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| 13 July 2018 |

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| Response form for the Consultation Paper on the draft technical advice on minimum information content for prospectus exemption |
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| Date: 13 July 2018 |

Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on the draft technical advice on minimum information content for prospectus exemption. Responses are most helpful if they:

* respond to the question stated;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all responses received by 05 October 2018.

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:

* Insert your responses to the questions in the Consultation Paper in the present response form.
* Please do not remove tags of the type <ESMA\_QUESTION\_PE\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* 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.
* When you have drafted your response, name your response form according to the following convention: ESMA\_PE\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_PE\_ABCD\_RESPONSEFORM.
* 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 the draft technical advice on minimum information content for prospectus exemption”).

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 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 the 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 | De Brauw Blackstone Westbroek |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |  |
| Country/Region | Netherlands |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_PE\_1>

As a general comment, we would like to note that it would indeed be very helpful to harmonise the minimum information content required for an Exempted Document to qualify for the exemption from the obligation to publish a prospectus. Preparing a prospectus is a burdensome, costly and time consuming process for an issuer. As such, being able to rely on an Exempted Document can be very valuable to issuers, in particular if that Exempted Document can be based predominantly on information an issuer is already required to disclose, e.g. because of requirements following from the Takeover Directive. However, the way the technical advice is currently drafted leaves few material differences between an Exempted Document and a full-fledged prospectus. We would have hoped that the Exempted Document regime would provide for a substantially lighter regime than the prospectus regime. We fear that with the very limited differences on the information to be included in either a prospectus or Exempted Document, issuers will likely take the safe route and opt for an voluntary prospectus approved by the Competent Authority. As a result, we do not see the exemption as likely to be relied on in practice. As a possibility to make the Exempted Document regime a lighter regime, ESMA could consider, to the extent the issuer and target are already admitted to trading on a regulated market or to an SME Growth Market, to exclusively include information on the takeover, merger or division and its impact on the issuer after the transaction in the Exempted Document, and thus not include the information provided in Appendix I and III. Such information is essentially already available to the market.

<ESMA\_COMMENT\_PE\_1>

*Operative Provisions and Definitions*

1. : Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_1>

1. : Do you agree to include a definition of a reverse acquisition as defined in IFRS 3 Business Combinations as endorsed by the EU into the technical advice (including in the situations where IFRS are not applicable). If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_2>

1. : Do you agree that a more comprehensive disclosure regime should apply if the takeover, merger or division transaction falls within the concept of reverse acquisition? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_3>

1. : Do you agree to include an overarching principle guiding the content of the Exempted Document as included in Article B in L2 provisions? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_4>

Please see our general comment at the beginning and end of this response form. The overarching principle as proposed is very similar to the overarching principle for prospectuses, although the specification under (a)-(c) differs slightly. We see a risk of creating a similar but slightly different liability norm for prospectuses as for Exempted Documents. This may cause uncertainty for market participants.

<ESMA\_QUESTION\_PE\_4>

1. : Do you agree to carry over the criteria included in Article 14 (1) of the PR into ESMA Technical Advice in order to prescribe the use of the Minimum Information Content Simplified disclosure regime for the Issuer Section? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_5>

Yes, we agree to carry over such criteria.

<ESMA\_QUESTION\_PE\_5>

1. : Do you agree to carry over the provision included in Article 19 of the PR in relation to incorporation by reference into the ESMA Technical Advice? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_6>

Yes, we agree to carry over such provisions.

<ESMA\_QUESTION\_PE\_6>

1. : Do you agree the issuers should be able to incorporate by reference the information required by Takeover Directive or Merger and Division Directive into the Exempted Document? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_7>

Yes, agreed.

<ESMA\_QUESTION\_PE\_7>

1. : Do you agree to carry over the provisions included in Article 27 of the PR in relation to language into the Technical Advice without including a summary of the Exempted Document? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_8>

Yes, agreed.

<ESMA\_QUESTION\_PE\_8>

1. : Do you agree that the Exempted Document should not require the publication of a summary translated into the language of the competent authority (including in cross-border transactions directed at retail investors)? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_9>

Yes, agreed.

<ESMA\_QUESTION\_PE\_9>

1. : Do you agree with Article F of this technical advice concerning Complex financial history and significant financial commitment into the technical advice? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_10>

We suggest that it should not be necessary to take into account this technical advice in case of a hostile acquisition, as it is not possible to provide pro forma information in those situations due to the lack of access to the financials of the target.

<ESMA\_QUESTION\_PE\_10>

1. : What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_PE\_11>

Given the similarities of the minimum information content for Exempted Documents compared to prospectuses, we believe that the costs of preparing such an Exempted Document would be significant. As set out in our introductory remarks, we believe that that is one of the reasons issuers will likely opt for a prospectus instead.

<ESMA\_QUESTION\_PE\_11>

*Appendix I – Minimum Information Content Simplified Disclosure Regime for the Issuer Section*

1. : Do you agree with the proposal relating to the Minimum Information Content Simplified Disclosure Regime on Issuer Information Section set out in Appendix I for the Exempted Document (when the issuer has already securities admitted to regulated market or SME Growth Market? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_12>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_PE\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_13>

*Appendix II – Minimum Information Content Issuer Section*

1. : Do you agree with the proposal relating to the Minimum Information Content Issuer Section as set out in Appendix II for the Exempted Document (when the issuer is not admitted to trading on a regulated market or to an SME Growth Market)?If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_14>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_14>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_PE\_15>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_15>

*Appendix III – Minimum Information Content Securities Section*

1. : Do you agree with the proposal relating to the Minimum Information Content Securities Section for the Exempted Document? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_16>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_16>

1. : Do you believe that information concerning placing and underwriting is necessary in the context of offers to public connected with takeovers, mergers or divisions? If yes, please provide your reasoning.

<ESMA\_QUESTION\_PE\_17>

In the scenario where a takeover is funded by a share issuance, but that share issuance is not (exclusively) directed at the shareholders of the target, could an Exempted Document be used both for the offer as well as for the share issuance? For which purposes can an issuer use an Exempted Document? If multiple uses are permitted – as we would warmly welcome – information on the placing and underwriting may need to be included.

<ESMA\_QUESTION\_PE\_17>

1. : Do you agree that Minimum Information Content Securities Section should include information items concerning non-equity securities issuances connected with takeovers, mergers and divisions? If not, please provide your reasoning.

<ESMA\_QUESTION\_PE\_18>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_18>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs on any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_PE\_19>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_19>

*Appendix IV – Minimum Information Content Description and Impact of Takeover, Merger and Division*

1. : Do you agree with the proposal relating to the Minimum Information Content on Description and Impact of the Takeover, Merger or Division Section? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_20>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_20>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_PE\_21>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_21>

*General Questions*

1. : Taking into consideration the scope of the exemption as described in this Consultation Paper, would you consider that the Technical Advice provides investors with useful and relevant information when an offer of securities to the public or admission to trading on regulated market is connected with a Takeover, Merger or Division? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_22>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_PE\_22>

1. : Taking into consideration that the Exempted Document will not be subject to scrutiny and approval pursuant to Article 20 of the PR, in which cases would you consider that issuers may opt for a voluntary prospectus instead of publishing an Exempted Document? Please provide your reasoning.

<ESMA\_QUESTION\_PE\_23>

As indicated above, we would have hoped that the Exempted Document regime would be lighter than currently proposed in the Consultation Paper. There would now seem to be very limited differences with the information to be included in a regular prospectus. This would likely cause issuers to opt for a voluntary prospectus as the approval of a Competent Authority provides issuers regulatory assurance that they complied with all rules. We therefore fear that the proposed Exempted Document regime will not be used much in practice. However, we recognise advantages of the Exempted Document regime, including that no summary is required and passporting of the document is not necessary (which is extremely helpful when the transaction covers multiple countries with retail investors). In light of this, we suggest to make the Exempted Document regime a lighter regime. For example, ESMA could consider, to the extent the issuer and target are already admitted to trading on a regulated market or to an SME Growth Market to exclusively include information on the takeover, merger or division and its impact on the issuer after the transaction in the Exempted Document, and thus not include the information provided in Appendix I and III. Such information is essentially already available to the market.

<ESMA\_QUESTION\_PE\_23>