12 December 2024
ESMA74-1103241886-1086

Consultation Paper

Draft technical advice concerning MAR and MiFID II SME GM

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. 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'.

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.

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1 References, definitions, acronyms

Amending Regulation	Amending Regulation in this CP refers specifically to the amending regulation which will amend MAR and MIFIR under the Listing Act.
Bank recovery and Resolution Directive or BRRD	Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council
CDR 2017/565	COMMISSION DELEGATED REGULATION (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive
CESR	Committee of European Securities Regulators
CMOB	Cross Market Order Book
CP	Consultation Paper
EBA	European Banking Authority
ESMA	European Securities and Markets Authority
European Commission or Commission	The European Commission

FIRDS	Financial Instruments Reference Database
FITRS	Financial Instruments Transparency System
List of protracted processes	Annex 1 to the proposed delegated act detailed in Annex IV of this consultation paper
Listing Act	In this consultation paper references to the Listing Act should be understood as references to the compromise text published following the provisional agreement reached on 1 February 2024 between the European Parliament and Council. The legislative proposal included a Regulation amending the Prospectus Regulation, the Market Abuse Regulation and the Markets in Financial Instruments Regulation (MiFIR) and a Directive amending the Markets in Financial Instruments Directive (MiFID II) and repealing the Listing Directive. Furthermore, it introduced a new Directive on multiple vote share structures.
MAR Guidelines on Delayed Disclosure	ESMA's MAR Guidelines on Delay in the disclosure of inside information and interactions with prudential supervision (13/04/2022 - ESMA70-159-4966).
Market Abuse Regulation or MAR	Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
Markets in Financial Instruments Directive II or MiFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
Markets in Financial Instruments Regulation or MIFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
MIC	Market Identifier Code

MTF	Multilateral Trading Facilities
NCAs	National competent authorities
OTF	Organised Trading Facilities
RM	Regulated Markets
SMEs	Small and Medium Enterprises
SME GM	SME Growth Markets
TFEU	Treaty of the Functioning of the European Union

2 Executive Summary

Reasons for publication

In December 2022, the Commission adopted a legislative proposal known as the “Listing Act” to simplify the listing requirements to promote better access to public capital markets for EU companies, in particular SMEs, by reducing the administrative burden on listed companies or companies that seek a listing. The legislative package comprised a Regulation amending the Prospectus Regulation, MAR and MiFIR and a Directive amending MiFID II and repealing the Listing Directive. Furthermore, it introduced a new Directive on multiple vote share structures.

The Listing Act package was published in the Official Journal on 14 November 2024.

Considering that the Listing Act will enter into force 20 days after publication and that some provisions have a deferred entry into application from 15 to 18 months after such date, the Commission expects that the bulk of the provisions of the Listing Act should enter into application in July 2026. The Listing Act requires the Commission to adopt delegated acts in a number of areas within 18 months of its entry into force.

On 6 June 2024, ESMA received a request for technical advice from the Commission on a range of topics and in relation to the MAR, on the following points:

i) a non-exhaustive list of final events or final circumstances in protracted processes and, for each event or circumstance, the moment when it is deemed to have occurred and is to be disclosed pursuant to the new Article 17(1) MAR;

ii) a non-exhaustive list of situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers, as referred to in Article 17(4)(b) MAR;

iii) trading venues with cross-border activity above 50%, along with their share turnover over the past four years, to help identify those that will be subject to the Cross Market Order Book Mechanism established by Article 25a MAR.

In relation to MiFID II the request for technical advice relates to the delegated acts that the Commission should adopt regarding the requirements necessary for an MTF or a segment thereof to be registered as an SME growth market (SME GMs). The technical advice should ensure that these requirements maintain high levels of investor protection and confidence in SME GMs while minimising the administrative burdens for issuers on these markets.

Contents

This Consultation Paper presents a draft version of ESMA's technical advice. Section 3 addresses the background and mandate for ESMA to produce its technical advice. That section sets out the principles that the Commission has asked ESMA to take into account when developing its technical advice.

Section 4 sets out ESMA's advice on the implementation of the amendments to MAR in the context of the Listing Act.

There, for the purposes of elaborating the non-exhaustive list of protracted process and the relevant moment of disclosure, ESMA grouped protracted processes into (i) internal processes of the issuer; (ii) processes involving the issuer and another party; and (iii) processes involving a public authority. With respect to each category of processes, ESMA elaborated principles to identify the moment of disclosure that were followed for the specific protracted processes listed in the Annex I to the proposed delegated act. Those principles will also assist issuers whenever assessing the moment of disclosure for protracted processes that are not included in the proposed list.

Additionally, Section 4 lays down the new conditions to delay disclosure of inside information. In particular, for the purpose of establishing a non-exhaustive list of examples where there is a contrast between the inside information to be delayed and the latest public announcement by the issuer, ESMA considered different situations in the lifecycle of an issuer where the inside information to be delayed would represent a material change compared to the issuer's latest public communication. ESMA also identified the types of communication by the issuer which would have the ability of generating and influencing market expectations.

Lastly, Section 4 outlines ESMA's methodology and preliminary results for identifying trading venues with a significant cross-border dimension, aimed at supporting the establishment of the new mechanism for exchanging order data to detect and enforce cross-border market abuse cases (the CMOB mechanism). The methodology relies on data from ESMA's FIRDS and FITRS and includes all trading venues that report data to ESMA. The cross-border dimension is assessed according to the criteria outlined in Article 25a MAR. Detailed data supporting this analysis, including information on trading venues' MIC codes and trading volumes over the past three years, as well as 2024 data once available, will be included in ESMA's technical advice to the Commission.

Section 5 provides ESMA's advice on the conditions that an MTF, or a segment thereof, shall comply with in order to be registered as an SME GM. This section presents a systematic review of the relevant legal provision in CDR 2017/565 and proposes some targeted adjustments to the current provisions to ensure that the registration of a segment of an MTF as an SME GM complies with the relevant requirements in revised Article 33 of

MiFID II. This section additionally proposes some conditions to meet the registration requirements as specified in the revised Article 33 of MiFID II for a segment of an MTF.

Annex I contains the full of list of questions posed throughout the consultation paper.

Annex II reproduces ESMA's mandate to provide technical advice in relation to the implementation of MAR amendments and the implementation of MiFID II amendments in relation to SME GMs in the context of the Listing Act as requested by the European Commission.

Annex III presents the relevant provisions of MAR and MiFID II as amended by the Listing Act, highlighting all the changes made with respect to the current drafting.

Annex IV contains the proposed delegated act, including (i) a first annex with a non-exhaustive list of protracted processes together with the identified final circumstance or event and the moment of disclosure of inside information for each of them and (ii) a second annex with a non-exhaustive list of situations where there is a conflict between the inside information intended for delay and the latest public announcement or other types of communication by the issuer on the matter.

Annex V summarizes the approach followed in third countries in relation to the disclosure of inside information in the context of protracted processes.

Next Steps

When finalising its technical advice to the European Commission, ESMA will consider all feedback received in relation to this Consultation Paper by 13 of February 2024. ESMA has settled for an eight-week consultation period to be able to meet the deadline for delivering its technical advice, set on 30 April 2025.

A Final Report containing a summary of all consultation responses and a final version of ESMA's technical advice is expected to be delivered to the European Commission and published on ESMA's website in Q2 2025.

3 Introduction

1. In December 2022, the Commission adopted a legislative proposal to simplify the listing requirements to promote better access to public capital markets for EU companies, in particular SMEs, by reducing the administrative burden on listed companies or companies that seek a listing. The package comprised a Regulation amending the Prospectus Regulation[1], MAR and MiFIR and a Directive amending MiFID II and repealing the Listing Directive. Furthermore, it introduced a new Directive on multiple vote share structures.

2. The European Parliament and Council reached a provisional agreement on the Listing Act on 1 February 2024. The compromise was approved by the Council on 14 February 2024 and voted by the European Parliament in first reading in plenary session on 24 April 2024 respectively. On 8 October 2024, the Council adopted the Listing Act. Finally, the legislative package was published in the Official Journal on 14 November 2024[2].

3. Considering that those legal texts will enter into force 20 days after the publication and that some provisions have a deferred entry into application from 15 to 18 months after such date, the bulk of the provisions of the Listing Act should enter into application in July 2026. The Listing Act requires the Commission to adopt delegated acts in several areas within 18 months of its entry into force.

4. Several provisions included in the Listing Act will require the adoption of Level 2 measures. These will consist of a number of implementing and delegated acts, some of them based on technical standards to be drafted by ESMA.

5. In this context, on 6 June 2024, ESMA received a formal request from the Commission to provide technical advice on certain delegated acts supplementing specific provisions of the Prospectus Regulation, MAR and MiFID II, as amended by the Listing Act. ESMA is working on the response to that call for advice by publishing several Consultation Papers[3], each of them focussing on one or more of the above pieces of legislation.

6. This Consultation Paper focuses on ESMA's advice relating to the delegated acts supplementing MAR and MiFID II. The deadline for the technical advice is 30 April 2025.

7. With respect to MAR, ESMA is invited to provide technical advice on the delegated acts that the Commission shall adopt in respect of i) disclosure of inside information in a protracted process and ii) conditions to delay the disclosure of inside information. These two elements are addressed separately in the sections 4.1 and 4.2.

8. ESMA was also requested to provide information concerning the trading venues part of the

[1] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017.
[2] Regulation - EU - 2024/2809 - EN - EUR-Lex, Directive - EU - 2024/2810 - EN - EUR-Lex and Directive - EU - 2024/2811 - EN - EUR-Lex.
[3] Available at ESMA's dedicated website on the Listing Act: https://www.esma.europa.eu/esmas-activities/listing-act

Cross Market Order Book (CMOB) mechanism to exchange order data[4]. In particular, information is sought on trading venues with a cross-border activity above 50%, for which ESMA shall identify the respective revenues over the past four years.

9. With respect to MiFID II, ESMA is invited to provide technical advice on the delegated acts that the Commission should adopt regarding the requirements necessary for an MTF or a segment thereof to be registered as an SME GM. The technical advice should ensure that these requirements maintain high levels of investor protection and confidence in SME GMs while minimising the administrative burdens for issuers on these markets. Additionally, ESMA is asked to ensure that the above requirements take into account that the de-registration as an SME GM or the refusal to be registered as such does not simply occur as a result of a temporary failure to comply with the requirements specified in Article 33 (3) and (3a). This is addressed in Section 5 of this CP.

10. In its request for advice, the Commission clarifies that the technical advice "shall include legal drafting for the relevant recitals, articles and, where relevant, annexes for each of the delegated acts mentioned".

11. ESMA is also required to consult market participants "*in an open and transparent manner and provide a feed-back statement justifying its choices vis-à-vis the main arguments raised*". In addition, ESMA shall undertake an evidenced assessment of the costs and benefits of the technical options proposed.

12. Finally, the Commission has asked ESMA to take the following principles into account when developing its technical advice:

    - **Internal market:** the need to ensure the proper functioning of the internal market, in particular with regards to financial markets, and to ensure a high level of investor protection.

    - **Proportionality:** the technical advice should not go beyond what is necessary to achieve the objectives of the Amending Regulation. A competitive regulatory framework is not about deregulation, but about better regulation, taking into account the need to be mindful of rationalisation and avoid undue regulatory burden on companies.

    - In recent years, the Commission committed to reducing the reporting burden by 25% as indicated in its Communication on Long-term Competitiveness. When developing draft technical standards, technical advice for delegated acts and guidelines, ESMA should contribute to this objective by seeking, within the limits of the mandates, to decrease the administrative burden for reporting entities. It

[4] Article 25(a) MAR establishes a new mechanism to exchange order data for the purpose of detecting and enforcing cases of cross-border market abuse. The initial set-up requires an identification of trading venues that will have to share order data on financial instruments, and more in detail of venues with a "significant cross-border dimension".

should be simple and avoid creating divergent practices by national competent authorities.

- **Comprehensibility:** ESMA should provide comprehensive advice on all subject matters covered by the mandate in an easily understandable language.
- **Coherence:** the advice should be coherent with the wider regulatory framework of the Union.
- **Consultation:** ESMA is invited to consult market participants (e.g., sell-side, buy-side, intermediaries, exchanges), openly and transparently and provide a feedback statement justifying its choices vis-à-vis the main arguments raised. ESMA's advice should consider the different opinions expressed by market participants.
- **Evidence:** ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking an evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted together with the advice to the Commission.

4 MAR Technical Advice

4.1 Disclosure of inside information in a protracted process

4.1.1 Background and Mandate

13. To reduce the regulatory burden on issuers and increase legal certainty while maintaining appropriate market integrity, Article 2(6) of the Amending Regulation modifies the disclosure obligation contained in Article 17(1) of MAR in relation to "protracted processes".

14. In the new regime, pursuant to the new Article 17(1) of MAR, the obligation for an issuer to inform the public as soon as possible about the inside information directly concerning the issuer shall not apply to "*inside information related to intermediate steps in a protracted process* […]*, where those steps are connected with bringing about or resulting in particular circumstances or a particular event. In a protracted process, only the final circumstances or final event shall be required to be disclosed, as soon as possible after they have occurred*."

15. Consistently, the new paragraph 4a of Article 17 MAR specifies that the inside information relating to intermediate steps in a protracted process is not subject to the requirements for the delayed disclosure.

16. However, similarly to what currently happens when information is being delayed, an additional sentence in Article 17(7), second subparagraph, provides that when a rumour explicitly relates to such inside information, the issuer should disclose the inside information to the public as soon as possible.

17. Recital (67) of the Amending Regulation indicates that at the base of the amendment is the consideration that information of a preliminary nature disclosed at a very early stage may mislead investors, rather than contribute to efficient price formation and address information asymmetry. Consequently, that Recital explains that in a protracted process "*the disclosure requirement should not cover announcements of mere intentions, ongoing negotiations or, depending on the circumstances, the progress of negotiations, such as a meeting between company representatives"*.

18. Identifying the exact moment when an event becomes final is not always straightforward, thus the new Article 17(12) of MAR requires the Commission to adopt delegated acts to establish and review, as necessary, (i) a non-exhaustive list of final events or final circumstances in protracted processes and, (ii) for each event or circumstance, the moment when it is deemed to have occurred and must be disclosed according to Article 17(1) of MAR.

19. Against this background, ESMA is requested to provide technical advice on the establishment of such non-exhaustive list of final events or final circumstances and the relevant moment of disclosure ('the list of protracted processes').

20. In addition, the Commission requested ESMA:

- to be "as comprehensive as possible capturing different types of protracted processes, such as those related to the issuer's corporate governance, capital structure, financial results and business strategy" and to take into consideration the examples included in Recital 67 of the Amending Regulation with the view to apply the same approach to other protracted process.

- to give due consideration to the fact that under the future regime, in some instances (e.g. negotiations) issuers should no longer need to resort to delay the disclosure to avoid a prejudice to their legitimate interest, as intermediate steps would be no longer subject to the disclosure obligation.

- to consider "*price sensitive interventions by regulators*", and in particular recovery and resolution process of a credit institutions as described under the Bank Recovery and Resolution Directive (BRRD)[5] and the Single Resolution Mechanism Regulation (SRMR)[6]. In this respect ESMA "*is*

[5] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014.
[6] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014.

expressly encouraged to consult the EBA on how to best reflect this protracted process and determine timely triggers for disclosure, while meeting the objectives of MAR and BRRD or similar third-country crisis management frameworks".

– when compiling the list of final events and final circumstances in protracted processes, to take into account similar lists that have already been developed by EU national competent authorities or in major jurisdictions outside the Union.

4.1.2 Analysis and proposal

Interactions with the existing framework and the future guidelines

21. ESMA understands that the delegated act described in Article 17(12) of MAR, on which its advice is requested, will contain a non-exhaustive list of protracted processes and for each process, the relevant event or circumstance able to produce inside information and the moment when the issuer must publicly disclose the information concerned.

22. ESMA notes that the list aims to facilitate the issuer's identification of the moment when disclosure of the inside information is required in case of protracted processes.

23. Before analysing the potential content of the list, ESMA sees merit in providing some clarifications on the application of the MAR provisions in relation to public disclosure of inside information for protracted processes. Such provisions include the definition of inside information in Article 7 of MAR[7] and the possibility to delay the disclosure described in Article 17(4)[8] of MAR.

24. First of all, it is worth reminding that the disclosure obligation is triggered only by information which meets the requirements set forth in Article 7 of MAR on the definition of inside information, i.e. precision, materiality and non-public nature. Consequently, whenever the information relating to the final events or circumstances listed does not meet any of such requirements, the relevant final event or circumstance will not be subject to the disclosure obligations, despite being on the list.

25. Furthermore, whatever happens after the disclosure of inside information related to a concluded protracted process should be assessed by the issuer as another set of events or circumstances, for which the issuer retains a stand-alone disclosure obligation whenever

[7] Article 7 of MAR reads inside information is defined as "information of a precise nature, which has not been made public, relating directly or indirectly to one or more issuers or to one or more financial instruments, and which, if made public, would be likely to have a significant effect on the prices of those financial instruments or related derivative financial instruments".
[8] Article 17(4) of MAR reads "an issuer or an emission allowance market participant may, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met: (a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant; (b) delay of disclosure is not likely to mislead the public; and (c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information".

in presence of inside information. As a result, that inside information will have to be disclosed as soon as possible after the issuer comes into possession of the inside information or, in case of another protracted process, when that has reached its final stage.

26. It is also worth noting that while in the future issuers will no longer need to resort to delay the disclosure of inside information in presence of intermediate steps of a protracted process, the possibility to delay the disclosure remains applicable to the final event or circumstance identified in the list, provided that the conditions for a delay are met.

27. For example, in the case of a procurement, despite that the process should be considered as concluded after the award of the contract, where a confidentiality agreement subsists for the stand still period, immediate disclosure could prejudice a legitimate interest of the issuer that could allow it to delay the disclosure, if also the other relevant conditions are met.

28. In this respect it is worth noting that the new Article 17(11) of MAR mandates ESMA to issue guidelines to establish a non-exhaustive indicative list of the legitimate interests of issuers for the delay of disclosure. ESMA thus aims to review the existing MAR Guidelines on delayed disclosure[9] in light of the new regime.

29. It is also worth recalling that the amendment brought to paragraph 7 of Article 17 of MAR clarifies that "where inside information relating to intermediate steps in a protracted process has not been disclosed in accordance with paragraph 1, and the confidentiality of that inside information is no longer ensured, the issuer or the emission allowance market participant shall disclose that inside information to the public as soon as possible". As a result, the issuer is obliged to disclose inside information regarding the process whenever a leak occurs before the final event or circumstance included in the list.

30. Furthermore, few specifications appear to be necessary given the non-exhaustive nature of the list. The identification of inside information with respect to final events or circumstances of protracted processes not included in the proposed list remains an issuer's case-by-case assessment. Therefore, the issuer remains responsible to identify the final event or the final circumstance for processes not included in the list and, for each one of them, the moment when it is deemed to have occurred and is then to be disclosed.

31. To identify the moment of disclosure regarding non-listed processes, issuers are expected to follow by analogy the rationale used in relation to the protracted processes contained in the list, as outlined in the following sections.

32. Issuers should always be able to provide a justification regarding the identification of the moment of disclosure in line with the approach adopted in the delegated act and more generally with the obligation to disclose the inside information as soon as possible.

[9] https://www.esma.europa.eu/press-news/esma-news/esma-publishes-guidelines-delayed-disclosure-under-mar

Protracted Processes vs one-off events

33. When drafting the list of protracted processes, ESMA considered the request of the Commission to be as comprehensive as possible and to capture different types of processes.

34. To distinguish between one-off events and protracted processes ESMA notes that Recital 67 of the Amending Regulation identifies that a non-protracted process is "*a one-off event or set of circumstances, notably when the occurrence of that event or set of circumstances does not depend on the issuer*".

35. By contrast, ESMA understands a protracted process to be a series of several actions or steps spread in time which need to be performed, in order to achieve a pre-defined objective or result.

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

Consultation with EBA and existing guidance at national level

36. Following the Commission request to include in the list "price sensitive interventions by regulators, and in particular the recovery and resolution process of a credit institutions as described under the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR)" ESMA engaged with EBA to add to the list also processes pertaining to the supervision and crisis management of credit institutions (see section F of the list of protracted processes).

37. Also following the Commission's request, ESMA took into account similar lists that have already been developed by EU national competent authorities or in major jurisdictions outside the Union.

38. A survey among the NCAs revealed that under the regime before the entry into force of MAR, Greece[10], Poland and Spain[11] had established a list of information qualifying as inside information for the purpose of public disclosure.

39. In July 2007, the CESR also published examples of what constitutes inside information in the Level 3 guidance regarding MAD in its "Second set of CESR guidance and information

[10] 3/347/12.7.2005 (Φ.Ε.Κ. Β' 983/13-7-2005) Υποχρεώσεις των Εκδοτών για τη Δημοσιοποίηση Προνομιακών Πληροφοριών
[11] https://www.boe.es/eli/es/o/2009/06/01/eha1421; https://www.boe.es/buscar/pdf/2009/BOE-A-2009-18005-consolidado.pdf

on the common operation of the Directive to the market"[12].

40. Taking into consideration the CESR guidance, CMVM reviewed and updated the "Entendimentos da CMVM quanto à Divulgação de Informação Privilegiada"[13], previously published, which provides examples of facts that might qualify as inside information.

41. After the entry into force of MAR, several NCAs across the Union have issued guidelines regarding the disclosure of inside information, including the appropriate timing for the disclosure in specific cases.

42. For instance, FSMA adopted guidelines on "Considerations and good practices with respect to inside information disclosures by listed biotech companies"[14],and "Obligations incombant aux émetteurs cotés sur un marché réglementé"[15], CONSOB adopted the "Linee guida n. 1/2017 - Gestione delle informazioni privilegiate"[16], and Bank of Lithuania adopted the first version of the "Informacijos Atskleidimo Gaires" guidelines on disclosure of information in 2019, which have been subsequently updated in 2023[17]. Moreover, in March 2020, BaFin revised its Issuer Guidelines, and specifically "Module C - Requirements based on the Market Abuse Regulation".[18]

43. Outside the EU, the legal frameworks in the USA and Japan, provide lists of specific events that should trigger the public disclosure. With respect to the timing, the disclosure in the US is requested after four days from the event, whereas in Japan it is requested as soon as possible after the fact or the decision of the executive body of the issuer (see Annex V).

44. To ensure that the list of protracted processes included in this technical advice is comprehensive and easily applicable in different jurisdictions, the processes should be read in general terms. For example, "material agreement" should be read as including a broad spectrum of agreements, such as customer agreements, supply agreements, cooperation agreements, Joint Ventures agreements, lease or granting of credit lines.

Protracted processes: general approach and classification

45. In their simplest form those processes are internal to the issuer. However, there are also situations where the process is initiated by or involves external parties (e.g. counterparties in a contract or public authorities within legal proceedings).

[12] https://www.esma.europa.eu/sites/default/files/library/2015/11/06_562b.pdf
[13] https://www.cmvm.pt/PInstitucional/Content?Input=94A66EEBB39E4E19FEB6BF9979295C3BA3828B4244A59A93E6EE5998C75E3B76
[14] Considerations and Good Practices with respect to Inside Information Disclosures by Listed Biotech Companies (October 2020)
[15] FSMA - Obligations incombant aux émetteurs cotés sur un marché réglementé
[16] Linee guida n. 1/2017 del 13 ottobre 2017 - Gestione delle informazioni privilegiate (October 2017)
[17] See footnote 8
[18] https://www.bafin.de/SharedDocs/Downloads/EN/Leitfaden/WA/dl_emittentenleitfaden_modul_C_en.html.

46. Furthermore, processes may relate to different aspects of the corporate affairs ranging from daily business (e.g. agreements, licenses for products) to extraordinary corporate transactions (e.g. mergers or reorganisations) and legal proceedings.

47. To reflect the diversity of processes the issuer may be involved in, several categories of protracted processes likely to produce inside information were identified and inserted in the list, including business strategy, capital structure, provision of financial information, corporate governance, interventions by regulators, and administrative and legal proceedings and sanctions.

48. Regarding the identification of the moment of disclosure for the protracted process, the Commission requested ESMA to "*take into consideration the examples already included in recital (67)* [of the Amending Regulation] *with the view to applying the same approach also to other protracted processes*".

49. The first part of recital 67 of the Amending Regulation indicates that the objective of public disclosure of information is to "*enable investors to take well-informed decisions*" and consequently does not require issuers to disclose inside information about protracted processes at an early stage, not to mislead the investors[19].

50. The second part of the same recital clarifies that for mergers the disclosure moment should be "as soon as possible after the management has taken the decision to sign off on the merger agreement, once the core elements of the merger have been agreed upon" and for contracts "when the main conditions of the contract have been agreed upon".

51. The disclosure is thus required when there is a **degree of certainty** regarding the outcome of the process which is sufficient not to mislead investors with information which is still subject to changes.

52. While providing a list of events and circumstances and for each of them the relevant moment for public disclosure, ESMA saw merit in setting forth **categories of processes** and **general principles** that were applied to the listed processes but could also guide issuers when assessing any other non-listed process.

53. In this respect, ESMA noted that the different listed processes can be grouped into 3 main categories. Namely, (i) protracted processes that are entirely internal to the issuer, (ii) processes that involve the issuer and external counterparties and (iii) protracted processes that involve the issuer and public authorities.

54. Considering the processes involving public authorities, they can also be further distinguished into a) processes that are driven by the public authority with no initiative by the issuer (e.g. SREP, legal proceedings) and b) processes that are triggered by the issuer

[19] Recital 67 reads as follows "disclose inside information aims, primarily, to enable investors to take well-informed decisions. When information is disclosed at a very early stage and is of a preliminary nature, it might mislead investors, rather than contribute to efficient price formation and address information asymmetry".

but are driven by a public authority (e.g. authorisation request).

55. In this latter case, two sequential processes are identifiable: one internal process performed by the issuer and whose final event is the submission of the request to the authority, and a second one that is led by the authority which ends with the authority's decision further to the issuer's request.

56. In some cases, this second process may not be a protracted process for the issuer, that may only receive the public authority's final decision. However, in other cases, the decisional process led by the authority may be a protracted process characterised by exchanges of information between the authority and the issuer, which may be inside information on its own, even before the final decision is adopted by the authority.

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

Protracted processes that are entirely internal to the issuer

57. **Protracted processes that are entirely internal to the issuer** are those where the issuer is the only actor, and it is thus able to determine autonomously their completion. They include for example reorganisations, increases of capital and distributions of dividends.

58. ESMA considers that, where the **issuer is the only actor in the protracted process,** the decision of the governing body of the issuer should ensure a sufficient degree of certainty regarding the outcome of the process. Therefore, the adoption of the decision by the issuer's governing body should trigger the disclosure obligation.

59. By "governing body" the competent body of the issuer having the decision power under national law or bylaws to adopt the decision is meant, including cases where the decisional power was conferred through delegation. This body would typically be the board of directors or management board, but it can also be a natural person, for example the CEO, where he or she has been empowered through delegation by the Board of directors or directly by the by-laws to adopt certain decisions.

60. For certain decisions, the validation or confirmation of the governing body's decision by **another corporate body** may be needed**,** typically the shareholders general meeting or the supervisory board in the two-tier corporate governance system. Similarly, on certain matters, the governing body is only allowed to propose the decision to the shareholder's meeting who is the one entitled to adopt it by law (e.g. decisions on dividend distribution).

61. ESMA considers that 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.

62. In any case, ESMA is of the view that publication cannot wait for the final decision of the shareholders' general meeting as their agenda is usually subject to forms of publicity. Even where that is not the case, the information regarding the shareholders' general meeting needs to be provided to a high number of shareholders, making the information *de facto* public.

63. It is also worth noting, that in certain instances a decision of an external authority may be required to confirm the decision of the issuer (e.g. acquisition of own shares). According to the proposed classification as further explained in the sections below, the approval of an external authority would qualify as a separate and additional process, triggered by the issuer but driven by the authority who will be able to determine the final outcome. In these cases, two processes would be identifiable, one led by the issuer and terminating ending with the decision of the issuer to conduct the transaction, and another one led by the authority and terminating with the decision of the authority to approve it. Both final events should be disclosed autonomously subject to the disclosure obligation.

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?

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?

Protracted processes involving the issuer and another party different from a public authority

64. Examples of processes involving the issuer and another private party are all the cases where the issuer enters into an agreement. This category includes certain extraordinary transactions carried out to reach strategic objectives (mergers, acquisitions, or disposal of relevant assets, including subsidiaries) but also any other contractual relationships the issuer may need to have in place for its ongoing business or corporate activity (e.g. business agreement or employment contracts[20]).

65. In these cases, the sole decision of the issuer is not sufficient to achieve a degree of certainty regarding conclusion of the agreement, as this is also subject to the counterparty's decision. Furthermore, Recital 67 seems to suggest that the disclosure should occur "*when*

[20] A protracted process regarding the termination of an employment contract is foreseeable only in case of negotiations. Where the contract is terminated throught a termination notice, the termination notice qualifies as a single off event to be disclosed immeadiatly.

the core conditions of [that] *agreement have been agreed upon"*.

66. As a result, ESMA considers that when **another private party is involved**, 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.

67. In case of extraordinary transactions (mergers, acquisitions of assets), where the decisional process is structured and designed by law (or the by-laws), the completion of the negotiations on the main conditions is generally followed by a decision by the respective corporate bodies of the two parties. As a result, it is possible to conclude that there is agreement on the core conditions and formal commitment to enter into the agreement when the competent bodies/persons of all parties involved, having the respective decision power, have taken the decision to sign off the agreement, where by "sign-off" the explicit approval of the transaction is meant.

68. For the same reasons outlined in the previous section, also in this case 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.

69. It is also worth noting that coordination of the decision-making process of all parties could already occur during negotiations, to avoid any conflicting or non-synchronised communications to the public.

70. Lastly, considering the cases when decisions are to be taken by a person delegated by the governing body within the issuer, with less formalities in comparison to extraordinary transactions, the moment when both parties take the decision to commit to the agreement may occur only when both parties become legally bound by the agreements. That moment may be the signing of the final agreement but may also be earlier in time in presence of a preliminary agreement or any other preliminary commitment according to the applicable law.

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?

Protracted processes involving the issuer and a public authority

71. The protracted processes involving the issuer and a public authority can be distinguished between a) processes that are driven by a public authority with the involvement of the

issuer (e.g. SREP[21], legal proceedings) and b) processes that are triggered by the issuer and whose final outcome is decided by a public authority (e.g. licensing, authorisation).

72. Protracted process **driven by a public authority and where the issuer is simply involved in it** are those processes where, ahead of the authority's decision, several interactions and exchange of information between the issuer and the authority take place. As before the formal notification of the authority's decision to the issuer there is no certainty regarding the outcome of the process, only that formal notification should trigger the obligation to disclose inside information.

73. The reference to the formal communication to the issuer seems important to exclude any informal communication between the authority and the issuer before the final decision has been adopted by the authority.

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?

74. Differently, where the issuer triggers the process, and a public **authority is to give its authorisation or express its determinations**, two processes can be identified, and disclosure should occur upon completion of each of them.

75. This scenario refers, for example, to the case where the issuer wishes to have a product protected by intellectual property rights and consequently initiates a registration process with the competent authority. Other instances that would fall under this category are those processes involving the granting of a license to the issuer as well as those ones entered into with the aim of obtaining permission to commercialise a particular product.

76. In these cases, the final event of the process driven by the issuer corresponds to the submission of the request to the authority, and therefore it is in that moment that disclosure should occur.

77. The final event in relation to the second process driven by the authority and concluding with the granting (or rejection) of the authorisation should follow the general principles for processes driven by the authority, with disclosure due to occur when the issuer has received the final decision from the public authority, even where the issuer and the public

[21]Supervisory Review and Evaluation Process (SREP). The SREP is targeted at evaluating the risk profile and capital needs of credit institutions and to adopt appropriate measures when needed

authority previously exchanged preliminary information that may on its own amount to inside information.

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?

78. The table below displays the relevant moment of disclosure for the categories of processes identified.

TABLE 1: MOMENT WHERE CERTAINTY REGARDING THE OUTCOME OF THE PROCESS IS ACHIEVED CONSIDERING THE ACTORS INVOLVED

	Parties involved in the process	Party driving the process	Moment of disclosure
1	Issuer	Issuer	As soon as possible after the competent body of the issuer having the decision power takes the **decision**, even when another body has to give its final approval.
2	Issuer and another private party	Issuer and another private party	As soon as possible after the competent body/person of both the issuer and the relevant counterparty **commit** to the completion of the process, even when another body of the issuer(s) has to give its final approval. **For extraordinary transactions**: adoption of the relevant decision by the governing bodies of the two parties. **For any other agreement**: when both parties become bound by the agreement.
3	Issuer and a public authority	Issuer	As soon as possible after the issuer has submitted the request to the public authority.
		Public authority	As soon as possible after the issuer has received the formal **notification** of the Authority decision, even where the issuer and the public authority previously

			exchanged preliminary information that may on its own amount to inside information.

Specific processes: takeovers

79. A takeover bid promoted by the issuer on a target company implies a decisional process within the issuer to finalise the bid, and thus qualifies as a process.

80. Differently, where the issuer is the target of a takeover bid, it is worth distinguishing between a friendly takeover and a hostile takeover to identify where a process occurs.

81. In case of a friendly takeover, parties are in agreement regarding the transaction to be performed. To reach such an agreement an internal process is usually carried out within the issuer, generally including recommendations to shareholders' regarding the bid. In contrast, a hostile takeover occurs when the acquirer company appeals directly to a company's shareholders, by-passing the management body that does not want to be taken over. In the latter case, given the lack of an internal decisional process, the takeover is more likely to be qualified as a single one-off event (the bid placement), rather than a process.

82. In light of the above, in case of a takeover bid from the issuer ESMA proposes to identify the moment where the management body takes the relevant decision as the moment for disclosure. Where the issuer is the target of the bid, only the friendly takeover should be taken into consideration for the purposes of the list and disclosure should occur where the management has decided to recommend/not recommend accepting the bid.

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?

Specific processes: financial reports, profit warnings, earning surprises and forecasts

83. ESMA understands that the production of a **financial report** by the issuer is a special case of protracted process.

84. This is because is the figures detailed in the report could be inside information before the issuance of the report.

85. As the production of the financial report is also aimed at confirming the figures and presenting them in a way that is more intelligible for investors, ESMA proposes to identify the moment of disclosure in the finalisation of the periodic financial report illustrating the figures.

86. In this respect, ESMA notes that before the formal adoption of the report, it is hard to identify a specific moment in which the figures were identified and confirmed, as the figure collection and validation may be spread over time.

87. Regarding the periodic report production, ESMA also notes that while certain jurisdictions merely require the governing bodies to acknowledge the report, other require its formal approval. Thus, the wording proposed in the delegated act should take into consideration the different level of involvement of the governing body in the process foreseen in the different legal frameworks, and it would need to be applied according to what is applicable in the jurisdiction at hand.

88. Profit warnings or earning surprises (especially when not in line with what was expected or previously communicated), cannot be considered part of the processes aimed at producing the periodic financial reports. Thus, they are to be considered a separate set of inside information to be published to the public immediately as soon as they are available to the issuer.

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?

Specific processes: Biotech companies trials and commercialisation authorisations

89. ESMA acknowledges that biotech or pharmaceutical companies before submitting the request for the authorisation to commercialise their products conduct several tests, medical trials and collect feedback from the scientific community.

90. ESMA acknowledges that such tests and feedback collection are part of the process carried out by the issuer to submit the authorisation request. However, the test phase can be considered as a process on its own given its length, structure, complexity, and the fact its outcome can represent inside information of its own.

91. For example, on the base of the “trend vote” (a vote amongst members of a scientific committee on whether they are in favour of recommending the granting of a marketing authorization) an issuer can decide to stop the procedure aimed at submitting an application for licencing. Such decision may amount to inside information. Similarly, negative tests performed by the issuers may induct the issuer to abandon the internal process to submit the request for authorisation, which may also be inside information.

92. In light of the above, ESMA proposes that the mentioned medical tests and trials be qualified as a separate process and that their conclusion or the collection of the relevant

feedback should correspond to a specific final event to be disclosed.

Specific processes: Credit Institutions

93. Banking regulation[22] provides for specific processes for credit institutions, characterised by the prudential or the resolution Authorities' intervention for supervisory purposes. Taking this into account, Annex I of the proposed delegated act contains a section dedicated to processes of credit institutions (see section F of the list of protracted processes).

94. Section F of the list of protracted processes firstly includes the Supervisory Review and Evaluation Process (SREP)[23] and the redemption, reduction and repurchase of own funds process under Article 28(1) of the Commission delegated Regulation 241/201[24]. It is worth recalling that in 2022, ESMA provided guidance on disclosure of inside information regarding both such processes in the MAR Guidelines on delayed disclosure[25].

95. In line with the MAR Guidelines on delayed disclosure and the principle for disclosure in processes relating to the issuer and a public authority, ESMA's proposal would be to disclose the SREP outcome only upon the receipt of the final SREP decision from the Prudential Competent Authority, even where the issuer and the Prudential Competent Authority previously exchanged preliminary information that may on its own amount to inside information.

96. Similarly, in the reduction and repurchase of own funds the disclosure should occur as soon as possible after the credit institution is notified that the reduction of funds has been authorised by the Prudential Competent Authority.

97. It is worth noting that despite the approval process of the prudential authority being triggered after an internal process within the credit institution to proceed with the transaction, in this case no disclosure of the governing body decision on the transaction would be required. This is because the Article 28(1) of Commission Delegated Regulation 241/2014 provides that redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior approval of the Prudential Competent Authority.

98. In addition, pursuant to the Commission's request, ESMA consulted the EBA on how to best determine timely triggers for disclosure of protracted processes described under the

[22] Banking regulation - European Commission
[23] See footnote no. 20.
[24] Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions, OJ L 74, 14.3.2014, p. 8–26
[25]https://www.esma.europa.eu/sites/default/files/library/esma70-156-4966_final_report_on_mar_gls_on_delayed_disclosure_and_interactions_with_prudential_supervision.pdf

BRRD and the SRMR.

99. EBA provided the following input on recovery and early intervention measures.

BOX 1: EBA'S INPUT ON RECOVERY AND EARLY INTERVENTION MEASURES

According to the BRRD, the purpose of recovery is to restore the financial and business viability of credit institutions and investment firms following their significant deterioration. To achieve this objective, institutions could implement various measures taking into account the specific crisis and nature of the institution. In addition, the BRRD gives powers to authorities to impose 'early intervention measures' to restore viability.

The recovery process usually consists of different going-concern actions and, where those actions form part of a protracted process with inside information disclosure should take place only at the end of it. The list of protracted processes contained in the Annex 1 of the proposed Delegated Act incorporates the most common type of actions that could be taken in recovery.

The adoption of early intervention measures by supervisory authorities is also a composite decision-making process made up of several steps that should be disclosed only upon finalisation of the overall process. The list of protracted processes contained in the Annex 1 of the proposed Delegated Act incorporates the most common type of actions that could be taken as early intervention measures.

100. ESMA understands that EBA is of the view is that the recovery and early intervention measures may translate into protracted processes already included in the list, such as mergers, acquisitions of business, etc. ESMA also understands that when a recovery or an early intervention measure corresponds to such processes, the credit institutions should proceed with disclosure in the moment indicated in the list.

101. Regarding resolution, EBA suggested to add to the list of protracted processes the preparation of the resolution action and normal insolvency proceedings in accordance with the applicable national law, as displayed in the table below.

TABLE 2: EBA'S INPUT ON RESOLUTION

Protracted Process	Final circumstances or Events	Moment of disclosure
Preparation of the resolution action (1)	Decision of the resolution authority to take resolution action in accordance with Article 82(2) BRRD	As soon as the decision of the resolution authority is published pursuant to Article 83 BRRD
Normal insolvency proceedings in accordance with the applicable national law	Decision of the relevant authority in accordance with national law	As soon as the decision of the relevant authority has been taken and notified to the institution in accordance with national law
(1) This process includes as intermediary steps the assessment of the FOLTL, the write down or conversion of capital instruments (Article 59 BRRD) and any decision or action adopted by the competent authority or the resolution authority until the adoption of the resolution decision.		

102. Considering resolution, ESMA understands that the BRRD distinguishes between the notification of the decision of the resolution authority (Article 83(2) of the BRRD) and the publication of the decision by the resolution authority (Article 83(4) BRRD).

103. The notification of the decision of the resolution authority to the credit institutions could occur first, in order to allow the implementation of the resolution action (for example with regard to bail-in execution in order to require suspension from trading and cancellation of instruments). This notification can be considered as an interim step, functional to the resolution process.

104. On the contrary, the publication of the decision is done only when all the necessary arrangements have been taken for the resolution to take place.

105. The reason for the credit institution to retain an obligation to disclose the inside information after the publication of the authority is because the notification it has received from the authority may include inside information that is not reported in the publication.

106. In light of the above, ESMA proposes to include in the list the resolution processes provided by EBA.

107. Regarding national insolvency proceedings, ESMA understands the language proposed by EBA should be able to cover all possible national laws under which the credit institutions have to enter into national insolvency proceedings. Also, this item was thus included in the list taking into consideration by EBA's input.

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

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?

4.2 Conditions to delay disclosure of inside information

4.2.1 Background and mandate

108. The current MAR regime allows issuers (or emission allowances market participants) to delay disclosure of inside information provided that the conditions specified under Article 17(4) of MAR are met, namely when:

> a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
>
> (b) delay of disclosure is not likely to mislead the public;
>
> (c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

109. As explained in the previous section, while the regime for public disclosure in relation to intermediate steps in protracted processes has been amended in the sense that disclosure should take place only upon completion of those processes, the Amending Regulation continues to acknowledge that there may be instances where an issuer may have a legitimate reason to delay disclosure of inside information even once the final event has occurred.

110. Therefore, the mechanism for delaying disclosure of inside information has been maintained, with some amendment to the relevant conditions. Namely, the provision under Article 17(4)(b) of MAR whereby "*delay of disclosure is* ***not likely to mislead the public***" has been replaced by the following: "*the inside information that the issuer or emission allowance market participant intends to delay* ***is not in contrast with the latest public announcement or other type of communication*** *by the issuer or emission allowance market participant on the same matter to which the inside information refers*". The conditions under Article 17(4)(a) and 17(4)(c) of MAR remain unchanged.

111. Together with such a revision of Article 17(4)(b) of MAR, the Amending Regulation also empowers the Commission to adopt a delegated act to set out and periodically review

a non-exhaustive list of: "(..) *situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers, as referred to in paragraph 4, first subparagraph, point (b)*".

112. As explained in Section 3, the Commission has requested ESMA to provide technical advice on a list of examples where it is deemed that there is a contrast between the intended delayed inside information and the latest public announcement or other type of communication by the issuer on the same matter to which the inside information refers.

113. The Commission's request for technical advice suggested that ESMA:

- give due consideration to the fact that the scope of the assessment should be limited to the latest public announcement/communication by the issuer and only to announcements/communications that concern the same matter to which the inside information refers;
- identify a comprehensive list of *"other types of communication by the issuer*" that are relevant for the purpose of assessing whether disclosure can be delayed, by only taking into account communications that may generate/influence market expectations;
- take into account that the amended provision only refers to situations where there is a contrast between the inside information to be delayed and previous announcements/communications;
- give generally consideration to the exceptional nature of delays under the amended MAR disclosure regime.

4.2.2 Analysis and proposals

114. Firstly, ESMA notes that the amendment to Article 17(1) of MAR introduced by the Amending Regulation, whereby inside information arising in the context of an intermediate step in a protracted process should no longer be subject to public disclosure, is likely to reduce the scope of application of the delay under Article 17(4) of MAR. In other words, considering that intermediate steps in a protracted process should no longer be subject to the disclosure requirement ahead of completion (except when the confidentiality of the information can no longer be ensured), resorting to the delay mechanism will no longer be needed in those cases.

115. However, as mentioned, the Amending Regulation continues foreseeing, under certain conditions, a mechanism to delay the disclosure once the final event has occurred. That could be the case, for example, when the process has actually ended for the issuer, but a further action or approval is needed by a public authority.

116. While two of the three existing conditions have not been amended (i.e. Article 17(4)(a) and 17(4)(c) of MAR, referring respectively to the legitimate interest of the issuer or emission allowance market participant and the confidentially of the information), the co-legislators have revisited the condition under Article 17(4)(b) of MAR, i.e. that delay of disclosure is not likely to mislead the public.

117. The rationale behind such an amendment can be found in Recital 70 of the Amending Regulation which explains that the change aims at providing issuers with more legal certainty by providing clearer conditions for delaying the disclosure of inside information. More precisely, the recital explains that the circumstances where disclosure should not be delayed will be clarified by direct reference to previous public statements or other types of communications by the issuer. In this context, the Commission's delegated act on the non-exhaustive list, on which ESMA is called to provide advice, will be key to provide such clarifications.

118. From a practical perspective, ESMA notes that the amendment to Article 17(4)(b) of MAR should reduce the burden for issuers, who should now carry out a more limited assessment, only covering their latest announcement/communication on the same matter. The rationale being that only the **latest** announcement/communication would still be the one relied upon by the public and capable of influencing the price of the relevant financial instruments.

119. Yet, while the Amending Regulation and the request for technical advice only refer to the latest announcement or communication, 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. This seems of relevance in case of a series of partial announcements which only combined together provide the full picture. Such a reading appears coherent with Recital 70 of the Amending Regulation which refers to "previous public **statements** or other types of **communications** by the issuer ".

120. Relatedly, with respect to Commission request in the technical advice to identify a comprehensive list of "other types of communication by the issuer", ESMA understands that this provision aims at covering a broad spectrum of messages and signals conveyed by the issuer to the market, and should not be limited to public announcements, provided that those have the ability of generating or influencing market expectations.

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?

121. ESMA takes note of the Commission's request to draw up a list of examples where

it is deemed that there is a contrast between the intended delayed inside information and the latest public announcement or other type of communication by the issuer on the same matter to which the inside information refers. In this context, ESMA considers that the list should aim at capturing as many situations as possible in the lifecycle of an issuer where such a contrast may arise, ranging from, inter alia, corporate governance to business strategy, corporate finance or capital structure operations.

122. At the same time, ESMA notes that the list is by definition non-exhaustive and that while it is intended to cover common situations where a contrast may materialize, other circumstances non listed in the delegated act may give rise to a contrast between the inside information that the issuer intends to delay and the latest announcement or communication. In those circumstances, a case-by-case assessment would be needed. This is also reflected in Recital 9 of the delegated act.

123. Against this background, the non-exhaustive list presented by ESMA in the draft delegated act (see Annex IV) covers inside information which would represent a material change in relation to the issuer's latest public announcement or communication on:

- forecasted financial results or business objectives;
- environmental or social impact of a project or product;
- the financial viability of the issuer;
- capital structure operations;
- business strategy operations;
- contracts/deals;
- corporate governance operations.

124. In practice, this would mean that whenever the inside information that the issuer intends to delay constitutes a material change compared to the latest public communication (or to the latest communications when a clear direction cannot be drawn exclusively on the basis of the very last announcement) on the same matter of the inside information, the condition under Article 17(4)(b) of MAR as amended by the Amending Regulation would not be met and the issuer would not be able to delay the disclosure of that inside information.

125. With respect to the Commission's request in the technical advice to identify a comprehensive list of "other types of communication by the issuer", Article 4 of the draft delegated act presents a comprehensive list of types of communication that, in ESMA's view, would have the ability of generating and influencing market expectations and which should therefore be considered relevant for the purpose of the assessment under Article 17(4)(b) of MAR as amended by the Amending Regulation.

126. This includes communications and press releases on the issuer's website or social media accounts, pre-close calls, communications in the context of the shareholder meeting, advertising and regulatory filings. In addition, ESMA considers that public interviews, roadshows, other public events (e.g. podcasts) and any other communication should be deemed relevant as long as those are delivered by persons perceived as representing the issuer.

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?

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?

4.3 Cross market order book

4.3.1 Background and mandate

127. The new Article 25(a) of MAR establishes a new mechanism for the exchange of order data, aimed at improving the detection and enforcement of cross-border market abuse cases. Effective monitoring of order data is crucial for the surveillance of market activity, and therefore, competent authorities must have access to the relevant data necessary for their supervisory tasks. This mechanism is especially pertinent when dealing with data related to financial instruments traded on trading venues located in another Member State.

128. This mechanism requires an initial setup phase, which involves identifying trading venues that fall within its scope. To ensure proportionality, only those competent authorities overseeing markets with significant cross-border activity are obliged to participate in this mechanism. However, also other Member States with an interest may participate voluntarily to the mechanism.

129. As part of this mechanism, trading venues will be required to share order data concerning financial instruments when requested by a participating NCA. The concept of a trading venue with a "significant cross-border dimension" is introduced to identify relevant participants. Initially, the mechanism will apply to shares, with the exchange of order data for this asset class to be fully operational within 18 months from the date of entry into force of the Amending Regulation. For other asset classes, namely bonds and futures, the mechanism will be extended, with a requirement that it becomes operational within 42 months from the same date. However, to ensure that the mechanism for exchanging order data adapts to developments in financial markets and the capacity of competent authorities

to process new data, the Commission should be empowered to further broaden the scope of instruments whose order data can be exchanged through this mechanism and to potentially postpone the inclusion of bonds and futures, taking into account ESMA's analysis of the deployment of the mechanism, particularly with respect to costs.

130. To operationalize this mechanism, Article 25(a)(5) MAR tasks the Commission with designating participating trading venues based on two key parameters and thresholds. Specifically, the mechanism applies to:

a) trading venues with an annual turnover from shares trading activity of EUR 100 billion or above per year in any of the last 4 years, and
b) trading venues with a cross-border activity above 50%

131. The cross-border activity criterion (point b) above) is defined as the ratio between the turnover of shares where the competent authority of the most relevant market, as defined under Article 26 of Regulation (EU) No 600/2014, differs from that of the trading venue, relative to the total turnover of all shares traded on that venue in a year. This ratio must be determined using the latest available, representative, and comparable data across trading venues. The annual turnover criterion refers to shares trading activity aggregated at the level of each trading venue over the last four calendar years.

132. To assist in determining the initial scope of trading venues with a significant cross-border dimension, the Commission has requested ESMA's technical advice. [26]The request seeks information on the turnover of all trading venues with cross-border activity above 50% and detailed data on their turnover over the past four years. ESMA is also expected to highlight any challenges or data limitations encountered during the preparation of this overview.

133. In providing the technical advice, ESMA will perform the relevant analysis for all years in scope, including data up to 2024. However, to gather feedback from stakeholders, ESMA intends to share with the market the methodology used as well as the results of its preliminary analysis up to 2023. This approach allows market participants to provide input and insights on the methodology before the analysis is finalized with the 2024 data.

4.3.2 Methodology used for the calculation

134. The identification of trading venues falling within the scope of the new mechanism

[26] Section 4.3 of the Request to ESMA for technical advice on the implementation of the amendments to Prospectus Regulation, Market Abuse Regulation and Markets in Financial Instruments Directive II in the context of the Listing Act provides that "To facilitate the identification of trading venues with a significant cross-border dimension, the Commission seeks information from ESMA concerning all trading venues with a cross-border activity above 50% and requests for each of those identified trading venues its turnover over the past four years."

under Article 25(a) MAR relies on data already available in ESMA's FIRDS and FITRS.

135. The analysis focuses on shares, identified through their Classification of Financial Instrument (CFI) Code. Specifically, CFIs starting with 'ES' are considered, where 'E' indicates the category Equity and 'S' refers to the group Shares (Common/Ordinary). It includes all trading venues that report data to ESMA, such as RM, MTF, and OTF, and is conducted at the level of the operating MIC, ensuring a precise assessment of trading venues.

136. The cross-border dimension is computed according to the criteria defined in the Level 1 regulation. Relevant turnovers are those from shares for which the competent authority of the Most Relevant Markets in terms of Liquidity (MRMTL), as determined by the equity annual transparency calculations and referenced in Article 26 of Regulation (EU) No 600/2014, differs from the competent authority of the trading venue itself.

137. The analysis covered the last three calendar years, namely 2021, 2022, and 2023. As of the publication date of this consultation paper, data for the year 2024 is not yet available, and therefore, could not be included in this initial analysis. However, the final report will consider 2024 data as part of the analysis to ensure the full four-year period requested by the European Commission is covered.

138. Based on the data analysis for the years 2021-2023, the trading venues that fall within the scope of the mechanism include two trading venues under the supervision of the Autorité des Marchés Financiers (AMF) in France and two venues under the supervision of the Autoriteit Financiële Markten (AFM) in the Netherlands. The analysis shows that the composition of these venues is stable over the three years reviewed, and therefore it gives a preliminary indication of what could be the trading venues that will be finally in scope.

139. The granular data underpinning the analysis, including detailed information on the trading venues' MIC codes and trading volumes over the past three years, as well as data for 2024 once available, will be included in ESMA's technical advice to the European Commission.

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

5 Technical advice on SME growth markets

5.1 Background and Mandate

140. Article 33 of MiFID II introduced a new category of MTFs labelled SME GMs. The creation of SME GMs under MiFID II is intended to promote access to capital markets for

SMEs and to facilitate the further development of specialist markets that aim to cater for the needs of small and medium-sized issuers.

141. Article 33(3) of MiFID II established the conditions which an MTF shall satisfy when applying to its NCA to be registered as an SME GM. Such conditions encompass several requirements, including a 50% threshold on the minimum number of SMEs issuers traded on the SME GM, appropriate criteria for initial and ongoing admission to trading, sufficient information published as well as appropriate ongoing financial reporting of issuers, dissemination of information to the public and compliance with systems and controls under MAR. An MTF seeking registration as an SME GM should meet such conditions additionally to those already applicable to any MTF under MiFID II.

142. The requirements in Article 33 of MiFID II were further specified in Articles 77 to 79 of CDR (EU) 2017/56527. Those included the criteria to be used by MTFs to (i) identify companies that qualify as SMEs for the purpose of the SME GM label and to (ii) register/deregister as an SME GM.

143. In May 2020 ESMA published a review report on the functioning of the regime for SME GM[28] . In the 2020 Report on SME GMs, ESMA noted that the SME GM regime in the EU appeared relatively successful, with seventeen MTFs registering as SME GMs as of 2020. The report additionally suggested targeted amendments to the SME GM regime in the MiFID II framework, aiming at simplifying investors' access to information and promoting concentration of liquidity on SME GMs.

144. Amongst various proposals included in the Report, ESMA proposed the inclusion in Level 1 of a provision allowing a segment of an MTF to register as an SME GM. ESMA had previously published a Q&A[29] on this matter, clarifying that the operator of an MTF can apply for a segment of the MTF to be registered as an SME GM when the requirements and criteria set out in Article 33 of MiFID II and Articles 77 and 78 of the Commission Delegated Regulation 2017/565 were met by the segment.

145. In the Report on SME GMs, ESMA also suggested to extend the issuer non-objection requirement in Article 33(7) of MiFID II concerning the admission to trading of an instrument already admitted on SME GMs to any trading venue. This proposal was deemed beneficial to reduce risks of liquidity fragmentation.

146. The Listing Act introduces focussed amendments to MiFID II, including the possibility for a segment of an MTF to register as SME GM. Several amendments introduced by the Listing Act need to be further developed in Level 2 regulation. To that end, the European Commission is empowered to adopt delegated acts in accordance with

[27] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0565
[28] https://www.esma.europa.eu/sites/default/files/library/final_report_on_sme_gms_-_mifid_ii.pdf
[29] Q&A 8 of section 5 of ESMA Q&As on MiFID II and marker structure topics, ref. https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_qas_markets_structures_issues.pdf

Article 290 of the Treaty of the Functioning of the European Union. Many of these delegated acts should be adopted within 12 months after entry into force of the Listing Act, i.e. most likely by the end of 2025.

147. In order to develop such delegated acts, the European Commission issued a call for ESMA's technical advice which derives from the European Commission's empowerment under paragraph 8, Article 33 of MiFID II, as amended by the Listing Act. Namely, the European Commission is empowered to adopt delegated acts to further specify the requirements that an MTF, or a segment thereof, must comply with to operate an SME GM, as per Article 33 (3) and (3a) of MiFID II.

148. In this context, the European Commission seeks ESMA's technical advice on how to ensure that these level 2 measures account for two aspects. Namely,

a. the need to maintain high levels of investor protection and confidence in SME GMs while minimising the administrative burdens for issuers on these markets;

b. that the de-registration as an SME GM or the refusal to be registered as such does not simply occur as a result of a temporary failure to comply with the requirements specified in Article 33 (3) and (3a).

149. This CP seeks views from stakeholders on proposed amendments of Articles 78 and 79 of CDR 2017/565 to fulfil the request for technical advice from the EU Commission. Additionally, the CP seeks stakeholders' views on the proposed new Article 78a of CDR 2017/565 which is meant to specify the conditions in amended Article 33(3)(a) of MiFID II. Annex II of this CP includes the EU Commission's request for technical advice on Article 33 of MiFID II and Annex III details the text of Article 33 of MiFID II as amended by the Listing Act.

5.2 Article 78 of CDR 2017/565

150. Article 78 of CDR 2017/565 established the criteria which an MTF should fulfil to register as an SME GM, specifying further the requirements laid down in Article 33(3) of MiFID II.

151. The provisions in Article 78 of CDR 2017/565 aim at striking a balance between the need to maintain high levels of investor protection and to promote investor confidence in SME GMs, while minimising the administrative burdens for issuers traded on such markets.

5.2.1 Analysis

Article 78(1) of CDR 2017/565

152. Article 78(1) of CDR 2017/565 specifies how to calculate the percentage of issuers

that qualify as SMEs to meet the requirement in Article 33(a) of MiFID II that at least 50% of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME GM and each calendar year after.

153. More specifically, Article 78(1) of CDR 2017/565 states that to determine whether the 50% threshold is met, the average ratio of SMEs over the total number of issuers whose financial instruments are admitted to trading on that market should be calculated on 31 December of the previous calendar year. Such average should be calculated as the average of the twelve end-of-month ratios of the relevant year.

154. Additionally, Article 78(1) of CDR 2017/565 states that, without prejudice to the other conditions to be met and specified in Article 33(3) of MiFID II, an MTF applying to become an SME GM without previous operating history should be registered as such and calculations establishing compliance with the 50% threshold should be carried out after three calendar years.

155. With respect to the methodology to be used for the calculation, in the 2015 Final Report, various options were explored. Those included the possibility to calculate if at least 50% of the issuers admitted to trading on the SME GM were SMEs: (a) on a single day, (b) over a period of at least 180 days in the preceding year or (c) on the basis of an average of each month of the previous calendar year.

156. Feedback received at the time from stakeholders indicated that the third option appeared to be the preferred one as it was deemed sufficiently precise.

157. Additionally, with respect to the registration of MTFs without previous operating history it was noted that new markets would not have any issuers and could not possibly meet the 50% criterion. In this sense, markets specifically designed to cater for SME issuers should not be prevented from being granted the SME GM status from the outset and they shall be deemed as meeting the 50% requirement at the time of registration.

158. The requirements in Article 78(1) of CDR 2017/565 on the registration as SME GM 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, as the calculation criteria is based on a full calendar year.

Article 78(2)(a) and (b) of CDR 2017/565

159. Article 78(2)(a) and (b) of CDR 2017/565 establish that (i) to be registered as an SME GM an MTF should have rules which provide for objective and transparent criteria for the initial and ongoing admission to trading of issuers on its venue and that (ii) the operating model of the MTF should be appropriate for its functions and to ensure the maintenance of fair and orderly trading.

160. The current requirements in Article 78(2)(a) and (b) of CDR 2017/565 were established considering the variety of approaches towards initial and ongoing admission to

trading of financial instruments which MTFs targeting SMEs adopted prior to the entry into force of the SME GM regime. In this respect, the 2015 Final Report identified several aspects on which rules were established by existing markets which included, inter alia, rules regarding (i) the issuer management board and (ii) the systems and controls put in place by the issuer.

161. The 2015 Final Report proposed that MiFID should remain neutral with respect to the operating model of an SME GM. It was remarked that a prescriptive approach could result in limited flexibility in the development of SME GMs which often take into account the specificity of the local markets.

162. When considering possible homogenous requirements to be set on initial and ongoing admission to trading, the 2015 Final Report noted that some areas of relevance could be: (i) the appropriateness of an SME GM issuer's management and board to fulfil the responsibilities of a publicly quoted company, (ii) the appropriateness of an SME GM issuer's systems and controls in providing a reasonable basis for it to comply with its continuing obligations under the rules of the market and (iii) the adequacy of an issuer's working capital.

163. With respect to the first two elements, neither MiFID II nor the Prospectus Regulation foresee specific corporate governance requirements for issuers to be admitted to Regulated Markets, and the same holds true with respect to prescriptions regarding internal systems and controls.

164. At the time of the 2015 Final Report, on the basis of the feedback received by stakeholders it was considered that prescribing requirements in relation to corporate governance and systems/controls at the MiFID II level would diminish the flexibility afforded to market operators. It was rather proposed that an NCA should be satisfied that the MTF has in place procedures and rules to ensure that the issuers admitted to trading are appropriate for the SME GM.

165. In the 2020 Report on SME GM, ESMA did not consider it necessary to propose changes to the approach regarding the criteria to be used by MTFs registered as SME GMs for initial and ongoing admission to trading of financial instruments of issuers on the market. Nevertheless, ESMA asked for market participants' views to understand whether it could be appropriate to set out more stringent criteria in this respect and whether it would be beneficial to propose a harmonised approach amongst SME GMs in the EU vis-à-vis their admission to trading conditions.

166. At that stage, feedback from stakeholders indicated that the current regime applicable to SME GMs regarding the initial and ongoing admission to trading of financial instruments was appropriate and did not require any changes. This was reinforced by the view that those markets are characterised by a local dimension and trading venues are best placed to design admission regime requirements and to ensure local market liquidity.

Articles 78(2)(c), (d) and (f) of CDR 2017/565

167. Article 78(2)(c), (d) and (f) of CDR 2017/565 specify further the requirements in Article 33(3)(c) of MiFID II, which aim at ensuring that when an issuer is admitted to trading on an SME GM, there is sufficient information available to the public to enable investors to have an informed judgement regarding a potential investment in the financial instrument.

168. Article 78(2)(c) of CDR 2017/565 requires the MTF seeking registration as an SME GM to establish and apply rules that require issuers seeking admission to trading on the MTF to publish, in cases where Directive 2003/71/EC (hereafter 'Prospectus directive') does not apply, an appropriate admission document, drawn up under the responsibility of the issuer. This document should also clearly state whether or not it has been approved or reviewed and by whom.

169. In this respect it should be noted that Directive 2003/71/EC has been repealed by Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a RM (hereafter 'Prospectus Regulation').

170. Article 78(2)(d) of CDR 2017/565 requires the MTF to establish and apply rules defining the minimum content of the admission document under point (c). Such minimum content should provide sufficient information to investors, enabling them to make an informed assessment of the financial position and prospects of the issuer, and the rights attached to its securities.

171. Article 78(2)(f) of CDR 2017/565 requires that arrangements are made from the SME GM for the admission document to be subject to an appropriate review of its completeness, consistency and comprehensibility.

172. In the 2015 Final Report ESMA noted that, with respect to the requirements on initial information disclosure by issuers, MTFs appeared to take different approaches. Some MTFs preferred to take a 'top-down approach', starting from the requirements embedded in the Prospectus Directive and specifying which of those are disapplied for the SME GM admission document. Other MTFs specified what the minimum content of the admission document should be, providing a list of minimum information to be included.

173. Based on the above ESMA proposed to establish in Level 2 only general principles regarding the content of the admission document, without prescribing specific disclosure requirements. Nevertheless, ESMA noted the importance of ensuring the completeness of the admission document, hence recommending it includes a statement to specify if the document has been reviewed and by whom. The choice not to be prescriptive on who should review the admission document was intended to ensure that the SME GM operator could set the appropriate way of reviewing such document.

174. The 2015 Final Report additionally recommended that, in the context of the review of the admission document, SME GMs should make arrangements to ensure the admission

document meets the minimum disclosure requirements, determining the appropriate arrangements on the basis of its operating model.

175. In the 2020 Report on SME GM, ESMA had sought stakeholder views on the possibility to propose a harmonization of the admission requirements on the information to be disclosed, specifically considering the content of the admission document.

176. Despite stakeholders not supporting the proposal for harmonization, ESMA noted that envisaging a medium-term standardization of requirements across the EU could incentivise the growth of SME GMs and foster cross border investment.

Article 78(2)(e) of CDR 2017/565

177. Article 78(2)(e) of CDR 2017/565 requires the issuer to state, in the admission document referred to under point 78(2)(c) of CDR 2017/565, whether or not, in its opinion, its working capital is sufficient for its present requirements or, if not, how it proposes to provide the additional working capital needed.

178. In the 2015 Final Report ESMA noted that in some instances the Prospectus Directive required a statement by issuers seeking admission to a RM that, in their opinion, the working capital available would be sufficient for their present requirements or, if it is not, how they would propose to provide the additional working capital needed.

179. In this respect, it was considered that the treatment of issuers seeking admission to a RM could be taken as a benchmark to evaluate the appropriate requirements for SME GM issuers. Although it would not be proportionate to impose standards on SME GMs which are more burdensome than those imposed on RMs, imposing sufficient standards on information disclosure can promote confidence in SME GMs and foster investors' participation.

180. Hence, taking into account the feedback from the consultation, it was deemed appropriate to recommend that an issuer on an SME GM includes in its admission document a working capital statement, disclosing whether or not it possesses sufficient working capital (and if not, how additional capital would be provided).

181. In the context of the 2020 Report on SME GM, some stakeholders provided feedback seeking specific alleviations of the information to be disclosed at issuance, and specifically the abolition of the requirement regarding the annual financial reports or statements of working capital. At the time, ESMA noted that such type of alleviation could have counterproductive effects on investments as the proposal could lead to weakened investor protection.

182. It should be noted that the Listing Act has introduced a new type of prospectus, the EU Growth Issuance prospectus. This prospectus is to be used in particular by SMEs or issuers other than SMEs with securities admitted or to be admitted to trading on an SME GM. The EU Growth Prospectus includes a requirement for the issuer to include a

statement on working capital only with respect to shares and not with respect to non-equity instruments. Considering that also the Prospectus Regulation does not include such requirement for instruments other than shares, the requirements for the admission document concerning SME GMs could be aligned.

Article 78(2)(g) of CDR 2017/565

183. Article 33(3)(d) of MiFID II requires that there is appropriate ongoing periodic financial reporting by the issuer. This is further detailed in Article 78(2)(g) of CDR 2017/565, which requires the issuer whose securities are traded on the SME GM to publish annual reports within 6 months after the end of each financial year, and half year reports within 4 months after the end of the first 6 months of each financial year. An issuer that has no equity instruments traded on the MTF can be exempted to publish half-year reports.

184. In the 2020 Report on SME GM, ESMA consulted on the possibility to standardise the format of the periodic financial information. All respondents were against this measure. Most respondents argued that such standardisation would likely represent a burden for SMEs and would not increase benefits. In the respondent's view, SME GMs are likely to remain a local reality: investment in SME securities is related to local information and direct knowledge of the company. Furthermore, some respondents argued that a harmonization process which is not tailored to local markets conditions would not be beneficial.

185. Accordingly, ESMA did not recommend an immediate Level 1 amendment, but encouraged the European Commission to take into account a potential harmonisation of requirements for SME issuers in the context of the discussion on the establishment of the ESAP as recommended by the High-Level Forum. ESMA noted that it would have been beneficial for SMEs to use the ESAP to disseminate information in a standardised format to provide investors with information which is easily accessible across the EU.

186. In November 2023, ESMA and EBA published a joint Consultation Paper (CP) proposing Draft Implementing Technical Standards specifying certain tasks of collection bodies and certain functionalities of the European single access point under Regulation (EU) 2023/2859 (hereafter CP on ESAP tasks and functionalities). In this CP, it was proposed that SMEs traded on an SME GM would use the ESAP to disclose some of the information they are required to produce as per Article 33 of MiFID II.

187. More specifically, the specified information that SMEs traded on an SME GM should disclose through the ESAP includes: (i) the Prospectus - Article 33(3)(c) of MiFID II; (ii) annual financial reports - Article 33(3)(d) of MiFID II; (iii) SME regulatory information concerning the issuer - Article 33(3)(f) of MiFID II and (iv) SME transfer of ownership - Article 46(2) of MiFID II. ESMA notes that a possible harmonization of the format of publication of such documents could be evaluated at a later stage.

188. ESMA observes that Article 78(2)(g) of CDR 2017/565 requires issuers to publish financial reports annually (and additionally half yearly in case of equity issuances) but does

not include a requirement that such reports should be subject to an audit. ESMA notes that including a requirement for the financial reports to be subject to an audit could foster investor confidence in SME GMs and create an incentive to invest in the financial instruments traded on those markets.

Article 78(2)(h) and (i) of CDR 2017/565

189. Article 33(3)(f) of MiFID II requires that regulatory information concerning the issuers on the market is stored and disseminated to the public. Article 78(2)(h) of CDR 2017/565 further specifies that the MTF should ensure that prospectuses, admission documents, financial reports and information defined in Article 7(1) of MAR which is publicly disclosed by the issuers whose securities are traded on its venue, is made public on the SME GM website, or through a direct link to the page of the website of the issuers where such documents, reports and information are published.

190. Article 78(2)(i) of CDR 2017/565 states that the information made available under point (h) of the same article remains available for at least 5 years. If a link is provided, such link should remain available for 5 years.

191. In the 2020 Report on SME GMs, ESMA had proposed the possibility to make financial reports concerning the issuers admitted to trading on the SME GM publicly available up to one year before such issuers are admitted to trading. The feedback received was opposing the proposal to make historical information available as in most of the cases it does not exist.

5.2.2 Proposals

Article 78(1) of CDR 2017/565

192. The methodology envisaged in Article 78(1) of CDR 2017/565 appears suited for the calculation of the number of issuers qualifying as SMEs to meet the 50% criterion set in Level 1. ESMA has no evidence suggesting that this provision should be revised.

193. Considering the case of a segment of an MTF applying to register as an SME GM, the methodology for the calculation does not appear to pose challenges. In this sense, ESMA does not believe specific advice should be given to amend Article 78(1) of CDR 2017/565.

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.

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.

Articles 78(2)(a) and (b) of CDR 2017/565

194. ESMA notes that SME GMs are characterised by a local dimension and to ensure their development it appears beneficial to grant MTFs sufficient flexibility when establishing SME GMs. In this respect, the feedback ESMA received from stakeholders in the context of the 2020 Report on SME GM highlighted that the current rules appear sufficiently flexible to be tailored to the specificities of the local market.

195. Considering the above, ESMA does not propose the specification of more prescriptive requirements with respect to Articles 78(2)(a) and (b) of CDR 2017/565 regarding the criteria for the initial and ongoing admission to trading of issuers on the venue and for the operating model of the MTF. In this sense, ESMA deems that NCAs are best placed to assess if the rules applicable to the MTF applying to register as an SME GM ensure transparency and objectivity in admission to trading and sufficiently promote the objectives of fair and orderly trading. No further adaptation appears necessary for the registration of a segment.

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.

Articles 78(2)(c), (d) and (f) of CDR 2017/565

196. As discussed above, the requirements specified in Article 78(2)(c), (d) and (f) of CDR 2017/565 aim at ensuring that when an issuer is admitted to trading on an SME GM there is sufficient information available to the public to enable investors to have an informed judgement regarding a potential investment in the financial instrument.

197. As discussed in the 2020 Report on SME GMs, ESMA remarks that, in the medium term a standardisation of requirements across the EU regarding the information to be included in the admission document could incentivise the growth of SME GMs and foster cross border investment.

198. Nevertheless, considering the aim of the Listing Act to minimise the administrative burdens for the issuers on those markets, at the current stage ESMA does not propose amendments in this direction. No further adaptation appears necessary for the registration of a segment.

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.

Article 78(2)(e) of CDR 2017/565

199. Article 78(2)(e) of CDR 2017/565 requires the issuer to state, in the admission document referred to under point 78(2)(c) of CDR 2017/565, whether or not, in its opinion,

its working capital is sufficient for its present requirements or, if not, how it proposes to provide the additional working capital needed.

200. As discussed in the previous section, ESMA proposes to align this requirement with the Prospectus Regulation and the new Growth Issuance prospects, by amending Article 78(2)(e) to specify that the statement regarding the working capital should be applicable only in case of share issuances and not in case of issuance of securities other than shares.

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.

Article 78(2)(g) of CDR 2017/565

201. As discussed above, Article 33(3)(d) of MiFID II requires the issuer to have appropriate ongoing periodic financial reporting. Article 78(2)(g) of CDR 2017/565 specifies further the financial information SME GM issuers should disclose.

202. As noted in the previous section, Article 78(2)(g) of CDR 2017/565 requires issuers to publish financial reports but does not include a requirement that such reports should be subject to audits. ESMA deems it beneficial to propose the introduction of a requirement stating that the published financial reports shall be subject to audits. Despite such requirement would impose a further obligation on issuers, ESMA believes it would entail positive effects in terms of enhancing investors' confidence in SME GMs.

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?

Article 78(2)(h) and (i) of CDR 2017/565

203. Article 33(3)(d) of MiFID II requires either the publication on the website of the MTF or the provision of the link to the page of the website of the issuers where certain documents are published, namely the prospectus, the admission document, the financial reports and the information defined in Article 7(1) of MAR which is publicly disclosed by the issuer. Article 78(20(h) and (i) define how such information should be publish by the MTF and how long records should stay available.

204. ESMA believes that this requirement ensures immediate access to information which is relevant to investors and for this reason, should not be amended. No further adjustment seems necessary for the registration of segments.

Q22: Do you agree with the proposal not to modify Articles 78(2)(h) and (i) of CDR 2017/565? Please elaborate.

5.3 New Article 78a of CDR 2017/565

5.3.1 Analysis

205. Article 33(3a) of MiFID II requires that for a segment of the MTF to be registered as 'SME growth market':(i) the segment should be clearly separated from the other market segments operated by the MTF operator – Article 33(3a)(a) of MiFID II; (ii) the transactions made on the specific SME GM segment should be clearly distinguished from other market activity within the other segments of the MTF – Article 33(3a)(b) of MiFID II; and (iii) if requested by the NCA the MTF shall provide a comprehensive list of the instruments listed on the SME growth market segment and any further information – Article 33(3a)(c) of MiFID II.

206. In order to specify further the three requirements, set out in Article 33(3a) of MiFID II, ESMA proposes to add a new Article 78a to CDR 2017/565. In this context, to meet the first and second requirement, ESMA proposes that the market identification code to use to ensure clear separation should be a segment MIC under ISO 20022. Having a unique identification code for the segment allows to meet the conditions in Article 33(3a). ESMA notes that nevertheless nothing prevents an SME GM to additionally assign internal dedicated codes to instruments or segments on top of the required standards, i.e. ISIN and ISO 20022 segment MIC. The segment MIC under ISO 20022 would ensure that transactions on the specific SME GM segment are clearly distinguished, and it would be used for the different reporting purposes, including transaction reporting, disclosure of trade transparency information as well as the submission of data to the CTP.

207. With respect to the third requirement, ESMA understands that NCAs might request different information depending on the rationale of the request. However, it is suggested that there is a minimum level of information that could be provided from the SME GM segment, namely, the ISIN of the share and/or bond, the full name and the MIC of the SME GM segment. This standardised information should be considered as a minimum to be provided, whilst nothing prevents the MTF to enrich the data delivered with internal codes assigned to instruments or trading systems or any additional information considered to be relevant.

5.3.2 Proposals

208. In order to ensure that a segment of an MTF meets the requirements in Articles 33(3a)(a) and (b) of MiFID II, ESMA proposes to require that as a minimum, the relevant segment is attributed a dedicated segment MIC under ISO 20022 which is then assigned to the transactions executed on that MIC.

209. Furthermore, each segment SME GM can then assign additional internal codes to instruments or further segments on top of the standards (ISIN and ISO 20022 segment MIC) required.

Q23: Do you agree with the proposals to meet the first and the second requirements under Article 33(3a) (a) and (b)? Please explain.

210. With respect to the requirement in Article 33(3a) (c) of MiFID II, ESMA proposes that the MTF should provide as minimum (i) the ISIN of the shares traded on the SME GM segment, (ii) the full name of the shares and (iii) the segment MIC of the SME GM. Nevertheless, nothing prevents the trading venue to complement such information with any other relevant information.

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

5.4 Article 79 of CDR 2017/565

5.4.1 Analysis

211. Article 79 of CDR 2017/565 established the criteria for the deregistration of an SME GM both in case of the SME GM failing to comply with the 50% SME issuers criterion for three calendar years and with any of the further criteria in Article 33(3)(b) to (g) of MiFID II.

5.4.2 Proposals

212. Considering that those provisions are related to the SME GM in general, no adaptation seems necessary for SME GMs being organised on a segment. Therefore, ESMA does not propose specific amendments to this article.

213. Additionally, ESMA notes 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 in Article 33 of MiFID II, as deregistration happens if the 50% threshold is not met for three consecutive years.

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

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 in Article 33 of MiFID II? Please explain.

Annexes

6.1. Annex I - Summary of questions

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

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

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?

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?

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?

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?

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?

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?

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?

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

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?

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?

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?

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?

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

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.

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.

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.

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.

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.

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?

Q22: Do you agree with the proposal not to modify Articles 78(2)(h) and (i) of CDR 2017/565? Please elaborate.

Q23: Do you agree with the proposals to meet the first and the second requirements under Article 33(3a) (a) and (b)? Please explain.

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

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

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?

6.2. Annex II – European Commission mandate to provide technical advice on the implementation of the amendments to Market Abuse Regulation and on the implementation of the amendments to MiFID II in relation to SME Growth Markets in the context of the Listing Act

Annex II only refers to the Market Abuse Regulation components of the mandate and to the MiFID II components of the mandate that relate to SME Growth Markets. Namely, items 4.1. – 4.3. and 5.1. of the mandate.

6.2.1 Disclosure of inside information

The Listing Act amends the disclosure obligation laid down in Article 17(1) MAR in the context of "protracted processes" with a view to reducing regulatory burden for issuers and increasing legal certainty while ensuring an appropriate level of investor protection and market integrity.

The Listing Act sets out that:

- the obligation for an issuer to inform the public as soon as possible of inside information which directly concerns that issuer shall not apply to inside information related to intermediate steps in a protracted process as referred to in Article 7(2) and (3) of MAR where those steps are connected with bringing about or resulting in particular circumstances or in a particular event;

- in a protracted process only the final circumstances or final event shall be required to be disclosed, as soon as possible after they have occurred.

Recital (67) specifies the rationale behind such amendment. It highlights that the requirement to disclose inside information aims, primarily, to enable investors to take well-informed decisions and that when information is disclosed at a very early stage and is of a preliminary nature, it might mislead investors, rather than contribute to efficient price formation and address information asymmetry.

As the exact identification of the moment when an event becomes final is not always straightforward, and in order to enable the issuer to identify the moment when disclosure of information is required, the Listing Act empowers the Commission to adopt delegated acts to set out and review, where necessary:

- a non-exhaustive list of final events in protracted processes; and

- for each event, the moment when it is deemed to have occurred and shall be disclosed pursuant to Article 17(1) MAR.

With the present mandate, ESMA is invited to provide technical advice on the establishment of a non-exhaustive list of final events in protracted processes as well as on the identification of the moment when each of those final events is deemed to have occurred.

- ESMA should compile a list of protracted processes which are deemed to give rise to

inside information. While the list is non-exhaustive, ESMA should strive to ensure that it is as comprehensive as possible, capturing different types of protracted processes, such as those related to the issuer's corporate governance, capital structure, financial results and business strategy. For each identified protracted process, ESMA should indicate the final circumstances or final event and the moment when they are deemed to have occurred. In doing so, ESMA should take into consideration the examples already included in recital (67) with a view to applying the same approach also to other protracted processes. In the case of a merger, disclosure should be made as soon as possible after the management has taken the decision to sign off on the merger agreement, once the core elements of the merger have been agreed upon. In general, for contractual agreements the final event should be deemed to have occurred when the core conditions of that agreement have been agreed upon.

- ESMA should give due consideration to the functioning of the new disclosure regime. Under the current MAR regime, ongoing negotiations may allow an issuer to delay disclosure of inside information where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure, as in this case disclosure may prejudice the legitimate interest of the issuer (see recital 50 of MAR). Under the future MAR regime, as clarified in recital (67) of the Listing Act, disclosure should not cover "*announcements of mere intentions, ongoing negotiations or, depending on the circumstances, the progress of negotiations (such as a meeting between company representatives)*". This should be read in conjunction with the new Article 17(1) according to which the requirement to disclose does not apply to inside information relating to intermediate steps in a protracted process where those steps are connected with bringing about or resulting in particular circumstances or in a particular event. In consequence, under the future MAR regime, issuers should no longer need to resort to delay of disclosure in order to avoid that public disclosure affects the outcome or normal pattern of the negotiations (once the final event has occurred, an issuer may resort to delay of disclosure provided that all conditions under Article 17(4) are met).

- The list should also give consideration to price sensitive interventions by regulators that at the same time pursue public interest objectives. For example, the Commission's attention has been drawn to the specific considerations that need to be taken into account when dealing with the recovery and resolution of a failing bank under the Bank Recovery and Resolution Directive [30] (BRRD) / Single Resolution Mechanism Regulation[31] (SRMR) and the need to protect financial stability in those circumstances. Acknowledging that the recovery and resolution process is sequential and follows interim steps, ESMA is expressly encouraged to consult the EBA on how to best reflect this protracted process and determine timely triggers for disclosure, while meeting the objectives of MAR and BRRD or similar third-country crisis management frameworks.

[30] Directive 2014/59/EU of the European Parliament and of the Council.
[31] Regulation (EU) No 806/2014 of the European Parliament and of the Council.

- When compiling the list of final events in protracted processes, ESMA is invited to take into account, where relevant, similar lists that have already been developed by EU national competent authorities or in major jurisdictions outside the Union.

6.2.2. Conditions to delay disclosure of inside information

While reducing the scope of the disclosure obligation in the context of protracted processes, the Listing Act acknowledges that there may still be instances where an issuer may have a legitimate interest to delay disclosure of inside information once the final event has occurred, provided that certain conditions are met.

With a view to reducing regulatory burden for issuers and enhancing legal clarity, the Listing Act amends Article 17(4)(1)(b) to replace the condition according to which disclosure of inside information may be delayed provided that the public is not likely to be misled with a new condition according to which the inside information that the issuer intends to delay "*is not in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers*".

This means that, under the amended regime:

- the assessment should be limited to public announcements or other types of communication by the issuer; and

- for the purpose of assessing whether disclosure can be delayed, the issuer should compare the inside information that the issuer intends to delay with the content of the latest previous public announcement or other type of communication by the issuer concerning the same matter. In case the two are in contrast, disclosure cannot be delayed.

Article 17(12) of MAR, as amended by the Listing Act, empowers the Commission to adopt a delegated act to set out and review, where necessary, a non-exhaustive list of situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or the emission allowance market participant on the same matter to which the inside information refers to.

ESMA is invited to provide technical advice on the development of such list. ESMA should in particular provide a list of examples where it is deemed that there is a contrast between the inside information that the issuer intends to delay and the latest public announcement or other types of communication by the issuer on the same matter to which the inside information refers.

- ESMA should give due consideration to the fact that, for the purpose of assessing whether disclosure can be delayed, the amended provision limits the scope of the assessment:

    - to the latest public announcement/communication by the issuer and

- only to announcements/communications that concern the same matter to which the inside information refers.

These two references aim to ensure that the assessment performed by the issuer takes into account previous announcements/communications by the issuer that are still capable of influencing expectations in relation to the price of financial instruments.

- ESMA should strive to identify a comprehensive list of "other types of communication by the issuer" that are relevant for the purpose of assessing whether disclosure can be delayed. In doing so, ESMA should take into account only communications by the issuer that may generate/influence market expectations.

- When developing the list of examples, ESMA should also take into account that the amended provision only refers to situations where there is a contrast between the inside information that the issuer intends to delay and the latest public announcement or other types of communication by the issuer on the same matter to which the inside information refers. This means that the existence of a mere difference between the two does not necessarily lead to the conclusion that disclosure cannot be delayed.

- Finally, and on a more general note, ESMA should give consideration to the exceptional nature of delays under the amended MAR disclosure regime.

6.2.3. Mechanism to exchange order data

Article 25(a) MAR establishes a new mechanism to exchange order data for the purpose of detecting and enforcing cases of cross-border market abuse. The initial set-up requires an identification of trading venues that fall in the scope of application of the mechanism. Those trading venues will have to share order data on financial instruments upon request of a participating NCA. For that purpose, the concept of a trading venue with a "significant cross-border dimension" is introduced. In its initial design stage, the mechanism is confined to share instruments, however, its scope may be extended to bonds and derivatives in the future.

To operationalise the mechanism, the Commission, pursuant to Article 25(a)5 MAR, has been tasked to designate participating trading venues, subject to two parameters and based on two narrowly framed thresholds. To capture the most relevant venues, only trading venues with annual turnover from shares trading activity of EUR 100bn or above fall in the scope of the mechanism. Furthermore, only venues that host 50% of trading in shares registered by another competent authority form part of the mechanism.

To facilitate the identification of trading venues with a significant cross-border dimension, the Commission seeks information from ESMA concerning all trading venues with a cross-border activity above 50% and requests for each of those identified trading venues its turnover over the past four years. The criterion of cross-border activity is defined as the ratio between the turnover in shares for which the competent authority of the most relevant market referred to in Article 26 of Regulation (EU) No 600/2014 differs from the competent authority of the trading

venue and the total turnover in all shares traded. The ratio shall be determined based on latest available information that is representative and comparable across trading venues. Concerning the criterion of annual turnover, the turnover shall refer to shares trading activity aggregated at the level of the trading venue and shall consider the last four calendar years, namely 2021, 2022, 2023 and 2024. ESMA should flag any challenges or data limitations it may have encountered while drawing up the overview.

6.2.4 MTF or segment of an MTF to be registered as an SME Growth Market

The SME growth market category was introduced by MiFID II to increase the visibility and profile of markets specialised in SMEs and to foster the development of common regulatory standards in the Union of markets specialised in SMEs.

To foster the development of such specialised markets and to limit the organisational burden on operators of multilateral trading facilities (MTFs), the Listing Act amends Article 33(1) of MiFID II specifying that the operator of an MTF may apply to its home competent authority to have the MTF, or a segment of that MTF, be registered as an SME growth market, subject to certain conditions. It also describes the conditions in relation to a segment of the MTF, under Article 33(3a). The Listing Act empowers the Commission to adopt delegated acts to supplement MiFID II by further specifying the requirements under Articles 33.3 and 33.3a of MiFID II.

The Commission invites ESMA to provide technical advice for the development of the delegated act to ensure that any such requirements necessary for an MTF or a segment thereof to be registered as an SME growth market minimise the administrative burdens for the issuers on those markets while taking into account the need to maintain high levels of investor protection and confidence in those markets.

In its technical advice, ESMA is also requested to ensure that the above-mentioned requirements take into account that any refusal of registration or any de-registration of an MTF or a segment of an MTF on a SME growth market does not simply occur due to temporary failure of compliance with conditions laid down in paragraph 3, point (a), of Article 33.

6.3. Annex III – Relevant provisions of Market Abuse Regulation and of MiFID II as amended by the Listing Act

The changes to the relevant provisions are highlighted in light-blue.

6.3.1. Article 17 of MAR as amended by the Amending Regulation

Article 17

Public disclosure of inside information

1. An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer. That requirement shall not apply to inside information related to intermediate steps in a protracted process as referred to in Article 7(2) and (3) where those steps are connected with bringing about or resulting in particular circumstances or a particular event. In a protracted process, only the final circumstances or final event shall be required to be disclosed, as soon as possible after they have occurred.

The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council (1). The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly.

This Article shall apply to issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State

1a. An issuer shall ensure the confidentiality of the information which meets the criteria of inside information as referred to in Article 7 until such time as that information is disclosed pursuant to paragraph 1 of this Article.

2. An emission allowance market participant shall publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business, including aviation activities as specified in Annex I to Directive 2003/87/EC or installations within the meaning of Article 3(e) of that Directive which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part. With regard to installations, such disclosure shall include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations.

The first subparagraph shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent and, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold.

The Commission shall be empowered to adopt delegated acts in accordance with Article 35 establishing a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input for the purposes of the application of the exemption provided for in the second subparagraph of this paragraph.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 35 specifying the competent authority for the notifications of paragraphs 4 and 5 of this Article.

4. An issuer or an emission allowance market participant~~,~~ may, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

(a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

~~*(b) delay of disclosure is not likely to mislead the public;*~~

(b) the inside information that the issuer or emission allowance market participant intends to delay is not in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers

(c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

~~*In the case of a protracted process that occurs in stages and that is intended to bring about, or that results in, a particular circumstance or a particular event, an issuer or an emission allowance market participant may on its own responsibility delay the public disclosure of inside information relating to this process, subject to points (a), (b) and (c) of the first subparagraph.*~~

Where an issuer or emission allowance market participant has delayed the disclosure of inside information under this paragraph, it shall inform the competent authority specified under paragraph 3 that disclosure of the information was delayed and shall provide a written explanation of how the conditions set out in this paragraph were met, immediately after the information is disclosed to the public. Alternatively, Member States may provide that a record of such an explanation is to be provided only upon the request of the competent authority specified under paragraph 3.

By way of derogation from the second subparagraph of this paragraph, an issuer whose financial instruments are admitted to trading only on an SME growth market shall provide a written explanation to the competent authority specified under paragraph 3 only upon request.

As long as the issuer is able to justify its decision to delay, the issuer shall not be required to keep a record of that explanation.

4a. Non-disclosure by an issuer of inside information related to intermediate steps in protracted processes, in accordance with paragraph 1, is not subject to the requirements laid down in paragraph 4.

5. ~~In order to preserve the stability of the financial system, a~~ An issuer that is a credit institution or a financial institution or an issuer that is a parent undertaking of such an institution, may, on its own responsibility, delay the public disclosure of inside information, including information which is related to a temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort, provided that all of the following conditions are met:

(a) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;

(b) it is in the public interest to delay the disclosure;

(c) the confidentiality of that information can be ensured; and

(d) the competent authority specified under paragraph 3 has consented to the delay on the basis that the conditions in points (a), (b) and (c) are met.

6. For the purposes of points (a) to (d) of paragraph 5, an issuer shall notify the competent authority specified under paragraph 3 of its intention to delay the disclosure of the inside information and provide evidence that the conditions set out in points (a), (b) and (c) of paragraph 5 are met. The competent authority specified under paragraph 3 shall consult, as appropriate, the national central bank or the macro-prudential authority, where instituted, or, alternatively, the following authorities:

(a) where the issuer is a credit institution or an investment firm the authority designated in accordance with Article 133(1) of Directive 2013/36/EU of the European Parliament and of the Council (1);

(b) in cases other than those referred to in point (a), any other national authority responsible for the supervision of the issuer.

The competent authority specified under paragraph 3 shall ensure that disclosure of the inside information is delayed only for a period as is necessary in the public interest. The competent authority specified under paragraph 3 shall evaluate at least on a weekly basis whether the conditions set out in points (a), (b) and (c) of paragraph 5 are still met.

If the competent authority specified under paragraph 3 does not consent to the delay of disclosure of the inside information, the issuer shall disclose the inside information immediately.

This paragraph shall apply to cases where the issuer does not decide to delay the disclosure of inside information in accordance with paragraph 4.

Reference in this paragraph to the competent authority specified under paragraph 3 is without prejudice to the ability of the competent authority to exercise its functions in any of the ways referred to in Article 23(1).

7. Where disclosure of inside information has been delayed in accordance with paragraph 4 or 5, or where inside information relating to intermediate steps in a protracted process has not been disclosed in accordance with paragraph 1, and the confidentiality of that inside information is no longer ensured, the issuer or the emission allowance market participant shall disclose that inside information to the public as soon as possible.

This paragraph includes situations where a rumour explicitly relates to inside information the disclosure of which has been delayed in accordance with paragraph 4 or 5, or to inside information related to intermediate steps in a protracted process that has not been disclosed in accordance with paragraph 1, where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured.

8. Where an issuer or an emission allowance market participant, or a person acting on their behalf or for their account, discloses any inside information to any third party in the normal course of the exercise of an employment, profession or duties as referred to in Article 10(1), they must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure, and promptly in the case of a non-intentional disclosure. This paragraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association, or on a contract.

9. Inside information relating to issuers whose financial instruments are admitted to trading on an SME growth market, may be posted on the trading venue's website instead of on the website of the issuer where the trading venue chooses to provide this facility for issuers on that market.

10. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine:

(a) the technical means for appropriate public disclosure of inside information as referred to in paragraphs 1, 2, 8 and 9; and

(b) the technical means for delaying the public disclosure of inside information as referred to in paragraphs 4 and 5.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

11. ESMA shall issue guidelines to establish a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in ~~point (a) of~~ paragraph 4, first subparagraph, point (a) ~~and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in point (b) of paragraph 4~~.

12. The Commission shall be empowered to adopt a delegated act to set out and review, where necessary, a non-exhaustive list of the following:

(a) final events or final circumstances in protracted processes and, for each event or circumstance, the moment when it is deemed to have occurred and is to be disclosed pursuant to paragraph 1;

(b) situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers, as referred to in paragraph 4, first subparagraph, point (b).

6.3.2. Article 33 of MiFID II as amended by the Listing Act Directive

Articles 33

SME Growth Markets

1. Member States shall provide that the operator of an MTF may apply to its home competent authority to have the MTF, or a segment thereof, registered as an SME growth market.

2. Member States shall provide that the home competent authority may register the MTF, or a segment thereof, as an SME growth market if the competent authority receives an application as referred to in paragraph 1 and is satisfied that the ~~requirements~~ conditions set out in paragraph 3 are complied with in relation to the MTF, or that the conditions in paragraph 3a are complied with in relation to a segment of the MTF.

3. Member States shall ensure that MTFs are subject to effective rules, systems and procedures which ensure that the following is complied with:

(a) at least 50 % of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market and in any calendar year thereafter;

(b) appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market;

(c) on initial admission to trading of financial instruments on the market there is sufficient information published to enable investors to make an informed judgment about whether or not to invest in the financial instruments, either an appropriate admission document or a prospectus if the requirements laid down in Directive 2003/71/EC are applicable in respect of

a public offer being made in conjunction with the initial admission to trading of the financial instrument on the MTF;

(d) there is appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market, for example audited annual reports;

(e) issuers on the market as defined in point (21) of Article 3(1) of Regulation (EU) No 596/2014, persons discharging managerial responsibilities as defined in point (25) of Article 3(1) of Regulation (EU) No 596/2014 and persons closely associated with them as defined in point (26) of Article 3(1) of Regulation (EU) No 596/2014 comply with relevant requirements applicable to them under Regulation (EU) No 596/2014;

(f) regulatory information concerning the issuers on the market is stored and disseminated to the public;

(g) there are effective systems and controls aiming to prevent and detect market abuse on that market as required under the Regulation (EU) No 596/2014.

3a. Member States shall ensure that the relevant segment of the MTF is subject to effective rules, systems and procedures which ensure that the conditions set out in paragraph 3 and all of the following conditions have been complied with:

(a) the segment of the MTF registered as 'SME growth market' is clearly separated from the other market segments operated by the investment firm or market operator operating the MTF, which is, inter alia, indicated by a different name, different rulebook, different marketing strategy, and different publicity, as well as a specific allocation of the market identification code to the segment registered as SME growth market segment;

(b) the transactions made on the SME growth market segment concerned are clearly distinguished from other market activity within the other segments of the MTF;

(c) upon the request of the competent authority of the home Member State of the MTF, the MTF shall provide a comprehensive list of the instruments listed on the SME growth market segment concerned, as well as any information on the operation of the SME growth market segment that the competent authority may request.

~~*4. The criteria in paragraph 3 are without prejudice to compliance by the investment firm or market operator operating the MTF with other obligations under this Directive relevant to the operation of MTFs. They also do not prevent the investment firm or market operator operating the MTF from imposing additional requirements to those specified in that paragraph.*~~

4. Compliance by the investment firm or market operator operating the MTF, or a segment thereof, with the conditions laid down in paragraphs 3 and 3a is without prejudice to compliance by that investment firm or market operator with other obligations under this Directive relevant to the operation of MTFs. Without prejudice to paragraph 7, the investment firm or market operator operating the MTF, or a segment thereof, may impose additional conditions.

5. Member States shall provide that the ~~home~~ competent authority of the home Member State of an MTF may deregister an MTF, or a segment thereof, as an SME growth market in any of the following cases:

(a) the investment firm or market operator operating the ~~market~~ MTF, or a segment thereof, applies for its deregistration;

(b) the ~~requirements~~ conditions in paragraph 3 or 3a are no longer complied with in relation to the MTF, or a segment thereof.

6. Members States shall require that if a ~~home~~ competent authority of the home Member State of an MTF registers or deregisters an MTF, or a segment thereof, as an SME growth market under this Article, that authority shall as soon as possible notify ESMA of that registration or deregistration. ESMA shall publish on its website a list of SME growth markets and shall keep that list up to date.

7. Member States shall require that where a financial instrument of an issuer is admitted to trading on one SME growth market, the financial instrument may also be traded on another ~~SME growth market~~ trading venue only where the issuer has been informed and has not objected. ~~In such a case however~~ Where the other trading venue is another SME growth market or a segment of an SME growth market, the issuer shall not be subject to any obligation relating to corporate governance, or initial, ongoing or ad hoc disclosure, with regard to ~~the latter~~ that other SME growth market. Where the other trading venue is not an SME growth market, the issuer shall be informed of any obligation to which the issuer will be subject that relates to corporate governance, or initial, ongoing or ad hoc disclosure, with regard to the other trading venue. ESMA shall develop guidelines by 5 June 2026 with respect to the procedures for informing issuers and to the process for lodging objections, as well as the relevant timelines.

8. The Commission is empowered to adopt delegated acts in accordance with Article 89 to supplement this Directive by further specifying the ~~requirements~~ conditions laid down in paragraphs 3 and 3a of this Article. ~~The measures~~ Those conditions shall take into account the need to maintain high levels of investor protection in order to promote investor confidence in those markets, while minimising the administrative burdens for issuers on the market. They shall also take into account ~~and~~ that de-registrations ~~do~~ are not to occur nor ~~shall~~ are registrations to be refused merely because of a temporary failure to comply with the ~~requirement~~ condition laid down in paragraph 3, point (a), of this Article.

6.4. Annex IV – Proposed Delegated Act

COMMISSION DELEGATED REGULATION (EU) …/...

of XXX

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council by establishing a non-exhaustive list of final events or final circumstances to be disclosed in a protracted process and of the relevant moment for disclosure, and of situations in which the inside information whose disclosure is intended to be delayed is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (1), and in particular Article 17 thereof

Whereas:

(1) Pursuant to Article 17(12) of Regulation (EU) 596/2014, the Commission is empowered to adopt a delegated act establishing a non-exhaustive list of final events or final circumstances in protracted processes and, for each event or circumstance, the moment when it is deemed to have occurred and is to be disclosed pursuant to Article 17(1) of Regulation (EU) 596/2014;

(2) The list should facilitate the issuer's identification of the moment when disclosure of the inside information is required in case of protracted processes pursuant to Article 17(1) of Regulation (EU) 596/2014. For this purpose, the list of final events or circumstances and relevant moments of disclosure should be as extensive as possible, by including the most frequent processes the issuer is subject to.

(3) The list of protracted process should refer to processes and to the corresponding final events or circumstances in a generic way, in order to include more specific

processes and accommodate Member States' specificities regarding the applicable regime. When using the list, issuers should consider the processes included in the list and the relevant moment for disclosure in light of all the relevant national provisions, including corporate and insolvency law, as well as rules governing judicial or administrative proceedings.

(4) The list should be read in light of all the relevant provisions of Regulation (EU) 596/2014. This includes the definition of inside information in Article 7 of Regulation (EU) 596/2014, the obligation to disclose the information as soon as possible contained in the first paragraph of Article 17(1) and the possibility to delay the disclosure pursuant to Article17(4) of the same Regulation.

(5) Consequently, whenever the information relating to the final events or circumstances listed in this delegated act does not qualify as inside information pursuant to Article 7 of Regulation (EU) 596/2014, the relevant final event or circumstance is not subject to the disclosure obligations pursuant to Article 17(1) of (EU) Regulation 596/2014.

(6) Whenever an issuer considers that public disclosure of inside information relating to a final event or circumstance would prejudice its legitimate interest, the issuer may delay the disclosure of the final event in accordance with Article 17(4) of (EU) Regulation 596/2014, provided that all the other conditions therein contained are met.

(7) The list of protracted process includes some specific processes provided in relation to credit institution's recovery and resolution. However, recovery and early interventions measures foreseen under the Directive 2014/59/EU may correspond to processes foreseen in the list of protracted processes for all issuers. In such case, credit institutions can refer to the relevant part of the list processes to identify when to disclose the relevant of the recovery or of the early intervention measure.

(8) Given the non-exhaustive nature of the list, the identification of inside information in respect to final events or circumstances of protracted processes not listed in the present delegated act remains an issuer's case-by case assessments. In those cases, the issuer remains responsible to identify the final event or the final circumstance and, for each event or circumstance, the moment when it is deemed to have occurred and is to be disclosed. The issuer is expected to be able to provide a justification regarding the identification the final event or the final circumstance and the relevant moment of disclosure upon the request of the competent authority to demonstrate compliance with Article 17(1) of EU regulation 596/2014.

(9) Pursuant to Article 17(12) of Regulation (EU) No 596/2014, the Commission is empowered to adopt a delegated act establishing a non-exhaustive list of situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers. The list is intended to provide legal certainty to issuers which should use it for the purpose of assessing whether there is a contrast between the inside information that is intended to be delayed and the latest

public announcement or other types of communication by the issuers. For the purpose of such an assessment, the issuer should only consider its latest announcement or communication on the subject matter unless a clear conclusion about the message conveyed by the issuer to the public cannot be drawn exclusively on the basis of the latest communication or announcement. In that case, the issuer should also take into account other previous announcements.

(10) Announcements and other types of communication should encompass a broad spectrum of messages and signals conveyed to the public by the issuer and, for that purpose, this delegated act provides a comprehensive list of all types of communication that issuers should take into account in their assessment.

(11) While the list of situations where there is a contrast between the inside information and the latest public announcement or communication covers the most common cases where a contrast may materialize, this is intended to be non-exhaustive and therefore other situations non listed in this delegated act may give rise to a contrast. Consequently, for the cases non included in the list, issuers should conduct a case-by-case assessment.

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation establishes, pursuant to Article 17(12) of Regulation (EU) 2014/596, a non-exhaustive list of:

(a) final events or final circumstances in protracted processes and, for each event or circumstance, the moment when it is to be disclosed pursuant to paragraph 1 of Article 17 of Regulation (EU) 2014/596;

(b) situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers.

Article 2
Disclosure of inside information in protracted processes

For the purpose of paragraph 1 of Article 17 of Regulation (EU)596/2014, a non-exhaustive list of events or circumstances in a protracted process and of the moments when each of them is deemed to have occurred and is to be disclosed referred to in Article 17(12) of Regulation (EU) 596/2014 is contained in Annex I.

Article 3

Delayed disclosure of inside information

For the purposes of applying paragraph 4, point (b), of Article 17 of Regulation (EU) No 596/2014, a non-exhaustive list of situations in which the inside information that the issuer or the emission allowance market participant intends to delay is in contrast with the latest public announcement or other type of communication by the issuer or emission allowance market participant on the same matter to which the inside information refers, referred to in Article 17(12) of Regulation (EU) 596/2014, is contained in Annex II.

Article 4

Types of communication by the issuer

For the purposes of the non-exhaustive list of situations in Annex II of this Regulation, the following types of communication by the issuer shall be deemed relevant:

a) any communication or press release published on the issuer's website;

b) any communication or press release published on the issuer's social media accounts;

c) public interviews delivered by any person perceived as representing the issuer;

d) publicly accessible pre-close calls, roadshows and other public events, including webinars and podcasts, organized or authorized by the issuer, or to which any person perceived as representing the issuer takes part;

e) advertising and marketing campaigns made public by the issuer;

f) regulatory filings by the issuer;

g) written and oral communications in the context of the issuer's shareholders meetings;

h) any other communication capable of reaching the public and delivered by any person perceived as representing the issuer.

Article 5

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States

Done at Brussels,

The President

ANNEX I

Non exhaustive list of Final circumstances or events and moment of disclosure of inside information in protracted processes

No	Protracted Process	Final circumstances or Events	Moment of disclosure
A	**Business Strategy**		
1	Mergers	Decision to sign off the merger agreement	As soon as possible after the competent bodies of all companies involved, having the decision power under national law or bylaws, have taken the decision to sign off the merger/demerger agreement, once the core conditions have been agreed, even where another body of the issuer(s) may have to give its final approval.
2	Takeover bid made by the issuer	Decision to make a takeover bid	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to make a takeover bid, even where another body of the issuer may have to give its final approval.
3	Takeover bid received by the issuer	Recommendation to shareholders regarding the bid	As soon as possible after the competent body having the decision power under national law or bylaws has decided to recommend accepting or not the takeover bid.
4	Acquisition or disposal of relevant assets (including subsidiaries)	Decision to sing off the agreement for acquisition or disposal of relevant assets	As soon as possible after the competent bodies/persons of all parties involved, having the decision power under national law or bylaws, have taken the decision to sign off the agreement for acquisition or disposal of relevant assets, once the core conditions have been agreed, even where another body of the issuer(s) may have to give its final approval

5	Major corporate reorganisations	Decision on corporate reorganisation	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to proceed with a corporate reorganisation whose core elements have been defined, even where another body of the issuer may have to give its final approval.
6	Other material agreements	Decision to sign off the material agreement	As soon as possible after the competent bodies/persons of all parties involved, having the decision power under national law or bylaws, have taken the decision to sign off the material agreement, once the core conditions have been agreed, even where another body of the issuer(s) may have to give its final approval. In the absence of a formalised decision, as soon as possible after entering into the relevant binding agreement.
7	Voluntary termination of a material agreement	Decision to terminate a material agreement	In case of voluntarily termination of a material agreement by the issuer, as soon as possible after the competent body/person having the decision power under national law or bylaws has taken the decision to terminate the agreement, even where another body of the issuer may have to give its final approval.
B	**Capital Structure**		
8	Capital increase (Issuance of additional shares)	Decision to issue new capital instruments	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision on a capital increase and on its core conditions, even where another body of the issuer may have to give its final approval.

9	Share buyback	Decision to purchase own share	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to carry out a buy back and on its core elements, even where another body of the issuer may have to give its approval.
10	Conversion of instruments	Decision to convert instruments	As soon as possible after the competent body having the decision power under national law or bylaws has decided on the conversion of the financial instruments and on its core elements, even where another body of the issuer may have to give its approval.
C	**Provision of financial Information**		
11	Financial reports or interim financial reports	Approval of financial results	As soon as possible after the financial results have been or formally acknowledged or approved by the competent body/person having the decision power under national law or bylaws, even where another body of the issuer may have to give its final approval
12	Forecasts	Approval of the forecast	As soon as possible after the forecast have been formally acknowledged or approved by the competent body/person having the decision power under national law or bylaws
13	Dividends	Decision on distribution of dividends or change in the dividend policy	As soon as possible after the competent body having the decision power under national law or by laws has taken the decision to propose a dividend distribution or a change in the dividend policy to the shareholders'

14	Postponement or cancellation of interest payments or redemptions payments	Decision to postpone or cancel interest or redemption payments	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to postpone or cancel the payments, even where another body of the issuer may have to give its approval.
D	**Corporate Governance**		
15	Change of management [Departure of Directors or Principal Officers; Election of Directors; Appointment of Certain key Officers)	Decision to appoint a member of a corporate body in a key position or to terminate its position	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to appoint a person or to terminate its position, even where another body of the issuer may have to give its approval.
16	Significant amendments to Articles of Incorporations or by laws	Decision to make significant amendments to the issuer's articles of incorporation or by-laws	As soon as possible after the competent body having the decision power under national law or issuers` bylaws has taken the decision to propose the amendments to the articles of incorporation or by-laws to the shareholders.
E	**Interventions by regulators**		
17	Application for a licence or authorisation	Application for a licence or authorisation	As soon as possible after the issuer submitted the application to the relevant public authority.
18	Granting or withdrawal of licence or authorisation	Granting or withdrawal of licence or authorisation	As soon as possible after the issuer has received the formal notification granting or withdrawing a licence or an authorisation, even where further to an application for a licence or authorisation the issuer and the public authority previously exchanged preliminary information or draft decisions that may on its own amount to inside information.

19	Application for recognition of Intellectual Property rights	Application for recognition of intellectual property rights	As soon as possible after the issuer submitted the application to the public authority.
20	Recognition of Intellectual Property (IP) rights	Notification of recognition of IP rights	As soon as possible after the issuer has received the final notification of recognition/non recognition of IP rights, even where further to an application for recognition of property rights the issuer and the public authority previously exchanged preliminary information or draft decisions that may on its own amount to inside information.
21	Application for licence to commercialise the product	Application for authorisation to commercialise the product	As soon as possible after the issuer submitted the application to the public authority.
22	Obtaining the authorisation to commercialise a product	Authorisation on product commercialisation	As soon as possible after the issuer has received the formal notification granting an authorisation to commercialise the product. even where further to an application for a licence to commercialise a product the issuer and the public authority previously exchanged preliminary information or draft decisions that may on its own amount to inside information.
23	Medical/clinical trials for pharmaceutical products	Medical trials conclusions	As soon as possible after the issuers has concluded the medical trials.
24	Authorisation to commercialise medical/pharmaceutical products	Authorisation to commercialise medical/pharmaceutical products	As soon as possible after the issuer has received the decision from the authority (regardless whether it is an acceptance or a rejection), even where further to an application for an authorisation to commercialise a medical/pharmaceutical product, the issuer and the public authority previously

			exchanged preliminary information or draft decisions that may on its own amount to inside information.
25	Participation in a public procurement process	Award of contract	As soon as possible after the issuer has received the formal notification that the issuer has been awarded a contract.
26	Pre-Insolvency/ restructuring proceedings	Formal decision to enter into (preliminary) insolvency proceedings or agreements with creditors	In case of court supervised proceedings, as soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to file for pre-insolvency proceedings, even where another body of the issuer may have to give its approval. In case of proceedings not supervised by a court, as soon as possible after the competent body having the decision power under national law or by laws to propose an agreement with creditors or any other arrangements foreseen for the case of insolvency has taken the relevant decision, even where another body of the issuer may have to give its final approval.
27	Insolvency	Insolvency declaration	As soon as possible after the competent body having the decision power under national law or bylaws has taken the decision to file for insolvency, even where another body of the issuer may have to give its approval.
F	**Credit institutions**		

28	Supervisory review and evaluation process (SREP)[32]	Formal decision of the Prudential Competent Authority	As soon as possible after the credit institution has received the final SREP decision from Prudential Competent Authority, even where the issuer and the Prudential Competent Authority previously exchanged preliminary information that may on its own amount to inside information.
29	Reduction of own funds[33]	Formal decision of the Prudential Competent Authority to reduce own funds	As soon as possible after the credit institution is notified that the reduction of funds has been authorised by the Prudential Competent Authority.
30	Preparation for resolution action[34]	Decision of the resolution authority to take resolution action in accordance with Article 82(2) of the BRRD.	As soon as the Decision of the resolution authority is published pursuant to Article 83 BRRD.
31	Normal insolvency proceedings in accordance with the applicable national law	Decision of the relevant authority in accordance with national law	As soon as the decision of the relevant authority has been notified to the institution in accordance with national law.
G	**Legal Proceedings and Sanctions**		

[32] SREP refers to supervisory activities performed in accordance with Basel Pillar 2 in conformity the Capital Requirements Directive (Directive (EU) No 2013/36/EU), the relevant Level 2 measures and the EBA Guidelines and Opinions. Namely, it refers to the procedure identified in Article 97 of Directive (EU) No 2013/36/EU conducted regularly by competent authorities to determine whether the arrangements, strategies, processes and mechanisms implemented by a credit institution to comply with EU capital requirements and the own funds and liquidity held by it ensure a sound management and coverage of the risks to which the institution is or might be exposed and the risks revealed by stress testing. The SREP also assesses the risk that an institution poses to the financial system.

[33] Article 77 of the Capital Requirements Regulation (Regulation (EU) No 575/2013) lays down the conditions for the reduction of own funds. Namely, it establishes that an institution shall require the prior permission of the competent authority to (a) reduce, redeem or repurchase Common Equity Tier 1 instruments issued by the institution in a manner that is permitted under applicable national law and/or to (b) effect the call, redemption, repayment or repurchase of Additional Tier 1 instruments or Tier 2 instruments as applicable, prior to the date of their contractual maturity.

[34] This process includes as intermediary steps the assessment of FOLT, the write down or conversion of capital isntruments (Article 59 BRRD) and any decision or action adopted by the competent authority or the resolution authority until the adoption of the resolution decision.

32	Administrative proceedings	End of the first phase of the proceedings	As soon as possible after the issuer is formally informed by the competent authority of the outcome of the investigations, even where the issuer and the public authority previously exchanged preliminary information that may on its own amount to inside information.
33	Precautionary measures within judicial proceeding (both as plaintiff or defendant)	Decision by authority or court.	As soon as possible after the issuer received the notification of the decision on the precautionary measure (even if the decision it is still subject to appeal).
34	Judicial Proceedings	Decision by authority or court	As soon as possible after the issuer received the notification of the decision (even if the decision it is still subject to appeal).
35	Proceedings for quantification of sanctions	Decision on sanction	As soon as possible after the issuer is informed of the decision on the sanction (even if the decision is still subject to appeal).
36	Delisting	Decision of delisting	In case of voluntarily delisting, as soon as possible after the formal decision of the competent corporate body having the decision power by national law or issuers´ bylaws has taken the decision on the delisting, even where another body of the issuer may have to give its final approval. In case of decision by the competent authority or the stock exchange, upon the receipt of the notice of delisting or failure to satisfy a continued listing rule or standard, even where the issuer and the public authority or the stock exchange previously exchanged preliminary information that may on its own amount to inside information.

ANNEX II

Non exhaustive list of situations where it is deemed that there is a contrast between the inside information that the issuer intends to delay and the latest public announcement or other types of communication by the issuer on the same matter to which the inside information refers

Number	Example
1	Inside information regarding a material change to forecasted financial results or business objectives previously announced by the issuer (e.g. profit warnings or earning surprises).
2	Inside information regarding a material change to the environmental or social impact of a project or product previously publicly announced by the issuer (e.g. environmental targets which are likely not to be met).
3	Inside information regarding the financial viability of an issuer where materially different information regarding its financial strength was publicly announced by the issuer (e.g. need for capital increase or extraordinary bonds issuance).
4	Inside information that the results or the deadlines of a product or a project in development will not be met where those results or the deadlines were publicly announced by the issuer.
5	Inside information regarding a material change to a capital structure operation previously publicly announced by the issuer (e.g. significant modification in the issuance of financial instruments).

6	Inside information regarding a material change in a business strategy previously publicly announced by the issuer (e.g. sale of a business line after significant investments in that same business line).
7	Inside information regarding a material change to a business operation previously publicly announced by the issuer (e.g. different target company of an acquisition).
8	Inside information regarding a material change to a contract/deal or of its conditions previously publicly announced by the issuer (e.g. termination of a commercial partnership).
9	Inside information regarding a material change in the previously publicly announced issuer's governance, including compensation arrangements, management structure and codes of conduct (e.g. decision to cancel a planned increase in the number of independent Board members).

6.5. Annex V – Disclosure of inside information in third countries

1. In its request to provide technical advice on the list of protracted processes, the Commission requested ESMA to consider whether similar lists exist in other major jurisdictions outside of the European Union (see section 6.2.1 of Annex II).

2. To comply with this request, ESMA took into consideration the regimes on disclosure of inside information in the United States, Japan, Canada and Australia.

3. According to ESMA's findings, among these jurisdictions, only in the United States and Japan the legal frameworks provide for a list of events which require public disclosure. While Canada's regime for disclosure is not based on a list of events to be disclosed, it provides by means of principles-based guidelines some valuable examples of the types of events or information which may be material.

4. The following paragraphs describe the regimes for disclosure in the analysed jurisdictions.

USA

5. Under the US regime, listed companies do not have an independent duty to publicly disclose inside information on continuous basis. However, pursuant to the Securities Exchange Act of 1934[35], publicly reporting companies are required to publish annually a significant amount of information about the company, including their audited financial statements. Domestic companies file this information via annual reports on the form 10-K[36] and on a quarterly basis via the form 10-Q[37]. Companies that qualify as *"foreign private issuers*" under the Securities Exchange Act[38] file annual reports on Form 20-F and are not subject to quarterly reporting requirements. In addition, domestic companies are under the obligation to publish updates to the market concerning significant events that occur between the required quarterly reports through the Form 8-K[39]. The 8-K form is submitted to the SEC and specifies which events need to be disclosed and determines the disclosure timeline for each event. Foreign private issuers are required to submit current reports on Form 6-K rather than Form 8-K, when material disclosure is made pursuant to their home country or exchange requirements.

6. Unless otherwise specified, Form 8-K must be filed within four business days following the event. Should the event occur on a weekend or a U.S. federal holiday, the four-day filing period begins from the next business day. Form 6-K is due promptly after the

[35] Securities Exchange Act.pdf
[36] Form 10-K
[37] Form 10-Q
[38] See Exchange Act Rule 3b-4.
[39] Form 8-K (sec.gov)

foreign private issuer makes public the material contained in the report.

7. The Regulation on Fair Disclosure provides an exception to the four-day filing rule in case of selective disclosure of material information. In such instances, domestic companies are required to file Form 8-K or otherwise make public disclosure either simultaneously with, in case of inadvertent selective disclosure, or prior to any intentional disclosure to selected individuals. For unintentional disclosures, the filing must occur without delay, and no later than 24 hours or the start of the next trading day. Regulation FD does not apply to foreign private issuers.

8. Form 8-K is structured into nine principal categories, each of which prescribes disclosure requirements for events that trigger a reporting obligation and public disclosure, e.g., entry into and termination of a material definitive agreement, completion of acquisition or disposition of assets. Notably, the disclosure pertains solely to the final events, rather than intermediate steps of the protracted process which may lead to the occurrence of such events. These sections collectively encompass over 30 distinct reporting requirements. The categories included are Registrant's Business and Operations, Financial Information, Securities and Trading Markets, Matters Related to Accountants and Financial Statements, Corporate Governance and Management, Asset-Backed Securities, Regulation Fair Disclosure, Other Events, and Financial Statements and Exhibits.

Japan

9. In Japan, the framework for disclosure obligations is governed by the Securities Listing Regulations of the listing exchanges. Chapter 4, Section 2 of the Tokyo Stock Exchange (TSE) Securities Listing Regulations [40] (Rule 402 to 420) outline the requirements for timely disclosure of corporate information. Under these rules, listed companies are obligated to promptly disclose the material events which are listed under Rule 402 through 405, which could influence investment decisions or impact market fairness.

10. In addition, Rule 401 through 407 of the Enforcement Rules for Securities Listing Regulations[41] specify the threshold to be used to evaluate whether the events listed in Rule 402 through 405 of the TSE Securities Listing Regulations are significant enough to be disclosed.

11. More in detail, Rule 402 and 403 of the TSE Securities Listing includes a list of "facts" and decisions by the "body which decides a listed company's business execution". Rule 404 and 405 of the TSE Securities Listing requires disclosure of earnings estimates and changes to those estimates. Overall, the listed facts or decisions to be disclosed pertain to a vast range of circumstances, including Changes in Financial Conditions,

[40] Securities Listings Regulations
[41] Enforcement Rules for Securities Listing Regulations

Management, Corporate Governance, Significant Operational Shifts (e.g. changes in their financial results, mergers, or major asset acquisitions and disposals, or changes in capital), or earnings estimates.

Canada

12. Canadian securities legislation does not provide for a defined list of events or processes that must be publicly disclosed. Instead, under National Instrument 51-102 *Continuous Disclosure Obligations*[42], reporting issuers (other than investment funds) are required to immediately disclose any "material change" in the affairs of the issuer. A "material change," as defined under Ontario securities legislation, refers to (a) a change in the business, operations, or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any securities of the issuer, or (b) a decision to implement such a change made by the board of directors or senior management, when confirmation by the board of directors is probable. It is worth noting that the interpretation of the term "material change" under securities legislation is also informed by Canadian case law.

13. Determining materiality under Canadian securities legislation is the responsibility of the reporting issuers on a case-by-case basis, considering the specific facts and circumstances.

14. National Policy 51-201 *Disclosure Standards*[43] offers guidance on best practices for timely disclosure of material changes and provides non-exhaustive examples of events that may be considered material. These examples entail changes in the corporate structure, capital structure, financial results, business and operations, acquisitions and dispositions and credit arrangements. While these guidelines do not themselves constitute legal requirements, they reflect case law and regulatory decisions that have interpreted the requirements of securities law.

Australia

15. The rules for disclosure of inside information in Australia do not provide for a list of processes or events to be disclosed.

[42] National Instrument 51-102 Continuous Disclosure Obligations
[43] National Policy: NP - 51- 201 - Disclosure Standards