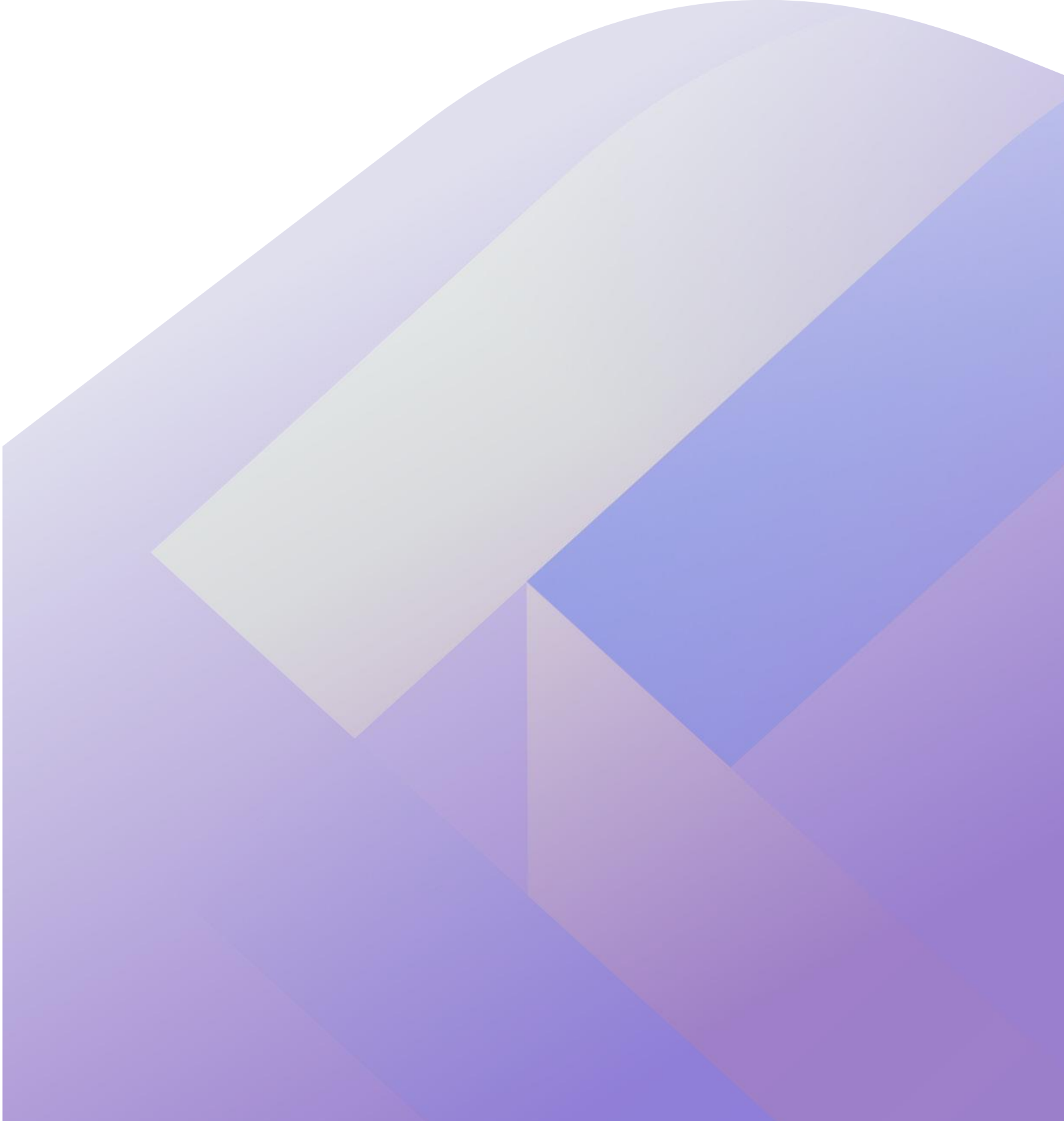


# Reply Form

**to the Consultation Paper on Draft technical advice  
concerning MAR and MiFID II SME GM**



## Responding to this Consultation Paper

ESMA invites comments on all matters in this Consultation Paper and in particular on the specific questions summarised in Annex 1. 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](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

## Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type < ESMA\_QUESTION\_LATA\_0>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_ LATA\_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ LATA\_ABCD.

- Upload the Word reply form containing your responses to ESMA's website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at [www.esma.europa.eu](http://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](http://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.

## 1 General information about respondent

Name of the company / organisation	Deutsche Börse Group
Activity	Trading Venue
Are you representing an association?	<input type="checkbox"/>
Country / Region	Germany

## 2 Questions

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

<ESMA\_QUESTION\_LATA\_1>

Deutsche Börse Group (DBG) 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, we 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.

<ESMA\_QUESTION\_LATA\_1>

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

<ESMA\_QUESTION\_LATA\_2>

The categories of processes identified by ESMA seem to make sense. However, DBG does not agree with the general principle described in para. 51 of the Consultation Paper, where 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 MAR which requires only the final circumstances or final event to be disclosed. In addition, ESMA’s proposal mixes 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.** DBG would therefore invite ESMA to revisit this part of the definition.

<ESMA\_QUESTION\_LATA\_2>

**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?**

<ESMA\_QUESTION\_LATA\_3>

DBG 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. DBG 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 considered. We 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.

<ESMA\_QUESTION\_LATA\_3>

**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?**

<ESMA\_QUESTION\_LATA\_4>

Please note our answer to question 3.

<ESMA\_QUESTION\_LATA\_4>

**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?**

<ESMA\_QUESTION\_LATA\_5>

No comments.

<ESMA\_QUESTION\_LATA\_5>

**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?**

<ESMA\_QUESTION\_LATA\_6>

DBG believes 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*” (see no. 34 of the non-exhaustive list) means. The receipt of the (oral) 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 (which is, under Article 17 (1a) MAR, a condition for the application of the amended Article 17 (1) MAR). Therefore, 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 long 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). **It seems to DBG that 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.**

<ESMA\_QUESTION\_LATA\_6>

**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?**

<ESMA\_QUESTION\_LATA\_7>

No comments.

<ESMA\_QUESTION\_LATA\_7>

**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?**

<ESMA\_QUESTION\_LATA\_8>

No comments.

<ESMA\_QUESTION\_LATA\_8>

**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?**

<ESMA\_QUESTION\_LATA\_9>

DBG understands that ESMA considers profit warnings/earnings surprises regarding the figures of the previous reporting period as one-off events and other inside information in course of the preparation of the financial statements, like the forecast on the following reporting period as part of a protracted process. We generally agree with ESMA's result. However, to avoid confusion it would be helpful to revisit the argumentation of how ESMA derives at this result. The fact that an issuer will miss its previous forecast will become apparent in the process of preparing the financial statements for the previous reporting period and thus in the course of a protracted process. **The final event of that protracted process is, however, not the finalisation of the financial statements, but much earlier in the preparation process, when the figures become sufficiently clear** (in a sense that major deviations of the preliminary figures from the final figures can no longer be expected). That would be the time for disclosure.

Contrary, e.g., the forecast for the next reporting period may depend on the decisions of the issuer up to the point of the finalisation of the financial statements, hence the final event for that information is later.

This might be the more solid logic to support the result that ESMA reaches.

<ESMA\_QUESTION\_LATA\_9>

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



<ESMA\_QUESTION\_LATA\_10>

No comments.

<ESMA\_QUESTION\_LATA\_10>

**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?**

<ESMA\_QUESTION\_LATA\_11>

No comments.

<ESMA\_QUESTION\_LATA\_11>

**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?**

<ESMA\_QUESTION\_LATA\_12>

DBG notes, and this is also observed by ESMA in para. 118 of the Consultation Paper, 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, we understand 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).

DBG also 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, DBG would welcome a clarifying statement by ESMA that the new wording of Article 17 (4) (b) MAR does not establish new or stricter conditions.**

<ESMA\_QUESTION\_LATA\_12>

**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?**

<ESMA\_QUESTION\_LATA\_13>

DBG generally agrees with the list of “types of communication by the issuer” in Article 4 of the draft delegated act. However, we believe 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 Consultation Paper) 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*”.

<ESMA\_QUESTION\_LATA\_13>

**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?**

<ESMA\_QUESTION\_LATA\_14>

DBG agrees with the list and believes that it is sufficiently comprehensive.

<ESMA\_QUESTION\_LATA\_14>

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

<ESMA\_QUESTION\_LATA\_15>

No comments.

<ESMA\_QUESTION\_LATA\_15>

**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.**

<ESMA\_QUESTION\_LATA\_16>

In general, we agree with the calculation method. However, the underlying definition of an SME within MiFID II (and other regulations) should be unified and increased regarding the market capitalisation. We support raising the threshold for companies qualifying from an average market capitalization of EUR 200 million to EUR 500 million. The current qualifying threshold for SMEs of EUR 200 million is too low as it only takes into consideration small enterprises but not mid-caps. A higher threshold would strengthen the ability of SME GM's to attract more companies, with the potential to increase liquidity on these markets.

<ESMA\_QUESTION\_LATA\_16>

**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.**

<ESMA\_QUESTION\_LATA\_17>

No comments.

<ESMA\_QUESTION\_LATA\_17>

**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.**

<ESMA\_QUESTION\_LATA\_18>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_18>

**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.**

<ESMA\_QUESTION\_LATA\_19>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_19>

**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.**

<ESMA\_QUESTION\_LATA\_20>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_20>

**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?**

<ESMA\_QUESTION\_LATA\_21>

DBG supports the requirement that annual financial reports must be audited. However, we do not think it would be appropriate to include interim financial reports under the obligation. This requirement does not exist for other segments, such as the general standard and should therefore not apply to SME GM in order to avoid unnecessary additional burden. **We therefore suggest a clarification by ESMA that the proposal only applies to annual financial reports.**

<ESMA\_QUESTION\_LATA\_21>

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

<ESMA\_QUESTION\_LATA\_22>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_22>

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

<ESMA\_QUESTION\_LATA\_23>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_23>

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

<ESMA\_QUESTION\_LATA\_24>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_24>

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

<ESMA\_QUESTION\_LATA\_25>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_25>

**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?**

<ESMA\_QUESTION\_LATA\_26>

Yes, we agree.

<ESMA\_QUESTION\_LATA\_26>