



## ADVICE TO ESMA

### Response to ESMA's Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive

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#### I. Executive summary

*The Omnibus II Directive introduced some important changes to the Prospectus Directive with the aim of further harmonisation in relation to prospectuses, their approval and publication, and to dissemination of advertisements. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) as part of assisting the European Commission with its advice. To this end ESMA has published a Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive.*

*One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide high level advice to ESMA, facilitating the preparation of all standards and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach of building a harmonised rulebook on prospectuses. In addition the SMSG has prepared answers for a few selected questions which can influence high-level matters.*

*While preparing answers for the questions selected under the above conditions, the SMSG took special care to ensure appropriate regulation with the aim of achieving an efficient and orderly functioning of the financial markets, with equilibrium sought between investor protection and more stringent requirements levied on issuers.*

*Although the SMSG in principle supports almost all of ESMA's proposals, the SMSG has tried to highlight those areas where different interpretations could result from the current wording of such proposals, with the aim of helping to achieve better clarity of wording. In some cases the SMSG proposes smaller modifications and/or alternative wordings with the aim of building a strong and unified market across the EU, with the highest possible level of protection of both issuers and investors.*

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#### II. Explanatory remarks

1. Directive 2014/51/EU (the 'Omnibus II Directive') was published in the Official Journal of the European Union on 22 May 2014 and entered into force on 23 May 2014. The Omnibus II Directive requires ESMA to submit draft Regulatory Technical Standards ('RTS') in relation to four topics in Directive 2003/71/EC (the 'Prospectus Directive' or 'PD'): prospectus approval, incorporation by reference, prospectus publication and dissemination of advertisements.

2. On 25 September 2014, ESMA published its Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive, with four topics specified:
  - a. Approval of the prospectus
  - b. Incorporation by reference
  - c. Publication of the prospectus
  - d. Dissemination of advertisements
3. Generally all the questions to the above topics may be split into two categories: (i) high-level/principles-based questions and (ii) technical questions. The main task of the Securities and Markets Stakeholder Group (SMSG) is to provide advice on high-level topics, leaving more technical and detailed questions to be dealt with by other, more technically oriented consultative groups. Taking this into account, the SMSG has concentrated its work on the first category, i.e. the principles-based questions, and has addressed only those technical questions which could influence high-level issues.

### **III. Draft RTS on approval**

#### **Procedures for approval (CP, Section III.ii.i)**

##### **Q1. Is there any information that should be added or removed from the list in the proposed Article 2(2)?**

4. The SMSG is of the opinion that nothing should be changed in the list proposed in Article 2(2). Indeed, generally ESMA's mandate is to develop draft RTS to specify procedures for the approval of prospectuses, which would appear to call for harmonisation of different NCA's approval practices, rather than requiring additional obligations to be placed on issuers, which could be rather costly for them and should thus be avoided if they are not considered necessary for investor protection. The proposed list is already quite extensive and complete, so there is no need to add or remove anything from there.
5. Nevertheless, one improvement is proposed by the SMSG which would render Article 2(2)(6) of the draft RTS to be more in line with Article 13(4) of the Prospectus Directive, which provides the competent authority with a possibility of asking for supplementary information, when it is based on reasonable grounds. The improved Article 2(2)(6) should go as follows: "(6) any other information necessary for the review by the competent authority of the home Member State and expressly required **on reasonable grounds** by the competent authority for that purpose."

**Q2. Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

6. The SMSG cannot find any reason why submitting all versions of the prospectus at a minimum in searchable electronic format would impose any additional cost on issuers, offerors or other persons. Nowadays we are all using computers and the internet and there is no problem with producing a pdf file in such a format, at no cost at all. On the contrary, submitting prospectus in a searchable electronic format only could even result in lowering the costs, if the NCA would decide not to require also the printed version, but only require the electronic version, as costs of printing and delivering the paper version would then disappear.

**Q3. Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?**

7. The SMSG expresses some concern on requiring issuers to provide written statements confirming that they have complied with their obligations under the RTS (see RTS Article 2(4) and 2(7)), as it imposes an additional and unnecessary administrative as well as cost burden. This is particularly so if an NCA requires a signed written statement from the issuer, as any senior person representing the issuer is likely to need to obtain legal advice before signing such written statement.

#### **Adjustment of time limits (CP, Section III.ii.ii)**

8. ESMA explained in details (and as summarised in paragraph 68, p. 19 of the CP) why no draft RTS is proposed regarding the conditions in accordance with which time limits may be adjusted. However Article 13(7) of the Prospectus Directive (PD) amended by the Omnibus II Directive requires ESMA to specify such conditions in the draft RTS.

9. The SMSG recognises and states the importance, also for the issuer, of a transparent and predictable process in getting the prospectus approved within an envisaged time-frame (and cost). We do note with satisfaction that this is how it currently works in a number of Member States, so the further consolidation of these best practices within the EU is welcome.

10. Nevertheless, the SMSG would also like to point out that there are cases where after receiving a draft prospectus, questions are sent to the issuer to submit some missing documents or to provide some supplementary information, according to Article 13(4) of PD. In fact, this often results in an adjustment of time limits, as these are then counted only from the date on which such requested information is provided by the issuer. Sometimes such a procedure is repeated (even several times) and in practice time limits are adjusted (prolonged) again. This may create an uncertainty about the real time limits.

11. Therefore a draft RTS could be prepared on a time adjustment, which would state that time limits may be adjusted (prolonged) only once, at the beginning of the approval process, when the NCA may ask for missing documents or supplementary information. Such a list of missing documents or information specified by the NCA should be complete enough to allow the issuer to supplement the draft prospectus in one step, and no additional request for missing documents or information should be

forwarded to the issuer after the first reply. If, after such additional submission of documents, some documents or information would still be missing, NCA could notify the issuer that the draft prospectus could not be approved as it remains incomplete. Such a statement in a draft RTS would result in a more disciplined procedure of applying time limits specified in the PD.

#### **IV. Draft RTS on incorporation by reference**

##### **Content of draft RTS (CP, Section IV.ii)**

##### **Condition i: “filed or approved in accordance with the Prospectus Directive” (CP, Section IV.ii.i)**

**Q4. Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.**

12. The SMSG agrees with ESMA’s interpretation of which documents could be defined as being filed or approved in accordance with the Prospectus Directive. The key point is that the prospectus must be set out in an easily analysable and comprehensible form (PD, Article 5(1)). On the other hand setting out all the information in full in a prospectus is burdensome for issuers. Therefore incorporation of information by reference is a reasonable solution, but such documents should be **readily** available to investors, and not only “available” (but not filed), as it is stressed in CP, para 80. The list specified in CP, para 87, is consistent with that principle.

**Q5. Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

13. The SMSG does not see any reason why incorporation by reference of documents specified above could impose any cost on issuers, offerors or persons asking for admission to trading. If those documents are already published or approved and/or filed in accordance with the PD, they are easily accessible to the public and as such may be incorporated by reference at no cost.

##### **Condition ii: “filed in accordance with the Transparency Directive” (CP, Section IV.ii.ii)**

**Q6. Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.**

14. The SMSG generally agrees that the information specified in Article 4(5) of the draft RTS constitutes the information which complies with the requirement of being filed in accordance with the TD. However the list is closed and does not for example allow for incorporating by reference annual and half-yearly reports of an issuer of debt securities with a denomination of €100,000 or more, as specified in

para 92 bullet points 2-3 of the CP. The SMSG is of the opinion that the approach explained in para 88-91 of the CP is much too restrictive and, as a consequence, an indirect distinction is made between issuers of debt securities with a high denomination and those with a low denomination, as the RTS as currently worded will place more onerous obligations on issuers of debt securities with a minimum denomination of €100,000.

15. This is because the proposed regime would require issuers who issue only debt securities with high denominations to set out their financial statements in the prospectus, whereas issuers of securities with low denominations would be able to incorporate them by reference. Incorporation by reference is a useful tool for issuers as this alleviates the heavy administrative and cost burdens associated with having to set out information in full in the prospectus document as such. Placing heavier burdens on issuers that issue high denomination debt securities only is an unexpected, and undesirable, result. Even more so as buyers of such high denomination securities would typically be sophisticated investors fully capable of tracing information incorporated by reference.
  16. The exhaustive list of documents proposed by ESMA in RTS Article 4 does not allow enough flexibility for NCAs and issuers to be able to determine how best to meet the requirement that a prospectus be in an easily analysable and comprehensible form under PD Article 5.1, in light of the specific circumstances of the offer. Therefore this might not result in prospectuses that are more easily analysable and comprehensible by investors. The restrictive approach also cuts across other fundamental aspects of the Level 1 regime by imposing significant burdens on issuers, and in particular on issuers who make filings in third countries and under domestic legislation which might also be relevant to investors elsewhere in the EEA.
  17. Another explanation is necessary in relation to Article 4(7) of the draft RTS, as in the list some documents (such as by-laws and minutes of shareholder meetings) are not mentioned directly, however the text does include a reference to information provided under the laws, regulations and administrative provisions of a Member State adopted in accordance with Article 3(1) of Directive 2004/109/EC (TD – Transparency Directive). According to the regulations of some Member States, issuers must publish on their website their by-laws and all the amendments to them, and also the minutes of shareholder meetings. The SMSG would like to be sure that the wording of Article 4(7) is clear enough to allow a listed issuer to incorporate by reference these company documents among the ones that can be so incorporated.
  18. By way of derogation from Article 3(1) of the TD, Article 3(1a) of the TD allows Member States to require issuers to publish additional periodic financial information on a more frequent basis than the annual financial reports and the half-yearly financial reports, where specific conditions are met. If a given Member State has used such a derogation, such additional reports have to be filed in accordance with the TD, and as such they should be allowed to be incorporated by reference. Therefore the SMSG is of the opinion that in Article 4(5) of the draft RTS, after point (iii) a new point (iiia) should be added: “(iiia) additional periodic financial information disclosed in accordance with Article 3(1a) of Directive 2004/109/EC”.
  19. A clarification is also needed with regard to the possibility of incorporating by reference documents that are regarded by the competent authority as being equivalent to the prospectus itself, and which thus have to be available according to art. 4(2)(c)-(d) of the PD.
- Q7. Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or per-**

**sons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

20. The restrictive approach taken by ESMA (in para 88-91 of the CP) to incorporation by reference will impose significant cost and administrative burdens on issuers that are no longer able to incorporate financial or other information into their prospectuses by reference (like issuers that issue high denomination debt securities only). This is because a team of lawyers and auditors will be required to check that the information set out in the prospectus exactly matches the original document. For financial information running to several hundred pages, that will be a very time consuming and expensive exercise.

## **V. Draft RTS on publication**

### **Content of draft RTS (CP, Section V.ii)**

#### **Provisions regarding websites used for the purpose of electronic publication**

**Q16. Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.**

21. The SMSG believes the proposed measures will enhance the accessibility of electronically published prospectuses, however one additional condition has to be fulfilled. A prospectus should be accessible on the website at a minimum in searchable electronic format, rather than as a scanned version of a previously printed document. Sometimes the quality and legibility of scanned versions are very weak, so while accessible in theory, these are not readable in practice.

**Q17. Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

22. It should be noted that the draft RTS might require some issuers to establish a new website in order to comply with their obligations under the RTS (for example, if the relevant regulated market or NCA website ceases to make prospectuses “easily available” in accordance with the RTS). This could have significant and practical consequences, particularly for issuers that do not have their own websites.

#### **Publication of a list of approved prospectuses by the home NCA under PD Article 14(4)**

**Q18. Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?**

23. A practical matter/question arises as a consequence of ESMA's advice on both having documents included in the prospectus via reference and hyperlinks (which procedure the SMSG is generally supportive of) and of the fact that the prospectus should remain available for 12 months. If documents are included by reference and thus by link, care should be taken, in the case of subsequent update of

the referenced document, that the link still goes to the version existing at the time the prospectus was published and not to the latest version (of e.g. financial statements, articles of association etc.) published on the website. If possible, and where relevant, the referenced “static” document could note that a more updated version of the document in question now exists and is available under another section on the issuer's website.

## **Publication of information incorporated by reference**

### **Q20. Do you agree that all information incorporated by reference in a prospectus should be published electronically? If not, please state your reasoning.**

24. The SMSG agrees with that requirement. However wording of Article 11(2) of the draft RTS should be improved as it is not precise enough. As it is written in the draft it means that a prospectus containing information incorporated by reference shall include either:
  - a) hyperlinks to each document containing information incorporated by referenceor:
  - b) hyperlinks to the webpage on which each document containing information incorporated by reference is published.
25. There is a small difference between the wording of the sentence above (*to the webpage on which each document is published*) and the wording in para 149 of the CP (*to each webpage on which documents are published*). The meaning of both versions is not the same, so there is doubt how it should be interpreted exactly.
26. But this is not the only problem with that second condition specified in Article 11(2) of the draft RTS, because it means that it would be enough to include a hyperlink to the webpage, on which several other documents could also be published. As it often happens, on one webpage hundreds of documents may be published and it may be very difficult to spot that one document that contains information incorporated by reference. It would be not enough to include a general hyperlink to such a webpage, but a direct link should be included to each document containing such information.
27. Therefore the SMSG is of the opinion that Article 11(2) should be limited to the first part only and should be worded as follows: “**2. A prospectus containing information incorporated by reference shall include hyperlinks to each document containing information incorporated by reference.**”
28. Such a wording is consistent with the deliberations contained in para 144-149 of the CP, whether all such documents would be accessible on the same website or on different webpages, as it does not specify the number or location of those websites/webpages. If it is still not clear enough, another sentence may be added specifying that the documents containing information incorporated by reference may be accessible on the same website or on different webpages. But each and every hyperlink should lead directly to each respective document, and not indirectly to the specific website/webpage only.

## **VI. Draft RTS on advertisements**

### **Content of draft RTS (CP, Section VI.ii)**

#### **Provisions concerning dissemination of advertisements (CP, Section VI.ii.i)**

**Q23. Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.**

29. The answer to this question should be based on requirement set on supplements to the prospectus, specified in Article 16(1) of the PD. Not every mistake or inaccuracy, but only **material** mistakes or inaccuracies should be mentioned in a supplement to the prospectus. The same should be applied to advertisements – only a material inaccuracy in an advertisement should be under such a requirement. A requirement for amending any and all advertisements which comprise inaccurate or misleading information (even if only a small and unimportant inaccuracy) would go beyond the provisions of Article 16 of the PD. Being required to update all advertisements that comprise inaccurate or misleading information would impose high cost on issuers without assuring that the respective update comes to the attention of the entitled addressees. Therefore Article 12(2) of the draft RTS should be amended appropriately.

#### **Provisions laid down in Article 15(4) (CP, Section VI.ii.ii)**

**Q25. Do you agree with the requirements suggested for Article 13(1) of the draft RTS? If not, please provide your reasoning.**

30. While generally in agreement with what is being suggested the SMSG would, for the avoidance of doubt, just like to point out that the wording “whether for advertisement or **other purposes**” in Article 13(1) of the draft RTS should not be interpreted as including the analyst presentations typically made to institutional investors in advance of the actual publication of the prospectus as an introduction to the issuer. The unintended consequence could otherwise be that also these analyst presentations, which could run to several hundred pages, would need to be published as being deemed to be included in the prospectus due to the fact that the prospectus is published afterwards (Article 13(6) of the draft RTS).
31. Similarly, in relation to Article 7 of the draft RTS, and while acknowledging the fact that Article 14(3) of the PD does state that a home Member State may require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public, this should not be interpreted as also requiring what are commonly referred to as “Tombstones” to be published at the expense of the issuer.

## **Investor access to information disclosed outside of the prospectus**

**Q27. Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.**

**Q28. Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

32. According to Article 15(5) of the PD, only material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, shall be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed – when no prospectus is required, or, where a prospectus is required to be published such information shall be included in the prospectus or in a supplement to the prospectus.
33. There is no other requirement in Article 15 of the PD to make information disseminated in advertisements accessible to all investors, so there is no ground for ESMA to put such an obligation on issuers. Moreover it is the task of NCAs, and not of investors, to monitor whether issuers are fulfilling all the requirements specified in law, and there is no ground in the PD to delegate such a task to investors.
34. Of course some investors might be interested in thoroughly examining and comparing the consistency of such information with the more complete information contained in the prospectus, as it is specified in para 185 of the CP, but the SMSG is of the opinion that requiring issuers, offerors or persons asking for admission to trading to facilitate this would be much too far-reaching and going out of the scope of the requirements set in the PD. Such information should be maintained by the issuer, offeror or other person in a way specified in the first sentence of Article 13(3), and in Article 13(4)-(5) of the draft RTS, so NCAs could effectively perform their monitoring tasks, but the second sentence in Article 13(3) is superfluous and unnecessary.
35. Its execution would be too burdensome and costly for issuers, as in practice every investor would be authorised to require issuer to send him a durable copy of all the information disclosed in all the advertisements specified in Article 12(1) of the draft RTS, including all the amendments specified in Article 12(2). In addition there would be no additional benefit to investors as such information anyway needs to be consistent with the information contained in the prospectus, which – according to Article 5(1) of the PD – shall contain all the necessary information. It should also be noticed that according to Article 5(2)(b), the summary of the prospectus shall contain a warning that any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor.

Adopted on 16 January 2015



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