LISTING ACT

PROTRACTED PROCESS AND DELAYED DISCLOSURE OF INSIDE INFORMATION – ESMA'S CONSULTATION

AMAFI's answer

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

AMAFI welcomes the opportunity to respond to ESMA's Consultation on the draft technical advice concerning MAR and MiFID II SME Growth Markets with respect to the disclosure of inside information in a protracted process and the conditions to delay the disclosure of inside information and on the proposed Commission Delegated Regulation establishing a non-exhaustive list of final events or final circumstances to be disclosed in a protracted process, as annexed to the consultation paper (the "CDR"). The CDR contains 2 annexes on which AMAFI has several comments. Before answering the specific questions of the consultation, AMAFI provides hereafter general observations on aspects that it considers essential. Only the questions to which AMAFI provides an answer are listed henceforth.

GENERAL OBSERVATIONS

AMAFI much appreciates the changes that the Listing Act Regulation (*Regulation (EU) 2024/2809*) made to Article 17 of the Market Abuse Regulation (*Regulation (EU) No 596/2014*) with respect to exempting from the application of the requirement to publish as soon as possible inside information when it is 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*". These amendments are helpful in disconnecting the occurrence of inside information with the obligation to publish it. This

provides flexibility, as there is no longer an automatic obligation to publish or retain inside information when it is part of a protracted process.

However, AMAFI expresses strong concerns about the aim of the proposed Commission Delegated Regulation (CDR), which is to lock up a wide variety of complex situations of protracted processes in tables, in Annex I of the CDR, that define once and for all which are, per type of protracted process, the compulsory "*final circumstances or events*". Those final circumstances or events cannot and should not be uniformly predefined, as situations differ greatly, and the facts of each case need to be considered to assess what are the "*final circumstances or events*".

For example, in some cases, a piece of information that becomes available before the predefined "*final circumstances or events*" is decisive on the value of the issuer's securities and should thus be disclosed to the market. In other cases, the predefined "final circumstance or event" could be dependent on other circumstances making the "final circumstance or event" of Annex I ineffective in the issuer's securities' price determination.

It seems particularly inappropriate to block issuers in their strategic operations by deciding in advance, in a fixed manner, when and for each of them they must publish. At the very least, such an approach should be assessed from the point of view of its impact on the competitiveness of EU firms.

Therefore, the enumeration of "*final circumstances or events*" of Annex I of the CDR should be indicative, not compulsory.

The events that are enumerated under the column "*final circumstances or events*" are subject to the provisions on delaying the communication of information (*MAR, art. 17.4 as modified by Listing Act*). This is well explained in Recital 6 of the proposed CDR, but this should be provided for also in the text of the proposed CDR. Annex I of the proposed CDR is entitled "*moment of disclosure*". This title is misleading, as at the moment a final circumstance or event appears, disclosure is not automatic. Instead, it obliges the issuer to consider delaying the communication or communicating immediately. AMAFI considers that the title should be made clearer and could read "*Non exhaustive list of Final circumstances and moment of disclosure or delay of disclosure of inside information in protracted process*".

I. SECTION 4 – MAR TECHNICAL ADVICE

4.1 DISCLOSURE OF INSIDE INFORMATION

Question 1 – Do you agree with the definition of protracted processes provided?

No, AMAFI does not agree with the definition provided in par. 35 of the consultation paper, as it states that the objectives of a protracted process are "*pre-defined*".

In many cases, the initial objectives of an operation evolve throughout the process, depending on market, economic, legal or strategic circumstances. Those evolutions could mean that a given protracted process comes to an end and that another event or protracted process occurs.

Furthermore, stating that objectives are "*pre-defined*" contradicts the part of the sentence that states "*notably when the occurrence of that event or set of circumstances does not depend on the issuer*" (*par. 34*).

Fortunately, the notion "pre-defined" does not appear in the proposal for a Commission delegated regulation (*CDR, Annex IV of the consultation document*). We would welcome clarification in the future CDR, for example in the recitals, on the fact that objectives may not be "pre-defined", i.e. that the proposal in the Consultation Paper is not retained in the CDR.

Question 2 – Do you agree with the identified categories of processes and general principles?

Although the "*categories of processes*" are defined in par. 52 and following of the consultation paper, it is unclear what the "*general principles*" mentioned in the question and par. 52 refer to.

Furthermore, the "categories of processes" defined in par. 52 of the consultation paper, are not used in the proposed CDR. The rationale for this classification in the consultation paper is therefore not clear to AMAFI.

AMAFI does not agree with the identified categories because the identification of "*final circumstances or events*" in Annex I of the CDR is compulsory and does not reflect the complexity of real-world situations, as explained in the introduction to this response paper.

AMAFI agrees with ESMA's proposal to include a non-exhaustive list of final circumstances or events of a protracted process, i.e. the total number of final circumstances or events of protracted processes (currently 36 protracted processes in Annex I of the proposed CDR) is not exhaustive. However, the "*final circumstances or events*" listed in column 3 of Annex I to the proposed CDR are mandatory. For example, in point 6 "*Other material agreements*", the final circumstance or event is the "*decision to sign off the material agreement*". This is too limited and adamant and does not account for practical situations. In this example, the signed material agreement may have one or more conditions precedent, which lead to consider that all the needed steps have not yet been completed. As an example, the signing of an acquisition agreement with financing conditions that are not yet fully secured so that there is a real risk of execution (risk that the sale will not take place and that it would therefore be premature to announce it).

Additionally, there may be agreements signed by a listed issuer, but which are part of a larger contractual frame involving many parties other than the issuer itself. It may therefore be premature to communicate if parallel contract remain in progress and other parties do not agree to disclose the underlying transaction/this partial agreement immediately.

In that case, the decision to sign off the final agreement depends on other circumstances and the protracted process is therefore not finalised. AMAFI recommends that not only the list of events is non-exhaustive (as currently proposed) but also that the identified "final circumstances or events" (CDR, Annex I, Column 3) should be indicative rather than mandatory. AMAFI believes that issuers should have discretion to delay disclosure where the situation warrants it.

Question 3 – 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?

AMAFI generally agrees with ESMA's proposal to set the moment of disclosure for the issuer's internal protracted processes at the moment of the decision of the competent body committing the company to the outcome of the process.

However, we would like to emphasise that this rule cannot be applied uniformly to all situations. More specifically, the column "*Final circumstances or events*" in column 3 of Annex I of the proposed CDR should be indicative, not mandatory. This is elaborated in our answer to question 2.

For this reason, AMAFI believes that issuers should have discretion to delay disclosure where the situation warrants it.

Question 4 – 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?

Decisions by governance bodies may take place at very different stages depending on the nature of the transaction in question. For example, in the context of a potential public offer, a decision by the board of directors to open a data room to prepare for a potential sale of a business would constitute a binding decision in the sense proposed by ESMA. However, rapid disclosure of this information would be particularly inappropriate in view of the preliminary nature of the decision and the remaining uncertainties as to the completion of the transaction.

An initial decision does not necessarily mean that the transaction is at a sufficiently advanced stage to warrant disclosure. AMAFI believes that ESMA should leave issuers some discretion as to the timing of disclosure, considering in particular:

- the type of operation,
- its scope, and
- its stage of progress.

To avoid premature disclosures that could mislead investors or undermine the proper conduct of operations, AMAFI suggests that ESMA specifies in its approach that:

- the decision of a first governance body does not automatically imply an obligation to disclose,
- the relevance of the disclosure must be assessed in the light of the maturity of the transaction and the importance of the information for the market.

Question 5 – 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?

In the case of protracted processes involving the issuer and a party other than a public authority, the moment of disclosure should be when the competent bodies or persons of all the parties involved, who have power of decision under national law or bylaws, sign the agreement which is the final event which follows the moment at which the decision has been taken. We refer here to the signing of a binding agreement by all parties which is an objective act. Therefore, any reference to the "*decision to commit to the agreement*" or to the "*preliminary agreement or any other preliminary commitment according to the applicable law*" contained in the Consultation Paper (par. 70) should be avoided as it could undermine the objective of the legislative amendment to art. 17.1 and create uncertainty.

Regarding Annex 1:

It should be recalled that this table applies only when the criteria to qualify as inside information are met.

- 1-4-6 mergers / acquisitions or disposals / material agreements: the final circumstances or events should be the signing of the agreement. The moment of disclosure should consider the fact that in some instances the supervisory board / management board or a board of directors has to approve the operation. In that case, the moment of disclosure needs to be delayed until the final approval by the other corporate body as defined by law, bylaws, or any internal rules of the issuer or the other party. The same applies to 5 (major corporate organisations) and 7 (voluntary termination of material agreement)
- 8-9-10: the moment of disclosure is to be delayed until the final approval of the operation
- 12: this point should be deleted. The issuer decides whether to do a profit forecast and if so, whether to communicate on this. Profit forecasts are not profit warnings.
- 15: this event should be limited to the election or departure of key Directors only. The event indicated in column 3 refers to members of a corporate body holding a "*key*" position, although the protracted process concerns "*change of management*". There is a mismatch between the process and the event. The final circumstances or event should be in case of appointment the final decision of the competent body. In case of dismissal, it should be the notification to the competent body.

Question 6 – 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?

AMAFI does not agree with ESMA's proposal that the moment of disclosure by the issuer in this situation should *always* be when the issuer has received the final decision from the public authority. On the one hand, issuers should have a margin of appreciation to determine whether the decision received from a public authority is sufficiently material to constitute inside information and require

disclosure. On the other hand, in the course of decision taking by the public authority, information may become available that the issuer might wish to disclose. There should be no prohibition on disclosing information earlier than when the issuer has received the final decision from the public authority.

AMAFI would like to add the following comments.

1. The issuer's obligation to disclose information at the moment the issuer has received the final decision from the public authority should be made conditional to a prohibition of disclosure, since under some public procedures or upon a decision by the public authority, the issuer may be prohibited to disclose information.
2. In some well-regulated processes, such as mergers and acquisitions (M&A) transactions, the current disclosure rules are well established and should remain fully applicable.

Question 7 – 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?

The two final events of the processes as identified in the consultation paper are:

1. The final event of the process driven by the issuer corresponding to the submission of the request to the authority (par. 76);
2. The final event of the process driven by the authority and concluding with the granting (or rejection) of the authorisation (par. 77).

AMAFI has reservations about ESMA's proposal to consider the submission of the request by the issuer, i.e. the first protracted process, as the final event. As long as the outcome is uncertain, there is no inside information.

The submission of a request to a public authority does not necessarily constitute inside information justifying public disclosure. Each situation should be analysed on a case-by-case basis to determine whether this step is sufficiently significant and likely to impact the market. In the absence of such an impact, it would be disproportionate to require disclosure. In many cases, the publication of the application to a public authority would be contrary to the legitimate interests of the issuer. In the example given by ESMA in the consultation paper, a patent filing involves strategic issues that justify discretion until the patent is granted. Requiring disclosure at this stage could harm the issuer's business interests.

Finally, the experience of AMAFI members shows that, in most cases, the final decision of the public authority constitutes the relevant event that could, depending on the circumstances, be qualified as inside information, and not the mere submission of a request by the issuer.

Question 8 – 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?

AMAFI has strong reservations about ESMA's proposal to distinguish between friendly and hostile takeover bids for the purpose of determining the timing of disclosure in the context of protracted processes.

AMAFI believes that such a distinction is counterproductive. The regulatory framework for takeover bids is already particularly comprehensive and precise. Introducing a distinction between friendly and hostile bids risks unnecessarily complicating the regulatory corpus, making it less readable and more difficult to apply.

In practice, an offer initially described as friendly may become hostile, and vice versa. This development makes the distinction proposed by ESMA irrelevant and a source of additional uncertainty for issuers.

AMAFI would like to point out that the disclosure obligations related to public offers are already governed by clear rules. Any further intervention would risk undermining these existing rules and creating unnecessary contradictions. AMAFI recommends that ESMA abandons this distinction between friendly and hostile takeover bids and refrain from further regulation in this area, to preserve the coherence and readability of the regulatory framework in force.

Question 9 – 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?

Point 12 should be deleted, as explained in our answer to question 5 above.

AMAFI would like to make several observations regarding ESMA's proposed approach to financial reporting, profit warnings and earnings surprises.

- The processes for preparing financial results, including consolidated accounts, fall into a different category from more exceptional operations that require a specific approach. These are recurrent processes, planned and framed by abundant European regulations and national case law.

  These processes are well industrialised within companies, considerably limiting the risks associated with the disclosure of privileged information. In this context, it would be preferable for ESMA not to intervene on this subject, leaving it to issuers to determine, on a case-by-case basis, whether these transactions should be qualified as protracted processes or one-off events, in accordance with the existing regulatory framework.

- Although AMAFI agrees with the proposal not to consider profit warnings and earnings surprises as protracted processes, we underline the specificity of the process of consolidating financial results for groups of companies. The feedback of information is often done in a staggered manner, which leads to a gradual evolution of the available figures. A trend can emerge without a precise consolidated figure being immediately accessible. In these circumstances, AMAFI considers that it would be inappropriate to impose a disclosure obligation as soon as a trend emerges if it remains

subject to significant developments. It is essential to allow issuers the time they need to consolidate results and publish accurate and reliable information.
There is a risk that ESMA's overly rigid intervention on this subject could push market participants to maintain their current practices, particularly the use of the deferred publication regime, which is better understood and controlled by issuers. A simplification that is complex to interpret and implement would lose all its interest and risks remaining unapplied.

Question 10 – Do you agree with the proposed approach in relation to recovery and resolution protracted process?

AMAFI has no specific comment on the approach proposed by ESMA regarding the recovery and resolution processes. These processes seem to be able to be integrated in a relevant way in the list of protracted processes.

AMAFI therefore supports ESMA's approach on this point.

Question 11 – 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?

Yes, the list of protracted processes is sufficiently comprehensive, particularly since it is non-exhaustive. We propose to delete certain points. Please see our answer to questions 5 and 7.

4.2 CONDITIONS TO DELAY DISCLOSURE OF INSIDE INFORMATION

Question 12 – 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, AMAFI agrees with this statement.

Question 13 – 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?

AMAFI does not agree with the list of communications in Article 4 of the draft CDR.

- In points c) and d), the words "*perceived as*" should be deleted. A public interview given by a person "*perceived as*" representing the issuer are not communications "*by the issuer*" (art. 4, par. 1) and communication by a person who is only "*perceived as*" representing the issuer, without having authority to do so should not have any legal consequences for the issuer;
- In point g), only "*confirmed or recorded*" oral communication "*during*" the issuer's shareholders meetings should be relevant. The words "*in the context of*" should be replaced by the word "*during*" and the words "*confirmed or recorded*" should be inserted before the word "oral";
- Point h) is a catch-all provision that brings only uncertainty and should therefore be deleted.

Question 14 – 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?

1. AMAFI would welcome an acknowledgement in the recitals of the proposed CDR, that the situations identified in Annex II (and, more generally, the situations in which there is a contrast between what was announced before and the new facts) can equally constitute "*one-off events*", in which case there should be indeed no possibility to delay disclosure, and "*protracted processes*", in which case, the issuer is normally not obliged to disclose intermediate steps and is only obliged to disclose the final circumstances or event. In other words, the obligation to disclose immediately when there is a "contrast" with what was announced before and a new set of facts, should not trump the exception provided in the first paragraph of Article 17.1 for intermediate steps.

2. Most situations referred to will leave room for interpretation and will not necessarily provide the expected legal certainty, particularly given the difficulty that will remain in determining whether or not one is in one of the situations referred to (in particular the situations referred to in points 2, 6, 7, 8 and 9).

   In the case of regulated institutions, including credit institutions, the regulations applicable to them, particularly in the event of financial difficulties, prohibit them from disclosing a certain amount of information that could constitute inside information. The situations referred to in points 3 and 5 of the CDR could constitute cases in which the regulations applicable to these regulated institutions would require them, contrary to what is provided for in the CDR, to defer publication of the inside information in question.

   On this point, Article 17(5) of MAR allows regulated institutions, subject to certain conditions, to decide under their own responsibility to defer publication of inside information that concerns 'a temporary liquidity problem'. However, it does not seem to us that this text would make it possible to resolve all the situations in which there could be a contradiction between the regulations applicable to regulated institutions, which would require them to defer the publication of confidential information, and the CDR, which would require them to publish the inside information in question.

   In view of the above, we believe that it would be desirable for the Draft Delegated Regulation to expressly provide that the enumeration of Annex II is strictly indicative and non-binding.