

Reference: ESMA74-1103241886-1094

SN reference: 2025-25

Stockholm, February 13, 2025

Re: ESMA consultation on the draft technical advice concerning MAR

The Confederation of Swedish Enterprise (Sw. Svenskt Näringsliv) has got the opportunity to provide comments to the consultation from ESMA on draft technical advice concerning MAR. The Confederation of Swedish Enterprise has 60,000 member companies organized in 48 business and/or employer associations.

Please find our responses to the questions raised in the consultation below. We remain at your disposal in case you have any questions.

Kind regards,

THE CONFEDERATION OF SWEDISH ENTERPRISE
Business Policy and Law division

Maria Althin

Elias Skog

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Protracted processes		
Q1	Do you agree with the definition of protracted processes provided?	Yes, we agree with the definition of protracted processes provided.
Q2	Do you agree with the identified categories of processes and general principles?	We agree with the categories of processes suggested and believe that it is good that ESMA clearly states that the purpose of the rules is to facilitate for companies. Also, it is very good that ESMA emphasizes that the list is only relevant where the relevant information constitutes inside information and that this needs to be assessed on a case-by-case basis. The objectives of the MAR Article 17 changes made under the Listing Act are welcome; making it easier for issuers to comply, avoiding unnecessary and costly admin and protecting the market from information overload. In order

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		<p>to achieve these objectives, the disclosure obligation in Article 17 should not be triggered unless and until the inside information has developed into a <i>reality</i>. Reason: Neither the market nor issuers benefit from premature disclosures of uncertain 'maybes'. Such disclosure would not be conducive to informed decision-making. In addition, requiring premature disclosures would typically harm issuers and their investors by jeopardizing the materialization of the end result, be it a final agreement or a final decision on a corporate event. And although issuers should of course react to leaks and keep insider lists with regard to any inside information, there should be no unnecessary red tape requirements for as long as the inside information is in its preliminary state.</p> <p>We are concerned that the suggested principles are not clear as to what constitute a sufficient degree of certainty regarding the outcome of a process for the disclosure obligation to be triggered. This is particularly so for processes involving a counterparty, for example when it comes to negotiations of a potential contract. Such processes are, by definition, fraught with uncertainty until a binding agreement is executed and this must be generally acknowledged. Requiring disclosure at an earlier stage would not be in keeping with the objectives of the Listing Act – it would result in disclosure of unreliable information to the market and would jeopardize the outcome of the contract negotiation process, leaving European companies at a competitive disadvantage missing out on business opportunities. In our experience, issuers never make a disclosure of a transaction/agreement based on a "sign off" of the deal and the disclosure of such a provisional step would – absent a final deal – not enable investors to take well-informed decisions or contribute to efficient price formation, but would rather be misleading. Based on the above, the triggering event (final event) must be the signed agreement. Before signing, there is no deal to disclose. If the triggering event would be earlier than that, this would also introduce additional complicated and burdensome obligations on issuers to determine not only when inside information exists, but also when the purportedly final event would have occurred, as well as whether or not delayed disclosure may be permissible at that stage. Ensuring compliance with such</p>

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		<p>obligations would introduce more complexity and administration than today, where issuers' obligation to determine the existence of inside information coincide with the obligation to determine the permissibility of delayed disclosure (which is a continuing obligation). This would add to the administrative burdens of issuers, contrary to the objectives of the Amending Regulation.</p> <p>Decision-making processes with many intermediate steps and preliminary decisions and approvals relating to the deal, or parts thereof, including delegations of authority for finalization and approval, are common for many types of agreements and processes involving a counterparty (or several counterparties). However, in the principles suggested, they are only explicitly addressed in the list of final events under item A.6. To be clear and to avoid misunderstandings and difficult interpretations, ESMA should – for all situations involving a counterparty – clearly and explicitly recognize that the final event will coincide with all parties becoming legally bound by the agreement. Before that point, the situation would remain too uncertain for a disclosure obligation to be triggered. “Sign off”, in the sense of an approval to proceed to enter into a binding agreement, would not be sufficient, nor would entering into a non-binding document. In our experience, issuers would never make a disclosure of a transaction/agreement based on a “sign off”. Following the “sign off” by all parties of an agreement, signing would normally take place as soon as possible to avoid that the signing and finalization of the deal is delayed or hindered due to external factors.</p> <p>It should also be noted that also “internal processes” frequently comprise external elements and one or more steps involving counterparties and this needs to be acknowledged. Please refer to our response to Q3 below.</p> <p>It is our firm position that an extensive list of examples will not benefit the market. What would be helpful is rather a shorter, principles-based list that will explain the principles that ESMA would like to capture. For example, it would be beneficial if different agreement types and actions involving one or more external counterparties would be consolidated into one item in the list. Similarly, corporate actions that do not involve external counterparties could be</p>

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		<p>consolidated into another item. See also our response to Q11.</p> <p>For the level two legislation to be helpful and lead to the simplifications for issuers sought, the final events (and trigger of the disclosure obligation) must never be earlier than when there is a done deal (e.g. a binding agreement).</p> <p>We note ESMA's inclusion of a requirement that issuers are expected to be able to provide a justification regarding the identification of the final event or the final circumstance upon the request of the competent authority. There is no explicit support for such a requirement in the Amended Regulation. Whether or not sufficient grounds may be adduced to determine the existence of such a requirement clearly falls outside ESMA's remit.</p>
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?	<p>Yes, for processes that are purely internal we agree. However, many "internal" processes comprise external elements and one or more steps involving counterparties and therefore the guidance must be much more nuanced.</p> <p><u>For example</u>, capital increases may often involve the negotiation of underwriting commitments and support agreements with external parties, such as for example large shareholders. When external counterparties are involved, it is key that it is merely the <i>final</i> decision on the capital increase that constitutes the final event that trigger disclosure as soon as possible (either a final decision to approve the capital increase or the board's decision to propose to the general meeting of shareholders to approve the capital increase). A final decision would normally be taken only when the relevant commitments/agreements have been signed, and any decisions "in principle" taken by the corporate bodies earlier in the process cannot be considered the final event. This needs to be clarified by ESMA to avoid potential differing interpretations by the National Competent Authorities in the Member States.</p>
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?	<p>Yes, it makes sense that a final Board decision triggers disclosure as soon as possible although a subsequent shareholder approval is required. There may be additional relevant considerations to take into account in countries with two-tiered board structures.</p>

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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?	No, we do not agree. "Sign off" is not clearly defined but it is clear that "sign off", in the sense of an approval to proceed to enter into a binding agreement, is not a relevant or appropriate disclosure trigger. The relevant event is when all parties have become legally bound by the agreement, see our response to Q2 above. It is important that ESMA takes a clear and consistent approach and recognizes this more generally. Where an issuer's competent body may approve material terms "in principle" and authorize somebody else (e.g. the CEO) to negotiate outstanding material points subject to a negotiating mandate, the final event would coincide with all parties becoming legally bound by the agreement. The same applies when the competent body "signs off" the agreement as such. This would in no way detract from the spirit of the Amending Regulation, as such processes are fraught with uncertainty until the final agreement has been executed on behalf of the parties. As currently drafted, the Consultation Paper is not consistent on this point, and it needs to be clarified that this is to be generally applied for any process involving a counterparty.
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?	Yes, we agree that the moment of disclosure should in these cases be when the issuer has received the final decision, even where there has been prior preliminary exchanges between the issuer and the public authority.
Q7	Do you agree that for protracted processes that are triggered by the issuer and whose final outcome is decided by a public authority, two separate processes should be identified, and the moment of disclosure should occur upon completion of each of them as above outlined?	We do not have any comments to this item. We believe that relevant considerations may differ, depending on the situation.
Q8	Do you agree that a hostile takeover can be considered a	No, we do not agree. ESMA must take a much more nuanced approach to takeovers, and it is

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	<p>one-off event? Do you agree with the moment for disclosure identified for takeover processes?</p>	<p>not relevant to – as suggested – differentiate between hostile and friendly takeovers. The distinction that should be made is rather whether the takeover is announced with or without any prior approach to the target board. Regardless of whether the takeover is announced following an approach to the target, the takeover may very well turn out to be recommended (and not hostile). Conversely, a takeover offer may start by a confidential approach to the target board and then turn out to be hostile, insofar as the target board may resolve not to recommend it for acceptance. In addition, a takeover process can be viewed differently from the offeror's perspective and the target's perspective.</p> <p>For the offeror, the takeover would be a protracted process taking place in stages. If the takeover offer does not involve prior approaches to the target board, it may be an internal protracted process, but it may also involve a number of external elements, e.g. consisting of contacts and negotiations with large shareholders etc. If the takeover offer is made following an approach to the target board (and large shareholders), the process would also involve external elements. In any event, the final event would be when the offeror finally decides to make an offer.</p> <p>For the target, a takeover can happen in many ways, and issuers are normally prepared for handling a range of different scenarios. A takeover would only be a one-off event for the target in cases where the takeover is made (announced) without any prior contact with or approach to the target board (which is not commonly the case). When a takeover offer follows an approach to the target board, the process is very similar to any other process involving counterparties (e.g. negotiations regarding potential agreements). The competent body of the offeror may very well take a decision to make the offer, subject to the target board at a later stage deciding to recommend the offer (much like the final event in respect of an agreement that requires the approval of both parties). In fact, a decision by the offeror to make the offer (subject to confirmation that the target board has decided to recommend it for acceptance) may be (and often is) a condition that needs to be satisfied in order for the target board to be able to decide whether or not to recommend the takeover offer. Similarly, the target board would take a</p>

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		<p>decision to recommend a takeover offer, subject to the offer being announced (as there otherwise would be no offer to recommend). The list of final events should clarify the reciprocal nature of this process, in order to avoid triggering a disclosure obligation without the offeror knowing whether or not the offer would be recommended). Such a catch-22 would clearly be very harmful to the market for control within the EU, as most takeover offers would not be announced without certainty as to the target board's attitude to the offer.</p> <p>The final event (and disclosure obligation) can thus not be triggered until a final (unconditional) decision has been taken to make the bid. We believe that this also aligns with current market practice. If the final event would be earlier, this would create uncertainties and would go against the aim of reducing the regulatory burden of issuers.</p>
Q9	<p>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?</p>	<p>Yes, we agree that the preparation of a financial report is a protracted process as the production of financial reports is a process that involves the collection and validation of financial information spread over time. However, ESMA's advice completely ignores the widespread use of earnings calendars which set out dates (and times) on which quarterly reports are planned to be announced by issuers. In most developed economies earnings calendars are the backbone of orderly disclosure of regular financial information and in certain member states earnings calendars are mandatory under relevant listing rules. Furthermore, the provisions on closed periods set out in Article 19 of MAR build on the use of earnings calendars. It would clearly not be in line with the purpose of the Amending Regulation to undermine the widespread use of earnings calendars. Since it would be practically impossible on each and every occasion to time the relevant corporate body's adoption of a financial report so that it coincides perfectly with the earnings calendar, ESMA should make it clear that in the absence of a profit warning or earnings surprise immediate disclosure could prejudice a legitimate interest of the issuer to comply with its financial calendar.</p> <p>It is key that issuers are allowed to work in a structured and responsible manner that provides the market with the information as</p>

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		planned, not least to secure stability, efficiency and predictability in the financial market. We agree that profit warnings and earnings surprises would normally be one-off events, although they may also be the result of an internal process.
Q10	Do you agree with the proposed approach in relation to recovery and resolution protracted process?	We do not have any comments to this item.
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?	<p>An extensive list of examples like the one suggested will not benefit the market. The list is capable of being <i>comprehensive</i> without having to include <i>many</i> examples. Examples that are too specific would obviously detract from the comprehensiveness of the list. By providing more generic types of processes, ESMA should be able to produce a shorter but more comprehensive list. For example, it would be beneficial if different agreement types and actions involving one or more external counterparties were consolidated into one item in the list. Similarly, corporate actions that do not involve external counterparties should be consolidated into one item.</p> <p>For the level two legislation to be helpful for issuers and lead to the simplifications sought, the final events (and trigger of the disclosure obligation) must never be earlier than when there is a done deal (e.g. a binding agreement).</p> <p>As to the proposed moment of disclosure, please refer to our responses elsewhere in this document.</p>
Delayed disclosures		
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?	Yes
Q13	Do you agree with the list of communications presented in Article 4 of the proposed Delegated Act (Annex IV of this	We agree that this list seems fine. It is key that merely official communication from the company, targeted to the market, is relevant for these purposes.

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	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?	<p>The list is confusing since it is partially incompatible with the list of protracted processes. Since the situations listed would often also constitute protracted processes, it should be made clear that where this is the case, the delayed disclosure would merely be relevant in respect of the final event of such processes.</p> <p>There is concern that in respect of the possibility to delay disclosure, ESMA's Consultation Paper introduces doubt where there should be none. The Consultation Paper mentions 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. We agree with this view. It is, however, also important that it is made clear by ESMA that the possibility to delay disclosure is also relevant for one-off events. This is how we understand the letter and the spirit of the Amended Regulation, and it is important that this is made clear. While delayed disclosure of one-off events would clearly be the exception rather than the norm, there may be situations where, typically during a brief interim, delayed disclosure may be justified in order to protect the legitimate interest of the issuer. In this respect, one-off events are not by their nature fundamentally different from final events of protracted processes. We believe that it would be helpful if this point came across more clearly in ESMA's final report. This is key to secure that the interpretation by National Competent Authorities (which by experience is sometimes literal) acknowledges the possibility to delay disclosure also in case of one-off events.</p>