



European Securities and
Markets Authority

Response form for the Consultation Paper on scrutiny and approval



Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

1. respond to the question stated;
2. contain a clear rationale; and
3. describe any alternatives ESMA should consider.

ESMA will consider all responses received by 28 September 2017.

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:

4. Insert your responses to the questions in the Consultation Paper in the form “Response form_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper (www.esma.europa.eu → ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).
5. Please do not remove tags of the type <ESMA_QUESTION_SAC_1>. Your response to each question has to be framed by the two tags corresponding to the question.
6. 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.
7. When you have drafted your response, name your response form according to the following convention: ESMA_SAC_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_SAC_ABCD_RESPONSEFORM.
8. Upload the form containing your responses, in Word format, to ESMA’s website (www.esma.europa.eu under the heading ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confi-



dential 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 under the heading 'Data protection'.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to investors, issuers, including issuers already admitted to trading on a regulated market or on a multilateral trading facility, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation.



General information about respondent

| | |
|--------------------------------------|-------------------------------------|
| Name of the company / organisation | Afep |
| Activity | Non-financial counterparty |
| Are you representing an association? | <input checked="" type="checkbox"/> |
| Country/Region | France |

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_SAC_1>

Since 1982, **Afep** (Association française des entreprises privées) is the association which brings together French large companies and companies operating in France. Based in Paris and Brussels, Afep aims to foster a business-friendly environment and to present its members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation are Afep's core priorities. Afep has around 120 members and is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility.

We welcome ESMA's consultation on the level 2 measures of the new Prospectus Regulation adopted on 30 June 2017 (the **Regulation**). The proposals put forward by ESMA bring some clarity in the review and scrutiny of prospectuses and registration documents and the approval process. **However, we are concerned by the following issue.**

For the approval of the prospectus for **secondary issuances** and the filing of an **URD** (paragraphs 106-107 of the consultation paper), ESMA is proposing to require a **written statement** provided by the issuer and confirming that the issuer has complied with its obligation to disclose regulated information under the Transparency Directive (TD) and Market Abuse Regulation (MAR). This requirement is included in article C. 2. g) of ESMA's draft technical advice and reads as follows : "*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;*".

The rationale put forward by ESMA is that the availability of information disclosed under TD and MAR is an important prerequisite for the correct functioning of the secondary issuance regime and ESMA considers that "*it should as such be a condition for an issuer's use of the [secondary issuance] regime.*" ESMA does not provide any rationale for requiring a compliance statement for the filing of an URD.

We agree with ESMA that the basis for allowing listed issuers to benefit from a lighter disclosure regime is that they have to comply with periodic and ongoing disclosure obligations under TD and MAR. However, **the conditions to benefit from the secondary issuance regime and regarding the filing of URDs are precisely set in the Regulation :**

- as regards **the secondary issuance regime**, the conditions are laid down in article 14.1 of the Regulation and include the following :
 - a) issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued;

- b) issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities;
 - c) offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months.
- as regards **the filing of an URD**, the Regulation does not establish any specific condition and the filing of a written confirmation is only mentioned in article 9.11 of the Regulation regarding the status of frequent issuer and the faster approval process : the confirmation is only required in order to benefit from the status of frequent issuer.

If the EU co-legislators had considered that providing a written confirmation was an essential condition to benefit from the secondary issuance regime, or to be able to file an URD, such a condition would have been laid down in Level 1 Legislation. **Therefore ESMA cannot add any additional requirement** and article C.2.g) of the draft technical advice should be deleted :

“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;”~~

<ESMA_COMMENT_SAC_1>

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?

<ESMA_QUESTION_SAC_1>

We agree with the criteria proposed by ESMA to check the completeness of prospectuses. We don't consider that additional criteria are necessary. <ESMA_QUESTION_SAC_1>

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.

<ESMA_QUESTION_SAC_2>

We agree with the criteria proposed by ESMA to check the comprehensibility of prospectuses.

<ESMA_QUESTION_SAC_2>

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?

<ESMA_QUESTION_SAC_3>

We agree with the criteria put forward by ESMA for assessing the consistency of prospectuses. However we doubt whether the term "aligned", mentioned in A(3)(b)(c)(d)(e), is appropriate. Generally speaking, we consider that the term "consistent" is clear and does not need to be explained. Furthermore we are not in favour of introducing at Level 2, notions not mentioned in Level 1 legislation. Therefore we suggest the following amendments to article A.3 of the draft technical advice :

"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 in the risk factors section;

(b) The information contained in the summary is ~~aligned~~ **consistent** with information contained elsewhere in the draft prospectus;

(c) The figures in the use of proceeds section correspond to the amount of proceeds being raised and, where applicable, the disclosure of the use of proceeds is ~~aligned~~ **consistent** with the disclosure of the issuer's strategy;

(d) The description of the issuer in the operating and financial review, where required, the historical financial information, the description of the issuer's activity and the risk factors are ~~aligned~~ **consistent**;

(e) In case a working capital statement is required, this is ~~aligned~~ **consistent** with the risk factors, the auditor's report, the use of proceeds and, where applicable, the disclosure of the issuer's strategy and how the strategy will be funded."

Finally, to ensure comprehensibility and to allow issuers to draft prospectuses with "a structure that helps the investor understand their contents", **maximum flexibility should be given to issuers to choose the order of the sections**. This is contradictory with the objective of ESMA to impose a mandatory order and allow for flexibility only within each section.<ESMA_QUESTION_SAC_3>



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?

<ESMA_QUESTION_SAC_4>

No, we do not consider that there should be further aspects where scrutiny and review of the URD should differ from the general criteria.

<ESMA_QUESTION_SAC_4>

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

<ESMA_QUESTION_SAC_5>

Yes, we agree with ESMA's statement that it is not necessary to address partial/repeated reviews of a URD in the technical advice.

<ESMA_QUESTION_SAC_5>

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)?

<ESMA_QUESTION_SAC_6>

Yes, we agree with this approach.

<ESMA_QUESTION_SAC_6>

7. : Do you believe that application of the proposed criteria 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.

<ESMA_QUESTION_SAC_7>

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<ESMA_QUESTION_SAC_7>

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?

<ESMA_QUESTION_SAC_8>

We don't consider that ESMA should propose more detailed or additional criteria in its technical advice. The best and most effective way to harmonise practices among NCAs is not necessarily through additional Level 2 measures but rather by using other tools such as guidelines and recommendations addressed to NCAs and Peer Reviews.

<ESMA_QUESTION_SAC_8>

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

<ESMA_QUESTION_SAC_9>

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<ESMA_QUESTION_SAC_9>

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)?

<ESMA_QUESTION_SAC_10>

Article 26.4 of the Regulation defines 2 conditions in order to notify an URD or RD related to an issue of non-equity securities or drafted by a Third-country issuer to a Host Competent Authority:

- The URD or RD shall contain an appendix;
- The approval of the URD or RD shall encompass this appendix.

The approval is defined by the Regulation as “*the positive act at the outcome of the scrutiny by the home Member State’s competent authority of the completeness, the consistency and the comprehensibility of the information given in the [URD / RD]*”

A first reading of this article could lead to the conclusion that the approval of the URD/RD and of the appendix must take place at the same time, although there is no explicit reference to a timeline in article 26.4 of the Regulation. A different interpretation would be that, **at the time of the notification to a Host Competent Authority, the verification of the 3 Cs (completeness, consistency and comprehensibility) must have been performed on both the URD/RD and the appendix.**

The first interpretation would impose an additional constraint on a new provision designed to alleviate administrative burden and allow issuers to passport URD/RD. The second interpretation is in line with the objective of the co-legislators to introduce a notification system between competent authorities to ensure that, in case of a passporting of a URD/RD already approved, the registration document “*is not subject to a scrutiny or approval by the competent authority approving the prospectus*” (recital (69) of the Regulation). As a matter of fact, many recurring non-equity issuers have complained that, when passporting base prospectuses, some host Competent Authorities would review and comment on their registration documents incorporated by reference. **We therefore advocate for a more practical approach that would offer more opportunities to issuers to use this new mechanism** to realize cross-border issuances and contribute to the building of a Capital Market Union. The key issue here, as mentioned by ESMA, is to allow the host Competent Authority to approve the part of the summary relating to the issuer. This objective will be achieved if the host Authorities are notified with an approved URD/RD and an approved appendix irrespective of the date of approval of each of these elements. **Paragraphs (d) and (e) of article C.2 of the draft technical standard could therefore be deleted since we don’t consider that there is a need for level 2 measures regarding this specific point.**

<ESMA_QUESTION_SAC_10>

11. : Do you agree with the procedures for approval of the URD?

<ESMA_QUESTION_SAC_11>

We do not agree with ESMA’s proposal to require issuers that want to benefit from the status of frequent issuer to re-submit the confirmation mentioned in article 9.11 (a) at the time of the approval of the URD. The Regulation clearly states that a confirmation shall only be provided once upon the filing or submission for approval of a URD. There is no leeway for ESMA to require an update of this confirmation.

<ESMA_QUESTION_SAC_11>

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?

<ESMA_QUESTION_SAC_12>

The conditions to benefit from the secondary issuance regime and regarding the filing of URDs are precisely set in the Regulation :

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 - b) issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities;
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13. : Do you believe that any of the proposed procedures for approval and filing 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.

<ESMA_QUESTION_SAC_13>

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<ESMA_QUESTION_SAC_13>

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.

<ESMA_QUESTION_SAC_14>

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

<ESMA_QUESTION_SAC_14>

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

<ESMA_QUESTION_SAC_15>



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<ESMA_QUESTION_SAC_15>