

RESPONSE TO ESMA CONSULTATION ON THE DRAFT TECHNICAL ADVICE ON MINIMUM INFORMATION CONTENT FOR PROSPECTUS EXEMPTION

5 October 2018

SUMMARY

We welcome ESMA's consultation and would like to insist on the following point: we disagree with ESMA's approach to consider, as a starting point, the disclosure requirements for prospectuses. The starting point should be the information required by the takeover bid and company law directives and made public by issuers in case of a takeover by way of exchange offer, a merger or a division, supplemented where necessary by additional information regarding the transaction and its impact to allow shareholders of the companies concerned to take an informed decision. Furthermore, the content of the Exempted Document should not be similar or equal to the content of a full prospectus. We are therefore putting forward, in annexes 1 and 2, two proposals for the minimum content of the Exempted Document.

RESPONSE TO THE SPECIFIC QUESTIONS

Operative Provisions and Definitions

Q1 : Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added? Please provide your reasoning.

We agree with the definitions proposed to be carried over. We don't think that any additional definition should be added. Please refer also to our answer to question 3 regarding reverse acquisitions.

Q2 : Do you agree to include a definition of a reverse acquisition as defined in IFRS 3 Business Combinations as endorsed by the EU into the technical advice (including in the situations where IFRS are not applicable). If not, please provide your reasoning.

Please refer to our answer to question 3.

Q3 : Do you agree that a more comprehensive disclosure regime should apply if the takeover, merger or division transaction falls within the concept of reverse acquisition? If not, please provide your reasoning.

No, we do not agree that a more comprehensive disclosure regime should apply to reverse acquisitions. A specific regime for these transactions is not foreseen in the 2017 Prospectus Regulation and there is no mention in the Commission's mandate of reverse acquisitions. Article 1, paragraphs 4 and 5, of the Prospectus Regulation requires only the publication of a document for takeovers and mergers or divisions. As regards reverse acquisitions, we consider that information required by the Takeover Directive and Directive (EU) 2017/1132, along with additional disclosures we are putting forward will suffice (please refer to our answer to question 12 and to annexes 1 and 2).

Q4 : Do you agree to include an overarching principle guiding the content of the Exempted Document as included in Article B in L2 provisions? If not, please provide your reasoning.

The Prospectus Regulation provides for an exemption of prospectus in case of takeovers, mergers or divisions on the basis that information is already required by other pieces of EU legislation (the Takeover Directive and Directive (EU) 2017/1132) supplemented, as the case may be, by national provisions. The Exempted Document is not a prospectus and therefore:

- The principles applicable to a prospectus should not apply to the Exempted Document;
- The Exempted Document should not require issuers to disclose the same information than in a prospectus: for instance, disclosure requirements specific to prospectuses should not be required (persons responsible or the summary of information published over the last 12 months under MAR, for instance) as well as the disclosure of risk factors linked to the anticipated impact of the transaction.

Applying to the Exempted Document the principles applicable to prospectuses and/or requiring the same information would not be consistent with the exemption provided by the Prospectus Regulation. Therefore, we disagree with ESMA's proposal to include a principle that the Exempted Document « *shall contain the necessary information which is material to an investor for making an informed assessment* ».

As regards the process, in its mandate to ESMA, the Commission emphasized that the exemptions provided by article 1 of the prospectus Regulation represent an alleviation compared to the corresponding exemptions of the Prospectus Directive where the precondition to be fulfilled was « *that a document be available containing information "which is regarded by the competent authority as being equivalent to that of a prospectus"* ». » We welcome this alleviation and encourage ESMA to monitor the implementation of this exemption to ensure that, in practice, Competent Authorities do not review the Exempted Document.

Q5 : Do you agree to carry over the criteria included in Article 14 (1) of the PR into ESMA Technical Advice in order to prescribe the use of the Minimum Information Content Simplified disclosure regime for the Issuer Section? If not, please provide your reasoning.

We agree that listed companies already disclose information and should benefit from lighter requirements, but our concern is that ESMA is duplicating the prospectus regime to the Exempted Document and applying the same principles/requirements. We disagree with this approach which is not consistent with the exemption of prospectus provided by level 1 and consider that ESMA is overstepping its mandate.

Q6 : Do you agree to carry over the provision included in Article 19 of the PR in relation to incorporation by reference into the ESMA Technical Advice? If not, please provide your reasoning.

Yes, we agree that the provision included in Article 19 of the Prospectus Regulation regarding incorporation by reference should be carried over. However, as regards article D of the draft technical advice we consider that the list of documents should not be too restrictive. Looking in particular at item (b) of the list, which refers to the laws transposing the Takeover and the Company Law package Directives, we consider that ESMA's approach is overly restrictive. Issuers should be allowed to incorporate, by reference, any information required by national legislation that would be relevant for the transaction.

Q7 : Do you agree the issuers should be able to incorporate by reference the information required by Takeover Directive or Merger and Division Directive into the Exempted Document? If not, please provide your reasoning.

Yes, we agree.

Q8 : Do you agree to carry over the provisions included in Article 27 of the PR in relation to language into the Technical Advice without including a summary of the Exempted Document? If not, please provide your reasoning.

No, we do not agree and consider that the provisions included in Article 27 of the Prospectus Regulation should not be carried over. Each member state has their own provisions regarding language requirements and we do not see the need for additional requirements.

Q9 : Do you agree that the Exempted Document should not require the publication of a summary translated into the language of the competent authority (including in cross-border transactions directed at retail investors)? If not, please provide your reasoning.

Yes, we agree that there should not be any summary required. The Exempted Document is not a prospectus and it would be contrary to the level 1 legislation to transpose all the requirements of a prospectus to a situation where no prospectus is required. Please refer also to our answer to question 4.

Q10 : Do you agree with Article F of this technical advice concerning Complex financial history and significant financial commitment into the technical advice? If not, please provide your reasoning.

Yes, we agree that where the issuer has a complex financial history or has made a significant financial commitment and the inclusion in the Exempted Document of information relating to an entity other than the issuer is necessary, this information shall be deemed to relate to the issuer.

We would like to insist however on the fact that we do not agree with the different schedules (appendices I to IV) put forward by ESMA in its consultation paper, since they will result in requiring the same disclosures than for a prospectus. We are therefore proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

Q11 : What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

We consider that it is premature to assess the impact and the costs and benefits of the exemption. This question should be raised – before 21 July 2022 – when the Commission will draft the report on the review of the Regulation pursuant to its article 48.

Appendix I – Minimum Information Content Simplified Disclosure Regime for the Issuer Section

Q12 : Do you agree with the proposal relating to the Minimum Information Content Simplified Disclosure Regime on Issuer Information Section set out in Appendix I for the Exempted Document (when the issuer has already securities admitted to regulated market or SME Growth Market? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

We consider that ESMA's approach is not relevant and we are proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

In the case of a takeover bid by way of an exchange offer or a merger, the first third parties concerned are the shareholders of the companies involved in the transaction, who are privy of information regarding the companies. Therefore, we consider that the starting point for determining the minimum content of the Exempted Document should not be the prospectus but the information required by the Takeover and the Company Law package Directives. This first set of information should suffice to describe the transaction and additional information would only be required, where necessary, to describe the impact of the transaction on the issuer and the securities that will be admitted to trading.

Q13 : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

Please refer to our answer to question 11.

Appendix II – Minimum Information Content Issuer Section

Q14 : Do you agree with the proposal relating to the Minimum Information Content Issuer Section as set out in Appendix II for the Exempted Document (when the issuer is not admitted to trading on a regulated market or to an SME Growth Market)? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

We consider that ESMA's approach is not relevant and we are proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

Q15 : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

Please refer to our answer to question 11.

Appendix III – Minimum Information Content Securities Section

Q16 : Do you agree with the proposal relating to the Minimum Information Content Securities Section for the Exempted Document? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

We consider that ESMA's approach is not relevant and we are proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

Q17 : Do you believe that information concerning placing and underwriting is necessary in the context of offers to public connected with takeovers, mergers or divisions? If yes, please provide your reasoning.

No. Information concerning placing and underwriting is necessary in the context of offers to public connected with takeovers, mergers or divisions is not relevant and therefore not necessary.

Q18 : Do you agree that Minimum Information Content Securities Section should include information items concerning non-equity securities issuances connected with takeovers, mergers and divisions? If not, please provide your reasoning.

Yes, we agree that the Exempted Document should include information regarding non-equity securities issuances connected with takeovers, mergers and divisions. However, we consider that ESMA's approach is not relevant and we are proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

Q19 : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs on any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

Please refer to our answer to question 11.

Appendix IV – Minimum Information Content Description and Impact of Takeovers, Mergers and Divisions

Q20 : Do you agree with the proposal relating to the Minimum Information Content on Description and Impact of the Takeover, Merger or Division Section? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

We consider that ESMA's approach is not relevant and we are proposing different and alleviated disclosure requirements (please refer to annexes 1 and 2).

Q21 : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

Please refer to our answer to question 11.

General Questions

Q22 : Taking into consideration the scope of the exemption as described in this Consultation Paper, would you consider that the Technical Advice provides investors with useful and relevant information when an offer of securities to the public or admission to trading on regulated market is connected with a Takeover, Merger or Division? Please provide your reasoning.

Please refer to our answer to question 12 and to annexes 1 and 2.

Q23 : Taking into consideration that the Exempted Document will not be subject to scrutiny and approval pursuant to Article 20 of the PR, in which cases would you consider that issuers may opt for a voluntary prospectus instead of publishing an Exempted Document? Please provide your reasoning.

No response.

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ANNEX 1 - EXEMPTED DOCUMENT FOR MERGERS

Minimum content for listed companies

The document to be published in order to benefit from the prospectus exemption in case of a merger should include, when the issuer is listed on a regulated market:

- The information required by the provisions of national legislations transposing directive (EU) 2017/1132 as presented in **Table 1** below; and
- Additional information included in **Table 2** below, extracted from ESMA’s draft technical advice (appendices I, III and IV) and which we consider relevant and necessary.

TABLE 1

<p>Information made available according to Directive (EU) 2017/1132</p>	<ul style="list-style-type: none"> • Draft terms of merger: <ul style="list-style-type: none"> (a) the type, name and registered office of each of the merging companies; (b) the share exchange ratio and the amount of any cash payment; (c) the terms relating to the allotment of shares in the acquiring company; (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement; (e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company; (f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them; (g) any special advantage granted to the experts referred to in Article 96(1) and members of the merging companies' administrative, management, supervisory or controlling bodies. • The annual accounts and annual reports of the merging companies for the preceding three financial years. • Where applicable, an accounting statement drawn up on a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date. • The reports of the administrative or management bodies of the merging Companies (“detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio. That report shall also describe any special valuation difficulties which have arisen.”). • Where applicable, the report of the independent expert(s) on the draft terms and statement whether in their opinion the share exchange ratio is fair and reasonable.
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TABLE 2

<p>appendices I, III and IV of</p>	<p>1. Description of the merger</p> <ul style="list-style-type: none"> • Description of any anticipated synergies. • Where applicable, any conditions to which the effectiveness of the merger is

	<p>subjected to.</p> <ul style="list-style-type: none"> • Where applicable, any information on break-up fees which may be payable if the merger does not proceed. • Indications of any notifications and/or requests for authorisations required by the applicable regulations that the merger is subject to.
	<p>2. Impact of the merger</p>
	<ul style="list-style-type: none"> • To the extent not covered elsewhere, a business overview of the (to be) merged company and a brief description of the principal markets in which the (to be) merged company competes. • To the extent not covered elsewhere, information on any material investments / cancelation of future investments / disinvestments of the (to be merged) company. • Details of related party transactions that the (to be) merged company has entered into during the period covered by its last historical financial statements information and up to the date of the Exempted Document. • Strategy and objectives: a brief description of the issuer's intentions with regards to the future business following the merger in so far as how the issuer operating activities are/will be affected. • In so far as is known to the issuer, potential material impacts of the merger on the corporate governance, including future changes in the members of the administrative, management or supervisory bodies. • Where applicable, and to the extent known by the issuer, any potential changes in the issuer's shareholdings as a result of the merger.
	<p>3. Pro forma financial information</p>
	<p>In the case of a significant gross change, a description of how the merger might have affected the assets and liabilities and earnings of the issuer, had the merger been undertaken at the commencement of the period being reported on or at the date reported. This pro forma financial information is to be presented as set out in items 4 to 6 [of appendix IV of ESMA's draft technical advice] and must include the information indicated therein.</p> <p>This requirement will normally be satisfied by the inclusion of pro forma financial information. Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.</p>
	<p>4. Risk factors</p>
	<p>A description of the material risks that are specific to the issuer, <u>the merger</u> and the securities issued in a limited number of categories, in a section headed 'Issuer Risk Factors'.</p> <p>In each category the most material risk factors, in the assessment of the issuer, taking into account the negative impact on the issuer and the probability of their occurrence, shall be mentioned first.</p>
	<p>5. Working capital statement</p>
	<p>Statement by the issuer that, in its opinion, the working capital is sufficient for the issuer's present requirements or, if not, how it proposes to provide the additional working capital needed.</p>
	<p>6. Information concerning the securities to be admitted to trading</p>
	<p><i>[Only the relevant or necessary items of appendix III of ESMA's draft technical advice would be required. In this regard, we consider that disclosure on tax is not relevant and where the securities are of the same class than the securities already listed, a description of the rights is not necessary.]</i></p>

	7. Admission to trading and dealing arrangements <i>[Only the relevant or necessary items of appendix III of ESMA's draft technical advice would be required.]</i>
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ANNEX 2 - EXEMPTED DOCUMENT FOR TAKEOVER BIDS
Minimum content for listed companies

The document to be published in order to benefit from the prospectus exemption in case of a takeover by way of an exchange offer should include, when the issuer is listed on a regulated market:

- The information required by the provisions of national legislations transposing the Takeover Directive as presented in **Table 3** below; and
- Additional information included in **Table 4** below, extracted from ESMA’s draft technical advice (appendices I, III and IV) and which we consider relevant and necessary.

TABLE 3

<p>Information made available according to The Takeover Directive</p>	<ul style="list-style-type: none"> • Offer document established by Article 6 (3) of the Takeover Directive <ul style="list-style-type: none"> (a) the terms of the bid; (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company; (c) the securities or, where appropriate, the class or classes of securities for which the bid is made; (d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid; (e) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it; (f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire; (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company; (h) all the conditions to which the bid is subject; (i) the offeror’s intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business; (j) the time allowed for acceptance of the bid; (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities; (l) information concerning the financing for the bid; (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company; (n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company’s securities as a result of the bid and the competent courts.
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TABLE 4

<p>Items extracted from appendices I, III and IV of ESMA's draft technical advice</p>	<p>1. Description of the takeover</p> <ul style="list-style-type: none"> • Description of any anticipated synergies. • Where applicable, any information on break-up fees which may be payable if the takeover does not proceed. • Indications of any notifications and/or requests for authorisations required by the applicable regulations that the takeover is subject to.
	<p>2. Impact of the takeover</p> <ul style="list-style-type: none"> • Details of related party transactions that the (to be) acquired company has entered into during the period covered by its last historical financial statements information and up to the date of the Exempted Document. • In so far as is known to the issuer, potential material impacts of the takeover on the corporate governance, including future changes in the members of the administrative, management or supervisory bodies. • Where applicable, and to the extent known by the issuer, any potential changes in the issuer's shareholdings as a result of the takeover.
	<p>3. Pro forma financial information</p> <p>In the case of a significant gross change, a description of how the takeover might have affected the assets and liabilities and earnings of the issuer, had the takeover, been undertaken at the commencement of the period being reported on or at the date reported. This pro forma financial information is to be presented as set out in items 4 to 6 [of appendix IV of ESMA's consultation paper] and must include the information indicated therein.</p> <p>This requirement will normally be satisfied by the inclusion of pro forma financial information. Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.</p>
	<p>4. Risk factors</p> <p>A description of the material risks that are specific to the issuer, <u>the takeover</u> and the securities offered in a limited number of categories, in a section headed 'Issuer Risk Factors'.</p> <p>In each category the most material risk factors, in the assessment of the issuer, offeror or person asking for admission to trading on a regulated market, taking into account the negative impact on the issuer and the probability of their occurrence, shall be mentioned first.</p>
	<p>5. Working capital statement</p> <p>Statement by the issuer that, in its opinion, the working capital is sufficient for the issuer's present requirements or, if not, how it proposes to provide the additional working capital needed.</p>
	<p>6. Information concerning the securities to be admitted to trading</p> <p><i>[Only the relevant or necessary items of appendix III of ESMA's consultation paper would be required. In this regard, we consider that disclosure on tax is not relevant and where the securities are of the same class than the securities already listed, a description of the rights is not necessary.]</i></p>
	<p>7. Admission to trading and dealing arrangements</p> <p><i>[Only the relevant or necessary items of appendix III of ESMA's consultation paper would be required.]</i></p>