

**Mr Olivier Guersent
Director General
European Commission
DG for Financial Stability, Financial
Services and Capital Markets Union
1049 Brussels
Belgium**

ESMA's technical advice on minimum information content of documents describing a takeover, merger or a division under the Prospectus Regulation

Dear Mr. Guersent,

I am writing to you regarding the technical advice on the minimum information content of a document (Exempted Document) referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of paragraph 5 of Article 1 of the Prospectus Regulation (PR) that ESMA is mandated to submit to the Commission by 31 March 2019. ESMA's consultation on this technical advice should start in July 2018.

While ESMA acknowledges that one of the main objectives of the new PR is to facilitate issuers' access to EU Capital Markets, it is concerned that the scope of the aforementioned exemption could be potentially detrimental to investor protection. In particular, in ESMA's understanding, some of the transactions that qualify for the exemption may lead to the admission to trading on a regulated market of non-listed issuers without the publication of a scrutinised and approved IPO prospectus. In addition, there is a lack of clarity on the scope of the exemption, which may mean that issuers are hesitant to rely on it in practice.

Considering the absence of limitations in the scope of the exemption, in conjunction with the lack of definitions in the PR in relation to the concepts of 'takeovers', 'mergers' or 'divisions' and the fact that Directive 2004/25/EC on Takeover Bids and Directive 2017/1132 on Mergers and Divisions are minimum harmonisation directives, ESMA foresees a potential risk for regulatory arbitrage with a likely negative impact on supervisory convergence in the prospectus area. This is due to the fact that there are differences across Europe in the scope of application of these directives depending on national transposition.

While ESMA will carry out its mandate to develop the technical advice on the minimum content of Exempted Documents, the investor protection concerns and concerns as regards the lack of clarity for issuers raised above cannot be fully addressed in the technical advice as they do not fall within ESMA's mandate. Therefore, ESMA would like to bring this matter to your



attention and invite you to consider appropriate amendments to the Prospectus Regulation in order to deal with the considerations set out in this letter.

In particular, ESMA considers that it would be appropriate to limit the scope of the exemption to cases where all companies involved in takeovers, mergers or divisions already have shares admitted to trading on a regulated market or an SME Growth Market as in these cases, information concerning these companies is already available to investors before the transactions take place.

Finally, ESMA notes that a number of the PR provisions covering areas such as the responsibility statement, materiality test, publication of supplements, incorporation by reference and language regime are not applicable to Exempted Documents. Although some of these issues are addressed in the ESMA draft technical advice which will undergo consultation, ESMA believes that an amendment to the PR would be a preferable solution in order to ensure that all provisions that are important for investor protection are applicable to the Exempted Document and the Exempted Document is fit for purpose.

If you have any questions regarding this matter, please contact me or Evert van Walsum, Head of the Investors and Issuers Department.

Yours sincerely,

(Signed)

Steven Maijoor

cc: Roberto Gualtieri MEP, Chair of the Committee on Economic and Monetary Affairs, European Parliament

Hartwig Loeger, President of the ECOFIN Council, Council of the European Union

Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union