FESE response to the ESMA consultation on MAR and MiFID II SME Growth Markets

13th February 2025, Brussels

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

FESE generally agrees with the definition of protracted processes, which is presented by ESMA as "a series of actions or steps spread in time, which need to be performed, in order to achieve a pre-defined objective or result".

However, FESE would like to highlight one aspect of ambiguity: ESMA distinguishes the definition of protracted processes from the definition of non-protracted processes in recital 67 of the Amending Regulation, which are described as one-off events or sets of circumstances, notably when the occurrence "***does not** depend on the issuer*". The way ESMA derives at the definition of protracted processes allows for the conclusion that ESMA requires the series of actions that need to be performed in a protracted process to, at least in part, depend on the issuer.

The question arises whether there are protracted processes that may solely include steps which are outside of the issuer's control or whether there are protracted processes which might be triggered by circumstances which do not depend on the issuer. Therefore, it should be clarified whether it is a requirement for the steps in protracted processes to at least partly depend on the issuer or in other words whether events or circumstances the occurrence of which are not depending on the issuer are always classified as "one-off" events. While this would be helpful for issuers as a differentiator, it must be further explored whether it would serve for all scenarios.

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

The categories of processes identified by ESMA seem to make sense. However, FESE does not agree with the general principle described in para. 51 of the CP. Here, ESMA states that disclosure of inside information shall generally be 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". This approach is not in line with the wording of Article 17 (1) sentence 3 which requires only the final circumstances or final event to be disclosed. In addition, ESMA's proposal seems to mix the disclosure obligation in protracted processes under Article 17 (1) MAR with the definition of inside information in Article 7 (2) MAR according to which information in protracted processes shall be deemed to be of a precise nature if it relates to a circumstance or event that may *reasonably be expected to come into existence*. Hence, if there is a "degree of certainty regarding the outcome of the process", this might be sufficient to classify information as inside information within the meaning of Article 7 (2) MAR, but it should not be used at the same time to qualify the information as the final event that needs to be disclosed. FESE would therefore invite ESMA to revisit this part of the definition.

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?

FESE questions ESMA's consideration that the disclosure should always occur when the management board adopts the decision, even if the management board is under statutory law required to obtain approval from the supervisory board. FESE thinks that ESMA's assumption that the management board decision already provides for a sufficient degree of certainty regarding the outcome of the process (see para. 58 and 61 of the Consultation Paper) disregards the crucial role of the supervisory board as an independent body in two-tier systems. If the supervisory board approval is mandatory under statutory law, such approval requirement should be taken into account. FESE would therefore ask ESMA to please reconsider its current position. In any case, even if ESMA upholds its position that the management board decision marks the final event that needs to be disclosed, there must be no doubt that the option to delay the disclosure remains available to the issuer.

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?

Please note our answer to question 3.

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?

N/A

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?

FESE thinks that this approach is correct for administrative proceedings which involve an authority and the issuer only. These proceedings are non-public (and usually even subject to confidentiality) and involve only the authority and the issuer. In a scenario, however, where an issuer is the subject of court proceedings, we doubt that this approach is practical. First of all, it is not clear what "the issuer received the notification of the decision" means. The receipt of the announcement of the decision as such by the court or the receipt by the issuer of the written reasoning of the decision? But even more importantly, court proceedings are generally public, and therefore confidentiality cannot be ensured. The issuer will never be able to wait with the disclosure in accordance with Article 17 (1) MAR until the final event has occurred, but will always have to disclose the information earlier. Information regarding the proceedings will be available in the public domain even before the decision of the court. In addition, once the court has reached a decision, the decision will be made available to multiple parties at the same time (court judges, representatives of both parties to the proceedings, lawyers). From FESE's perspective, it does not make much sense to define the receipt by the issuer of the final decision of the authority as the final event if that final event will never be the relevant point in time of disclosure in practice. Also, for some allegations even the initiation of proceedings would represent a price-sensitive event.

In order to prevent the market from reacting on rumours and partial information it would be preferable for all stakeholders to inform the market early-on objectively, e.g., at the notification of the authority's decision to initiate proceedings.

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?

N/A

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?

N/A

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?

N/A

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

N/A

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?

N/A

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?

FESE notes, and this is also observed by ESMA in para. 118 of the CP, that this interpretation is not in line with the wording of the revised Article 17 (4) (b) MAR which uses the singular ("public announcement") and not the plural. In addition, Article 17 (4) (b) MAR only refers to the "latest" public announcement. However, FESE understands that the situations under which the delay of inside information could be assessed against more than one announcement should be very limited, e.g. in case of a series of partial announcements which only combined together provide the full picture (see para. 119 of the Consultation Paper). FESE notes that the rationale behind the amendment of the wording of Article 17 (4) (b) MAR was to provide issuers with more legal certainty by providing clearer conditions for delaying the disclosure of inside information (see para. 117 of the Consultation Paper). Therefore, FESE would welcome a clarifying statement by ESMA that the new wording of Article 17 (4) (b) MAR does not establish new or stricter conditions.

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?

FESE generally agrees with the list of "types of communication by the issuer" in Article 4 of the draft delegated act. However, FESE believes that information submitted to authorities (lit. f) of the list should not be included. This type of communication is not comparable to "public announcements" and not even able of generating or influencing market expectations (which seems to be the standard that ESMA has applied, see para. 120 of the CP) because the information is available to the authority only, but not to the general public. Please also see Article 4 lit. h) of the draft delegated act which rightfully refers to "any other communication capable of reaching the public..." and Annex II of the draft delegated act where all examples use the wording "previously publicly announced by the issuer".

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?

FESE agrees with the list and thinks that it is sufficiently comprehensive.

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

FESE agrees that ESMA's proposed approach for the methodology to be used seems appropriate. FESE would like to stress the importance of ensuring that there are no duplicative reporting requirements on the same data set stemming from different legal provisions for those trading venues that are in the scope of the CMOBS. This would be contrary to the objectives of the Listing Act. In addition, it is important that these requirements ensure a harmonised format is used. Regarding the ITS that ESMA is tasked with drafting: • (b) to determine appropriate arrangements, systems and procedures for trading venues to comply with the requirement in paragraph 1, third subparagraph, and • (c) to determine the format and the timeframe for provision of the requested data in paragraph 1, third subparagraph. It would be helpful if ESMA could clarify that this will align with MiFIR Art 25 and RTS24 so that no other duplicative arrangements are envisaged and that there will be both a common format and template set for RTS 24 (under MiFIR Art 25) as currently, different NCAs ask for different formats. We believe this is a key issue. Given this topic is currently under consideration by ESMA as part of the MiFIR Review, we urge ESMA to take these points on board and ensure a streamlined outcome. The risk of duplicate requirements needs to be fully addressed and therefore, we believe it should be made clear that if the trading venue already provides order data to its NCA on an ongoing basis under Art 25 MiFIR and RTS24, these MAR provisions will not apply. Otherwise, there is a concern that a trading venue may end up having to provide the same data twice (firstly as part of ongoing submission on a daily basis, and then secondly should another NCA request it on an ad-hoc basis) in different formats (e.g. csv and xml) which seems extremely onerous when the NCA already has the data.

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.

In general, FESE agrees with the calculation method. However, the definitions of SMEs are also restrictive and outdated. Amending these definitions would enable more companies to benefit from the advantages of SME reliefs and SME Growth Markets, reducing regulatory burdens and making public capital markets a more attractive growth option for them.

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.

Yes, FESE agrees.

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.

Yes, FESE agrees.

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.

Yes, FESE agrees.

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.

Yes, FESE agrees.

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?

FESE understands that it is already current practice for annual financial reports to be audited. However, this is not the case for half-year financial reports. Keeping in mind that one of the objectives of the Listing Act is burden reduction for issuers, especially SMEs, FESE suggests clarifying that the ESMA proposal in Article 78(2)(g) of CDR 2017/565 should only apply to annual financial reports.

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

Yes, FESE agrees.

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

FESE supports the designation of a separate MIC-code for SME Growth Markets to promote a proper separation of these markets. A clear separation contributes to enabling regulation and EU initiatives that are tailored exclusively for SME companies, which is a priority of the Listing Act. Moreover, there is already a legal requirement that an SME Growth Market should be “clearly separated” from other segments within the MTF, which can only be achieved by registering a separate MIC for the SME segment. FESE understands that this requirement is already a reality in some Member States as some NCAs require it.

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

Yes, FESE agrees.

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

Yes, FESE agrees.

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?

Yes, FESE agrees.