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Additional Information

Level 1 Regulation
Prospectus Regulation 2017/1129

Topic
Public offer

Subject Matter
Transferable securities

Question
If shares are offered to the public under shareholders' agreement restricting the transferability of the shares, would this have an impact on the status of those shares as 'transferable securities'?

ESMA Answer

31-03-2021

Original language

[ESMA 31-62-1258 Prospectuses Q&A nr 14.12]

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

The definition of securities[1] in the Prospectus Regulation refers to transferable securities as defined in MiFID II[2]. In turn, the obligation to publish a prospectus pursuant to the Prospectus Regulation only applies to the offer or the admission to trading on a regulated market of securities that are transferable.

Commission Delegated Regulation 2019/98[3] requires information in relation to restrictions on the free transferability of the securities (e.g. Annex 11, item 4.8) and information in relation to lock-up agreements of selling securities holders (e.g. Annex 11, item 7.4). Thus, while the ability to transfer a security may be reduced (e.g. on a contractual basis where there are selling restrictions applicable in a specific country, or in a situation where there is a lock-up agreement between an issuer and existing shareholders), it must be concluded that securities offered with certain restrictions remain "transferable securities" within the definition of securities in Article 2(a) of the Prospectus Regulation and, therefore, subject to the scope of the Prospectus Regulation.

Nevertheless, some other restrictions may be so broad that they result in the impossibility to consider the relevant securities as freely transferable and, therefore, outside the scope of the Prospectus Regulation.

When considering this question, NCAs should analyse on a case-by-case basis whether a class of securities that are subject to a restriction are transferable or not.

Disclaimer:

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

[1] Article 2(a) of the Prospectus Regulation.

[2] Ibid "[...] transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months".

[3] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (OJ L 166, 21.6.2019, p. 26).