

## RESPONSE TO ESMA'S CONSULTATION ON SCRUTINY AND APPROVAL OF PROSPECTUS LEVEL II MEASURES

28 SEPTEMBER 2017

### INTRODUCTION

We welcome ESMA's consultation on the Level 2 measures for the new Prospectus Regulation adopted on 30 June 2017 (the Regulation). Our main concerns are:

#### CRITERIA AND PROCEDURES (§19)

- ESMA considers that criteria are separate from the procedures which NCAs have to undertake to validate whether these criteria are met and that those procedures should be considered outside the scope of the delegated acts. The objective of the delegated acts is to *"ensure that all competent authorities take a convergent approach when scrutinising the completeness, consistency and comprehensibility of the information contained in the prospectus"*. Therefore, **we think that also the procedures to validate criteria need to be convergent and fall within the scope of the delegated acts.**
- The draft technical advice states that in some cases the NCA may apply **criteria beyond those which are mandatory** (see recital art. A and Article B 1). In our view, this interpretation **goes beyond Level 1 text** and leaves too much room to NCAs' discretionary powers. It runs counter harmonisation of scrutiny procedures and therefore the creation of a level playing field as required in recital 60.

#### INFORMATION INSIDE/OUTSIDE PROSPECTUS (§ 21, 22, 23)

ESMA tries to specify the **information which the NCA must use as the basis for the scrutiny**, i.e. which information **should be "scrutinized"** according to the criteria of completeness, comprehensibility and consistency. In our view, Level 1 is crystal clear on this point, stating that:

- Article 2 (r) of the Prospectus Regulation: *"Approval means the positive act of the outcome of the **scrutiny** by the home Member States' competent authority of the **completeness, the consistency and the comprehensibility of the information given in the prospectus**";*
- Article 20§11 of the Prospectus Regulation states that the delegated acts should specify "the criteria for the **scrutiny** of prospectuses, in particular, the completeness, comprehensibility and consistency of *the information contained therein ...*".

In ESMA's view, however, NCAs may choose to examine information outside the prospectus. While we are aware that NCAs look at external information, this information should only be a trigger to **ask for**

**supplementary information** to be included in the prospectus<sup>1</sup> but it should not be in the “scope of scrutiny”. Otherwise, the scope of scrutiny may become unlimited generating uncertainty for the issuers, on the timing and content of the prospectus approval, and on the NCAs’ legal liability. Therefore, we do not agree with NCAs having power to procure information nor to examine information from outside the prospectus referred to in para. 23 and 24 of the general considerations of ESMA Draft Advise on Scrutiny of Prospectus.

## **FURTHER GUIDELINES**

We believe that ESMA’s guidelines to promote supervisory convergence according to Art. 20§12 of the Prospectus Regulation should have been consulted on in parallel with this consultation. This would have allowed to harmonise approval processes and prevent situation where NCAs adopt different practices (e.g. see the paragraph above on information inside/outside the prospectus – while some NCAs could look at external information, others don’t).

## **RESPONSE TO QUESTIONS / SPECIFIC COMMENTS**

**Question 1: Do you agree with the criteria for determining whether a prospectus is complete (Article A (1))? Do you consider that additional completeness criteria are necessary?**

We agree with the criteria proposed by ESMA to check the completeness of prospectus. We do not consider that additional criteria are necessary.

**Question 2: Do you agree that NCAs should apply different criteria when assessing the comprehensibility of retail and wholesale prospectuses? If yes, do you agree with the criteria proposed in Article A (2)? Please make an alternative proposal if you do not agree with these criteria.**

We agree on the criteria proposed by ESMA to check the comprehensibility of prospectuses and on the use of different criteria when assessing retail and wholesale prospectus.

**Question 3: Do you agree with the criteria for assessing the consistency of a prospectus proposed in Article A (3)? Do you consider that additional consistency criteria are necessary?**

We agree with the proposed criteria for assessing the consistency of the prospectus in Article A (3). We do not consider that additional criteria are necessary.

We question whether the term “aligned” mentioned in Art. A (3)(b)(c)(d)(e), is the right one when talking about consistency. In particular:

- We question whether 3(b) is consistent with Level 1;
- Sometimes it can be tricky to assess alignment of the use of proceeds with the issuer’s strategy (for debt prospectuses, 99% of use of proceeds mentioned in prospectuses are “general corporate purpose”);

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<sup>1</sup> according to Article 20§4 and Article 32 (1) (a) (b) (c)

- It is not clear how to you assess alignment of a clean working capital statement? We wonder whether Art. 3(e) should rather be applicable to qualified working capital statement.

Regarding Article A(3)(a) on risk factors' scrutiny, to avoid redundancies and ensure flexibility, we suggest amendment as follows:

*"(a) Any material and specific risks disclosed elsewhere in the draft prospectus are included or referred to in the risk factors section".*

For example, FX and interest rates risks can be addressed in the notes to the financial statements (IFRS 7). The risk factors section could include a reference to the notes where these risks are dealt with. ESMA's proposed wording could be interpreted by some NCAs as a requirement to duplicate the information.

**Question 4: In relation to scrutiny and review of the URD where ESMA proposes that only minimal changes be made to the generally applicable scrutiny criteria, do you consider there to be any further aspects where scrutiny and review of the URD need to differ from the general criteria?**

No.

**Question 5: Do you agree that it is not necessary to address partial/repeated reviews of a URD in the technical advice?**

Yes.

**Question 6: In order to take a proportionate approach to scrutiny and review of prospectuses, do you agree that NCAs should only be required to scrutinise information which has not already been scrutinised/reviewed/approved, as proposed in Article B (2)?**

Yes.

**Question 8: Do you have any further suggestions for harmonising the way in which NCAs scrutinise prospectuses? In your view, should ESMA propose more detailed or additional criteria for scrutiny/review in its technical advice?**

We don't consider that ESMA should propose more detailed or additional criteria in its technical advice. However, to further harmonise practices among NCAs is necessary to use also other tools such as guidelines and recommendations addressed to NCAs and Peer Reviews.

## **APPROVAL OF THE PROSPECTUS AND APPROVAL AND FILING OF THE URD**

### **Question 9: Has ESMA identified all the necessary amendments to the existing procedures for approval of the prospectus?**

We agree on the requirement to submit prospectus in searchable electronic format. However, in some cases it may be useful to keep flexibility to send some documents in a paper form as for example scanned documents are not in searchable electronic format.

### **Question 10: Do you agree with the provision for providing the appendix to the registration document/URD laid down in Article C(2)(d) and (e)?**

We agree with ESMA's proposal to grant issuers the choice of whether to submit an appendix for approval at the same time as the URD is approved, bearing in mind that if no appendix is approved together with the URD, it will not be possible to passport the URD for an offer/admission of securities to retail investors.

### **Question 11: Do you agree with the procedures for approval of the URD?**

As pointed out by ESMA, article 9(11) (a) of the Prospectus Regulation states that one of the conditions for becoming a frequent issuer is that the issuer, when submitting a URD for approval or filing, provides written confirmation that it has filed and published all regulated information required under the TD and MAR. It is clear from Level 1 that this confirmation should be provided only when the URD is submitted for approval or filed. Therefore, ESMA cannot require that the confirmation be resubmitted along with the final draft of the URD. Besides this requirement goes beyond Level I requirements, we question the relevance of the rationale put forward by ESMA "*reason for such a resubmission would be that an issuer's compliance with TD and MAR could change between the submission/filing of the URD and the approval*"). In practice, issuers publish their annual or half-yearly financial statements before filing a prospectus/URD/securities note. Furthermore, where a price sensitive information occurs in the course of approval process, it would be very unlikely that NCA would not be informed/aware of that.

### **Question 12: Do you agree with the procedures for filing of the URD? Are there any further considerations which ESMA should take into account in this regard?**

We disagree with the additional requirement laid down in article C(2)(h) of the Draft Technical Advice and according to which "*where a universal registration document is filed without prior approval, confirmation whether the universal registration document is being used to fulfil an obligation to publish an annual financial report required under Article 4 of Directive 2004/109/EC or a half-yearly financial report required under Article 5 of that Directive*" shall be submitted to the NCA.

Such requirement is not provided for in Level 1. According to the Regulation, issuers can include their annual and half-year financial reports in the URD to fulfil their obligations provided that they comply with the publication deadlines of the TD, make the URD available to the storage mechanism (OAM) and include in the URD a cross reference list and a responsibility statement pursuant to the provisions of the TD. Therefore, additional conditions should not be introduced at Level 2. When the Authority approving

the prospectus is different from the Authority in charge of TD supervision, NCAs should organise themselves to fulfil their duties without imposing additional burden on issuers.

Refer also to our response to question 11 regarding the statement of compliance with TD and MAR.

## CONDITIONS FOR LOSING STATUS OF FREQUENT ISSUER

**Question 14: Do you agree that it is not necessary at Level 2 to further specify the conditions for losing the status of frequent issuer? If no, please elaborate on how ESMA should further specify the conditions already established at Level 1.**

Yes, we agree that it is not necessary at Level 2 to further specify the conditions for losing the status of frequent issuer.

**Question 15: Do you have any other considerations which ESMA should be aware of when finalising the technical advice covered by this Consultation Paper?**

Please see below specific amendments we would propose on the draft technical advice of ESMA which are reflecting our concerns.

## DRAFT TECHNICAL ADVICE

### Recitals of Article A

Prospectus scrutiny is a key factor in ensuring investor protection and there should be a level playing field across Member States. **An exhaustive list of c**Criteria for scrutiny of the draft prospectus should therefore be established so that competent authorities apply harmonised standards when scrutinising draft prospectuses for the purpose of their approval.

For the purposes of investor protection, efficient allocation of resources and timely prospectus approval, information given in the draft prospectus should receive a measure of scrutiny that is proportional to the circumstances of the issuer and the issuance. ~~As scrutiny of the information given in the draft prospectus is a qualitative process, it is not possible to establish an exhaustive list of the scrutiny criteria competent authorities should apply.~~ In some cases, it may therefore be necessary to ~~apply criteria beyond those which are mandatory, to ensure that a draft prospectus meets the standards of completeness, comprehensibility and consistency.~~ In other cases a competent authority may receive a draft prospectus replicating information that has already been reviewed or scrutinised and that therefore does not necessitate further examination; in such cases, **in order to have a proportionate approach**, the competent authority should be permitted, though not obliged, to adapt its scrutiny.

(...)

**Article A: Criteria for scrutiny of the draft prospectus and criteria for review of the draft universal registration document and amendments thereto**

1. When scrutinising or reviewing the completeness of the information given in the draft prospectus, the competent authority shall consider ~~in particular~~ whether the draft prospectus meets the following criteria:

(...)

2. When scrutinising or reviewing the comprehensibility of the information given in the draft prospectus, the competent authority shall consider whether the draft prospectus is capable of being understood, taking into consideration the nature and circumstances of the issuer, the type of securities and the type of investors targeted. To this end, the competent authority shall consider ~~in particular~~ whether the draft prospectus meets the following criteria:

(...)

3. When scrutinising or reviewing the consistency of the information given in the draft prospectus, the competent authority shall consider whether the draft prospectus is free of material discrepancies between the different pieces of information provided in the draft prospectus, including any information incorporated by reference. To this end, the competent authority shall consider ~~in particular~~ whether the draft prospectus meets the following criteria:

“(a) Any material and specific risks disclosed elsewhere in the draft prospectus are included or referred to in the risk factors section;”

(...)

## Article B

1. “In order to ensure that the information given in the draft prospectus meets the standards of completeness, comprehensibility and consistency, when scrutinising or reviewing a draft prospectus the competent authority may, ~~where deemed necessary for investor protection~~, apply criteria ~~beyond those~~ laid down in Article A”.

## Recitals of Article C

With the exception of the first draft prospectus, it is imperative that each draft of the prospectus submitted to the competent authority clearly show changes made to the previously submitted draft and ~~explain how such changes address any outstanding~~ issues notified by the competent authority **have been addressed**. Each submission of a draft prospectus to the competent authority should include both a marked version, highlighting all changes to the previously submitted draft, and an unmarked version, where such changes are not highlighted.

Where disclosure items contained in the relevant annexes to this Regulation are not applicable or, given the nature of the issue or issuer, are not relevant in the case of a specific prospectus, those disclosure items should be identified to the competent authority in order to minimise any delays in the scrutiny process.

(...)

## Article C: Submission of an application for approval of a draft prospectus or filing of a universal registration document and amendments to a universal registration document

(...)

2. The issuer, offeror or person asking for admission to trading on a regulated market shall also submit exclusively in searchable electronic format via electronic means to the competent authority:

(...)

~~(g) where the issuer is submitting for approval a draft prospectus drawn up under the secondary issuance regime or a draft universal registration document or filing a universal registration document without prior approval, confirmation that, to the best of its knowledge, all regulated information which it was required to disclose under Directive 2004/109/EC, if applicable, and under Regulation (EU) No 596/2014 has been filed and published in accordance with those acts over the last 18 months or over the period since the obligation to disclose regulated information commenced, whichever is the shorter;~~

~~(h) where a universal registration document is filed without prior approval, confirmation whether the universal registration document is being used to fulfil an obligation to publish an annual financial report required under Article 4 of Directive 2004/109/EC or a half-yearly financial report required under Article 5 of that Directive;~~

(i) where a universal registration document is filed without prior approval and fulfils a request for amendment or supplementary information that was previously made by the competent authority in the context of a review pursuant to the second subparagraph of Article 9(9) of Regulation (EU) 2017/1129, an explanation as to how such request has been taken into account in the document;

(j) any other information considered necessary, on reasonable grounds, for the scrutiny, review or approval by the competent authority and expressly required by the competent authority for that purpose.

## Article E: Final submission of a draft prospectus for approval

(...)

~~3. Except where the universal registration document has been filed without prior approval, where the final draft of a universal registration document is submitted for approval, the issuer shall inform the competent authority, in writing via electronic means, of whether the universal registration document is being used to fulfil an obligation to publish an annual financial report required under Article 4 of Directive 2004/109/EC or a half-yearly financial report required under Article 5 of that Directive.~~

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*European countries, covering markets worth € 7.6 trillion market capitalisation with approximately 8000 companies.*

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