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 | Italian Banking Association |
| Activity | Trade 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>

We do not have remarks on the definition of “protracted processes” provided by ESMA.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

Regarding the subcategory of processes initiated by an issuer and driven at a later stage by a public authority, we are somewhat perplexed by ESMA's decision to divide this subcategory into two distinct sub-processes (one internal to the issuer, the other internal to the authority); according to ESMA's interpretation, each of these two sub-processes should be subject to specific disclosure obligations.

In this respect, and as a matter of fact, we believe that, in general, the issuer's initiatives, whose final outcome depends on the adoption of a decision by the public authority, reach a sufficient degree of maturity only as a result of the decision of this authority, while the issuer's internal process lacks stable, objective and concrete evidence that could lead the issuer to believe that the circumstances or the event to which the information refers will undoubtedly occur.

In addition, the immediate disclosure of the issuer's internal process would mislead the market each time the authority, at a later stage, does not grant its approval to the issuer's application or grants it subject to conditions.

In light of the above, ESMA's proposal to consider the issuer's internal decisions as "final events", which in turn trigger disclosure obligations, cannot be supported.

In this respect, we respectfully request ESMA to delete the proposed distinction of sub-categories of events in paragraphs 54 and 55 of the Consultation Paper and to align the cases addressed in Annex I, Section E of the proposed delegated act accordingly.

<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 have not received comments by our members on this issue.

<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>

Overall, we agree with ESMA's proposal that the moment of disclosure of inside information about internal processes of the issuer should be the moment when the competent corporate body (generally the "management body" as identified by ESMA) has taken the decision.

However, with specific reference to the case where the decision of the management body needs to be validated or confirmed by another corporate body of the company other than the general meeting of shareholders (e.g. the supervisory board), we believe that the disclosure of inside information should necessarily await the decision of the last corporate body entitled to express an opinion on the same matter.

With regard to this specific issue, it should be underlined that it was indeed ESMA which, in the "MAR Guidelines - Delay in the disclosure of inside information and interactions with prudential supervision", considers as "not final" inside information which relates to decisions taken by the issuer's management body and which, according to national law or the issuer's articles of association, requires the approval of a body of the issuer other than the general meeting of shareholders.

Therefore, decisions taken by the issuer's management body should not be subject to the disclosure requirement, unless they are of a final and conclusive nature. In this respect, it is also argued that the immediate disclosure of such information before such a final decision has been taken would jeopardise the correct assessment of the information by the public.

On the contrary, the disclosure obligation should arise at the time when the last internal body of the issuer, other than the general meeting of shareholders, which is entitled to express an opinion on the same subject, takes its decision, since only this step and this point in time could be considered as the "final event".

In this respect, we request that the Consultation Paper be adapted in this sense, with the consequent deletion of the sentence “even if another body of the issuer may have to give its approval” from the cases listed in Annex I of the proposed delegated act.

<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>

We agree with ESMA's proposal that in the case of protracted processes involving the issuer and a party other than a public authority, the moment of disclosure should be when the competent bodies/persons of all the parties involved, who have the decision-making power under national law or bylaws, have taken the decision to sign off the agreement.

In this respect, and in line with our comments in response to question 4, we would like to emphasise that, in cases where the decision of the management body needs to be validated or confirmed by another internal body of the issuer other than the general meeting (e.g. the supervisory board), disclosure should await the decision of the last body that has a say on the matter.

<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 with ESMA's proposal that the moment of disclosure of inside information should be when the issuer has received the final decision from the public authority, excluding the disclosure of any preliminary information that may have been exchanged prior to that final decision.

<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 line with our comments in response to question 2 above, we would like to emphasise that, as a general rule, the issuer's initiatives, the final outcome of which depends on the adoption of a decision by the public authority, acquire a sufficient degree of maturity only as a result of the decision of that authority, while the issuer's internal process lacks stable, objective and tangible evidence that could lead the issuer to believe that the circumstances or the event to which this information relates will undoubtedly occur.

Therefore, we request the deletion of the proposal to create sub-categories of processes as set out in paragraphs 74-77 of the CP and, consequently, to align the circumstances and events covered in Annex I Section E of the proposed delegated act accordingly.

<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 agree with ESMA's proposal to define the disclosure obligation exclusively in relation to friendly takeovers, as this does not cause prejudice to the compliance with the specific rules governing IPOs, which aim to ensure transparency and fairness in the conduct of the parties involved.

<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>

We do not agree with the approach proposed, as we have some concerns about the qualification of financial reports and forecasts as "protracted processes". In our view, such information only becomes precise when the competent body approves the financial data to which it refers and therefore only from that moment on, should this be the case, does this information acquire the nature of "inside information".

Therefore, we would ask for the deletion of the circumstances and events mentioned in rows 11 and 12 of Annex I of the proposed delegated act.

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

We have not received comments by our members on this issue.

<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>

Overall, ESMA's proposal deserves support and appears to be consistent with the prudential rules applicable to credit institutions.

However, with reference to the protracted process related to the reduction of own funds, an integration would be necessary. Provision should be made for the case where the competent body of the issuer takes the decision after having received the authorisation of the Authority. In this case, we believe that the "final event" to be disclosed should be the adoption of the decision to reduce own funds by the issuer's competent body and not the receipt of the authority's approval.

Therefore, we request that the circumstance and event provided for in raw 29 of Annex I of the proposed delegated act be integrated with the following provisions (proposed integration in bold):

“As soon as possible after the credit institution is notified that the reduction of funds has been authorised by the Prudential Competent Authority **or as soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to carry out the reduction of own funds once the authorization by the Prudential Competent Authority is notified**”.

<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 agree with ESMA's proposal to consider the full range of messages and signals that the issuer sends to the market.

<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>

We have not received comments by our members on this issue.

<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 agree with the list of situations set out by ESMA in Article 4 of the proposed delegated act, with one exception: the inclusion of "regulatory filings", as they may be confidential in nature and therefore not previously subject to public disclosure.

We have no comments on the list proposed by ESMA of cases where there is a conflict between the inside information to be delayed and the issuer's last announcement or communication.

<ESMA\_QUESTION\_LATA\_14>

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

<ESMA\_QUESTION\_LATA\_15>

We have not received comments by our members on this issue.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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 received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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 received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<ESMA\_QUESTION\_LATA\_24>

1. Do you agree that no specific amendments are required for Article 79? Please explain.

<ESMA\_QUESTION\_LATA\_25>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<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>

We received no comments on this issue since our member banks are not directly involved by the draft technical advice on SME GM.

<ESMA\_QUESTION\_LATA\_26>