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Date
5 March 2026

Private and confidential

Response to the ESMA's Consultation paper on MAR Guidelines on delay in the disclosure of inside information (Reference: ESMA74-268544963-1567) dated 19 February 2026

Dear reader,

We welcome the opportunity to respond to the Consultation Paper on the proposed amendments to the MAR Guidelines on delay in the disclosure of inside information (the **Guidelines**) of the European Securities and Markets Authority (the **ESMA**) dated 19 February 2026.

We support the overarching objective of aligning the Guidelines with the reformed disclosure regime under the EU Market Abuse Regulation (Regulation (EU) 2014/596, the **MAR**), as amended by the EU Listing Act (Regulation (EU) 2024/2809, the **Listing Act**), with effect from 5 June 2026. In particular, we welcome the Simplification and Burden Reduction (**SBR**) approach.

Our responses to each of the consultation questions are set out below.

1. CONSULTATION RESPONSE

1.1 **Question 1 - Do you see merits in maintaining the legitimate interest currently described in point (b) of Guideline 1 (i.e., the possibility for the issuer to delay the disclosure of its financial situation, where an immediate publication may jeopardise the measures to reestablish its viability)? Please indicate the arguments supporting your answer.**

Response: Yes — Point (b) should be retained, with targeted amendments.

We strongly support the retention of the legitimate interest described in point (b) of Guideline 1, for the following reasons:

(a) *It addresses a distinct scenario not covered by the EC list of protracted processes*

While ESMA's Annex V (*Correspondence between legitimate interests in Guideline 1 and items on the EC list of protracted Processes*) maps point (b) to items 24 (*Pre-insolvency/Restructuring proceedings*) and 25 (*Insolvency proceedings*) in the EC list of protracted processes, we submit that the scope of point (b) is materially broader. Point (b) captures situations of grave and imminent financial danger that fall *outside* the scope of applicable insolvency law, precisely the most sensitive and unpredictable circumstances. By definition, if insolvency law does not yet apply, the EC list of protracted processes may not offer the issuer any procedural protection. Removing point (b) would therefore leave a significant and practically important gap.

(b) *Practical necessity in crisis situations*

In circumstances of severe financial stress (for example, where an issuer is in emergency negotiations with creditors or lenders, seeking a rescue financing package, or pursuing asset disposals to avert insolvency) a forced immediate disclosure could be self-defeating. It may cause a collapse in share price, trigger contractual mechanisms such as cross-default clauses, or lead counterparties to withdraw from rescue negotiations, which would in the end be worse for investors as well.

(c) *Consistency with the spirit of the Listing Act*

The Listing Act aims to reduce unnecessary administrative burdens while maintaining market integrity. Deleting point (b) would increase risk for issuers navigating financial distress and could be seen as inconsistent with the SBR objective, since issuers in financial difficulty would lose a proportionate basis for delay.

1.2 **Question 2 - What is your view on the legitimate interests which are proposed to be added to the MAR Guidelines? When commenting on a specific legitimate interest, please report your answer using the title given in the relevant subsection.**

1.2.1 Orders by a public authority to maintain confidentiality

We welcome the addition of these new legitimate interests, as they address a genuine and recurrent practical situation – particularly in the context of defence and national security contracts, public health emergencies, antitrust and other investigations, and certain regulated procurement processes – where issuers are legally required to maintain confidentiality.

We offer the following observations:

- **Scope of "public authority":** The proposed definition (a public authority of a Member State, the EU or a third country) is appropriately broad. We agree that third-country public authority

orders should be capable of constituting a legitimate interest. As an additional example of a public authority we would propose to add an antitrust authority..

- **Suggested addition:** We recommend the Guidelines also explicitly contemplate situations where confidentiality is required by *statute* (rather than a specific public authority order), for example, where applicable law prohibits disclosure during regulatory approval or supervisory processes.

1.2.2 Need to collect further information on the event or circumstances to be disclosed

We support the inclusion of this legitimate interest, which reflects a common and legitimate practical need. The example of cyber-attacks and major incidents is particularly relevant in the current environment, where issuers increasingly face complex and rapidly evolving events.

We offer the following observations:

- **Standard to be applied:** The requirement that the need to collect additional information must be based on "objective and verifiable grounds" is appropriate. We suggest that ESMA clarify that the standard does not require perfection: issuers are not expected to have complete information prior to disclosure, but rather sufficient information to enable a "correct and timely assessment" by the public. This approach is consistent with the formulation in Article 17(1) MAR.

- **Duty of expedition:** We welcome the explicit statement that issuers must carry out information-gathering actions without undue delay and proceed to disclose as soon as the market can properly assess the event. However, we suggest the Guidelines provide practical guidance on what constitutes "undue delay" in different scenarios (e.g., a cyber-attack may require a 24–72 hour assessment window, whereas a major industrial accident may justify a longer period).

- **Regulatory interaction:** For regulated issuers, ESMA should clarify that reporting obligations to NCAs (e.g., under NIS2 or DORA in the context of cybersecurity incidents or under GDPR for data leaks) may require disclosure before the issuer is ready for public disclosure. The Guidelines should address how these obligations interact.

1.2.3 Risk to lose a business opportunity when participating in parallel procurement processes

We welcome the recognition of this legitimate interest, which addresses a commercially sensitive scenario that has not previously been addressed in the Guidelines.

We offer the following observations:

- **Scope — private as well as public tenders:** The current proposal focuses on parallel *public* procurement processes. We recommend ESMA consider extending the scope to encompass parallel *private* competitive tender processes, where similar competitive dynamics apply. For example, an issuer awarded a major contract in a private competitive bid for a significant infrastructure project could face identical risks in ongoing similar private tenders.

- **Temporal limitation:** The delay in this context should clearly be limited to the duration of the overlapping tender period. Once all competing tender deadlines have passed, the legitimate interest in delay ceases.

- **Geographic scope:** We note the proposal expressly contemplates EU and third-country procurement. This is welcome and should be maintained.

- **Interaction with public authority confidentiality orders:** In many public procurement contexts, the contracting authority will itself impose confidentiality obligations (as contemplated under Article 21(2) of Directive 2014/24/EU). ESMA should clarify how these two legitimate interests interact and whether they can operate cumulatively.

1.3 **Question 3 - In addition to the case of parallel procurements of the same nature, are you aware of other instances where disclosure of sensitive commercial information may jeopardise an issuer's business opportunity, and should thus qualify as a legitimate interest for the delay?**

We suggest the following additional scenarios merit consideration:

(d) Price-sensitive commercial contracts in competitive markets

Where an issuer concludes a significant contract (e.g., a long-term supply or licensing agreement) in a market where competitors regularly compete for similar contracts, premature disclosure of the financial terms could enable competitors to undercut future bids or renegotiate existing contracts with mutual customers. We suggest

ESMA consider a broader category of "competitively sensitive commercial terms" as a basis for delay, subject to a strict temporal limitation.

(e) Regulatory or government approval processes in third countries

Where an issuer has received a preliminary approval or a conditional authorisation from a third-country regulator, and premature disclosure could prejudice the finalisation of that approval (e.g., by attracting political opposition or triggering competing applications), there may be a legitimate interest in delay. This is analogous to point (f) of existing Guideline 1 (now proposed for deletion as a protracted process) but may arise in the context of one-off events rather than protracted processes.

(f) Research and development / clinical trial outcomes

Where an issuer is engaged in a regulatory approval process for a new product (e.g., a pharmaceutical obtaining marketing authorisation) and receives a preliminary positive signal from regulators prior to formal approval, early disclosure could trigger a market reaction that attracts unwanted competitive attention. While IP rights are addressed in existing point (d) (now to be deleted as a protracted process), the specific scenario of pre-approval regulatory communications may warrant a distinct treatment.

1.4 **Question 4 - In your view, which legitimate interests could be added to the MAR Guidelines for the purpose of the delay in the disclosure?**

In addition to the scenarios raised under Question 3, we recommend ESMA consider the following further legitimate interests:

(a) Legal professional privilege and regulatory investigation confidentiality

Where inside information is subject to legal professional privilege, or where its disclosure is restricted by the terms of a regulatory investigation (e.g., a competition authority investigation, a NCA investigation, or an ESMA inquiry), the issuer may have a legitimate interest in delaying disclosure. This would apply where a public authority has requested or required the issuer to refrain from disclosure pending the investigation. This overlaps with the "public authority order" category but is sufficiently distinct – particularly in the context of competition law – to merit express mention.

(a) Court orders and injunctions

Where a competent court has issued an order (including an interim injunction) preventing the issuer from making a disclosure (for example, in the context of disputed transactions or injunctions sought by counterparties) the issuer should be

able to rely on this as a legitimate interest. ESMA should confirm that compliance with a binding court order constitutes a legitimate interest for these purposes.

(b) Tax rulings and regulatory settlements under negotiation

Where an issuer is in active negotiations with a tax authority or a regulatory body regarding a significant tax ruling, penalty settlement, or consent order, premature disclosure of the negotiations or their preliminary outcomes could jeopardise the outcome and cause material harm to the issuer and its shareholders. The final resolution of such negotiations would typically trigger a separate disclosure obligation, making a delay during the negotiation phase proportionate and justified.

(c) The nemo tenetur principle

We submit that ESMA should consider whether the nemo tenetur principle (the fundamental right not to incriminate oneself) may, in certain circumstances, constitute or support a legitimate interest for delaying the disclosure of inside information, and that this merits express recognition in the Guidelines.

The relevance of the principle arises where an issuer is the subject of, or a suspect in, a regulatory or criminal investigation, and the inside information whose disclosure is required under Article 17(1) MAR concerns facts or circumstances that are directly implicated in that investigation. In such cases, compelling the issuer to make immediate public disclosure could effectively force it to produce evidence against itself, in tension with the right against self-incrimination as recognised in EU law and EU case law of the Court of Justice of the European Union.

We therefore suggest that the revised Guidelines acknowledge that, where an issuer can demonstrate that immediate disclosure of inside information would directly and materially prejudice its rights of defence in ongoing criminal or regulatory proceedings (including by constituting a form of compelled self-incrimination) this may qualify as a legitimate interest for delay under Article 17(4)(a) MAR. We recognise that this legitimate interest would be of an exceptional character and subject to a strict necessity test.

We consider that the absence of any guidance on this point leaves issuers and their advisers without clarity on a question of genuine practical importance, particularly in the context of multi-jurisdictional investigations where the risk of self-incrimination may be acute.

1.5 Additional Comments

1.5.1 Removal of Guideline 2 (Situations likely to mislead the public)

We support ESMA's proposal to remove Guideline 2 in its entirety, given that the Listing Act has removed ESMA's mandate in this regard and transferred

responsibility for specifying the relevant situations to the European Commission via a Delegated Act (Article 17(12)(b) MAR). We note, however, that the EC's delegated act (expected to be adopted in Q1 2026) will need to be carefully calibrated to avoid creating uncertainty during the transitional period before the new MAR disclosure regime enters into application on 5 June 2026. We encourage ESMA to engage with the Commission to ensure appropriate alignment.

1.5.2 SME-Specific Guidance

We welcome the lighter notification requirements for SME growth market issuers introduced by the Listing Act. We encourage ESMA to consider whether the revised Guidelines should include specific examples or considerations tailored to the particular circumstances of SME issuers, who may have fewer legal and compliance resources to navigate the delay mechanism.

1.5.3 Effective Date and Transitional Period

Given that the new regime applies from 5 June 2026 and ESMA does not expect to publish the Final Report until Q4 2026, we encourage ESMA to consider issuing interim guidance (e.g., a Q&A or supervisory briefing) to provide market participants with clarity during the period between the entry into application of the new regime and the publication of the final revised Guidelines.

Kind regards,

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mr. R.P. Vrolijk