ESMA's proposal on the regulatory standards required by the new Prospectus Regulation. October 2018

The Prospectus Regulation (EU) 2017/1129 was published in the Official Journal of the European Union (EU) on 30 June 2017 and entered into force on the 20th day following that of its publication, on 20 July 2017, although a significant part of its provisions will not apply until 21 July 2019.

This Regulation requires ESMA to draw up draft regulatory technical standards (RTS) for implementing and supplementing certain areas thereof, particularly on the key financial information to be included in the summary, the data necessary for the classification of prospectuses and to make them machine readable, advertisements, the situations that require a supplement to the prospectus to be published and the arrangements necessary for the functioning of the notification portal that ESMA is required to launch.

The Regulation also gives ESMA the possibility to develop regulatory technical standards to further specify the requirements relating to the publication of prospectuses.

In line with the above, and within the planned deadline, on 17 July ESMA published the final report with its draft technical standards to comply with the aforementioned mandate and submitted it to the European Commission (EC) for approval.

As provided for in Article 10 of Regulation (EU) 1095/2010 (ESMA Regulation), these draft technical standards were subject to public consultation before preparation of the aforementioned report and final drafting of the standards. The consultation began on 15 December 2017 and ended on 19 March 2018.

The final report also contains a summary of the responses received during the consultation and the final wording proposed by ESMA of the six technical standards that are set out below:

Draft RTS on key financial information to be included in the prospectus summary

Article 7(13) of the Prospectus Regulation (the Regulation) requires ESMA to specify the content and format of presentation of the key financial information (KFI) to be included in the prospectus summary, taking into account the various types of securities and issuers and ensuring that the information produced is concise and understandable. In addition, Article 7(6)(b) sets out the financial periods and the type of KFI, such as pro forma financial information, to be included in the summary.

Taking into account the fact that the Regulation limits the length of the summary to seven pages, ESMA's proposal **reduces as much as possible the KFI to be included on a mandatory basis** and presents a set of key financial information according to the type of issuer and the types of securities. In addition to the mandatory items, ESMA proposes giving the issuer **flexibility to include further KFI that it considers material for investors** and also to allow, where necessary, the issuer to **include alternative performance measures** in order to present the fullest possible picture of the issuer on an individual basis.

In addition, the annexes of the proposed standard contain a series of tables detailing the KFI to be included for non-financial entities, credit institutions, insurance companies, non-equity securities, special-purpose vehicles and closed end funds. It also contains provisions on the KFI to be included relating to guarantors, pro forma financial information, complex historical financial information and special issuers.

It should be noted that, as a result of the feedback received in the consultation, ESMA has introduced qualifications to some aspects of its previous proposal:

• The limit to the number of KFIs that may be voluntarily included has been eliminated (initially the proposal was three), provided that the seven-page limit set for the summary is not exceeded.

• Non-financial entities are given flexibility to determine what cash flow measures to include in the summary, depending on which ones are most relevant to the investor.

• It has also included a measure of historical performance for closed end funds. The use of this measure is left to the discretion of the issuer.

Draft RTS for classification of prospectuses and the practical arrangements to ensure that such data is machine readable

Article 21(13) of the Regulation requires ESMA to develop draft technical standards to specify: a) the necessary data to be published by national competent authorities (NCAs) on their website about the approved prospectuses and b) the practical arrangements to ensure that such data is machine readable.

In addition, Article 47 of the Regulation requires ESMA to **publish every year a report containing statistics on the prospectuses approved and notified in the EU,** including, inter alia, specific information such as: a) the type of issuers, b) the type of issuances, c) the total consideration of the offers, d) the types of transferable securities, e) the types of trading venues and f) the denominations.

ESMA has taken these mandates into account when preparing its proposal, which specifies in detail the information necessary to comply with them. The proposal also details the **practical arrangements necessary to ensure it is machine readable.** Annex VII of the proposal includes the **list of data to be provided**, including the ISIN (*International Securities Identification Number*) of the securities and the LEI (Legal Entity Identifier) of the issuer, the offeror and the guarantor, as required by the mandate.

In addition, Article 32(1)(b) of the Regulation gives NCAs the power to require issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them to provide the necessary information and documents. However, ESMA believes that it is necessary to **specify more clearly the role or obligations of issuers in this regard** and, given that this issue is more related to the provisions on prospectus approval, it suggests that the EC should implement it through Level 2 measures.

Most of the comments received in the consultation expressed their agreement with the information requirements and the practical arrangements proposed to ensure that data is machine readable and therefore no significant modification was necessary.

Finally, it is worth noting that in line with the objectives set out in Recital 63 of the Regulation, **ESMA will enlarge its prospectus register to make it a centralised hub for the entire EU**, thus providing investors with free access to reliable data on prospectuses approved in the EU.

Draft RTS on advertisements

Article 22(9) of the Prospectus Regulation requires ESMA to develop regulatory technical standards to specify the provisions concerning the **dissemination of advertisements** set out in Articles 22(2) to 22(4) and those relating to the establishment of **procedures on the cooperation between the national competent authorities** of the home Member State and of the Member State where the advertisements are disseminated.

In 2015, ESMA delivered a technical standard in relation to a similar mandate set out in Article 1(4) of Directive 2014/51/EU (Omnibus II) on the dissemination of advertisements and on the consistency between oral and/or written advertisements and the information contained in the prospectus. This standard is contained in Articles 11 and 12 of Commission Delegated Regulation (EU) 2016/301.

However, the aforementioned technical standard will be repealed with entry into force of the new Regulation. Therefore, **ESMA proposes carrying over the content to its proposal by introducing in parallel the changes necessary to adapt it to the provisions of the new Regulation**, particularly respecting the provisions relating to cooperation between national competent authorities provided for in Article 22(6).

The final standard on advertisements proposed by ESMA is very similar to that published in the consultation stage, although it contains some minor modifications and clarifications.

Draft RTS on supplements to the prospectus

Article 23(7) of the Regulation requires ESMA to specify under which circumstances a significant new factor, material mistake or material inaccuracy related to the information published in the prospectus would trigger the requirement to publish a supplementary prospectus.

In 2014, ESMA delivered a draft regulatory technical standard on supplements to the prospectus under Directive 2003/71/EC (Prospectus Directive) relating to publication of supplements to the prospectus, which is set out in Commission Delegated Regulation (EU) No. 382/2014. ESMA considers, in essence, that the mandate received at that time and the current one are very similar, and therefore **proposes to transfer the provisions of the previous standard to its new proposal.**

In addition, and in view of the comments received during the consultation, ESMA has also decided to **incorporate into the standard other additional information requirements included in its technical advice to the European Commission** on the format and content of prospectuses, such as the **requirement to prepare a supplement when there are changes to a working capital statement** for underlying issuers of depository receipts **or where there is a significant amendment to, or a withdrawal of, a profit forecast already included in the prospectus.**

Draft RTS on publication of prospectuses

The aim of this proposal is to specify the requirements relating to publication of the prospectus. ESMA has, therefore, taken into account not only the mandatory empowerments provided for in the new Regulation, but also the voluntary empowerments under Article 21(12) of the Regulation.

As already indicated in the section on the draft standard on advertisements, **in 2015 ESMA delivered draft RTS in relation to a similar mandate contained in the Omnibus II Directive.** This standard will be repealed as soon as the new Prospectus Regulation becomes applicable.

As the market has grown accustomed to the standard and considering the need to minimise compliance costs, **ESMA has considered that the 2015 standard should be transferred to the new proposal,** notwithstanding any changes needed to make it compatible with the provisions of the new Regulation.

Draft RTS on the notification portal

Under Article 25(6) of the new Regulation, ESMA has to set up a notification portal through which, at the request of the issuer, the offeror, person asking for admission to trading on a regulated market or person responsible for drawing up the prospectus, the competent authority of the home Member State has to make a series of documents available to the competent authority of the host Member State. These documents are detailed in Article 25(1) and 26(2) of the Regulation.

With regard to prospectus notification, a certificate of approval attesting that the prospectus has been drawn up in accordance with the Regulation and an electronic copy of that prospectus must be submitted. Where applicable, the certificate shall be accompanied by a translation of the prospectus and any summary. The above is applicable to any supplement to the prospectus.

This register must also include the final terms of base prospectuses previously notified when they have not been included in the base prospectus or in the supplement, as well as their translation, where appropriate.

Similarly, with regard to notification of the registration documents or universal registration documents, a certificate of approval attesting that these documents, or any amendments thereto, have been drawn up in accordance with the Regulation and an electronic copy of said documents, together with their corresponding translation, where necessary, must be submitted.

It should be noted that this draft standard has not been submitted to public consultation as its scope is restricted to ESMA's IT system and only has an impact on NCAs.

Furthermore, and given that this mandate is, in turn, related to the technical standard on the classification of prospectuses, ESMA proposes to link the portal to the system whereby NCAs notify ESMA of information on approved prospectuses and associated data.

ESMA and the NCAs are working, in parallel, on the necessary technical standards which will detail the operation of the system.

Links of interest:

Final Report. Draft regulatory technical standards under the Prospectus Regulation (ESMA 31-62-1002).

DIRECTIVE 2003/71/EC, OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 4 November 2003 on the

prospectus to be published when securities are offered to the public or admitted to trading and amending Directors 2001/34/EC

COMMISSION DELEGATED REGULATION (EU) No 382/2014, of 7 March 2014, supplementing Directive 2003/71/EC, of the European Parliament and of the Council, with regard to regulatory technical standards for publication of supplements to the prospectus

DIRECTIVE 2014/51/EU, OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 16 April 2014, amending Directives 2003/71/EC and 2009/138/EC, and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)

COMMISSION DELEGATED REGULATION (EU) 2016/301, of 30 November 2015, supplementing Directive 2003/71/EC, of the European Parliament and of the Council, with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004