

FESE Response to the ESMA Consultation Paper on draft RTS under the new Prospectus Regulation

Introductory remarks

FESE members believes that, in order to be successful, the review of the Prospectus rules should significantly reduce burdens for companies, and ensure that rules are aligned with the existing framework and not duplicated. Clear rules are more likely to lead to clear reporting, thus ensuring that investors receive comprehensive, concise and consistent information. On the contrary, complexity leads to excessive costs which discourage companies (especially smaller ones) from entering public capital markets, and results in disclosure of an excessive number of risk factors and boiler plate language not helpful to investors.

In particular, we would recommend retaining flexibility for companies as this would allow them to better highlight to investors their distinct characteristics and features. Flexibility is also key to avoid duplication of information and make prospectuses more comprehensible. It takes on even more importance in the case of SMEs since they do not have as many resources to spend on disclosing information as large companies.

We would also encourage regulators to consider specific regimes currently adopted by the existing markets for growth companies, for example in the case of the approval procedures, and to reuse their features as much as possible. Although many requirements are naturally and still should be harmonised across the EU, there may well be practices which have developed in a local ecosystem and which motivate certain requirements. Especially smaller companies in earlier stages of growth are more dependent on local investors for financing, and thus the room for local adaptation of rules becomes especially important.

Last but not the least, in considering the proposals from the European Commission on the ESAs Review, and in particular on any amendment to the Prospectus Regulation, FESE believes the focus should be on the following high-level principles and objectives:

- Strengthening supervisory convergence within ESMA's current tools and structures
- Dismiss any unjustified proposals for new direct supervision
- Use the NCAs competence and knowledge to enhance the EU supervision and boost CMU

As highlighted by the FESE response to the relevant Public Consultation, on the Prospectus approval the Commission proposals for direct supervision would lead to counter-intuitive outcomes, such as fragmented supervision of trading venues' infrastructure as well as a duplication of responsibilities and costs:

NCAs have already developed the experience and expertise to review the prospectuses which are within the remit of the proposal and local ecosystems have evolved around these markets; this efficient and effective approach cannot be easily replicated.

If approved, this proposal would jeopardise the EU's firmly established position as a leading market in listing the corresponded securities, as it would create disruption and confusion in a well-functioning market, which is not in line with the objectives of the CMU.

Lastly, the final Prospectus Regulation was only published in 2017 and full implementation will only take place by mid-2019, with draft Regulatory Technical Standards, as the present one, being developed by ESMA. Therefore, there has not been any possibility at this stage to assess the functioning of the incoming regime. For this reason, the proposal appears premature and is not in line with the principles of subsidiarity and proportionality according to Article 5 of the Treaty on the European Union.

Key financial information in the summary

Q1. Do you agree that the KFI extracted from the issuer's historical financial information should be sign-posted?

Yes, we agree.

Q2. Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.

For retail non-equity securities, we suggest that the KFI for a guarantor should be included where financial statements have been included in the prospectus, and financial statements and KFI is not required or available for the issuer itself.

Dedicated templates for specialist issuers, including property, mineral, shipping companies, could be explored as well as NewCo/companies with, for instance, less than 3 years of existence. <

Q5. Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?

We consider that it would be appropriate to include a cross reference in the summary to where the APMs are explained in the prospectus, otherwise there is a risk of lengthy footnotes or complicated explanations.

Q6. Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

We consider that such flexibility should be provided to issuers that include pro-forma financial information in the summary.

Data and machine readability

Q14. Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.

We consider that data related to the amount raised should not be made mandatory, particularly as this can increase over time as the up-to amount in a base prospectus is approached.

Q15. Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.

We consider that there needs to be a clear distinction between prospectus related data that is necessary for the national competent authorities to carry out their scrutiny and approval functions (and report to ESMA) and 'nice to have' data relating to an issuer and its securities which would seem to be less important for prospectus scrutiny purposes, i.e. we recommend deleting all of the new data items on pages 43 and 44 of the consultation paper. If such data items are deemed necessary, then as a practical suggestion, we recommend that ESMA populates as much of the 'new' data as possible from the FIRDS database, e.g. CFI, FISN, denomination per unit. We struggle to see how the display of the proposed additional data fields on the prospectus register would be of significant benefit to investors.

Q16. Do you agree with the ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?

Yes, we strongly recommend that no measures are taken by ESMA which lead to increased administration or costs for issuers, which would be counter to the objectives of the revised Prospectus Regulation and the CMU.

Q17. Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?

In addition to our above comments, we are very concerned that any additional data requirements could apply in respect of final terms. We consider it vitally important that the issuance of securities by way of final terms remains an attractive funding option for issuers and there is no possibility of additional layers of administration which could negatively impact a section of the non-equity market that functions very effectively. If national competent authorities seek to obtain additional data through revised issuer application forms, then this could negatively impact the currently effective prospectus approval and issuance process, especially for final terms.

Q18. Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?

Our recommendation is for the national competent authorities to only obtain such data as is necessary to perform their prospectus scrutiny and approval functions. There are other mechanisms, such as the newly established FIRDS database, for investors to obtain information on securities admitted to EU trading venues.

Supplements

Q24. Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?

Yes, we agree.

Q25. Do you agree that the additional requirements identified from ESMA's draft technical advice should also be included.

Yes, we agree.

Q26. Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?

Yes, we agree. Audited financial statements after the approval of a prospectus but before the close of the offer or the date of the admission of the securities to trading should not trigger the requirement to publish a supplementary prospectus.

Publication

Q28. Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?

Yes, we agree.

Q29. Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.

Yes, we agree.