

**Mr John Berrigan
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European Commission
DG for Financial Stability, Financial
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ESMA's technical advice on general equivalence criteria for prospectuses drawn up under the laws of third countries under Article 29(3) of Regulation (EU) 2017/1129

Dear Mr. Berrigan,

I write to you in relation to the European Commission's mandate inviting ESMA, under Article 29(3) of Regulation (EU) 2017/1129 (the Prospectus Regulation), to provide technical advice on general equivalence criteria to guide future assessments of third country regulatory frameworks.

ESMA has undertaken a careful analysis of the mandate and discussed a possible approach to the general equivalence criteria with both national competent authorities and market stakeholders. These discussions led us to conclude that the operation of an equivalence regime under Article 29 of the Prospectus Regulation would raise serious practical challenges.

In particular, ESMA observes that Article 29(1)(a) entitles EU home competent authorities to approve prospectuses from third countries, if the information requirements imposed by those third country laws are equivalent to the requirements under the Prospectus Regulation (equivalent third countries). This appears to significantly limit the added value of the equivalence regime because, while third country prospectuses would be drawn up under the disclosure rules of the equivalent third country, they would have to be scrutinised and approved under the disclosure rules of the Prospectus Regulation. In addition, ESMA notes that, while Article 29(3) establishes a list of the articles of the Prospectus Regulation which should form the basis of the general equivalence criteria, this list leaves out important aspects of the prospectus regime, such as disclosure rules on risk factors, and does not clarify central elements of the equivalence regime, for example the rights and obligations connected to a third country prospectus in the EU.

The ESAs review proposal as adopted by the Commission suggested amending the equivalence framework under the Prospectus Regulation.¹ While these proposed amendments

¹ COM(2017) 536 final

were not supported by the co-legislators, the Commission's proposal clearly indicates that adjustments to Article 29 are needed.

For these reasons, ESMA invites the Commission to consider whether the mandate for technical advice on general equivalence criteria for the prospectus regime should be pursued under the current text of Article 29 of the Prospectus Regulation.

ESMA considers that, if the Commission were to not maintain its mandate at this point in time (i.e. under the Regulation's current wording), this would not create significant problems, notably for the reasons mentioned hereafter.

First and most importantly, Article 28 of the Prospectus Regulation already provides third country issuers with access to EU markets. Therefore, even in the absence of an equivalence regime in the prospectus domain, third country issuers can make an offer to the public or admit securities to trading on a regulated market in the EU by drawing up a prospectus in accordance with the Prospectus Regulation and having it approved by their EU home competent authority.

Secondly, preliminary indications from competent authorities and market participants suggest that there is limited demand for an equivalence regime from stakeholders.

Finally, in the absence of an equivalence framework under Directive 2003/71/EC (the Prospectus Directive), the decision not to activate equivalence under Article 29 of the Prospectus Regulation at this point in time would not cause any discontinuity from the previous regime.

For any further information on this technical advice, I suggest you contact me or Evert van Walsum, Head of the Investors and Issuers Department.

Yours sincerely,

Steven Maijor

cc: Irene Tinagli MEP, Chair of the Committee on Economic and Monetary Affairs,
European Parliament

Zdravko Marić, President of the ECOFIN Council, Council of the European Union

Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union