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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

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| --- | --- |
| Name of the company / organisation | DLA Piper Studio Legale Tributario Associato |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |  |
| Country/Region | Italy |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_SAC\_1>

Please note that the considerations included in this document take into account, *inter alia*, a debt capital market’s perspective.

On a preliminary basis, we would like to underline that many proposals in the consultation paper seem "shaped" only for standalone prospectuses; as a consequence, such proposals seem inconsistent and/or do not perfectly fit with the base prospectuses scenarios.

In particular we refer to the provisions relating to the universal registration document which seems applicable only to stand alone prospectus or a prospectus consisting of separate documents. We suggest clarifying what happens also in case of base prospectus.

Finally, in relation to the request of cost estimates at the end of each section/sub-section of the consultation paper, we have chosen not to precisely assess the impact of such costs for market participants.

<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 established by the Authority and no additional criteria are necessary.

However, in relation to the second criteria “*the prospectus reasonably addresses all the information items of the applicable disclosure schedules*” we suggest amending it with “*the necessary information which is material to an investor for making an informed assessment*” as stated in Article 6 of the Regulation (EU) 2017/1129 (the "**New Prospectus Regulation**").

<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 with the Authority’s suggestion to apply different criteria in order to determine the comprehensibility of a prospectus, which criteria depend on the type of investor (retail or wholesale) to which the prospectus refers.

In addition, we suggest applying different criteria in the case of prospectuses for retail investors (in particular prospectuses of non-equity securities). The retail prospectuses could cover a wide range of products with different complexity levels (from plain vanilla bonds to complex structured products).

Given that such complexity level may differ, the level of comprehensibility and disclosure of a prospectus could depend on the specific complexity of the products set out under such prospectus.

For instance, the level of disclosure required in connection with a prospectus for plain vanilla bonds should be less stringent than the disclosure level for a prospectus of structured products.

<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 criteria proposed by the Authority for assessing the consistency of a prospectus. In our opinion no additional criteria are necessary.

<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>

We agree with suggestion of the Authority to apply the same criteria indicated for assessing the completeness, comprehensibility and consistency of a prospectus to the registration document.

<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>

We agree with the approach of the Authority not to address partial or repeated reviews of a URD and to leave the decision to the NCA.

For example in the event that NCA has reviewed a URD, and subsequently the same URD is submitted with amendments, by reviewing only these amendments and not reviewing the document as a whole, there could be inconsistencies in the various parts of the document.

<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>

We agree with the suggestion of the Authority to scrutinise and review only information which has not been scrutinised/reviewed/approved because this allows to considerably accelerate the approval procedure.

<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>

Please refer to introduction.

<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 agree with all the criteria established by the Authority and the level of details which is given. Indeed, by providing more detailed or additional criteria, there are more requirements that the NCA must check have been satisfied and therefore the scrutiny and review procedures are lengthened. As a consequence, the approval procedure would be prolonged.

<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>

The submission procedure for the approval indicated in Article C of the technical advice is almost identical to the previous one.

However, there is an increase in the disclosure requirements; in fact, Article C includes quite a number of new documents that the issuer must submit.

For these reasons, the new approval procedure would turn out to be more onerous for the issuers.

<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 the provision of the Authority regarding the appendix to the registration document/URD.

However, paragraph 101 of the Consultation Paper provides that by including an appendix on the issuer’s key information to the registration document/URD, the URD will be passported.

As a consequence, as specified by the Authority, the accompanying securities note and summary note could be approved by a different NCA than that which approved the URD.

This provision seems to apply only in the case of a stand-alone prospectus.

We suggest inserting a provision describing what happens in the case of notification of a URD relating to a base prospectus.

Indeed, for such prospectuses summaries are required on an issue-by-issue basis for retail issuance only.

<ESMA\_QUESTION\_SAC\_10>

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

<ESMA\_QUESTION\_SAC\_11>

We agree with the approval procedure provided by the Authority for the universal registration document.

<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 suggest better clarifying the content of paragraphs 119 (ii) and 136 of the Consultation Paper, in which the Authority provides that the URD, even if it has been approved for two consecutive financial years, must be approved when the issuer decides to use it for the purpose of an offer or admission to trading of financial instruments.

These provisions seem to refer to prospectuses drawn up on a stand- alone basis or prospectuses consisting of separate documents.

Indeed, as explicitly established in the New Prospectus Regulation (in Recital (42)[[1]](#footnote-2) and article 10(3)[[2]](#footnote-3)), if an issuer decides to draw up a prospectus consisting of separate documents, all constituent parts of the prospectus should be subject to approval, including, where applicable, the universal registration document which has been filed by the issuer with the competent authority but has not been approved.

However it is not clear what happens in the case of a base prospectus drawn up as a single document.

For these reasons, the Authority should clarify if for this type of base prospectus the approval of the universal registration document (already approved for two consecutive financial years) is also necessary in the case of an offer or admission to trading of financial instruments.

<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>

Please refer to introduction.

<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>

We agree that is not necessary to specify the conditions for losing the status of frequent issuer because is already clear what is set out in the New Prospectus Regulation in article 9 paragraphs 2 and 11[[3]](#footnote-4).

<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>

We suggest reformulating any title of the technical advice where the title only makes reference to base prospectus procedures, while the body of the technical advice also sets out procedures regarding the universal registration document (i.e. Article E).

The Authority should pay more attention in its use of the term “review” when referring to a prospectus. In section 2.3.2 of the Consultation Paper, the Authority focuses on the distinction between the scrutiny procedure and review procedure, the latter being applicable only when the registration document has been filed without prior approval.

<ESMA\_QUESTION\_SAC\_15>

1. “*Where an issuer draws up a prospectus consisting of separate documents, all constituent parts of the prospectus should be subject to approval, including, where applicable, the universal registration document and any amendments thereto, where they have been previously filed with the competent authority but not approved. Amendments to the universal registration document should not be subject to approval by the competent authority at the time of filing but should only be approved when all the constituent parts of the prospectus are submitted for approval*.” [↑](#footnote-ref-2)
2. “*An issuer that has already had a universal registration document approved by the competent authority, or that has filed a universal registration document without prior approval pursuant to the second subparagraph of Article 9(2), shall be required to draw up only the securities note and the summary when securities are offered to the public or admitted to trading on a regulated market.*

   *Where the universal registration document has already been approved, the securities note, the summary and all amendments to the universal registration document filed since the approval of the universal registration document shall be subject to a separate approval.*

   *Where an issuer has filed a universal registration document without prior approval, the entire documentation, including amendments to the universal registration document, shall be subject to approval, notwithstanding the fact that those documents remain separate.*

   *The universal registration document, amended in accordance with Article 9(7) or (9), accompanied by the securities note and the summary shall constitute a prospectus, once approved by the competent authority.* [↑](#footnote-ref-3)
3. Article 9 paragraph 2 “*Any issuer that chooses to draw up a universal registration document every financial year shall submit it for approval to the competent authority of its home Member State in accordance with the procedure set out in Article 20(2) and (4).*

   *After the issuer has had a universal registration document approved by the competent authority for two consecutive financial years, subsequent universal registration documents may be filed with the competent authority without prior approval.*

   *Where the issuer thereafter fails to file a universal registration document for one financial year, the benefit of filing without prior approval shall be lost and all subsequent universal registration documents shall be submitted to the competent authority for approval until the condition set out in the second subparagraph is met again [… ]”.*

   Article 9 paragraph 11 “*An issuer fulfilling the conditions set out in the first or second subparagraph of paragraph 2 or in paragraph 3 of this Article shall have the status of frequent issuer and shall benefit from the faster approval process in accordance with Article 20(6), provided that:*

   *(a) upon the filing or submission for approval of each universal registration document, the issuer provides written confirmation to the competent authority 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; and*

   *(b) where the competent authority has undertaken a review as referred to in paragraph 8, the issuer has amended its universal registration document in accordance with paragraph 9.*

   *Where any of the above conditions is not fulfilled by the issuer, the status of frequent issuer shall be lost.”* [↑](#footnote-ref-4)