

OPINION

Format of the base prospectus and consistent application of Article 26(4) of the Prospectus Regulation

Legal basis

1. ESMA's competence to deliver an opinion is based on Article 29(1)(a) of Regulation (EU) No 1095/2010¹ ("ESMA Regulation"). In accordance with Article 44(1) of the ESMA Regulation, the Board of Supervisors has adopted this opinion.

Background

2. Article 5(3) of Directive 2003/71/EC (the "Prospectus Directive") sets out two alternative formats for a prospectus; a single document or a tripartite document composed of three separate documents: a registration document, a securities note and a summary.
3. The Prospectus Directive also expressly provides for a base prospectus. According to Article 5(4) of the Prospectus Directive, the base prospectus is a specific form applicable under strictly limited conditions related to the type of securities (non-equity) and the way they are offered to the public (in an offering programme for all types of issuers or issued in a continuous or repeated manner by credit institutions).
4. According to Article 2(1)(r) of the Prospectus Directive, a base prospectus means a prospectus containing all relevant information as specified in Articles 5, 7 (on the information to be contained in a prospectus) and 16 (in case there is a supplement) of the Prospectus Directive, concerning the issuer and the securities to be offered to the public or admitted to trading, and, at the choice of the issuer, the final terms of the offering.
5. In accordance with Article 5(4) of the Prospectus Directive, Article 26 of Commission Regulation 809/2004 (the "Regulation") sets out the format of the base prospectus and its related final terms.

Format of the base prospectus

6. The Prospectus Directive must be interpreted against the background of the legislation implementing it. In this respect, the Regulation sets out rules regarding the information to be included in prospectuses and base prospectuses, their format and aspects of publication, the information to be incorporated by reference and the dissemination of advertisements.
7. In particular, Article 26(4) of the Regulation expressly states that in the case where a registration document has been previously filed and an issuer decides later to draw up a base prospectus, the base prospectus shall contain the information included in the registration document. The registration document should be incorporated by reference in accordance with the conditions set out in Article 28 of the Regulation. The base prospectus should also include the information which

¹ OJ L 331 15.12.2010 p. 84

otherwise would have been contained in the securities note, save for any information which could be included in the final terms where final terms are not included in the base prospectus.

8. Article 26(5) of the Regulation refers only to the final terms as a document which could be presented in the form of a separate document. It also states that the information of the securities note which is included in the base prospectus should not be repeated in the final terms.

Conclusion

9. The base prospectus shall not be drawn up as a tripartite prospectus and any incorporation by reference of relevant information should comply with the conditions set out in the Regulation.
10. The overall prospectus regime does not provide the necessary legal framework for the possibility of a tripartite base prospectus and changes to both the Prospectus Directive and Regulation, other than those amendments introduced by Directive 2010/73/EU, would have been required to facilitate such a construct.
11. Furthermore, the “choice” of the issuer, referred to in Article 26(4) of the Regulation, is whether to draw up a base prospectus and not whether to incorporate the registration document by reference.
12. ESMA will examine compliance with the provisions of Article 26(4) of the Regulation nine months following the publication of this opinion and may at that point pursue non-compliant national competent authorities under Article 17 of the ESMA Regulation.
13. In the interim period, should ESMA become aware of any notifications under Article 18 of the Prospectus Directive of a base prospectus drawn up in non-compliance with Article 26(4) of the Regulation (with the exception of notification of any supplements to base prospectuses already notified at the time of publication of this opinion), it may consider expediting its examination of non-compliant practices.