12 December 2024
ESMA74-1103241886-1094

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 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 under the heading '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.

1 General information about respondent

Name of the company / organisation	AMF Italia – Associazione Intermediari Mercati FInanziari
Activity	Trade Association
Are you representing an association?	☒
Country / Region	Italy

2 Questions

Q1 Do you agree with the definition of protracted processes provided?

<ESMA_QUESTION_LATA_1>

In general terms, we welcome Commission's and ESMA's methodological approach to protracted processes, as it is market friendly and depowers the institution of delay, thereby reducing the high degree of subjectivity in the assessment of concrete situations that has led to uncertainty in how and when using it and, as a matter of fact, resulted in its excessive use.

This new approach better schematizes the protracted processes (perhaps over-simplified in some cases), but has the merit of providing clearer indications that can be dropped into the corporate structure and internal rules framework.

We believe that the protracted processes selected in the list should in any case be internalized and will require a case-by-case evaluation of the issuer.

<ESMA_QUESTION_LATA_1>

Q2 Do you agree with the identified categories of processes and general principles?

<ESMA_QUESTION_LATA_2>

As a general matter, we concur with the primary categories as proposed.

<ESMA_QUESTION_LATA_2>

Q3 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. It is our position that, in cases where processes are conducted entirely within the issuer, the relevant moment for disclosure should be deemed to occur at the point in time when the corporate body vested with decision-making authority has formally resolved to commit to the outcome of the process.

<ESMA_QUESTION_LATA_3>

Q4 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>

See answer above

<ESMA_QUESTION_LATA_4>

Q5 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>

In our opinion for protracted processes involving the issuer and a counterparty other than a public authority, the moment at which disclosure should occur is when the competent corporate bodies or individuals of all involved parties, possessing decision-making authority under

applicable national law or bylaws, have executed the agreement (so called signing). The signing constitutes the final event subsequent to the decision-making process.

In this regard, reference is made to the execution of a binding agreement by all parties, which constitutes an objective and definitive act. Accordingly, any reference to the "decision to commit to the agreement" or to a "preliminary agreement or any other preliminary commitment in accordance with applicable law," as included in paragraph 70 of the Consultation Paper, should be avoided. Such references may undermine the legislative intent behind the amendment to Article 17(1) and introduce undue uncertainty.

Annex I remarks:

It should be emphasized that the table contained in Annex I applies exclusively in circumstances where the criteria for classification as inside information are satisfied.

1-4-6 (Mergers, Acquisitions, Disposals, and Material Agreements): The final circumstances or events triggering disclosure should be the execution/signing of the agreement, including, where applicable, the execution of a termination agreement between the issuer and the counterparty.

Where the execution of an agreement is not required (e.g., a merger or demerger governed solely by draft terms), the final moment of disclosure should align with the approval of the draft terms by the supervisory board or board of directors, as applicable. In such cases, disclosure should occur only upon the final approval by the competent corporate body as defined by National law. This principle equally applies to items 5 and 7.

8-9-10 (Other Significant Transactions): The moment of disclosure should coincide strictly with the final approval of the transaction.

15 (Key Directors): The triggering event should be, in the case of an appointment, the signing final decision of the competent body. In the event of a dismissal, the disclosure obligation arises upon notification to the competent body.

32 (Regulatory Investigations): The final event should be referenced as "final observations," with the corresponding entry in the last column revised to state: "as soon as possible after the issuer is formally informed by the competent authority of its final decision following the investigation."

<ESMA_QUESTION_LATA_5>

Q6 **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 with the approach.

<ESMA_QUESTION_LATA_6>

Q7 **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>

Where a relationship with the relevant Public Authority is of an exclusive nature – for instance, in the context of an application for an authorisation (e.g. banking/securities trading license or patent) – the only reportable final event shall be the formal notification of the authorisation granted by the Public Authority to the issuer; therefore we propose to delete the provisions in points 17, 19, 21 and 23 of the list in Annex I to the Proposed Delegated Act. Conversely, any refusal by the Public Authority shall not be disclosed.

Where acquisitions or disposals are conditional upon prior authorisation from the Public Authority (including, by way of example, clearance under antitrust or golden power regulations) before completion, it shall be clearly stated that such a process entails two distinct reportable events: (i) the signing of the agreement (the first final event), and (ii) the completion of the transaction (the second final event), which shall occur following clearance by the Public Authority. In the event that such clearance is not obtained prior to the agreed long-stop date, the issuer shall, on such date, disclose that the transaction has been terminated (abortion final event).

For consistency reasons, we suggest the extension of the approach adopted for credit institutions (see Paragraphs 93-98), in relation to the redemptions, reductions and repurchases of own funds, to all types of financial intermediaries, in order to ensure a level playing field.

<ESMA_QUESTION_LATA_7>

Q8 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>

Our primary observation concerns the absence of definitions for friendly and hostile takeovers in EU legal framework. In light of this, we suggest making a distinction between takeovers where the issuer is actively involved and those where no such involvement occurs.

Where an offer is publicly announced by the bidder without prior engagement with the issuer/target (i.e., no involvement of the issuer), no inside information arises at the issuer level, and consequently, no disclosure obligation arises for the issuer.

Conversely, where the bidder approaches the target prior to the announcement (i.e., involvement occurs), this should be deemed to trigger a protracted process for the target. Under current practice, a delay in disclosure is initiated where the issuer is involved. The final event in such a scenario would occur when the bidder and the target or its shareholders sign an agreement on the terms of the offer.

<ESMA_QUESTION_LATA_8>

Q9 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 qualification of profit warnings and earnings surprises necessarily as one-off event when the competent body approves them. Indeed, it may be the case that profit warnings and earnings surprises emerge as part of a protracted process within the issuer and therefore a case by case assessment should be necessary. For instance, an issuer may start observing a gradual decline in sales or a series of operational hurdles (such as supply chain disruptions or production delays) over several quarters. The negative trends might only become unequivocally material at a certain point in time, prompting a profit warning or leading to an earnings surprise. Another example could involve rising costs and project overruns while they initially appear manageable, they accumulate over a prolonged period, ultimately requiring the issuer to revise its earnings projections downwards.

In these scenarios, the underlying issues do not surface abruptly but rather unfold progressively, reflecting a process that should be monitored and evaluated for potential disclosure obligations at various stages, rather than being treated as a single one-off event.

<ESMA_QUESTION_LATA_9>

Q10 Do you agree with the proposed approach in relation to recovery and resolution protracted process?

<ESMA_QUESTION_LATA_10>

Yes, we agree with the approach.

<ESMA_QUESTION_LATA_10>

Q11 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_11>

Q12 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 believe that only by referring to the latest public communication (assuming that this latest communication is in line with the previous ones and therefore the inside information that the issuer intends to delay can only be a material change in relation to the latest communication) can the issuer obtain effective relief from the current delayed disclosure regime. If that is the case, the latest public communication should be enough.

In line with the practical ESMA's approach to identify protracted processes, we therefore consider it appropriate that the reference to the obligation to compare with several public communications should be considered as residual and applicable only where, in the issuer's opinion, this assessment is absolutely necessary for a better understanding of the context. Otherwise, issuers would face a degree of uncertainty in assessing concrete situations in terms of how many communications to take into account and how to compare each past communication to the actual situation.

<ESMA_QUESTION_LATA_12>

Q13 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_13>

Q14 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_14>

Q15 Do you have any views on the methodology used to conduct the analysis?

<ESMA_QUESTION_LATA_15>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_15>

Q16 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_16>

Q17 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_17>

Q18 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_18>

Q19 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_19>

Q20 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 oppose the inclusion of a working capital report in an admission document, as it is both unnecessary and costly. This requirement is not aligned with standard financial reporting practices, where no such report is mandated in periodic financial statements (such as interim or annual reports). Our objections are as follows: (a) Lack of consistency with financial reporting standards – Standard financial disclosures do not require a separate *working capital report*. Introducing such a requirement would create an inconsistency with established reporting frameworks. (b) Redundancy with existing disclosures – The key components of working capital (current assets and current liabilities) are already presented in the balance sheet, while liquidity and operational financing trends are adequately addressed in the cash flow statement. A separate report would therefore duplicate existing disclosures without adding meaningful value. (c) Excessive cost and administrative burden, particularly for SMEs – The preparation of a working capital report entails significant effort, including auditor review, legal verification, and management assessment. This process imposes unnecessary costs, particularly for small and medium-sized enterprises. (d) Limited practical utility for investors – The inclusion of such a report could create confusion by focusing on short-term liquidity metrics rather than providing a clear picture of the issuer's overall financial health and long-term business prospects. (e) Burdensome and potentially misleading – The requirement places an undue burden on issuers and may lead to misinterpretation by investors, as short-term liquidity assessments do not necessarily reflect broader financial stability.

For these reasons, we strongly advocate against the introduction of a mandatory working capital report in admission documents.

<ESMA_QUESTION_LATA_20>

Q21 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.

<ESMA_QUESTION_LATA_21>

Q22 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_22>

Q23 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_23>

Q24 Do you agree with the proposals to meet the third requirement under Article 33(3a) (c)? Please explain.

<ESMA_QUESTION_LATA_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_24>

Q25 Do you agree that no specific amendments are required for Article 79? Please explain.

<ESMA_QUESTION_LATA_25>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_25>

Q26 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_LATA_26>