Consultation Response

ESMA Consultation on draft technical advice concerning MAR and MiFID II SME GM

February 2025

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on ESMA's consultation on the draft technical advice concerning MAR and MiFID II small and medium enterprise growth markets. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate for stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA), a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Questions and responses

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

We broadly agree with the definition of protracted processes provided. We request that ESMA include the definition as a recital in the proposed delegated act.

We note however that there are certain events or circumstances where it may be challenging to make a clear delineation between a one-off event and a protracted process. An example of such an event or circumstances could be the occurrence and consequences of an industrial accident at a plant.

Such an accident could have significant consequences for production, and consequently, the commercial and financial performance of a firm. The accident itself would likely be a one-off event, and the firm would disclose information to inform the market of the occurrence of the event in the usual manner, if it deems right away that the one-off event is material. There could then follow a protracted process of assessment of the consequences and repair, with the point at which relevant information subsequently becomes precise – and thus disclosable – subject to uncertainty.

In such circumstances, firms would neither wish to risk creating a false market by disclosing imprecise information prematurely, nor to hold on to information beyond the point at which the information becomes subject to disclosure. In such circumstances, firms would assess the facts of the situation as they develop and would work to ensure the market remained appropriately informed as the process of assessment of the consequences and repair and reconstruction was completed.

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With such an example in mind, it may therefore be appropriate to avoid the suggestion of a clear division between a one-off event and a protracted process. An event may become a protracted process, and a process may be terminated by an event. What matters is the obligation to inform the market of information as it becomes sufficiently specific and precise. This can only be assessed on a case-by-case basis.

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

We agree with the identified categories of processes and general principles which ESMA has set out. As an overarching comment, we would like to emphasise that each situation must be evaluated on its own merit. That general principle should not be lost when considering the identified categories and the principles of the table in Annex I.

We request that ESMA clarify the category it would consider appropriate for alternative dispute resolution procedures (negotiation, mediation and arbitration etc). If these are to be considered under category (ii) – *processes that involve the issuer and external counterparties* – then we request that ESMA clarify how firms should classify and disclose information relating to the mediator/arbitrator and the alternative dispute resolution process as well as that which relates to peer firms and other external counterparties.

We also suggest consideration of a fourth category to cover processes related to situations that are outside the control of the issuer and do not involve counterparties (in the sense of parties with whom the issuer has a relationship) or public authorities, such as acts of God. Processes caused by, related to or consequential to an act of God – such as a hurricane or a bad harvest – do not fit neatly into the categories currently set out. They would however likely have a significant impact on the issuer. Working out the scale and meaning of that impact and working through the resultant processes would take time. It would be helpful therefore if ESMA were to clarify how it expects firms to manage and disclose inside information in such circumstances.

Looking at the table in Annex I of the proposed delegated regulation in which ESMA provides a non-exhaustive list of final circumstances or events and moments of disclosure of inside information in protracted processes, we wish to comment on Item E.23 '*[m]edical/clinical trials for pharmaceutical products*'. The moment of disclosure is indicated as '*[a]s soon as possible after the issuer has concluded the medical trials*'. It is rare that the appropriate point to make a disclosure would be the moment immediately following the conclusion of a medical trial. In some circumstances, intermediate but still meaningful results may be communicated before a trial is over. In other circumstances, the raw data from the trial must be processed and analysed in their entirety, and the results scientifically validated internally, before the outcome can be communicated. We therefore suggest that the moment of disclosure be changed to '*as soon as possible after the outcome of the medical trials is sufficiently certain and meaningful to be communicated.*'

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?

We do not consider that ESMA's intention is clear from the language of the question and of the preceding paragraphs of the consultation paper.

In paragraph 60 of the consultation paper, ESMA notes *'[f]or certain decisions, the validation or confirmation of the governing body's decision by another corporate body may be needed [emphasis added]*', and cites as an example of such a body in such a case '*the supervisory board in the two-tier corporate governance system*'.

In paragraph 61, ESMA then states '*in all these instances the disclosure should occur when the management board adopts the decision, as its decision already provides for a sufficient degree of certainty regarding the outcome of the process*.'

It is not clear how a validation or confirmation of a preliminary decision may be '*needed*' (implying such validation or confirmation is necessary for the process to continue) in paragraph 60, but that management board adoption is '*sufficient*' in paragraph 61. ESMA also seems to imply that, in a two-tier governance structure, the decision of the management board always comes first, subject to validation by the supervisory board. In fact, it is sometimes the reverse (for instance in France when the supervisory board has to authorise the management board to take certain actions).

This lack of clarity is compounded by the reference in the question to the moment of disclosure being when '*the corporate body having the decision power has taken the decision to commit to the outcome of the process*', with no clarification as to whether '*the decision power*' is intended to mean the power to propose or the power to approve or reject the proposal.

AFME considers that in situations where the confidentiality of the information can be maintained, the appropriate moment for disclosure should be when the decision is approved and no longer subject to veto by an internal body. In Annex I to the proposed delegated act, the sentence '*even where another body of the issuer may have to give its final approval*' which appears in several instances, should thus be deleted.

In situations where the confidentiality of the information cannot be maintained – for example, where a proposal must be set out to and approved by a shareholders' meeting – then the decision of the relevant corporate body at the level of which confidentiality can be maintained would be the appropriate moment of disclosure.

We note certain issues relating to process which may begin as processes internal to the issuer but which depend upon external circumstances to be brought to completion. The process of preparing a possible private placement is an example of such a process.

If an issuer were to consider launching a private placement, it would first analyse and discuss the matter internally. If the possible benefits were deemed greater than the potential drawbacks, the relevant corporate body of the issuer may then take a decision to seek to launch the placement process.

At this point, representatives of the issuer would wall-cross certain external market participants to gauge the interest of potential investors in a possible transaction and the conditions relating to it, in accordance with the procedure set out in MAR Article 11.

Following these discussions, it may become apparent that there is little market interest in the proposed transaction, or little interest under conditions that would be acceptable to the issuer. As such, the activity may then cease, and no further action would occur.

In implementing such rules as considered by this question, we request that ESMA and national competent authorities make clear that in situations such as the example set out here, the disclosure obligation should apply only when there is certainty that the outcome of the proposed process will occur. It is not always sufficient that the relevant internal corporate body '*commit*' to bringing about a process which may appear internal, when the outcome of that process could in fact depend on market interest or other external circumstances. The correct approach should be to consider each situation on its own merit and to come to a judgement on a case-by-case basis.

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?

As per our response to Question 3, we do not consider that information that remains subject to the approval of another body internal to the issuer should be subject to disclosure, except when the confidentiality of the information cannot be maintained. To require disclosure at a point when a proposal may still be rejected by an internal body would risk creating a false market with no associated benefit, given that the confidentiality of the information may still be maintained.

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?

As with our earlier responses, we consider that there is uncertainty as to ESMA's intentions in this section.

In paragraph 66 of the consultation document, ESMA states that '…*a sufficient degree of certainty regarding the conclusion of the agreement is achieved only when both parties commit to enter into the agreement, after they agreed on its main elements or conditions*'.

This recognises two processes – *agreeing* to enter into the main elements or conditions of an agreement, and later *committing* to enter into that agreement – and states that the latter of those two processes (i.e., *committing* to enter an agreement which has already been provisionally *agreed*) is the moment when a sufficient degree of certainty is reached, and thus when information should be disclosed.

In circumstances where the confidentiality of information can be maintained by both parties, we consider that this is correct. It should however be clarified that the relevant moment is when both parties commit to each other – as opposed to the moment when one party is committed but has not yet informed the other (if only because it wants to attempt to extract better terms). This is already clear in Items A.1, A.4, and A.6 of Annex I of the proposed delegated act ('a*s soon as possible after the competent bodies of all companies involved, [emphasis added] …*').

ESMA then goes on to state in paragraph 68 that '…*the decision relevant for the disclosure should be the one taken by the competent bodies/persons of all parties involved, regardless of the validation needed by another corporate body*'. This introduces the same uncertainty already discussed in our response to earlier questions. In firms subject to the two-tier corporate governance structure, it could be interpreted to mean that a mere proposal of a management or other initial body (and not the supervisory or other final body which could reject the proposal) should be the moment of disclosure.

In the phrasing of the question however, ESMA then refers to '*the decision to sign off to the agreement*'. This reference to '*signing off*' what has already been agreed – and not a reference as could have been made simply '*to sign*' – suggests that the moment of disclosure is in fact when approval is confirmed for what has earlier been provisionally agreed. This would suggest that the moment of disclosure is when approval is given by the final (and not the initial) corporate body.

We also note that a process between an issuer and a private party may form part of a broader process. In such a case, the first process may at a certain point be completed, but the outcome of the broader process of which

it forms part may still remain uncertain. In the case of a capital increase for example, a shareholder may agree to participate in a capital increase of an issuer (which implies preparatory work, a decision-making process, and a moment of commitment), but the agreement of other parties (other shareholders or regulatory authorities) may be necessary for it to proceed. In such a case, the moment of disclosure should be when the outcome of the relevant broader process is known and not only the moment when relevant internal bodies have 'signed off' to an agreement.

We request that ESMA clarify its position in the technical advice it shall provide.

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?

We agree.

There should however be an exception to account for situations where the issuer has received the final decision from a public authority, but the public authority has requested or required that the issuer maintain the confidentiality of the information.

In a situation where an issuer enters into a negotiated agreement to limit subsequent sanctions in return for co-operation with an investigating authority other than a financial markets regulator (with a competition authority in an anti-trust investigation, for example), the public authority may require the issuer to maintain confidentiality (and so forbid disclosure) to allow it to pursue continued action against other parties.

Another example is the grant of a public procurement contract or the receipt of a grant or award. The issuer will sometimes be informed before the information is made public by the relevant public authority, and be required to keep the information confidential until then.

In such a situation, the issuer in question must not be put into a situation where the competent authority for securities markets requires disclosure of information, but another authority forbids it. This may be achieved by the issuer deciding to delay disclosure to protect its legitimate interests as per Article 17(4) of MAR. However, we believe that this situation warrants a clarification. We therefore request that ESMA make clear that issuers may (and indeed must) refrain from disclosure when required to do so by public authorities pursuing the fulfilment or enforcement of other requirements in law.

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?

We agree that processes driven by the issuer, and subsequent actions and final decisions taken by a public authority, are and should be considered two separate processes. As such, in general terms, there is likely value in requiring disclosure upon completion of each of them. There is a risk however of creating a false market by disclosing intentions which raise expectations which subsequently do not come to fruition.

Firms may seek to reduce this risk by drafting disclosure notifications carefully and factually. But even with the most careful drafting, firms cannot control the expectations the market subsequently forms. Supervisory

authorities may therefore wish to reflect on the benefits and risks of requiring disclosure at the end of the first process, when the outcome does not yet meet the required degree of certainty, and thus when the most relevant information for the market may be that to be given at the completion of the second.

We request that ESMA clarify that a redemption or conversion of a security, share buyback, dividend distribution, capital increase or other change to capital that requires a regulatory approval (e.g., a central bank authorisation for a redemption or conversion of a security, share buyback or dividend distribution, or a national competent authority approval for a prospectus for a capital increase) is a process that is triggered by the issuer but is driven by a public authority and that this triggers a disclosure when the public authority formally communicates its decision on such approval, and not when the relevant corporate body adopts the decision or the submission of the request to the authority.

We also request that ESMA clarify the interaction of the disclosure regimes under MAR and the Prospectus Regulation as it relates to protracted processes. Information may at the same time constitute (1) '*inside information*' under MAR and the regime for the disclosure of information as part of a protracted process, and (2) '*a significant new factor, material mistake or material inaccuracy relating to the information included in a prospectus…*' under the Prospectus Regulation that triggers a prospectus supplement to be published '*without undue delay*'. Such a prospectus supplement requires national competent authority approval. It would be helpful if ESMA could clarify its approach on how the different requirements should interact with each other (e.g., could an intermediate step that is not disclosable under MAR still trigger a prospectus supplement, could pending national competent authority approval for a prospectus supplement impact the disclosure timing under MAR, etc.).

Rather than seeking to set a prescriptive approach, it may be more appropriate to remind issuers of the obligation to perform analysis on an ongoing basis, based on the facts of the situation at hand.

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?

The consultation document text preceding the question suggests a clean delineation between friendly and hostile takeovers. The situation is not however always so black and white. A friendly bid could become hostile and vice versa. The bid process (and actions by activist shareholders) can also be iterative with various steps taken before, or in conjunction with, a (takeover) bid.[1] Rather than seeking to set a prescriptive approach, it may be more appropriate to remind issuers of the obligation to perform analysis on an ongoing basis, based on the facts of the situation at hand.

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?

[1] A bidder (or activist shareholder), for example, may first pursue a change in strategy or management of the target before making a bid. Certain national laws (e.g., the Netherlands) also provide for statutory response times (e.g., for shareholder proposals to strategy) and reflection periods (e.g., for shareholder proposals to change management),

We agree with the proposed approach in relation to financial reports. Where these are in line with market expectations, it is better for the issuer and the market to receive these in accordance with a set schedule. This allows both sides to work in a shared understanding of timing and to allocate resources to produce and analyse the information to be disclosed appropriately.

Where the information to be disclosed is not in line with market expectations – as is the case with profit warnings or earnings surprises – then it is appropriate that these should be disclosed as one-off events as soon as the information is sufficiently precise. In this way, the issuer shall do what is in its power to avoid the creation or maintenance of a false market.

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

We do not submit a response to this question.

Q11: Do you consider the proposed list of protracted processes sufficiently comprehensive? Do you agree with the proposed moment of disclosure? Would you add or remove any process?

We do not submit a response to this question.

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?

We agree that inside information to be delayed can and in some cases should be assessed against more than one announcement. We consider that the correct approach is for issuers to make an assessment on a case-by-case basis, forming a view based on the facts of the situation at hand.

Q13: Do you agree with the list of communications presented in Article 4 of the proposed Delegated Act (Annex IV of this CP)? Do you consider it sufficiently comprehensive, or do you deem that any other cases should be added?

We consider item (h) in the list provided – '*any other communication capable of reaching the public and delivered by a person perceived as representing the issuer*' – to be overly broad.

'*Any other communication…*' does not appear to have any clear limit to its scope. It could be interpreted to include any written text or speech act – whether intended to be made public or to remain entirely internal to the issuer.

'…*capable of reaching the public*…' reinforces this perception. An internal document – an email between colleagues for example – could be regarded as '*capable'* of reaching the public, if by accident or design it could be sent to a non-internal recipient.

'…*perceived as representing the issuer*' is also problematic. By what metric is perception to be measured, and how many market participants should form such a perception for this to be valid? If an individual (or a small group of individuals) perceives an actor to represent an issuer when this actor fraudulently claims to do so, should it fall to the issuer to correct this perception?

What appears to be missing from the various elements of this item is the concept of agency or intent on the part of the issuer. If it were amended to make clear that it would include any other communication produced by the issuer *with the intent of reaching the public*, or (if a statement were made by a genuine issuer representative inadvertently) that it included individuals who were *legitimately and reasonably* perceived to represent the company, then it could fulfil the apparent intention to capture other appropriate communication not included in items (a) to (g).

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? Do you consider it sufficiently comprehensive, or do you deem that any other situations should be added?

We note that the list of situations is described as '*non-exhaustive*' in Annex II. There will always be situations that arise that are novel and that have not appeared previously or been considered *ex ante*. As such, we consider it best to recall the obligation of issuers to consider the particular circumstances of any given situation and to form a view based on reasonable analysis of the facts at hand.

We also alert ESMA to a possible contradiction in MAR protections now offered and potential future supervisory expectations, depending on the approach ESMA and national competent authorities may choose to take. This relates for instance to market perceptions of an issuer's general policy or growth strategy and a possible change in approach by the issuer in response to a new opportunity.

We may consider a firm which historically wished only to grow organically and which may therefore have stated that it was not in the market for acquisitions. At a subsequent point, an opportunity to acquire another party may arise that is sufficiently attractive for the issuer to reverse its previous policy of no acquisitions. The issuer and the party to be acquired may discuss and – if negotiations proceed positively – agree a non-binding term sheet.

Such an agreement (not yet binding, and still to be approved by relevant corporate bodies on both sides) would normally be an intermediate step in a protracted process. As such, it would benefit from the protection MAR now offers to intermediate steps in a protracted process, and disclosure would only be required at a later stage, when sufficient certainty that the acquisition would go ahead was achieved.

The prospect of such an acquisition would however also be materially different from the market's possible expectations of the issuer's likely actions, given the market's understanding of the issuer's previous attitude to potential acquisitions. Consequently, some competent authorities may consider that the issuer should make a disclosure at an intermediate stage.

To do this however – when the outcome of the negotiations is far from certain – could jeopardise the legitimate interest of the issuer in successfully completing the negotiations and could risk the creation of a false market,

if the negotiations did not then lead to a final agreement to proceed with the acquisition. The requiring of such a disclosure at an intermediate stage would also go against the protection the co-legislators clearly and explicitly sought to offer to issuers by amending MAR as they have.

We therefore request confirmation that the requirement to disclose where there is a contrast between the inside information to be delayed and the latest public announcement or other type of communication by the issuer does not trump the protection now offered for inside information related to intermediate steps in a protracted process, and does not remove the ability to delay disclosure where immediate disclosure is likely to prejudice the legitimate interests of the issuer.

This confirmation would avoid the risk of a false market arising, would safeguard the legitimate interests of issuers and market participants to develop business and to conduct negotiations and internal processes with care, and would be in keeping with the intentions and authority of the co-legislators.

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