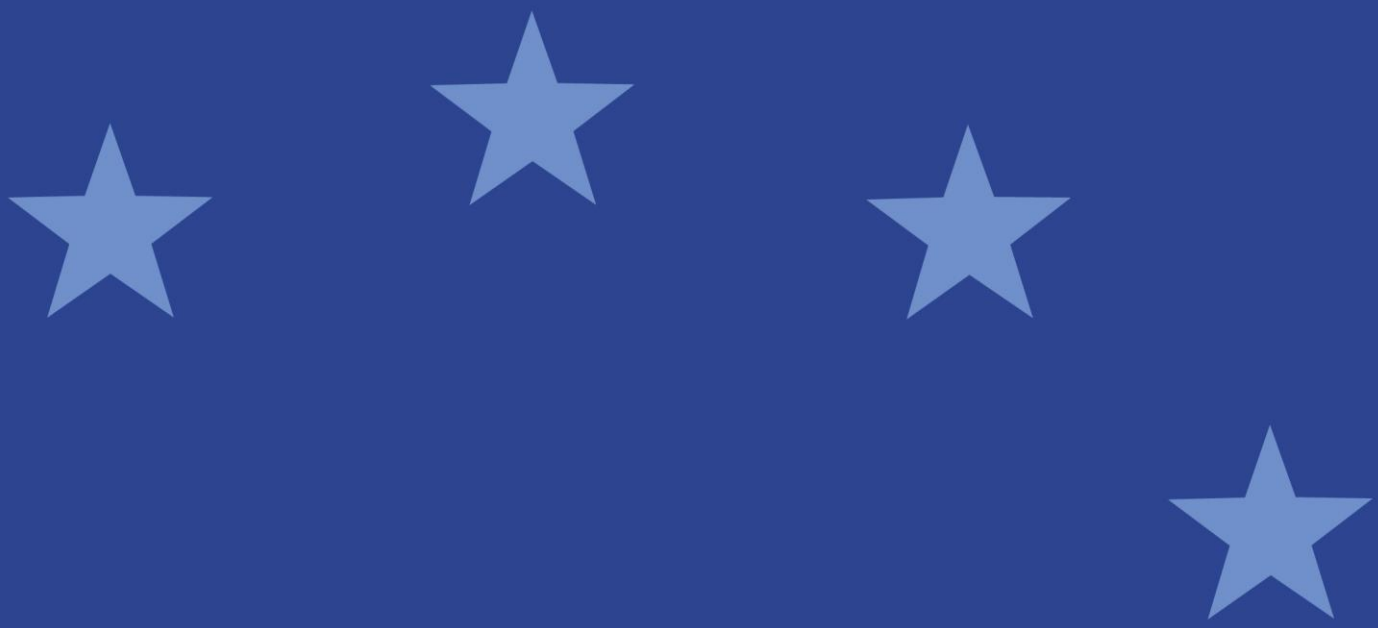
esma European Securities and Markets Authority

Response to public consultation

ESMA response to the European Commission consultation on the review of the Prospectus Directive



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Review of the Prospectus Directive: public consultation

In February 2015, the European Commission decided to hold a public consultation to seek views from all interested parties on their experience of Directive 2003/71/EC (the "Prospectus Directive"). The results of this public consultation will feed into the European Commission's review of the Prospectus Directive. The EC is required to assess the application of the Directive by 1 January 2016.

The Commission is evaluating the Prospectus Directive to assess:

- ✓ whether the current exemption thresholds are appropriate;
- ✓ whether different prospectus requirements should apply to public offers and admissions to trading on a regulated market or for primary and secondary issuances and whether a prospectus should be required for admission to trading on an MTF;
- ✓ whether the proportionate disclosure regimes should be modified or extended, including in relation to SME growth markets; and
- ✓ how to address interaction and overlaps with other pieces of legislation (Transparency Directive[1], Market Abuse Directive[2]/Market Abuse Regulation[3], PRIIPs[4]).

The objective of the review is to identify the needs of market participants and revamp the current regime in order to better facilitate companies to raise capital throughout the EU, particularly SMEs, and to lower the associated costs, while maintaining an effective level of investor protection.

This consultation response does not answer each and every question but follows a topic by topic approach to the issues raised in the CP. The overall structure of the response mirrors the division of the CP into three sections – i) when a prospectus is needed, ii) what information a prospectus should contain and iii) how prospectuses are approved.

[1] Directive 2004/109/EC
[2] Directive 2003/6/EC
[3] Regulation (EU) No 596/2014
[4] Regulation (EU) No 1286/2014

INTRODUCTION

1. The aims of the Prospectus Directive, and its implementing measures, as noted in the European Commission's Consultation Paper (CP)[5], are the protection of investors, market efficiency and transparency and the creation of a single European market for securities. These aims are facilitated by a single approval mechanism coupled with a passporting regime. ESMA considers that the objectives of the original Directive have been largely achieved but equally considers that, particularly in light of initiatives being taken as regards Capital Markets Union[6] and the development of alternative trading facilities, it is now opportune to review the operation of the Directive and to identify areas for further improvement. Furthermore, ESMA welcomes that the review seeks to ensure that a prospectus will only be required where it is really needed, that the approval process is efficient, that information included in prospectuses is useful and not burdensome to produce and that barriers to the raising of capital across borders are minimised.

2. While ESMA considers that strides towards reducing the administrative burdens on issuers were made through the Amending Directive[7], including the raising of certain exemption thresholds, certain of the objectives of the Amending Directive have arguably not been met and there is a need for a more conceptual or "back to basics" approach to the review. As part of this approach, ESMA is of the view that review should focus on the genuine purpose of the prospectus and to ensure that the prospectus regime is aligned with the needs of the real economy while continuing to deliver effective investor protection. Central to this is the need to revisit the balance between primary and secondary market disclosure and reduce the administrative burden on issuers, particularly SMEs. A revised disclosure regime should ensure that the prospectus is an informative document containing accurate information to inform the investment decision of all investors while at the same time avoiding duplication of information already in the public domain.

3. The EU institutions should consider the PD review as an opportunity to reflect on whether the regime is fit for purpose. It is important that this discussion take place before reviewing the more detailed aspects of the PD itself, since there is evidence to suggest that the PD may not place investors in a position to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to the securities at stake.

4. In determining whether the prospectus document is fit for purpose the issue of comprehensibility merits real consideration. PD (Article 5(1)) requires that the information in a prospectus is presented in an easily analysable and comprehensible form. Whether information is comprehensible depends on the language used and the level of knowledge of the investors. This issue is of particular importance in the context of retail prospectuses. Lack of comprehensibility or the ability to easily analyse information may lead to investors not using the prospectus as a primary source of information when making an investment decision. This undermines the aim of the PD to ensure investor protection. It is arguable that the prospectus has become somewhat more of a liability management tool for issuers, rather than a document that facilitates investors' investment decisions.

5. While the information provided must always be sufficient to allow the investor to make an informed assessment and therefore an informed investment decision, the quantum of

[5] http://ec.europa.eu/finance/consultations/2015/prospectus-directive/docs/consultation-document_en.pdf
[6] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:63:FIN&from=EN
[7] Directive 2010/73/EU

disclosure should be tailored to ensure that it is digestible for the end investor. Similarly, while not wanting to encourage information asymmetry, an overload of information for retail investors can be counterproductive as it can distract from the key areas on which investors should focus. A more investor friendly approach to disclosures, including through the use of plain language, diagrams and tables, could enhance investor protection while at the same time making the content of prospectuses more accessible with a possible consequence of greater investor involvement in the market. Disclosure of the target market of a particular offering in the prospectus could contribute more to this similar to the requirements contained in Article 16(3) and Article 24(2) in MiFID II[8]; the target audience, together with the denomination should be the determining factor for the level of disclosure.

6. Through the below responses to the questions raised by the European Commission, ESMA aims at identifying a number of opportunities and challenges to the continued successful operation of the prospectus regime. The order of the issues follows the order set out in the EC CP.

WHEN A PROSPECTUS IS NEEDED

When a prospectus is needed (Q1-Q3)

7. ESMA considers that the principle whereby a prospectus should be required for both public offers and applications for admission to trading of securities is very much valid. However, ESMA also considers that there should be a clear distinction between the disclosure requirements for public offers that are part of an IPO (within the meaning of issuers seeking admission to trading on a regulated market for the first time) and those which are secondary offers (i.e. offers by the issuer or any offeror of new or existing shares of a class already admitted to trading on a regulated market) which would assist in the creation of a truly proportionate disclosure regime.

8. Making a secondary offer document more relevant and focused on the salient terms of an offer will not have a detrimental impact on investor protection. In fact, it may result in existing shareholders and potential investors being more informed about the company and the offer, as the prospectus for the secondary offer would not be as cluttered with a vast amount of information already in the public domain, which can obscure some of the more important details of the offer. Generally, prospectus disclosure requirements for secondary offers should exclude those disclosures which are already in the public domain. Information required under the proportionate regime for pre-emptive offers could also be restricted to that which relates to any material updating of the issuer's financial condition, its prospects, the public offer and the features of the securities issued, as well as any material risk factors.

9. Furthermore, the reasons for restricting the proportionate regime to rights issues (i.e. the offer is addressed at existing shareholders who already have a good knowledge of the issuer) does not reflect the actual degree of dissemination of regulated information, which in fact is widely available to all the market, and so also to potential investors. Thus, a simplified prospectus regime could be applied to all secondary public offers.

10. As to the issue of whether different treatment should be granted to prospectuses prepared for the purposes of offers and those prepared for admission to trading, ESMA notes that, subject to the exemptions further outlined below, the Prospectus Regulation[9] (PR) already provides for

[8] Directive 2014/65/EU
[9] Commission Regulation (EC) No 809/2004

differing levels of substantive disclosure depending on the reason for preparation of the prospectus. Where there is no public offer, public offer disclosure items are not required to be included in the prospectus. A substance over form approach is preferable and therefore ESMA would see little benefit in creating different types of document in this regard.

Adjustment of existing exemption thresholds (Q4-Q7)

11. ESMA acknowledges that Member States have discretion to apply national disclosure requirements to offers between €100k and €5m. In practice, Member States have chosen different thresholds under national law for the minimum size of offer to which the obligation to produce a prospectus applies. ESMA is concerned that this may create incentives for regulatory arbitrage.

12. However, and notwithstanding efforts being made as part of the Capital Markets Union to increase cross-border capital raising, ESMA considers that Member State discretion below the threshold at €5m is an implicit recognition that national characteristics still play an important role in retail markets. Capital markets across EU vary widely in terms of size (of issuers, offers, retail investors' activity etc.) and therefore flexibility to treat smaller offers in a more tailored manner at the national level (with the associated reduction in costs and burdens of not having to produce a PD compliant prospectus) benefits both issuers and investors alike. Where Member States do apply PD disclosure requirements below the €5m threshold (or when issuers elect to subject themselves to the PD regime although the Member State does not apply disclosure requirements to issuers below the €5 million threshold), ESMA considers that it is important that issuers who prepare such a compliant prospectus should be entitled to the full benefits of the prospectus regime, including passporting.

13. As noted in question 4 of the EC CP, the exemption thresholds were initially designed to strike an appropriate balance between investor protection and alleviating the administrative burden on small issuers and small offers. ESMA considers that the thresholds and rules applying to offers to the public should be dependent on the issuance size and be platform/mechanism neutral. However, should the European Commission see particular risks inherent in crowdfunding that are not prevalent in other offers below the threshold, ESMA would recommend separately exploring options for the application of a specific harmonised proportionate disclosure requirements for the raising of capital through crowdfunding for offers to the public below €5m. In exploring such options, it would be useful to consider the interaction with the MiFID disclosure requirements to which some, but not all, crowdfunding platforms are subject. ESMA also notes that the PD disclosure requirements are of little relevance for offers made through crowdfunding platforms as they often deal with small businesses or start-up companies in their very early stages and the prospectuses likely to be produced are liable to be large documents containing information that investors in such offers, typically retail investors, are not expecting and may not find useful.

The need for a prospectus in the case of secondary issuance (Q8-Q10)

14. The burden of producing a full prospectus for admission to trading of shares of a class already admitted exceeds the benefits both to existing shareholders and potential investors and a proportionate disclosure regime with considerably less disclosure requirements should be established if a prospectus would still be required. The scope of application of Annex XXIII of the Prospectus Regulation could be expanded or adapted for open offers by issuers already admitted to trading and subject to ongoing disclosure requirements. The rationale for a reduction in this burden is that the issuer is already subject to the Transparency Directive (TD) and the Market Abuse Directive (MAD), therefore investors or market participants should be

sufficiently informed already about the issuer because of information provided in accordance with these directives.

15. ESMA supports increasing the threshold of the limitation in Article 4(2) (a) PD of "less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market" to 20% as proposed in the consultation paper. Alternatively, consideration could be given to a proportionate regime provided the issuer already has shares of the same class admitted to trading on the same regulated market. The establishment of such a regime would also remedy the contradiction existing within the current prospectus regime whereby in case of a rights issue (which involves a public offer) there is a proportionate disclosure regime available, while a (full) prospectus is required when there is no public offer at all (i.e. a prospectus prepared solely for admission to trading).

Prospectus requirement for admission to trading on MTF (Q11-Q12)

16. PD disclosure requirements apply to all public offers (that are not exempt) regardless of venue (i.e. whether a regulated market of MTF), ESMA acknowledges that differing disclosure requirements exist as regards the extent of disclosures required for admission to trading of securities on MTFs (when not a public offer) and the extent of the scrutiny that is applied ex ante to admission documents. ESMA also acknowledges that MTFs have been brought into scope in the recent revisions of the market abuse regime and MiFID.

17. Trading venue neutrality should become a leading principle under the PD. The investor should, in general, receive the same level of information on securities traded on MTFs as in case those securities where traded on a regulated market. Notwithstanding the existing differences in the regulatory regimes applying to MTFs and regulated markets, trading venue neutrality between MTFs and regulated markets would help to close the regulatory gap between these types of trading venues. It would also create a level playing field among MTFs. However, due to the limited differences between the "full regime" and the "proportionate disclosure regime", the latter introduced in 2012 has perhaps not been as successful as originally expected. ESMA would not be in favour of extending the proportionate disclosure regime in its current form to disclosure on MTFs as those issuers on MTF, which fall within the definition of SME already have the possibility to use the proportionate regime. However, ESMA would be supportive of a regime that takes greater account of the needs and specificities of issuers, and in particular SMEs, seeking admission to MTFs. Requiring a prospectus only for MTFs that are registered as SME Growth Markets would create additional venue bias.

Closed end funds (Q13)

18. ESMA considers that an exemption from the requirement for ELTIFs, certain European Social Entrepreneurship Funds and European venture capital funds, to publish PD compliant prospectuses where they are marketed to retail investors and where they are subject to relevant sectorial legislation and the production of a PRIIPs compliant KID is both sensible and appropriate. ESMA considers that such an exemption would avoid unnecessary duplication and costs (which would ultimately be borne by the end investor). Given that more tailored requirements exist in the relevant legislative texts, ESMA would not consider there to be any adverse impact in terms of investor protection given the similar involvement of NCAs in the authorisation process.

Employee share scheme exemption (Q14)

19. ESMA agrees with the European Commission regarding the esoteric nature of employee share scheme offers and that there would be little value in terms of investor protection in requiring a full prospectus. ESMA supports the extension of the exemption to non-EU private companies in order to level the playing field between private and public companies and not disadvantage employees. The protections that are built into the conditions the framework for equivalence in Article 4(1)(e) of the PD would however necessitate adaptation in the case of private companies in third countries in order to protect employees of such companies in their capacity as investors.
20. Furthermore, in order to properly address the issue of employee share schemes, ESMA considers that it is imperative that the European Commission establish a formal legal and regulatory framework for the equivalence of third country markets. Such a framework should however not be limited solely to employee share schemes.

Exemptions for wholesale debt (Q15)

21. ESMA considers that the €100,000 does create incentives for issuers to issue high denominated securities but has no evidence to suggest that lowering this threshold would equate to a corresponding increase in liquidity of the secondary market of the debt instrument. Institutional investors represent most of the trading in debt securities; they generally trade in large amounts and provide the most liquidity. ESMA does not expect retail investors to trade in such large amounts. The OTC nature of these markets also inhibits the trading of these securities with retail investors. Should the €100,000 threshold be removed then other mechanisms would be required in order to protect retail investors. In addition, ESMA considers that the €100,000 threshold helps to facilitate the use of the exemptions to the requirement to publish a prospectus.
22. Notwithstanding the above, ESMA believes that prospectuses should target a specific audience and that this, together with the denomination, should form the basis for the level and type of disclosure in a prospectus.

WHAT INFORMATION A PROSPECTUS SHOULD CONTAIN

The existing proportionate disclosure regime (Q16-Q19)

23. There is currently a desire within Europe to promote market based financing for SMEs. It is essential that SMEs have proper access to the capital markets, while ensuring that investors are properly protected. The current proportionate requirements for SMEs and Small Caps, pursuant to Art. 26b of the Prospectus Regulation, have been used to varying degrees across Member States and has probably failed to achieve the objectives which were originally set for it.
24. In terms of reviewing the existing regime for SMEs, it is important to consider the burden of disclosure for SMEs and to balance this with suitable investor protection measures. However, the complete absence of historical financial information in a prospectus for issuers which are not well known to the market would do little to increase the visibility and/or credibility of SMEs

in the EU market. In order to align the disclosure regime with the real economy, proper consideration should be given to reducing the administrative burden on issuers who are already admitted to trading on a regulated market or MTF.

25. The current prospectus schedules under Annexes XXIII and XIV of the Prospectus Regulation still provide for information which is redundant with respect to those already available for the market. It is not always clear that a proportionate regime for these types of offers makes a significant impact on investor protection, which is adequately covered by other EU legislation, in particular MAD, MiFID, the TD and Shareholders Rights[10] directives. The reasoning for restricting the proportionate regime to rights issues (i.e. the offer is addressed at existing shareholders who already have a good knowledge of the issuer) does not reflect the actual degree of dissemination of regulated information, which indeed is widely available for all the market, and so also for potential investors.

26. An analysis of the actual degree of application in the EU of the existing prospectus schedules for SMEs and Small Caps could certainly provide a more grounded knowledge of the effectiveness of such schedules. In addition, it could be worth undertaking an assessment of the ability of SMEs to fulfil all the existing prospectus disclosure requirements, many of which were originally drafted for companies of bigger size (e.g. those concerning board practices and related party transactions).

Bespoke regime for companies admitted to trading on SME growth markets (Q20-Q22)

27. ESMA is in favour of aligning the definition of “company with reduced market capitalisation” in the Prospectus Directive with that in MiFID II.

28. ESMA would not be in favour of having a bespoke regime for companies admitted to trading on SME Growth Markets and a contemporaneous proportionate disclosure regime for SMEs and Small Caps admitted to trading on regulated markets. As noted above, ESMA considers that venue neutrality should be a core component of the revision of the PD and that any revised regime should apply to both market types. Amending the proportionate regime for SME IPOs would be useful but probably challenging as efforts have already been made in this regard by ESMA, unless some restriction on eligible investors was also put in place.

29. As regards those SMEs whose shares are traded on SME growth markets, other MTFs or regulated markets and where MAR applies, lighter requirements, which take account of publicly available information, for secondary issues would better incentivise issuers to use these markets.

Incorporation by reference (Q23-Q24)

30. Incorporation by reference should be looked at in a more holistic way as part of the PD review, in particular clarifying the scope of the mechanism and resolving the disconnect between the PD and the PR. In order to make full use of incorporation by reference, thought should be given to facilitating, on a legislative basis, the incorporation by reference of information voluntarily filed. Were a revised list to be included at Level 1, the list could be further elaborated at Level 2 in order to take into account market developments. Voluntary filing should not however be without limits and thought should be given to the boundaries of any such proposal while at the same time accommodating market practice, increasing the

[10] Directive 2007/36/EC

readability of the prospectus and reducing the costs to issuers. Issuers who benefit from exemptions under one directive (Directive 2004/109/EC (the "Transparency Directive")) should not lose that benefit under another (PD).

31. In addition, it could be worthwhile to review the principle which allows the incorporation by reference of documents that are filed with the competent authority in accordance with the Transparency Directive as such principle does not appear to be based on a conclusive or practical rationale. In fact, most documents that are filed under the Transparency Directive, with the exception of annual financial reports, are rarely or never incorporated by reference in a prospectus. A more flexible incorporation by reference regime could simplify and reduce the costs of the drafting of prospectuses while at the same time providing potential investors with information they would need in order to make an investment decision.

Supplements / Market Abuse Directive (Q25-Q26)

32. ESMA is of the view that clarification of investors' withdrawal rights in case of a supplement (PD Article 16(2)) in particular for exempt offers would be welcome as part of any review of the prospectus regime. Article 16.2 PD should specify that the withdrawal right is not applicable in case of an exempt offer.

33. It would also be beneficial to clarify the extent to which supplements may be used to include additional, or amend existing, securities note information in base prospectuses bearing in mind concerns already highlighted regarding the readability of the prospectus (so called "product supplements"). The absence of the possibility to introduce new products by way of supplements leads to significant numbers of base prospectuses and resulting inefficiencies for issuers. Not to do so merely serves to add to the cost to the product producer and therefore the ultimate cost to the end user. Since each supplement is to be approved by the competent authority, investor protection would not be jeopardised. As this is a technical issue, detailed work should be carried out at level 2.

34. ESMA would not however be in favour of substituting the obligation to supplement a prospectus with a market announcement given the importance of the withdrawal right that accompanies a supplement in the context of a public (non-exempt) offer. In order to capitalise on what could be seen to be duplicative obligations, and preserve the protection afforded to investors by the withdrawal right, thought could be given to facilitating the incorporation by reference of market announcements in supplements. Should this be seen as duplicative then alternative ways of dealing with the withdrawal right should be explored.

Prospectus Summary / PRIIPs (Q27-Q28)

35. ESMA considers that there is scope for improvement in terms of the requirements for prospectus summaries. The requirements introduced in the previous PD review (e.g. requirements relating to base prospectuses and summaries) appear to have made it more difficult for investors to assess the information given in prospectuses. The current PD summary is considered by many market participants (and NCAs) as not being fit for purpose. These market participants consider that it has not fulfilled the co-legislator's idea of a document which is short, simple, comparable and clear and easy for targeted investors to understand. Rather, summaries, due to the requirements of PR Annex XXII, tend to be lengthy, generic, long and technical and do not improve the knowledge of the average investor.

36. When considering any potential changes to the summary regime, it is important to bear in mind that the contents and length of the summary are linked to the civil liability attached to

those persons who are responsible for the summary. It should also be taken into account that key information included in the summary is based on the information provided in the prospectus.

37. Consideration should be given to revisiting the current summaries template or at least making it more comprehensible and investor friendly. Introducing a level of flexibility would increase the readability and accessibility of the information. This may include facilitating a summary in the form of a narrative which includes the most important information in relation to the issuer and the particular transaction, and which may differ from case to case. In the narrative, the issuer should be free to choose the order in which information in the summary is presented, but there should be requirements concerning certain minimum information that should be included in the summary. Use of a narrative, however, should not prejudice the comparability of information included in summaries which was achieved through the 2012 amendments.

38. The option of having a different type of summary where a KID is also prepared could reduce overlap while acknowledging the essentially different functions, and authors, of the summary and KID. This would effectively result in four approaches to summary disclosure:

    a. No summary for wholesale issues (no change to the existing situation);

    b. Full summary for retail issues if no KID is required (i.e. outside the current scope of PRIIPs);

    c. A reduced summary focused on issuer disclosures combined with a PRIIPs compliant KID (the PD summary is reduced);

    d. A PD specific KID including information on both the issuer and securities. Such could be longer than a PRIIPs/UCITS KID if needed but much shorter than the current summary and could use existing KIDs as a starting point for disclosure.

39. ESMA considers however that it is important to acknowledge that the authors of a summary and KID may be different and that combining both may be cumbersome for both issuers and investors. It is also important to bear in mind that KIDs are not subject to approval by NCAs. In any case, duplication of information in a KID and prospectus summary should be avoided.

Length of the prospectus (Q29-Q30)

40. ESMA considers that the length of the prospectus is very much linked to the issue of liability but would not be in favour of setting maximum lengths for prospectuses. However, in order to make some efforts to reduce prospectus lengths, ESMA reiterates the suggestion previously made that the length of the summary be reconsidered, i.e. 7% of the prospectus or 15 pages (whichever is shorter) rather than that adopted in 2012 (whichever is longer). This could be an indirect but effective way forward to reduce the length of prospectuses, particularly base prospectuses. Alternatively, and in line with the proposal included in paragraph 37 of this response, it could be considered to reduce the length of the summary e.g. to maximum 10 pages by way of adapting the summary template in Annex XXII of the Prospectus Regulation.

Liability regimes and sanctions (Q31)

41. ESMA supports a more harmonised sanctions regime similar to that introduced in other pieces of legislation adopted in the capital markets area (PRIIPs Regulation, MiFID II, Transparency Directive, etc.). The effectiveness, proportionality and dissuasive effect of any sanctions imposed should be relative to the size of the issuer, offer or related to habitual infringements rather than being tied to individual Member States.

42. In addition, in light of proposals regarding CMU, and following ESMA's 2013 report to the European Commission on the national prospectus liability regimes in the EEA[11], it would be advantageous to identify measures to be taken in order to reach better convergence also with regard to the issue of responsibility for the prospectus. In this context, ESMA, in its final report, already identified some areas which would benefit from further harmonisation (e.g. persons subject to the liability regime, sanctions, degree of fault). As highlighted by ESMA, particularly in case of cross-border transactions, the diversity in the different jurisdictions could make it difficult for market participants to assess their risks and rights in accordance with the applicable prospectus liability regimes. Therefore, as regards the civil liability, it could be useful to clarify the nature of the liability (contractual/non-contractual, on the basis of which the rules of international private law apply), the time limit to file a claim and the beginning of the prescription and the distribution of the burden of proof.

HOW PROSPECTUSES ARE APPROVED

The scrutiny and approval process (Q33-Q39)

43. The perceived complexity of the prospectus regime is seen by many as one of the impediments to SMEs entering the capital markets in Europe and therefore adding further layers of regulation could be counterproductive. ESMA is aware of differences that currently exist in the way national competent authorities assess the completeness, consistency and comprehensibility of draft prospectuses submitted for approval but is hesitant to suggest more legal requirements in this regard. ESMA is currently undertaking a number of initiatives, including through the use of peer reviews and thematic convergence studies, in order to better identify where differences in NCA practices and approaches exist and is committed to achieving greater supervisory convergence in order to further a level playing field. ESMA is of the view that one way to achieve this is through use of tools already available to it including, but not limited to guidelines, opinions and Q&As. Other improvements however, such as moving to fully electronic processing of prospectuses or supporting the ability of NCAs to take a risk based approach, may require legislative change. From an administrative point of view, further clarity will also be brought to the prospectus approval process following the entry into scope of an RTS currently under development on this issue.
44. The language of the recent mandate on adjustment of time limits for approval led to difficulties in developing RTS in this area, particularly given the interaction between the Level 1 text and any proposed RTS. ESMA is not in favour of reducing the applicable time limits for prospectus approval or reducing the time limits for scrutiny of securities note information (a 7 day timeframe was originally considered during the drafting of the original PD). As noted in ESMA's Consultation Paper on draft RTS under the Omnibus II Directive[12], reducing the time limits for prospectus approval could put NCAs under excessive time pressure when scrutinising prospectuses, creating a risk of less comprehensive scrutiny and even lapses in the approval process. This seems directly at odds with the purpose of ensuring investor protection which underlies the prospectus regime. ESMA does however consider that the 20 day time limit should only be available once.
45. The PD does not currently envisage the passport of registration documents. A more preferable solution would be to simply allow the passporting of registration documents to avoid approved registration documents having to be reviewed by other NCAs in case they are used as part of

[11] ESMA/2013/619
[12] http://www.esma.europa.eu/system/files/2014-1186_consultation_paper_on_omnibus_ii_rts.pdf

a tripartite prospectus. This would also reduce the burden on issuers and help to speed up the review of prospectuses in which registration documents approved by other NCAs do not need to be incorporated by reference any more but could be used as part of prospectus consisting of separate documents.

46. As regards marketing activities prior to the prospectus approval, ESMA does not consider this to be a major issue: issuers already conduct marketing in advance of an offer and this is already permitted under the current prospectus regime.

47. In terms of the existing passport regime, ESMA considers that this operates well with little additional burden on issues. Furthermore, the passport system also provides national competent authorities with an overview of offers of securities taking place in their respective jurisdictions.

Base prospectuses (Q40-Q41)

48. In relation to securities which are publicly offered on a continuous basis or over a longer time, the use of base prospectuses becomes increasingly impracticable towards the end of their validity. To continue the public offer, the requirement currently is to draw up a new base prospectus with respective new final terms, often by incorporating information from the original base prospectus and/or final terms. This is neither efficient nor does it improve the comprehensibility of the documentation for the investor, in particular because there are currently different practices applied in the various Member States to address this problem. ESMA would therefore welcome exploring ways towards a more efficient use of the base prospectus regime in this respect. Approaches could be a general extension of the validity of base prospectuses beyond 12 months, which would reduce the cost of raising capital (as noted in the CMU Agenda), or allowing public offers under final terms filed within the validity of the base prospectus to be continued for up to 12 months after the filing of the final terms even after the base prospectus' validity (for the filing of new final terms) has expired. In terms of investor protection it would be required to update the base prospectus by way of supplement as long as offers under final terms relating to this base prospectus are ongoing (i.e. for a max. of 12 months after the last final terms has been filed).

49. From an investor protection point of view, consideration should also be given as to whether base prospectuses, given their complexity, are suitable for the issuance of structured products to retail investors. An alternative to the use of a base prospectus for structured products targeted at retail investors could consist of 1) a registration document containing information about the issuer 2) terms and conditions of the product in one single document (instead of them now being partly in base prospectus and partly in final terms) and 3) the associated KID that would inevitably be required under the PRIIPs regime. In this regard, it would be important to consider whether this approach could result in a disparity in the level of information provided in stand-alone prospectuses and by way of this new mechanism. This is due to the fact that PR Annex XXII (which specifies the contents of the summary) requires securities note information that is not provided in the terms and conditions.

50. Clarification as to the possibility for a base prospectus being drawn up in a tripartite format, as previously espoused by the European Parliament, would also be welcome. ESMA considers that the possibility to have a tripartite base prospectus would greatly increase the flexibility of the base prospectus format and may also contribute to issues such as comprehensibility and readability of base prospectuses.

Determination of Home Member State (Q42)

51. ESMA considers that the status quo should be maintained. ESMA is unaware of any major problems with the operation of the current regime. Issuers are free to have all prospectuses approved in the Member State where they have their registered office, thereby avoiding the situation where they may have different home Member States for the approval of the prospectus for different products. The current choice facilitates issuers of wholesale debt by allowing them to draw up their prospectuses for approval according to where they wish to have the securities admitted to trading or where the potential investors are based, and in a language acceptable by the relevant NCA, rather than requesting a transfer of approval which could be denied, Were there to be any change to the status quo, ESMA considers that it would be imperative to consider the home Member State provisions in the TD, MIFID and MAD.

Electronic filing and publication (Q43-Q45)

52. The current patchwork of sources of regulatory information and prospectuses is not conducive to investors having easy access to information in terms of taking investment decisions, both at the time of issuance and on an on-going basis. A centralised, pan-EU filing system for all securities subject to the PD, TD and MAD/MAR, would alleviate many of the issues that arise from the currently fragmented approach and would provide investors with a one-stop-shop when seeking access to regulated information. It would be opportune to capitalise on the European Electronic Access Point currently under development at ESMA. Alternatively, a review of ESMA's role as a central access point for information concerning prospectuses should be undertaken. The lack of full integration of systems (including between the prospectus register (developed following amendments to the PD by the Omnibus I Directive) and any solution developed regarding the receipt of final terms (to be developed following amendments to the PD by the Omnibus II Directive), and differing obligations in publication requirements on the ESMA website is hampering ESMA's ability to become a central access point.

53. In addition to the above, a number of issues regarding publication were identified as part of the work undertaken in drafting the RTS on publication for the purposes of Omnibus II, many of which were however considered to be outside the mandate. Principal among these was the need for clarity regarding for how long the issuer has to make the prospectus available to the public and the need for clarification of "as soon as practicable" regarding the timing of publication of the prospectus (PD Article 14(1)). Clarification of "if applicable" relating to publication of hyperlinks to published prospectuses (PD Article 14(4a)) would also be welcome.

54. Issuers should be required to prominently publish their prospectus on their website in order to avoid endangering investor protection in terms of accessibility of the prospectus. For example, it should not be the case that the prospectus can only be downloaded via a very small footnote at the end of the relevant webpage as such practices make it unlikely that investors will use a prospectus when making their investment decision.

55. With regard to publication of prospectuses, issuers having securities admitted to trading on a regulated market could be required to file the prospectus with the OAM (as defined in the TD). A similar requirement is set for disclosures of managers' transactions in MAR Art. 19(3) even though those disclosures are not defined as regulated information in the TD.

56. The question of the timing of publication is ambiguous in the case of base prospectuses as these may be submitted for approval in advance of the point in time where the issuer, offeror or person asking for admission to trading actually intends to offer securities to the public or

admit securities to trading. The market could benefit from clarification as to whether the issuer, offeror or person asking for admission to trading has the right to postpone publication of the base prospectus until securities are offered to the public/admitted to trading. Such postponement of the publication of the base prospectus should not be permitted since it is not in line with the requirement that the prospectus, including the base prospectus, be published "as soon as practicable" after being approved.

57. According to the provisions of PD Article 14(2), if the prospectus is not published in a newspaper or in a printed form, the issuer or the person responsible for drawing up the prospectus is free to choose between the means of electronic publication provided for in PD Article 14(2)(c), (d) and (e). However, if the prospectus is published in a newspaper or in a printed form, the only means of publication with which the issuer or person responsible for drawing up the prospectus can fulfil the requirement of electronic publication is the one set out in PD Article 14(2) (c). It seems inconsistent that a prospectus which is only published according to PD Article 14(2) (d) or (e) fulfils the obligation of electronic publication whereas a prospectus which is already published in a newspaper or in a printed form can only fulfil the obligation of electronic publication via PD Article 14(2) (c). While publication on the website of the regulated market (14(2) (d)) will only be possible for prospectuses regarding admission of securities to trading and publication on the website of the home competent authority (14(2) (e)) is restricted to those instances where the authority offers such publication, this does not constitute a sufficiently strong reason for excluding the use of these means of electronic publication in situations where they are actually available. Moreover, the possibility to publish a prospectus through newspaper (PD Art. 14(2) (a)) could be removed.

58. A further minor point concerns the deletion of "if applicable" in PD Article 14(4). The term "if applicable" in PD Article 14(4) is redundant following the establishment by the Amending Directive of the obligation to electronically publish the prospectus. Prior to the changes made to Article 14(2) (e), second subparagraph, not all prospectuses were published electronically and the home competent authority – if it chose to publish a list of approved prospectuses – only had the possibility of including a hyperlink to prospectuses which were electronically published. This explains why "if applicable" was inserted in Article 14(4); it reflects that home competent authorities were only obliged to include hyperlinks where the issuer, offeror or person seeking admission to trading had chosen to publish in this way. Given that the home competent authority should now be able to include a hyperlink to all approved prospectus due to the obligation of electronic publication, "if applicable" should be deleted.

59. Finally, according to Article 14(4), if a home competent authority chooses not to publish all prospectuses but instead a list of such, the authority must publish hyperlinks to the prospectuses published either on the website of the issuer or on the website of the regulated market. However, it should also be possible for the competent authority to provide a hyperlink to the prospectus published on the website of the financial intermediaries placing or selling the securities, including paying agents, as referred to in Article 14(2) (c), as it would run contrary to PD Article 14(2) (c) – which expressly allows such intermediaries to undertake the publication of the prospectus – to not allow competent authorities to provide hyperlinks to such websites.

60. The provisions concerning notification and communication procedures with regard to approved prospectuses and filed final terms (Article 5 (4), 14 (1), 17, 18 PD) could be streamlined. The current system with separate notifications to the host NCAs should be replaced or centralised by a single notification to the ESMA register with automatic transmission to the host NCAs. The current regime provides for separate notifications to ESMA and the host NCAs, while it would be much more efficient to use the notification to ESMA to simultaneously notify prospectuses to the host NCAs via ESMA. This will become even more relevant when, starting from 1 January 2016; also final terms need to be communicated to ESMA and the host NCAs by the home NCAs.

Equivalence (Q46-Q47)

61. ESMA would fully support a single equivalence mechanism for prospectuses drawn up in accordance with the legislation of third countries as there is only very limited use of the Article 20 equivalence framework as this is not linked with a passport mechanism according to which third country NCAs may notify approved prospectuses into Member States.
62. Alternatively, if the Article 20 equivalence assessments are to be maintained, and as the PR requirements are based on the IOSCO principles, ESMA would welcome clarification of the relationship between PD Article 20 and IOSCO principles as presently a review of third country regimes against both appears to be a duplication of the work required.
63. Finally, clarification of what constitutes an equivalent market under PR Annex VIII 2.2.11, and who is responsible for such determination, would be welcomed.

OTHER ISSUES

Definitions

64. While the EC has discretion in the review clause, ESMA would welcome clarification of "public offer" vs. "offer to the public", taking into account issues such as internet dissemination, advertisement, direct marketing and retail investment. This should at a minimum include that references in the PD to "public offer" or "offer" being revised to "offer to the public" as the PD only provides a definition of "offer of securities to the public" (Article 2 d) PD). It should be clarified whether the term "public offer" relates only to an individual investment decision of the investor or encompasses also situations where a group of investors vote by majority decision (e.g. scheme of arrangement, decision in an assembly of debt holders, insolvency proceedings, etc.).
65. The definition of public offer should be better delimited, in order to clarify which offers/transactions are in or out its scope (e.g. direct listing on MTF, enforced sales of securities). Regard should be had to the European Court of Justice (ECJ) ruling in case C-441/12[13] (Almer and Daedalus vs Van den Dungen and Oosterhout) which addresses whether an enforced sale of securities to the public is submitted to the obligation to publish a prospectus. Furthermore, in light of the work being undertaken at ESMA regarding private and bilateral transactions, it may be necessary to take this into account when formulating a definition of public offer.
66. Definition of the terms "primary market" and "secondary market" would be a welcome addition to the prospectus regime. Any definition of these terms should seek to strike a balance between information provided at the time of the issue and that available under periodic and ongoing information regimes. That may help to alleviate requirements for secondary issues, at least for issuers whose securities are listed on a regulated market. Clarification of the term 'financial information' used in the PD and Commission Regulation (whether this refers to financial statements (audited or unaudited) or whether it also refers to other types of financial information) would be welcomed.

[13] http://curia.europa.eu/juris/document/document.jsf?text=&docid=157805&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4655

Concepts requiring clarification

67. Paragraph 13.2 of PR Annex I (and corresponding requirements in other Annexes) should not be applicable issuers having already securities admitted to trading on a regulated market; as such issuers are already subject to liability regimes of the TD and MAD/MAR. The added value of the auditor is usually limited to a confirmation that the estimate is consistent with the accounting policies of the issuer. An alternative to the report may involve the issuer providing such confirmation (as is the case for prospectuses drawn up pursuant to Annex IX (Item 8)). Contrary to a profit forecast, the auditor of a profit estimate usually does not need to confirm that the estimate has been properly compiled on the basis of the underlying assumptions. This is due to the fact that profit estimates are not assumption-sensitive as they refer to economic transactions that have already occurred. It can also be noted that profit estimates are by nature more certain than profit forecasts.

68. Alternatively, if repeal is not considered appropriate, clarification of the definition of “profit estimate” in PR Article 2(11) and clarification of the agreement by auditors in PR Annex I, item 13(2) should be provided.

69. The wording "for which results have not yet been published" in the definition of a profit estimate (Article 2.11 PR) should be revised by implementing the interpretation given in ESMA’s FAQ No 84 Q1) “Definition of Profit Estimate”.

Additional suggestions

70. Clarification would be welcome as regards the responsibilities of the home and the host competent authority, respectively, for advertising activity in case of cross border offers (PD Article 15(6)). While the current wording provides that supervision of advertisements is the responsibility of the home competent authority, in practice this supervision is often carried on by host competent authorities. Clarification could address the important role of the host competent authorities in the supervision of the advertisements published in their own markets. Such supervision is justified by the language diversity in the EU.

71. The treatment of non-equity securities which do not include a denomination would benefit from clarification. Certain NCAs consider that in respect of non-equity securities which do not include a denomination, i.e. many warrants and certificates, it would be appropriate to rely on the "issue price" or another acquisition amount as equivalent to the "denomination" of such securities. The primary basis for this position was derived from the terms of Articles 7 and 12 of the PD Regulation which refer to securities with a denomination of less than/at least €100,000 or, where there is no individual denomination, securities that can only be acquired on issue for less than/at least €100,000. These competent authorities had agreed that, whilst the PD does not specifically include language relating to securities without an individual denomination, it was appropriate, on the basis that the PD Regulation treated denomination and acquisition price as equivalent, to follow this approach for similar references within the PD. This led to the development of a market practice relying on this interpretation of the term "denomination" and numerous prospectuses relating to warrants and certificates with an issue price/acquisition price of greater than €100,000 have been approved by competent authorities without the requirement for a summary to be provided (relying on the exemption for the requirement for a summary pursuant to Article 5(2) of the PD).

72. Prospectus requirements for hybrid securities, especially perpetual tier 1 securities, could be considered (including the development of additional annexes) as there is a perceived lack of clarity as to the required disclosure (e.g. project financing). Revisiting the requirements

regarding collective investments of the closed ended type has also been highlighted as an area where greater clarity may be merited.

73. More joined up thinking as regards the rules which apply could contribute to a less burdensome regime. The interaction between the PD and other directives and regulations could be considered, particularly through the elimination of conflicting requirements and the creation of greater synergies as outlined above. Directives where this would be relevant include the TD, MAR, MiFID and AIFMD. By way of example, it appears that the interaction between the PD and the AIFMD is raising some issues, e.g. the status of REITS under the AIFMD and the issuance of non-equity securities with some AIF like qualities. The PD review could be a way to address these matters.

74. Articles 16 (3) and 24 (2) in MiFID II contain specific requirements for investment firms and credit institutions in relation to defining the target group. Furthermore, investment firms and credit institutions need to align their distribution strategy to take into account the characteristics of the target group. These requirements are also applicable to financial instruments that are not manufactured by the investment firm or credit institution itself. Since many issuers also qualify as investment firms and credit institutions, it could be useful to reconcile these requirements in MiFID II and the obligation to approve a prospectus in the PD.

75. The lack of a passport for equivalent documents (i.e. Article 4(1)(b)-(c) and 4(2)(c)-(d)) means that for issuers having their shares admitted to several regulated markets within the EU it is easier to draw up a prospectus and get it passported into all the relevant EU Member States rather than drawing up multiple different equivalent documents subject to different requirements in different countries. Harmonisation of the disclosure requirements for such equivalent documents would be beneficial for issuers and could be considered in the context of the review.