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 | Vereniging Effecten Uitgevende Ondernemingen (VEUO; Dutch Association of Listed Companies) |
| Activity | Trade Association |
| Are you representing an association? |  |
| Country / Region | Netherlands |

# Questions

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

<ESMA\_QUESTION\_LATA\_1>

VEUO assumes that what is meant with a protracted process in relation to the MAR is (i) a process spread in time relating to information which is or may become inside information and (ii) intends to bring about particular circumstances or a particular event, or results in particular circumstances or a particular event, where those circumstances or that event are not necessarily pre-defined. We believe that such a description better reflects the wording of the amended MAR.

Further, we read the amended MAR such that in the case of protracted processes, the final events should be disclosed only "after they have occurred" (section 17(1) MAR) and therefore not when their occurrence is reasonably likely.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

Yes.

<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>

Yes. However, please see our response to Q4.

<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>

No. The relevant corporate body in a two-tier system is sometimes both the management body and the supervisory body, namely in cases where resolutions of the first have no legal effect (i.e. it does not by itself reach the intended outcome) without approval of the second. Only after the supervisory board has given its approval the decision stands. This is also important from a good governance perspective, as disclosure of the management board decision prior to the approval of the supervisory board would significantly reduce the room for the supervisory board to make its own judgment. Also, we see no justification for a different treatment of one-tier corporate governance systems and two-tier corporate governance systems in this respect.

VEUO concludes that the approval of the last corporate body should be designated as the final event in protracted processes that are entirely internal to the issuer.

For the avoidance of doubt, we note that this approach is not feasible for cases where an action is dependent on the approval of the AGM, given that AGM documentation is, by default, public. In such instances, we recommend that the decision of the last corporate body to submit it to the AGM be regarded as the final event.

<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>

No. Generally, the actual final event will be the execution of the agreement rather than the internal decision of the corporate body. For instance, in an M&A deal, even if the boards sign off on the main elements of the transaction, there may still be significant if not fundamental outstanding points upon which the deal is contingent. It is not uncommon for expected and unexpected issues to arise up to the moment of signing the agreement that may jeopardise the same.

We also believe that the proposed approach may lead to practical issues, because the duty to disclose for issuer A will depend on when issuer B's corporate body signs off on the agreement, which issuer A may not always know immediately and which it cannot control.

Furthermore, we cannot follow the reasoning that a different disclosure regime applies in the event the authorised corporate body designates its decision-making powers in relation to the transaction, as is suggested in the consultation paper.

Thus, VEUO proposes designating the execution (i.e. signing) of the agreement as the final event.

<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.

<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. First, VEUO would like to mention that whether one of the two processes is relevant from a MAR perspective hinges on the question whether it constitutes or will constitute inside information. For instance, the application for a governmental permit may not be inside information whereas the granting of the permit is.

But even in cases where the issuer's internal process would in itself be seen as inside information, one may expect issuers to delay publication of their internal step in the process until the relevant authority has granted it approval (in whatever shape or form). Therefore, the more practical and realistic approach is that the regulation itself only designates the governmental decision as the one final step, and not also the prior internal preparatory step(s) of the issuer.

We therefore suggest including in the guidance that protracted process that are triggered by the issuer and whose final outcome is decided by a public authority, will be considered as one protracted process, namely a process aimed at obtaining approval from a public authority (to reach the desired end result). The final event would then be the obtaining of that approval.

<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>

No. Whether or not a hostile takeover approach is a protracted process or not, in any event depends on the circumstances of the particular case. For instance, it regularly occurs that what starts as an unfriendly (or: not friendly) approach turns into a friendly scenario. We therefore believe that it is not correct and not desirable to coin every unfriendly takeover approach as a one-off event.

<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, with the caveat that while VEUO believes that in most cases such events will be one-off events, one cannot rule out that in a particular situation such an event is better categorised as part of a protracted process. As the list to be drawn up is non-exhaustive, VEUO believes that it would help if the guidance notes would make this clear, also in relation to the approach concerning financial report, profit warnings, earning surprises and forecasts.

<ESMA\_QUESTION\_LATA\_9>

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

<ESMA\_QUESTION\_LATA\_10>

VEUO refers to its answers to questions 4 and 5.

<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>

VEUO notes that it should be clear that the list is of a non-exhaustive nature. That said, VEUO believes that it would be helpful and right to add (internal) investigations to the list. An (internal) investigation (e.g. in relation to potential misconduct) may – depending on the circumstances – be regarded as a protracted process, namely in case it is aimed at establishing inside information and the initiation or intermediate findings of the investigation themselves (may) also constitute inside information. In such a case the conclusion of the (internal) investigation constitutes the final event.

<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>

VEUO considers the possibility of delaying the disclosure of inside information as important and in the interests of issuers and their shareholders and other stakeholders. It should be avoided that the new delay-regime is more stringent that the one currently in place.

<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>

VEUO recommends limiting the scope of Article 4 (c), (d) and (h) of the draft delegated act to actual representatives of the issuer instead of persons perceived as representing the issuer.

<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>

Yes

<ESMA\_QUESTION\_LATA\_14>

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

<ESMA\_QUESTION\_LATA\_15>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<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>

N/A

<ESMA\_QUESTION\_LATA\_24>

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

<ESMA\_QUESTION\_LATA\_25>

N/A

<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>

N/A

<ESMA\_QUESTION\_LATA\_26>