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| 6 July 2017 |

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| Response form for the Consultation Paper on  scrutiny and approval |
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| Date: 6 July 2017 |

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:

1. 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](http://www.esma.europa.eu) 🡪 ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).
2. 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.
3. 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.
4. 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.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://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 confidential 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](http://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 | Assonime |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | Italy |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_SAC\_1>

1. General comments

* MANDATORY CRITERIA (§ 17, 18, 19, 20): The draft technical advice states that in some cases the NCA may apply criteria beyond those which are mandatory (see recital art. A and Article B 1.)

=> in our view, this interpretation goes beyond the Level 1 and *leaves too much room to NCAs’ discretionary powers. Therefore, it would not facilitate the harmonisation of scrutiny procedures and the creation of level playing field as required in recital 60;*

Therefore we suggest the following amendments to 3.3 Draft Technical Advice :

Recitals: “Prospectus scrutiny is a key factor in ensuring investor protection and there should be a level playing field across Member States. *An exhaustive list* *of c*~~C~~riteria for scrutiny of the draft prospectus should therefore be established so that competent authorities apply harmonised standards when scrutinising draft prospectuses for the purpose of their approval.

For the purposes of investor protection, efficient allocation of resources and timely prospectus approval, information given in the draft prospectus should receive a measure of scrutiny that is proportional to the circumstances of the issuer and the issuance. ~~As scrutiny of the information given in the draft prospectus is a qualitative process, it is not possible to establish an exhaustive list of the scrutiny criteria competent authorities should apply~~. In some cases, ~~it may therefore be necessary to apply criteria beyond those which are mandatory, to ensure that a draft prospectus meets the standards of completeness, comprehensibility and consistency. In other cases~~ a competent authority may receive a draft prospectus replicating information that has already been reviewed or scrutinised and that therefore does not necessitate further examination; in such cases, *in order to have a proportionate approach*, the competent authority should be permitted, though not obliged, to adapt its scrutiny”.

Article A

* 1. When scrutinising or reviewing the completeness of the information given in the draft prospectus, the competent authority shall consider ~~in particular~~ whether the draft prospectus meets the following criteria:

[…]

* 1. When scrutinising or reviewing the comprehensibility of the information given in the draft prospectus, the competent authority shall consider whether the draft prospectus is capable of being understood, taking into consideration the nature and circumstances of the issuer, the type of securities and the type of investors targeted. To this end, the competent authority shall consider ~~in particular~~ whether the draft prospectus meets the following criteria:

[…]

* 1. 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:

[…]

Article B:

1. “In order to ensure that the information given in the draft prospectus meets the standards of completeness, comprehensibility and consistency, when scrutinising or reviewing a draft prospectus the competent authority may, ~~where deemed necessary for investor protection,~~ apply criteria ~~beyond those~~ laid down in Article A”.

* INFORMATION INSIDE/OUTSIDE PROSPECTUS (§ 21, 22, 23): ESMA tries to delineate the information which the NCA must use as the basis for the scrutiny, (i.e. which information should be “scrutinized” according to the criteria of completeness, comprehensibility and consistency).

In our view, Level 1 is crystal clear on this point, stating that:

* Article 2 (r) “Approval means the positive act of the outcome of the scrutiny by the home Member states’ competent authority of the completeness, the consistency and the comprehensibility of the information given *in the* prospectus;
* Article 20§11 of the Prospectus Directive states that the delegated acts should specifying “the criteria for the scrutiny of prospectuses, in particular, the completeness, comprehensibility and consistency of *the information contained therein .*..”

In ESMA’s view, however, NCA may choose to examine information outside the prospectus.

We cannot ignore that NCAs use external information, however, this information should be a trigger to ask for supplementary information to be included in the prospectus (according Article 20 (4) and Article 32 (1) (a) (b) (c)) and not be in the “scope of scrutiny”. Otherwise, the scope of the scrutiny become unlimited generating uncertainty for the issuers, on the timing and content of the of the prospectus approval, and on the NCAs’ legal liability.

We therefore do not concur with conclusions on paragraph 22, 23 and 24, in consequences, we suggest to delete them.

FURTHER GUIDELINES: ESMA guidelines to promote supervisory convergence according to art. 20(12) of the PR should have been put under consultation in parallel with the present consultation in order to harmonise approval processes and prevent situation where NCAs adopt different practices.

<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 consider that additional criteria are not necessary and those criteria should be considered exhaustive.

<ESMA\_QUESTION\_SAC\_1>

1. : 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 on the criteria proposed by ESMA to check the comprehensibility of prospectuses and on the different criteria when assessing retail and wholesale prospectus. Moreover, those criteria should be considered exhaustive.

<ESMA\_QUESTION\_SAC\_2>

1. : 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 proposed criteria for assessing the consistency of the prospectus in Article A(3). Moreover, those criteria should be considered exhaustive.

We doubt that the term “aligned” mentioned in A(3)(b)(c)(d)(e), is the right one when talking about consistency. In particular:

* Is 3(b) consistent with Level 1?
* It can be sometimes tricky to assess alignment of the use of proceeds with the issuer’s strategy (for debt prospectuses, 99% of use of proceeds mentioned in prospectuses are “general corporate purpose”).
* How do you assess alignment of a clean working capital statement? Shouldn’t 3(e) be applicable to qualified working capital statement?

Therefore, to avoid redundancies, we suggest to amend article A(3)(a) as follows:

“(a) Any material and specific risks disclosed elsewhere in the draft prospectus are included or referred to in the risk factors section”

Example: FX and interest rates risks can be addressed in the notes to the financial statements (IFRS 7). The risk factors section could include a reference to the notes where these risks are dealt with. ESMA’s proposed wording could be interpreted by some NCAs as a requirement to duplicate the information.

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>

1. : 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.

<ESMA\_QUESTION\_SAC\_4>

1. : 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.

<ESMA\_QUESTION\_SAC\_5>

1. : 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.

<ESMA\_QUESTION\_SAC\_6>

1. : 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>

1. : 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. However, to further harmonise practices among NCAs is necessary using also other tools such as guidelines and recommendations addressed to NCAs and Peer Reviews.

<ESMA\_QUESTION\_SAC\_8>

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

<ESMA\_QUESTION\_SAC\_9>

We disagree with the proposal to remove the option for NCAs to require that the final draft of the prospectus be submitted in a paper version should be removed, as scanned documents still cannot be submitted in searchable electronic format.

<ESMA\_QUESTION\_SAC\_9>

1. : 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>

We agree with ESMA’s proposal to grant issuers the choice of whether to submit an appendix for approval at the same time as the URD is approved, bearing in mind that if no appendix is approved together with the URD, it will not be possible to passport the URD for an offer/admission of securities to retail investors.

<ESMA\_QUESTION\_SAC\_10>

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

<ESMA\_QUESTION\_SAC\_11>

As pointed out by ESMA, article 9(11) (a) of the new Prospectus Regulation states that one of the conditions for becoming a frequent issuer is that the issuer, when submitting a URD for approval or filing, provides written confirmation that it has filed and published all regulated information required under the TD and MAR. It is clear from Level 1 that this confirmation should be provided only when the URD is submitted for approval or filed. Therefore, ESMA cannot require that the confirmation be resubmitted along with the final draft of the URD. Notwithstanding the fact that ESMA cannot impose additional conditions not laid down in the Regulation, the rationale put forward by ESMA is not relevant (“*reason for such a resubmission would be that an issuer’s compliance with TD and MAR could change between the submission/filing of the URD and the approval*”): in practice issuers would publish their annual or half-yearly financial statements before filing a prospectus/URD/securities note ; furthermore where a price sensitive information occurs in the course of approval process, it would be very unlikely that the NCA would not be informed/aware.

<ESMA\_QUESTION\_SAC\_11>

1. : 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>

We disagree with the additional requirement laid down in article C(2)(h) of the Draft Technical Advice and according to which “*where a universal registration document is filed without prior approval, confirmation whether the universal registration document is being used to fulfil an obligation to publish an annual financial report required under Article 4 of Directive 2004/109/EC or a half-yearly financial report required under Article 5 of that Directive*” shall be submitted to the NCA.

Such requirement is not included in level 1 and according to the Regulation, issuers can include their annual and half-year financial reports in the URD to fulfil their obligations under the only conditions that they comply with the publication deadlines of the TD, make the URD available to the storage mechanism (OAM) and include in the URD a cross reference list and a responsibility statement pursuant to the provisions of the TD. Therefore additional conditions cannot be introduced at level 2. NCAs should organise themselves, when the Authority approving the prospectus is different from the Authority in charge of TD supervision, in order to fulfil their duties and without imposing additional burden on issuers.

Refer also to our response to question 11 regarding the statement of compliance with TD and MAR.

<ESMA\_QUESTION\_SAC\_12>

1. : 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>

1. : 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>

1. : 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>

ESMA considers (§19) that criteria are separate from the procedures which NCA have to undertake to validate whether these criteria are met and that those procedures should be considered outside the scope of the delegated acts.

=> since the objective of the delegates acts is to “*ensure that all competent authorities take convergent approach when scrutinising the completeness, consistency and comprehensibility of the information contained in the prospectus*”, we think that also the procedures to validate criteria need to be convergent and fall in the scope of the delegated acts.

<ESMA\_QUESTION\_SAC\_15>