

## **EUROPEANISSUERS' RESPONSE TO ESMA'S CONSULTATION PAPER ON DRAFT RTS UNDER THE NEW PROSPECTUS REGULATION**

**9 MARCH 2018**

### **SUMMARY**

EuropeanIssuers, representing the interests of EU publicly quoted companies, welcomes ESMA's consultation. Our main comments are:

#### **1. Key financial information (KFI) in the prospectus summary**

- Given the stringent limit of 7 pages imposed on the prospectus summary under the Prospectus Regulation, we question the need for the cap on the number of additional line items and APMs to be included in the prospectus summary. Such requirement would be counterproductive and overly prescriptive.
- To avoid a one-size-fits all approach, we suggest allowing companies flexibility to:
  - determine the additional KFI they want to include in the prospectus summary;
  - to choose the format of presentation of KFI.

#### **2. Supplements**

We are supportive of ESMA's proposed approach, but we believe that issuers should have flexibility whether to include an outstanding profit forecast in a prospectus. Although, if the issuer chooses not to include outstanding profit forecasts, an explanation could be included as to why this was decided. We welcome the idea to abandon the requirement to provide the audit /accounting report on profit forecast.

#### **3. Data and machine readability**

We agree with ESMA's proposal to keep XML format as the practical arrangement to ensure that data is machine readable, but we express strong concerns with the proposal to shift the reporting burden to issuers. Any evolution of the current system should be carefully assessed in terms of costs and benefits and should not result in any additional burden on companies.

#### **4. Publication**

Technology and ways of publication and dissemination of information have significantly changed since the adoption of the 2003 Prospectus Directive. Wide-spread electronic dissemination and storage of regulated information raises issues in terms of security and liability that need to be addressed.

## RESPONSE TO QUESTIONS

### 1. KEY FINANCIAL INFORMATION IN THE SUMMARY

**Question 1: Do you agree that the KFI extracted from the issuer's historical financial information should be sign-posted?**

We do not consider that issuers should be required to sign-post key financial information (KFI) extracted from the issuer's historical financial information. Sign-posting these data would bring limited added value to the information disclosed. KFI disclosed by issuers should be understood as such meaning that they are all relevant for assessing the financial situation of these issuers. Considering also that in line with Article 7 para 5 of the Prospectus Regulation the summary should be read as an introduction to the prospectus, investors will be able, looking at the prospectus, to distinguish historical financial information from Alternative Performance Measures (APMs) and find all the necessary details and explanations regarding the latter (*Please, refer also to our answer to question 5*).

**Question 2: Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.**

We would advise against the inclusion of any additional specific templates. However, issuers should be given some flexibility to add information. In particular, such flexibility should be allowed for company groups which need to consolidate information on subsidiaries that are active in different sectors (e.g. the financial, non-financial, insurance, asset management and / or banking sectors). The same should apply to conglomerates.

**Question 3: Do you agree that cash flow from operations is the most useful measure of cash flow for non-financial entities issuing equity and that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities?**

Companies disagree with ESMA's suggestion that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities of non-financial entities. Both, cash flows from investing and financing could be relevant to investors considering the opportunity to invest in a company. For instance, that would be in case of a company pursuing an acquisition strategy, or active in commodities' sector, where significant cash flows stem from hedging transactions using derivatives, or a bio-tech company. It is important to allow issuers flexibility to decide whether KFI extracted from the cash flow statement are relevant to be included in the summary of a prospectus.

**Question 4: Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?**

NA

**Question 5: Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?**

We do not agree with the proposal to use footnotes to explain/reconcile APMs in the summary of a prospectus. Overall, it is not possible to draft the summary of a prospectus that complies with the ESMA's Guidelines on APMs while meeting the requirements of the Prospectus Regulation (e.g. regarding the page limit). Companies therefore consider that requiring the use of footnotes to describe APMs is unnecessary and could result in lengthy footnotes and complicated explanations. The

summary is an introduction to the prospectus and the detailed explanations regarding APMs are to be provided in the prospectus.

**Question 6: Do you agree that issuers should be given flexibility to present *pro forma* financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?**

We agree that issuers should be given flexibility to present *pro forma* financial information. Furthermore, we question the need to require disclosure of *pro forma* adjustments (para 48 of the consultation paper and para 5 of Article 2 of the draft RTS). Including *pro forma* adjustments would result in lengthy and heavy tables that would be inconsistent with the requirement for a concise summary. Where the issuer decides to add column(s), this obligation would result in 2 additional columns: a *pro forma* adjustments column and a *pro forma* KFI column). We would like to stress that the summary shall be an introduction to the prospectus. Therefore, only key *pro forma* financial information should be included in the summary. Investors may find all the details regarding *pro forma* information in the prospectus.

**Question 7: Do you agree that complex financial information in the summary should be presented according to its presentation in the prospectus? If not, please specify and provide alternative ways of presentation.**

Yes, we agree that complex financial information in the summary should be presented according to its presentation in the prospectus.

**Question 8: Which financial measures are most useful for retail investors to determine the health of a credit institution? Do you consider that the CET1 is comprehensible for retail investors? Please specify.**

NA

**Question 9: Do you agree that it should be mandatory for credit institutions to disclose SREP information in relation to Common Tier One Equity, the minimum prudential capital requirements, the Total Capital Ratio and the Leverage Ratio in the summary?**

NA

**Question 10: Do you agree with the choice of measures for insurance companies?**

Overall, we agree with the choice of measures for insurance companies. However, the definitions provided for IFRS based KFIs shall not be applicable to KFIs based on the local GAAP. Issuers must be provided with the flexibility to name the corresponding KFIs in accordance with the local GAAP.

The same flexibility shall be provided when it comes to the definitions of the APMs. Entities must be allowed to use their own APMs that correspond to the named APMs in the Annex. As there are no binding definitions of these APMs, issuers must be allowed to continue to use their existing APMs. Issuers should not be required to change their existing APMs due to the prospectus requirements. They shall be able to use their APMs in line with their financial reporting requirements.

**Question 11: Do you think it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary?**

NA

**Question 12: Given the page limit for the summary please provide your views on which items of historical financial information would be most useful for retail investors.**

The 7-page limit imposed on the summary by the Prospectus Regulation is a very stringent requirement. Companies consider that this requirement suffices to ensure that summaries remain short, useful and user-friendly. Therefore, there is no rationale for imposing a limit on the number of key financial information (KFI), including alternative performance measures (APMs).

Companies consider that the best way forward would be to allow issuers flexibility to include additional KFI. Issuers should be allowed to describe even all the APMs contained in the prospectus if they believe they are relevant for investors. Limiting the number of KFIs could raise liability issues due to inconsistency between information disclosed in the summary, the prospectus and other reports and public disclosures (e.g.: annual financial reports, registration documents, press releases...).

Furthermore, we consider that there is no specific piece of information that would be more meaningful or useful for retail investors. All information the issuer chooses to include in the summary of a prospectus is important for the investor to consider while making an investment decision.

**Question 13: Would the issuer, offeror or person asking for admission to trading incur costs if the proposed provisions are adopted? If so, please specify the nature of such costs, including quantifying them.**

In the REFIT Scoreboard Summary, published by the European Commission in October 2017, estimates that the review of the prospectus rules could result in savings of approximately 130 million euros per year thanks to the revised secondary issuance regime, and of around 45 million per year due to the new EU Growth prospectus. While we welcome these promising estimates, we believe that to ensure cost savings, flexibility is key. Imposing stringent rules and one-size-fits-all templates would further increase costs while drafting prospectuses. A prescriptive approach together with the new requirements regarding the summary of a prospectus (limit on the number of pages and risk factors to be included), could lead to potential liability issues and a significant increase of the legal and advisory fees linked to drafting and reviewing prospectuses.

## **2. DATA AND MACHINE READABILITY**

**Question 14: Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.**

No, we do not believe that the amount raised should be mandatory. Such a provision seems also to be going beyond Level 1 requirements. Furthermore, the data mentioned in Articles 21 and 47 of the Prospectus Regulation shall be provided to ESMA at the same time as the National Competent Authority (NCA) notifies the approval of the prospectus. While the amount raised would not be known at the time of the prospectus approval but only after closing of the offer or admission to trading of the securities. Requiring such data would result in additional burdens on the NCA and on the issuer.

**Question 15: Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.**

We could agree with the data identified by ESMA if the collection of such data does not impose any additional burden on issuers (*please also refer to our answer to question 17*).

**Question 16: Do you agree with the ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?**

We agree with the ESMA's proposal to keep XML format as the practical arrangement to ensure that data is machine readable. We emphasise though that the responsibility for providing / transferring the data in / to XML format should remain on the NCAs and should not be transferred to issuers. Otherwise, issuers (including listed SMEs) would be faced with additional costs which runs counter to the objective to facilitate access to capital markets. Any changes to the current system should be carefully assessed in terms of costs and benefits and any additional burdens on companies should be avoided.

**Question 17: Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?**

No, we do not believe that the proposed amendment is appropriate. We are concerned that such an amendment would shift the responsibility to collect data from the NCAs to companies, whereas the Prospectus Regulation clearly indicates the NCAs as responsible for providing such data to ESMA. Companies agree that when reviewing prospectuses, the NCAs may require some information that is not public at the time of the approval. Nevertheless, this should not result in a transfer of the responsibility to the issuers. Furthermore, it is important that issuers may provide such data in text format to the NCAs.

**Question 18: Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?**

We would like to raise the issue of the additional costs. Each section of this consultation paper contains a question regarding any additional costs that the issuer, offeror or person asking for admission to trading would incur if the proposed provisions were adopted, apart from this section. Requiring issuers to provide additional data would certainly increase administrative burdens and therefore would result in the additional costs.

We would like to point out that issuers make their prospectuses available on their websites, while investors can also find prospectuses on the websites of the NCAs, stock exchanges and eventually of the Officially Appointed Mechanism required by the Transparency Directive. All these websites provide for search functions. Furthermore, we question whether the reports to be published by ESMA in accordance with Article 47 of the Prospectus Regulation will improve investors' access to companies or companies' access to capital markets. This would run contrary to the objectives of the CMU and the objective to save approximately 175 million euros every year (*please refer to our answer to question 13*).

### 3. ADVERTISEMENTS

**Question 19: Do you consider that an advertisement should contain at least a hyperlink to the website where it is published and where available and technically feasible additional information that would facilitate tracing the prospectus? Please provide examples of the additional information that you think would be helpful to include in the advertisement.**

We agree that advertisements, with the obvious exception of the oral ones, should contain a hyperlink to the specific page of the website where the prospectus was or is to be published. We do not think of any additional information that would be helpful to include in advertisements.

**Question 20: Do you consider that the definition for complex securities set out in para 140 provides clarity to issuers and would be helpful in deciding when the comprehension alert referred to in Article 8(3)(b) of the PRIIPs Regulation should be included in an advertisement?**

Recital 18 of the PRIIPs Regulation contains the criteria to determine when an instrument should be qualified as a “complex security”. Therefore, the definition of complex securities under MIFID 2 should not be used to determine what type of securities fall under the scope of PRIIPs. In other words, complex securities under MIFID 2 should not be automatically considered PRIIPs or other way around. Therefore, we do not consider that the definition set out in para 140 of the consultation paper would be helpful to identify when the PRIIPs Regulation’s warning should be included in an advertisement.

**Question 21: Do you agree with the requirements suggested for Article 12 of the RTS? If not, please provide your reasoning.**

Yes, we agree with the requirements suggested for Article 12 of the RTS.

**Question 22: In particular, do you agree with the requirement to include warnings in advertisements? Do you consider that the suggested warnings are fit for purpose in terms of investor protection?**

Yes, we agree with the requirement to include warnings.

**Question 23: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including whether they are one-off or ongoing and, quantify them.**

No, we do not foresee any significant new costs stemming from the proposed provisions. If we understand well, the proposed draft carries over the current requirements under Delegated Regulation EU 301/2016. Therefore, there should not be any additional burden for the issuer, offeror or person asking for admission to trading.

### 4. SUPPLEMENTS

**Question 24: Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?**

Yes, we agree that Article 2 of Commission Delegated Regulation (EU) N°382/2014 should be carried over.

**Question 25: Do you agree that the additional requirements identified from ESMA's draft technical advice should also be included.**

We agree that the additional requirements identified by ESMA regarding changes in the working capital statement of the issuer of underlying securities of depositary receipts should be included in the draft RTS. In line with our answer to ESMA's 2017 consultation on format and content of the prospectus, we consider that issuers should have the flexibility whether to include an outstanding profit forecast in a prospectus. Although, if the issuer chooses not to include outstanding profit forecasts, an explanation could be included as to why this was decided. We welcomed the idea to abandon the requirement to provide the audit /accounting report on profit forecast. This requirement is an unnecessary burden on issuers. Especially the supplements increase this burden considerably. On the other hand, we question whether the audit reports are very useful for investors. The audit statement has no effect on the quality of the profit forecasts and estimates. The issuers themselves have a high interest in the accuracy of the information.

**Question 26: Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?**

Yes, we agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the obligation to publish a supplement per se. Material information about the financial situation of an issuer, especially when it is relevant for the issuer's capacity to pay the interests or redeem bonds for instance, would be price sensitive information. Pursuant to the provisions of MAR, the issuer would have to disclose such information without delay. Compared to this relevant information, financial statements that are fully in line with market expectations are not (new) information relevant for investment decisions. Bearing in mind that especially debt-based prospectuses are valid for 12 months, the publication of the audited financial statements should therefore not require the publication of a supplement on a systematic basis.

**Question 27: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including quantifying them.**

Considering that Article 16 of the draft RTS mainly carries over the contents of Article 2 of the Delegated Regulation (EU) No 382/2014, we do not foresee additional costs for the issuer, offeror or person asking for admission to trading derived from the aforementioned provisions.

## **5. PUBLICATION**

**Question 28: Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?**

Yes, we agree with ESMA's proposal to carry over only Article 6(1)(c) and 6(3) of Commission Delegated Regulation (EU) 2016/301.

**Question 29: Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.**

We would like to draw ESMA's attention that technology and especially the means of publication and dissemination of information have dramatically changed since the adoption of the 2003 Prospectus

Directive. Wide-spread electronic dissemination and storage of regulated information raises issues in terms of security and liability that need to be addressed.

**Question 30: Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.**

No, we do not foresee that the proposed publication provisions would result in additional costs on issuers, offerors or persons asking for admission to trading.

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