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>

<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>

We do not agree. The requirement is rather vague, and it is unclear how far back one should go to find a clear announcement.

<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>

Yes, we concur with the list, with the exception of subsections (c), (d), and (h) concerning “persons perceived as representing the issuer.” The inclusion of such a broad and subjective criterion would impose an undue burden on issuers, as it is inherently difficult—if not impossible—to exercise control over individuals merely perceived as acting on behalf of the issuer, thereby creating significant legal uncertainty.

The authority to represent an issuer should be a clearly defined and objective status—either a person is expressly authorised to act on behalf of the issuer, or they are not. There should be no ambiguous intermediary category whereby an individual may be deemed to represent the issuer based solely on perception or inference. From the issuer’s perspective, monitoring statements made by individuals who lack formal authority to speak on its behalf would be impracticable and legally uncertain.

Accordingly, subsections (c), (d), and (h) should be amended to read: “persons representing issuers.”

We also recommend to delete lett. 4 h), as it is much vague.

Reference to “regulatory filings by the issuer” in Article 4(f) appears overly broad. It should be explicitly clarified that such filings refer only to those that are already public and not confidential.

<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>

.<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>

We strongly disagree. The requirement for a working capital report in an admission document is both unnecessary and unduly burdensome, as such information is not included in any other periodic financial reports (such as interim or annual financial statements). Our objections are as follows:

(a) Lack of consistency with other financial reports – Standard financial reporting does not require the inclusion of a specific "working capital report" as part of periodic disclosures, leading to inconsistencies in reporting requirements.

(b) Redundancy with existing disclosures – The balance sheet already provides the key components of working capital, namely current assets and current liabilities, while the cash flow statement offers further insight into liquidity and operational financing trends. As such, a separate working capital report would be duplicative and unnecessary.

(c) Costly and time-consuming preparation, particularly for SMEs – The preparation of a working capital report demands significant resources, including auditor review, legal verification, and management assessment, thereby imposing substantial costs, particularly on small and medium-sized enterprises.

(d) Limited practical use for investors – Rather than providing meaningful insights, the inclusion of a working capital report may create confusion regarding short-term liquidity, without necessarily offering a clearer picture of the issuer’s overall financial health or long-term business prospects.

<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>

We agree but only regarding annual financial reports.

While audits play a critical role in maintaining financial transparency and investor confidence, imposing a mandatory audit requirement on SME GM issuers for half-year report would be disproportionate and counterproductive. The additional costs and administrative burdens would outweigh the potential benefits, making public listing less attractive and limiting SMEs' ability to access capital.

For these reasons, we strongly oppose the inclusion of this requirement in Article 78(2)(g) of CDR 2017/565 different than the annual report.

<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>