



TRANSACTIONS – ADVICE – LITIGATION

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Amsterdam, 10 October 2014
Re: Consultation on draft RTS on prospectus related issues under the Omnibus II Directive
(ESMA/2014/1186)

Ladies and Gentlemen,

Thank you for providing the opportunity to comment on the draft Regulatory Technical Standards (RTS) on prospectus related issues under the Omnibus II Directive (consultation paper ESMA/2014/1186 dated 25 September 2014). Annex I to the consultation paper sets out a list of 28 questions. I would appreciate to respond to question nr. 25.¹

**Question 25: Do you agree with the requirements suggested for Article 13(1) RTS ?
If not, please provide your reasoning.**

Response

1. Article 13(1) RTS provides, briefly said, that information outside the prospectus shall not (1) contradict or (2) refer to information contradicting the prospectus; (3) contain misleading omissions in comparison with the prospectus and (4) contain numerical performance measures, unless contained in the prospectus. Only nr. (4) has the level of concreteness required for qualifying as a “technical standard”. Nrs. (1), (2) and (3) in fact relate to open-ended, abstract concepts – “contradicting”, “omission”, “misleading” – which are not of a technical nature. These concepts are subject to interpretation on a case-by-case basis – taking into account the exact contents of the respective advertisement, the prospectus and all other relevant circumstances – by the competent regulators and courts of the member states.
2. Moreover, the fact that information provided outside the prospectus should not be inaccurate or misleading and should be consistent with the information in the prospectus, has already been covered by art. 15(3) and 15(4) Prospectus Directive 2003/71 (PD). Article 13(1) RTS nrs. (1), (2) and (3) does not add anything in this respect.
3. Objections can especially be raised against nr. (3) of art. 13(1) RTS, in which it is provided that the omission of information from an advertisement may cause it to be misleading. In comparison with the prospectus, an advertisement is by definition an incomplete document. For that reason, article 15(3) PD does not prohibit *incomplete*

¹ This question has drawn my special attention, not only as a capital markets lawyer in general but also in the framework of my current preparing of a PhD-thesis on prospectus liability, for which the concepts of “inaccurate”, “incomplete” and “misleading” are of key importance.

advertisements, but only advertisements which are *inaccurate or misleading*. The current regime of art. 15(3) PD, providing for an open-ended rule, already allows to qualify an advertisement as misleading on the basis of material incompleteness. Introducing a separate provision (in the form of the proposed technical standard) confirming this (a) is unnecessary and (b) erroneously creates the impression that a certain level of completeness is a base characteristic of advertisements. As it has been stated above, exactly the opposite is true: *incompleteness* is inherent to the nature of an advertisement. Therefore, nr. (3) of RTS 13(1) should be deemed to be contrary to both the letter and the spirit of article 15(3) PD.

4. It is important that the investor is aware that an advertisement by definition contains incomplete information in comparison with the prospectus. The investor should be encouraged as much as possible to read the prospectus or at least the summary thereof. Recently, access of the investor to the prospectus (summary) has been substantially facilitated in various ways by Amending Directive 2010/73. In the first place, the elaborately defined concept of "key information" has been introduced and it is provided that the summary should convey the key information with respect to the securities. The rationale for this amendment is provided by preamble (15) Amending Directive:

"The summary of the prospectus should be a key source of information for retail investors. It should be a self-contained part of the prospectus and should be short, simple, clear and easy for targeted investors to understand. It should focus on key information that investors need in order to be able to decide which offers and admissions of securities to consider further."

5. Secondly, the Amending Directive requires publication of the prospectus on the internet at all times. As a result, access by the investor to the prospectus, including the summary, is gained by a couple of mouse-clicks. It is questionable whether people who in the current age of information do not have the disposal of an internet connection, should be encouraged to invest at all.
6. Rather than introducing requirements for the (relative) completeness of advertisements, ESMA and the national regulators should focus on making sure that the prospectus summary serves its purpose for the retail investor. The incompleteness of advertisements is a "fact of life" which should not be concealed or mitigated by regulation or technical standards, which will only diminish the investor's awareness that he should read the (summary of) the prospectus, thus creating a moral hazard. All efforts should be directed at procuring that the investor will read the (summary of) the prospectus.
7. From a practical point of view, rules and technical standards promoting a certain level of completeness of advertisements will trigger substantial discussion as to whether (summaries of) entire parts of the prospectus should be included in the advertisement. Para. 179 of the consultation document sets out ESMA's view that the omission of information from advertisements should be prohibited, if a "distorted and biased image of the risks of the investment" would thereby be created. The "related downside potential" of a communication should also be included in the advertisement "to ensure balance". This immediately triggers the question whether certain risk factors contained in the prospectus should be copy-pasted or summarized in the advertisement. If that would be the way practice is going to develop, advertisements will only become longer and more difficult to access by investors. Certain types of advertisements will run the risk of developing into mini-prospectuses. Such developments are not desirable.
8. Issuing an advertisement with respect to an offering of securities constitutes a "commercial practice" within the meaning of Directive 2005/29 concerning unfair business-to-consumer commercial practices (UCPD). Unfair, including misleading, commercial practices are prohibited (article 5(1) and 5(4) UCPD). A commercial practice is misleading if, taking into account all circumstances, it omits material information that

the average consumer needs to take an informed transactional decision (article 7(1) UCPD). However, when the medium used imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted (article 7(3) UCPD).

9. The UCPD provides for a balanced system to assess B2C commercial communications as to their completeness, complementing article 15(3) PD. *Both* the information needs of the average consumer (retail investor) *and* the limitations of the medium (limited space of advertisement) *and* the availability of full information elsewhere (publication of the prospectus, including the investor-friendly summary, on the internet) are taken into account to assess whether information has been omitted from the advertisement. Additionally, the concept of "average consumer" has been elaborated by the European Court of Justice in its landmark decision of 16 July 1998 (C-210/9) *in re Gut Springenheide*. In the opinion of the Court, the average consumer is reasonably well-informed and reasonably observant and circumspect. This level of "sophistication" should be taken into account by ESMA and national regulators when introducing or enforcing rules against misleading statements in or outside prospectuses. The average consumer of Gut Springenheide knows or should know that an advertisement is by definition incomplete.
10. Although it is possible for (rules promulgated under) the PD to prevail over the UCPD (see article 3(4) UCPD), the balanced system set forth by the UCPD is in my view the preferred regime for governing the completeness of advertisements in securities offerings. Compared with this regime, the proposed nr. (3) of RTS 13(1) is too undifferentiated and should not be adopted. Nrs. (1) and (2) of RTS 13(1) should not be adopted because they are not of a technical nature and do not add anything to the current article 15(3) and (4) PD (see nrs. 1 and 2 above).

I am happy to provide further clarification of the above views, should that be desirable for ESMA's purposes.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jan Paul Franx', is written over a horizontal line.

Jan Paul Franx
advocaat
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