



European Securities and
Markets Authority

Questions and Answers

on the Prospectus Regulation



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1. Purpose and status

The purpose of this document is to promote common, uniform and consistent supervisory approaches and practices in the day-to-day application of the Prospectus Regulation. It does this by providing responses to questions asked by the public, financial market participants, competent authorities and other stakeholders. The question and answer (Q&A) tool is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Further information on ESMA's Q&A process is available on our website.

ESMA intends to update this document on a regular basis and, for ease of reference, ESMA provides the date each question was first published as well as the date/s of amendment beside each question. A table of all questions in this document is provided in Section 3.

Additional questions on the Prospectus Regulation may be submitted to ESMA through the Q&A tool on our website. Please see the guidance available on our website before submitting your question.

2. Legislative references and abbreviations

Legislative references

Commission Delegated Regulation 2019/979

Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301¹

Commission Delegated Regulation 2019/980

Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004²

¹ OJ L 166, 21.06.2019, p. 1-25

² OJ L 166, 21.06.2019, p. 26-176

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| <i>Commission Delegated Regulation 2020/1272</i> | Amending and correcting Delegated Regulation (EU) 2019/979 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal ³ |
| <i>Commission Delegated Regulation 2020/1273</i> | Amending and correcting Delegated Regulation (EU) 2019/980 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market ⁴ |
| <i>ESMA Regulation</i> | Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ⁵ |
| <i>Prospectus Directive / PD</i> | 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 Directive 2001/34/EC ⁶ |
| <i>Prospectus Regulation / PR</i> | Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC ⁷ |
| <i>Market Abuse Regulation</i> | Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC ⁸ |
| <i>MiFID II</i> | Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments |

³ OJ L 300, 14.09.2020, p. 1-5

⁴ OJ L 300, 14.09.2020, p. 6-23

⁵ OJ L 331, 15.12.2010, p. 84-119

⁶ OJ L 345, 31.12.2003, p. 64-89

⁷ OJ L 168, 30.06.2017, p. 12-82

⁸ OJ L 173, 12.06.2014, p. 1-61

and amending Directive 2002/92/EC and Directive 2011/61/EU⁹

*CESR
Recommendations /
Recommendations*

ESMA update of the CESR recommendations (20 March 2013 | ESMA/2013/319)

Abbreviations/Acronyms

| | |
|--------------------------------------|---|
| <i>APM</i> | Alternative Performance Measure |
| <i>Competent Authority / NCA</i> | National Competent Authority |
| <i>CP</i> | Consultation Paper |
| <i>CESR</i> | Committee of European Securities Regulators |
| <i>EC</i> | European Commission |
| <i>EEA</i> | European Economic Area |
| <i>EFTA</i> | European Free Trade Association |
| <i>EU</i> | European Union |
| <i>ESMA</i> | European Securities and Markets Authority |
| <i>GDRs</i> | Global Depositary Receipts |
| <i>KID</i> | Key Information Document |
| <i>RD</i> | Registration Document |
| <i>SMSG</i> | Securities and Markets Stakeholder Group |
| <i>URD</i> | Universal Registration Document |

⁹ OJ L 173, 12.06.2014, p. 349-496

3. Summary table

This table summarises the Q&As set out in section 4 entitled ‘Questions and Answers’ by subject and topic. Furthermore, it sets out the provisions which the Q&As aim to clarify, the date the Q&As have been last updated and the number of the Q&As, e.g. 1.1, 1.2, 2.1, etc.

| Subject | Q | Topic of the Question | Level 1 / Level 2 / Other | Last updated |
|---|-----|---|---|---------------|
| Grandfathering/ Implementation of the Prospectus Regulation | 1.1 | Application of provisions on advertisements under the Prospectus Regulation to prospectuses approved under national laws implementing the Prospectus Directive. | Article 46(3) PR | 27 March 2019 |
| Grandfathering/ Implementation of the Prospectus Regulation | 1.2 | Use of Registration Document approved under national laws implementing the Prospectus Directive in a prospectus approved under the Prospectus Regulation. | Article 46(3) PR | 27 March 2019 |
| Grandfathering/ Implementation of the Prospectus Regulation | 1.3 | Passporting of a prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation. | Article 46(3) PR | 27 March 2019 |
| Grandfathering/ Implementation of the Prospectus Regulation | 1.4 | Supplementing of a prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation. | Article 46(3) PR | 27 March 2019 |
| Grandfathering/ Implementation of the Prospectus Regulation | 1.5 | Filing of final terms in relation to a base prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation. | Article 46(3) PR | 27 March 2019 |
| Grandfathering/ Implementating of the Prospectus Regulation | 1.6 | Continuing an offer which has initially been made using a base prospectus approved pursuant national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation | Article 8(11) PR | 12 July 2019 |
| Status of level 3 guidance following the transition from the PD to the PR. | 2.1 | Applicability of the Level 3 guidance relating to the Prospectus Directive after the entry into application of the Prospectus Regulation. | ESMA update of the CESR Recommendations (20 March 2013) ESMA/2013/319 ESMA Q&As on prospectuses (29th updated version – January 2019) ESMA31-62-780. | 27 March 2019 |

| | | | | |
|--------------------------------------|-----|---|---|---------------|
| Updating information in an RD or URD | 3.1 | Updating information in a registration document before it is part of a prospectus. | Article 10(1) PR Article 26(5) PR | 27 March 2019 |
| Updating information in an RD or URD | 3.2 | Updating information in a universal registration document before it is part of a prospectus. | Article 9(7) PR Article 9(9) PR Article 9(10) PR Article 10(3) PR Article 26(2) PR | 27 March 2019 |
| Updating information in an RD or URD | 3.3 | Updating information in a registration document or a universal registration document after it is part of a prospectus. | Article 9(1) PR Article 10(1) PR Article 12 PR Article 23 PR Article 23(2) PR Article 23(5) PR Article 26(3) PR | 27 March 2019 |
| Public offer | 4.1 | Share options schemes | Article 2(a) PR Article 2(d) PR | 12 July 2019 |
| Public offer | 4.2 | Free offers | Article 2(d) PR | 12 July 2019 |
| Public offer | 4.3 | Rights issue: communication by a custodian to its clients in a member state about pre-emption rights in relation to a public offer of new shares taking place in another EEA member state | Article 2(d) PR | 12 July 2019 |

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| Public offer | 4.4 | Subscription of securities by residents of a country where the public offer is not taking place | Article 2(d) PR | 12 July 2019 |
| Incorporation by reference | 5.1 | Incorporation by reference: language requirements | Article 19 PR Annex 1, item 18.1 of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Home Member State | 6.1 | Nearly equivalence of Euro 1,000 (Article 2(m)(ii) of the Prospectus Regulation) | Article 2(m)(ii) PR | 12 July 2019 |
| Financial information | 7.1 | Item 18.1.1 of Annex I of the Commission Delegated Regulation (EU) 2019/980 | Annex 1, item 18.1.1 of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Financial information | 7.2 | Inclusion of Alternative Performance Measures (APMs) in information disclosed about the offer to the public or the admission to trading on a regulated market | Article 16(1)(d) of Commission Delegated Regulation 2019/979 | 12 July 2019 |
| Financial information | 7.3 | Identification of profit forecasts in prospectuses | Article 1(d) of Commission Delegated Regulation 2019/980 | 09 November 2020 |

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|-----------------------|-----|--|---|-----------------|
| Financial information | 7.4 | Item 18.1.1 of Annex 1 Commission Delegated Regulation 2019/980: clarifying the meaning of “or such shorter period as the issuer has been in operation”. | Annex 1, item 18.1.1 of Commission Delegated Regulation 2019/980 and similar items appearing throughout the annexes of Commission Delegated Regulation 2019/980 | 28 January 2021 |
| Supplements | 8.1 | Supplement to prospectuses: interim financial information | Article 23 PR Article 23(1) PR | 12 July 2019 |
| Supplements | 8.2 | Non-relevant information in relation to a published prospectus that does not trigger the obligation to publish a supplement | Article 23(1) PR Article 21(10) PR | 12 July 2019 |
| Supplements | 8.3 | Application of Article 23(3) where an entity distributes its own securities. | Article 23(3) PR | 12 July 2019 |
| Supplements | 8.4 | Application of Article 23(3) subparagraphs 1 and 2 | Article 23(1)(2) PR | 12 July 2019 |
| Passporting | 9.1 | Quality of translations of passported prospectuses | Article 27(2)(3)(4) PR Article 25 (1) PR | 12 July 2019 |

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| Responsibility for a prospectus | 10.1 | Responsibility Statements | Article 11 PR Article 11(1) PR | 12 July 2019 |
| Final terms / Base prospectus | 11.1 | More than one final terms for a specific issue of bonds | Article 8(4) PR Article 23 PR Article 18 of Commission Delegated Regulation 2019/979 General | 12 July 2019 |
| Final terms / Base prospectus | 11.2 | Issue specific details in case of Category B items | Article 26(2) of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Derivatives, indices, underlyings & related disclosure | 12.1 | Interpretation of the text "description of the index" included in item 2.2.2 of Annex 17 of the Commission Delegated Regulation (EU) 2019/980 | Annex 17, item 2.2.2 of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Derivatives, indices, underlyings & related disclosure | 12.2 | Type of underlying | Annex 14, item 4.8 of Commission Delegated Regulation 2019/980 Annex 15, item 4.8 of Commission Delegated Regulation 2019/980 Annex 16, item 4.9 of Commission Delegated Regulation 2019/980 Annex 17, item 2.2.2 of Commission Delegated Regulation 2019/980 Annex 27, item 3.1.7 of Commission Delegated Regulation 2019/980 | 12 July 2019 |

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| Summaries | 13.1 | Inclusion of “extra” information in individual summaries | Article 7 PR Article 7(9) PR Article 8(9)(a)(b) PR | 12 July 2019 |
| Summaries | 13.2 | Pro-forma summaries in base prospectuses | Article 8 PR Article 8(8) Article 8(9) | 04 December 2019 |
| Summaries | 13.3 | The length of summaries (multiple securities) | Article 7 PR Article 7(7) Article 8(9) | 18 February 2020 |
| Summaries | 13.4 | The length of summaries (multiple guarantors) | Article 7 PR Article 7(3) Article 7(7) | 18 February 2020 |
| Other | 14.1 | Offering programmes | General | 12 July 2019 |

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|-------|------|---|---|------------------|
| Other | 14.2 | Use of the term “prospectus” | General | 12 July 2019 |
| Other | 14.3 | Item 4.6 of Annex 11 of Commission Delegated Regulation (EU) 2019/980 | Annex 11, item 4.6 of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Other | 14.4 | Scope of the wording ‘any bankruptcies, receiverships or liquidations’ used in Annex 1, item 12.1 and Annex 3, item 8.1 | Annex 1, item 12.1 of Commission Delegated Regulation 2019/980 Annex 3, item 8.1 of Commission Delegated Regulation 2019/980 | 12 July 2019 |
| Other | 14.5 | Estimate expenses charged by a financial intermediary in a retail cascade | General | 12 July 2019 |
| Other | 14.6 | Application of the various annexes of Commission Delegated Regulation 2019/980 | Article 6 PR Commission Delegated Regulation 2019/980 | 04 December 2019 |
| Other | 14.7 | Updating of the prospectus | General | 28 January 2021 |

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|---|-------|---|---|------------------|
| Other | 14.8 | Valuations and statements prepared by an expert | Annex 1, item 21.1(b) of Commission Delegated Regulation 2019/980 | 28 January 2021 |
| Other | 14.9 | Order of the information in the prospectus | Articles 24 and 25 of Commission Delegated Regulation 2019/980 | 28 January 2021 |
| Other | 14.10 | How to determine which annexes of Commission Delegated Regulation 2019/980 apply when drawing up a prospectus. | Commission Delegated Regulation 2019/980 | 28 January 2021 |
| Other | 14.11 | Global Depositary Receipts (GDRs) | General | 31 March 2021 |
| Other | 14.12 | Transferable securities <u>Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation</u> | Article 2(a) PR | 31 March 2021 |
| Thresholds, calculations, exemptions, scope | 15.1 | Application of Article 1(5)(a) of the Prospectus Regulation | Article 1(5)(a) PR | 09 November 2020 |

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|---|------|---|---|------------------|
| Thresholds, calculations, exemptions, scope | 15.2 | Adjustment of the basis for the 20% calculation in Article 1(5)(a) of the Prospectus Regulation | Article 1(5)(a) PR | 09 November 2020 |
| Thresholds, calculations, exemptions, scope | 15.3 | The exemptions from the obligation to publish a prospectus in Article 1(5) Prospectus Regulation (EU) 2017/1129 as stand-alone exemptions | Article 1(5)(a) PR Article 1(5)(f) PR | 28 January 2021 |
| Thresholds, calculations, exemptions, scope | 15.4 | Conversion or exchange of non-transferable securities and exemption from publishing a prospectus | Article 1(5)(b) PR | 31 March 2021 |
| Home Member State | 16.1 | Choice of PR home Member State at the end of the UK's transition period for leaving the EU | Brexit | 09 November 2020 |
| Home Member State | 16.2 | Use of prospectuses, approved by the UK, after the end of the UK's transition period for leaving the EU | Brexit | 09 November 2020 |
| Advertisements | 17.1 | Dissemination of amended advertisements | Article 15(3) of Commission Delegated Regulation 2019/979 | 31 March 2021 |

4. Questions and Answers

Grandfathering/Implementation of the Prospectus Regulation

1.1 Application of provisions on advertisements under the Prospectus Regulation to prospectuses approved under national laws implementing the Prospectus Directive

Updated: 27/03/2019

Q1.1 If advertisements are published in relation to securities in a prospectus approved in accordance with the national laws implementing the Prospectus Directive, do the national laws implementing the Prospectus Directive apply or the rules relating to advertisements in the Prospectus Regulation?

A1.1 *Advertisements do not fall within the scope of the grandfathering provisions in Article 46(3) of the Prospectus Regulation, because they do not form a part of a prospectus and the scope of the grandfathering provisions is limited to prospectuses approved in accordance with the national laws implementing the Prospectus Directive. This means that all advertisements published after the full entry into application of the Prospectus Regulation will need to comply with the Prospectus Regulation.*

This means that if an advertisement is published in May 2019 before the entry into application of the Prospectus Regulation, the national rules implementing the Prospectus Directive will apply. However, where an advertisement is published in, for example, August 2019, the rules in the Prospectus Regulation will apply to it, even if it relates to securities that are subject to a prospectus that was approved pursuant to the national laws of a Member State implementing the Prospectus Directive.

1.2 Use of Registration Document approved under national laws implementing the Prospectus Directive in a prospectus approved under the Prospectus Regulation

Updated: 27/03/2019

Q1.2 Can a Registration Document approved or filed in accordance with the national laws implementing the Prospectus Directive be used as a constituent part of a prospectus approved under the Prospectus Regulation?

A1.2 *It is not possible to use a registration document approved or filed under the Prospectus Directive as a constituent part of a prospectus approved under the Prospectus Regulation. Although registration documents are approved or filed under the Prospectus Directive, they do not qualify as a prospectus without a securities note and summary. Article 46(3) of the Prospectus Regulation only applies to full prospectuses (i.e. a registration document, securities note and summary) approved or filed in accordance with the national laws implementing the Prospectus Directive.*

Nevertheless, information from a registration document approved or filed in accordance with the national laws implementing the Prospectus Directive can be incorporated by reference into a prospectus that will be approved in accordance with the Prospectus Regulation pursuant to Article 19(1)(a). However, information included in a registration document that was approved or filed in accordance with the national laws of a Member State implementing the Prospectus Directive and that is incorporated by reference will still need to comply with the relevant disclosure requirements set out in the Prospectus Regulation. This may require including information in the prospectus, so that the disclosure requirements in the Prospectus Regulation are satisfied.¹⁰ The person(s) responsible for the prospectus should take care to ensure that the comprehensibility of the prospectus is not endangered when updating the information in the registration document.

Additionally, it is not possible to supplement registration documents that were approved or filed in accordance with the national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation. This is a result of the fact that registration documents do not fall within the scope of Article 46(3) of the Prospectus Regulation, as previously explained in this Q&A. However, if a registration document is incorporated by reference into a prospectus that is approved under the Prospectus Regulation, then it is possible to supplement the entire prospectus, including the registration document information.

¹⁰ For example, an issuer incorporates by reference an equity registration document approved or filed under the national laws implementing the Prospectus Directive into an equity prospectus to be approved under the Prospectus Regulation. As the Prospectus Regulation disclosure requirements for equity registration documents differ from those under the Prospectus Directive, the issuer may need to include information in the prospectus to satisfy the Prospectus Regulation disclosure requirements and to ensure that the information relating to the issuer is up-to-date.

1.3 Passporting of a prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation

Updated: 27/03/2019

Q1.3 Is it possible to passport a prospectus approved in accordance with the national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation?

A1.3 It is possible to notify a prospectus approved under the national laws of a Member State implementing the Prospectus Directive to a competent authority in a host Member State after the entry into application of the Prospectus Regulation. However, this notification will need to be done pursuant to the national laws implementing the Prospectus Directive in the Member State of the competent authority that approved the prospectus, because Article 46(3) of the Prospectus Regulation states that prospectuses approved under national laws implementing the Prospectus Directive shall continue to be governed by those laws after the entry into application of the Prospectus Regulation.

1.4 Supplementing of a prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation

Updated: 27/03/2019

Q1.4 Is the supplement regime under the Prospectus Regulation applicable when supplementing a prospectus approved in accordance with the national laws implementing the Prospectus Directive?

A1.4 Article 46(3) of the Prospectus Regulation states that prospectuses approved under national laws implementing the Prospectus Directive shall continue to be governed by those laws after the entry into application of the Prospectus Regulation. Accordingly, any prospectuses approved in accordance with the national laws of the issuer's home Member State implementing the Prospectus Directive will need to be supplemented in accordance with those national laws. This is because the supplement relates to the information included in the prospectus and the prospectus itself is governed by the national laws implementing the Prospectus Directive of the issuer's home Member State.

1.5 Filing of final terms in relation to a base prospectus approved under national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation

Updated: 27/03/2019

Q1.5 When filing final terms in relation to a base prospectus approved under national laws implementing the Prospectus Directive, should the rules relating to the filing of final terms under the Prospectus Regulation be applied?

A1.5 The final terms relating to a base prospectus approved under the national law of a Member State implementing the Prospectus Directive must be filed pursuant to those same national laws. This means that the content of the final terms and the specific summary attached to those final terms must comply with the provisions of national law implementing the Prospectus Directive. This is because the final terms form part of a prospectus approved under the national laws implementing the Prospectus Directive and, therefore, fall within the scope of Article 46(3) of the Prospectus Regulation. This also means that the rules relating to the filing of final terms in the Prospectus Regulation should not be applied when filing final terms in relation to a base prospectus approved in accordance with national laws implementing the Prospectus Directive.

1.6 Continuing an offer which has initially been made using a base prospectus approved pursuant national laws implementing the Prospectus Directive after the entry into application of the Prospectus Regulation

Updated: 12/07/2019

Q1.6 Can an offer which has initially been made using a base prospectus approved pursuant to national laws implementing the Prospectus Directive be continued by using a base prospectus that is approved pursuant to the Prospectus Regulation?

A1.6 Article 8(11) of the Prospectus Regulation confirms that offers may continue after the expiration of an approved base prospectus and explains how.

However, while Article 8(11) of the PR serves as the general legal basis for so-called 'bridging offers' (offers which are continued with unchanged terms and conditions using a succeeding approved base prospectus before the end of the validity of a preceding base prospectus) it does not specifically address the matter of bridging offers which are continued when transferring from a base prospectus approved pursuant to national laws implementing the Prospectus Directive to a base prospectus approved pursuant to the Prospectus Regulation.

Therefore, to provide clarity regarding the transitional phase, ESMA would firstly like to state that it is possible to continue an offer after the end of the validity of a base prospectus that was approved under the national laws implementing the Prospectus Directive by using a base prospectus that is approved under the Prospectus Regulation.

However, the person(s) responsible for the base prospectus should prepare a new set of final terms, with a revised summary of the individual issue annexed to the final terms. Both the new set of final terms and the revised summary should comply with the relevant provisions of the Prospectus Regulation and should be made available to the public and filed with the competent authority in the home Member State in accordance with Article 8(5) of the Prospectus Regulation.

Status of level 3 guidance following the transition from the PD to PR

2.1 Applicability of the Level 3 guidance relating to the Prospectus Directive after the entry into application of the Prospectus Regulation

Updated: 27/03/2019

Q2.1 To what extent do the ESMA Q&As relating to prospectuses and the ESMA update of the CESR Recommendations apply to prospectuses drawn up in accordance with the Prospectus Regulation?

A2.1 *ESMA Q&As relating to prospectuses¹¹ and the ESMA update of the CESR recommendations¹² should be applied to prospectuses drawn up under the Prospectus Regulation to the extent they are compatible with the Prospectus Regulation. The application of both documents can help to facilitate the review process and assist issuers when drawing up prospectuses.*

Updating information in an RD or URD

3.1 Updating information in a registration document before it is part of a prospectus

Updated: 27/03/2019

Q3.1 How should the information in a registration document be updated before it is a constituent part of a prospectus?

A3.1 *The information in a registration document is updated via a supplement pursuant to Article 10(1) of the Prospectus Regulation if it is not a constituent part of a prospectus. This supplement must be submitted for approval to the competent authority that approved the registration document.*

¹¹ ESMA31-62-780 – Q&As on prospectuses (29th updated version – January 2019).

¹² ESMA/2013/319 – ESMA update of the CESR recommendations (20 March 2013).

Where the registration document was passported before the supplement was approved, the approved supplement must be passported to the same Member States as the registration document pursuant to Article 26(5) of the Prospectus Regulation.

Withdrawal rights

According to Article 10(1) of the Prospectus Regulation, the right to withdraw acceptances does not apply when a registration document is supplemented. This is a consequence of the fact that there is no offer of securities to the public if a registration document is not a constituent part of a prospectus.

3.2 Updating information in a universal registration document before it is part of a prospectus

Updated: 27/03/2019

Q3.2 How should information in a universal registration document be updated before it is a constituent part of a prospectus?

A3.2 *According to Article 9(10) of the Prospectus Regulation, the information in a universal registration document can only be updated via an amendment, under Articles 9(7) and 9(9) of the Prospectus Regulation, in the period before the universal registration document forms a constituent part of a prospectus. This amendment is filed with the competent authority that approved the universal registration document or where the universal registration document was filed. The filing of this amendment shall not require an approval by the competent authority until the URD becomes part of a prospectus or is passported.*

Amendments to a universal registration document, which has been filed but not approved

Where an issuer has filed a universal registration document without prior approval and wishes that such universal registration document (and any amendments thereto) form part of a prospectus, Article 10(3) of the Prospectus Regulation states that the entire documentation (including any amendments) shall be subject to approval. This process ensures that the universal registration document and any amendments are approved before their use as a constituent part of a prospectus.

In addition, a filed universal registration document and any amendments thereto must be approved before they can be passported to a competent authority in another Member State.

Amendments to an approved universal registration document, which is not a constituent part of a prospectus

Where a universal registration document has already been approved, any amendments that were filed since the approval of the universal registration document will need to be approved before that universal registration document (and the amendments thereto) can be used as a constituent part of a prospectus. In addition, a universal registration document and any amendments thereto must be approved before they can be passported to a competent authority in another Member State.

Amendments to an approved universal registration document after passporting, but before it is a constituent part of a prospectus

Where a universal registration document has been approved and passported but is not yet a constituent part of a prospectus, then amendments to that universal registration document would be subject to separate approval in accordance with the second sub-paragraph of Article 10(3) of the Prospectus Regulation before a prospectus, with the universal registration document as a constituent part, can be approved by the competent authority of another Member State. After approval, the amendment should be passported to the same competent authorities as the universal registration document had been passported in accordance with Article 26(2) of the Prospectus Regulation.

Figure 1: Timeline regarding the update of a passported universal registration document (URD)

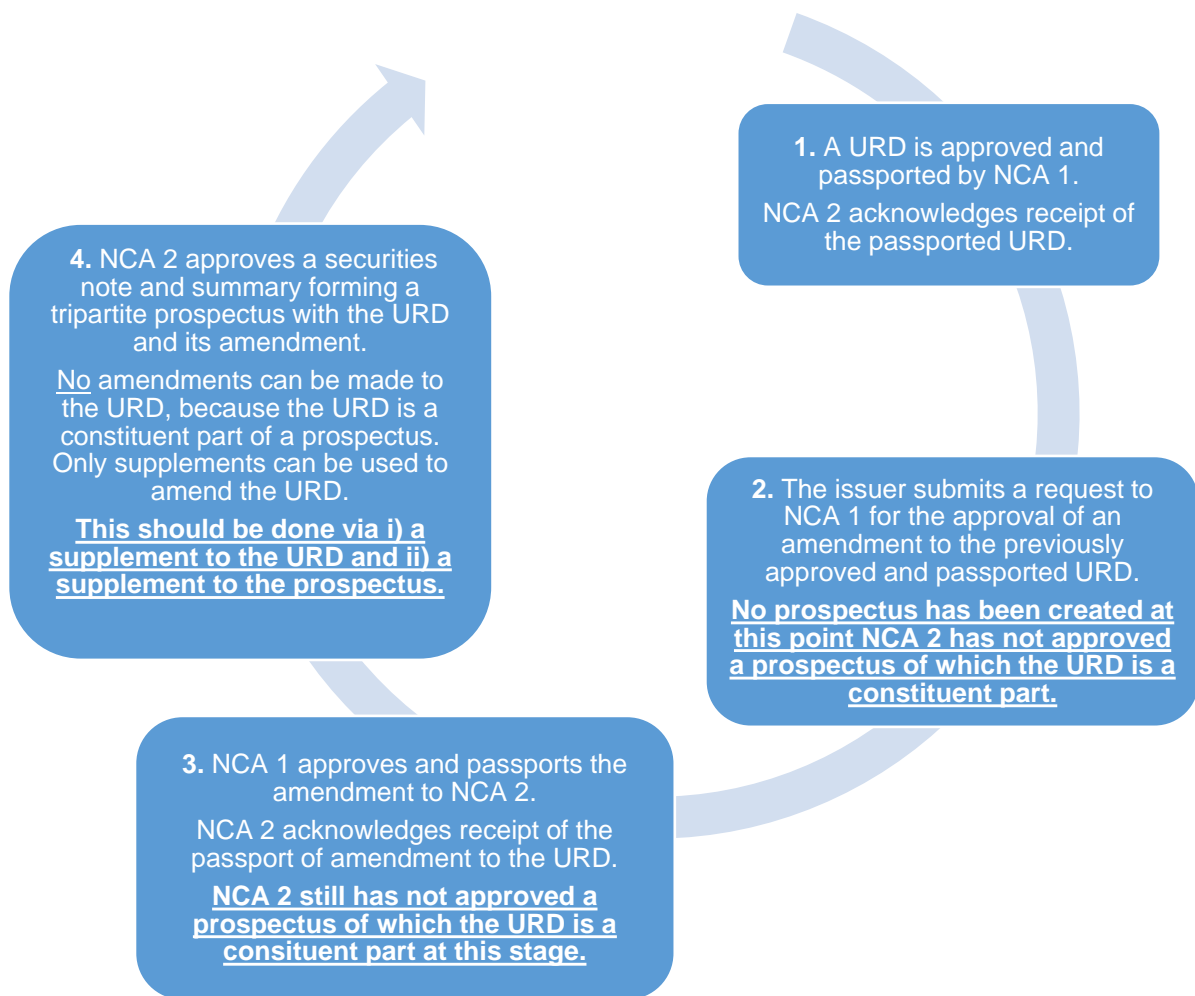
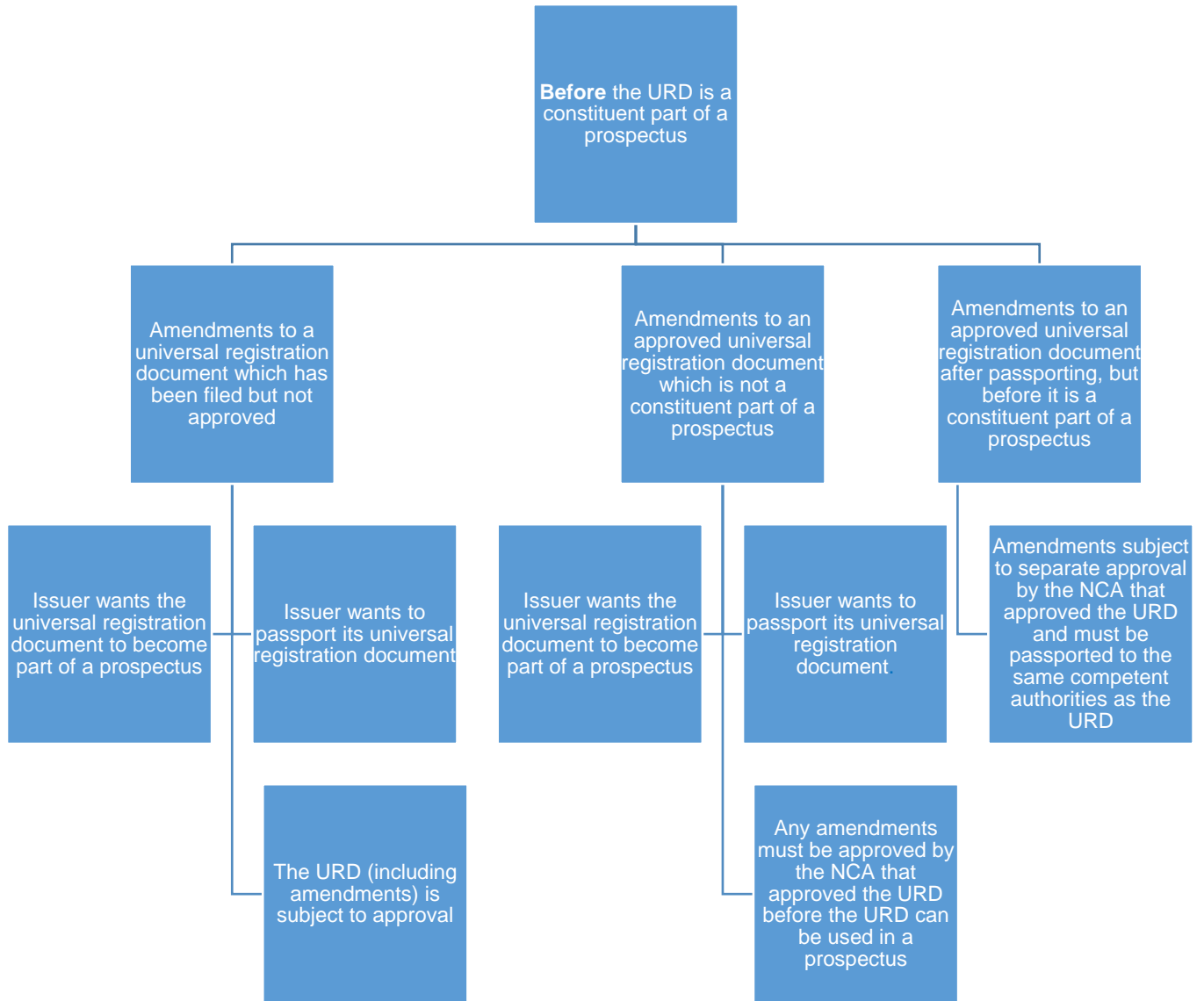


Figure 2: Updating the information in a universal registration document (URD) before it is a constituent part of a prospectus



3.3 Updating information in a registration document or a universal registration document after it is part of a prospectus

Updated: 27/03/2019

Q3.3 How should information in a registration document or a universal registration document be updated after it is a constituent part of a prospectus?

A3.3 Article 9(1) of the Prospectus Regulation explains that issuers can draw up a registration document in the form of a universal registration document. After a registration document or universal registration document has become a constituent part of a prospectus, the information in that registration document or a universal registration document is updated via a supplement. Additionally, the prospectus(es) of which the registration document or universal registration document is a constituent part must also be supplemented in accordance with Article 23 of the Prospectus Regulation. Both the supplements to the registration document, or to the universal registration document, and the supplement to the prospectus should be published in a single document.

Where the supplement updates several prospectuses in accordance with Article 23(5) of the Prospectus Regulation, the supplement should clearly identify all the prospectuses to which it relates.

The competent authority to approve the supplements

Article 26(3) of the Prospectus Regulation provides that the competent authority in Member States receiving a passported registration document or universal registration document shall not undertake any scrutiny or approval of the registration document, universal registration document and any amendments thereto.

This creates a division of responsibility between the competent authority that approved the registration document or universal registration document and the competent authority in the home Member State for the prospectus approval that approves the securities note and summary. From this, ESMA understands that:

- the authority that approved the registration document or universal registration document is competent to approve any supplements to the information in the registration document or the universal registration document; and
- the authority in the home Member State for the approval of the prospectus is competent to approve any supplements to information in the securities note.

Consequently:

- *where a prospectus and its registration document, or universal registration document, has been approved by just one competent authority, then a single document can be approved that is a supplement to the prospectus and to the registration document, or universal registration document, and securities note; and*

- *where the registration document, or universal registration document, has been approved by one competent authority and the securities note (and the prospectus itself) has been approved by another competent authority, each competent authority can only approve as follows:*
 - *the competent authority which approved the registration document, or universal registration document, can only approve a document which is a supplement to the registration document, or universal registration document, and to the prospectus; and*

 - *the competent authority which approved the securities note (and the prospectus itself), can only approve a document which is a supplement to the securities note and to the prospectus.*

Withdrawal rights

The provision in Article 10(1) of the Prospectus Regulation stating that withdrawal rights shall not apply in relation to a supplement to a registration document is only valid for a registration document before it is a constituent part of a prospectus. Therefore, investors have the right to withdraw their acceptances in accordance with Article 23(2) of the Prospectus Regulation when a prospectus of which a registration document or a universal registration document is a constituent part is supplemented.

If a registration document or a universal registration document is no longer a constituent part of a prospectus

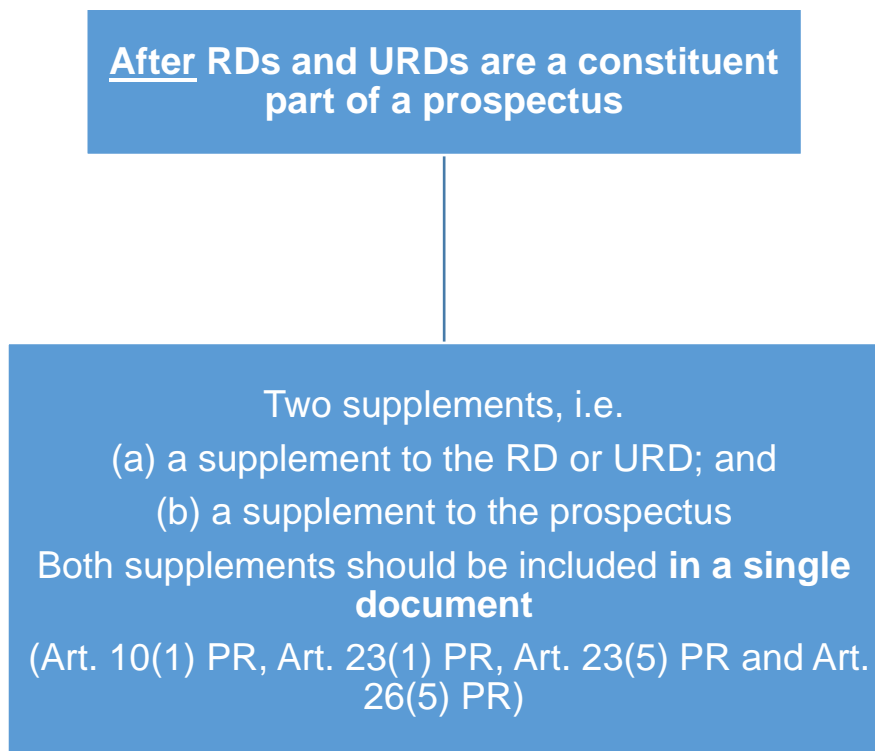
A prospectus may have a life that is shorter than the validity period, under Article 12 of the Prospectus Regulation, of the registration document or the universal registration document that is a constituent part of the prospectus. In such cases:

- *if a registration document is no longer a constituent part of a prospectus, then the information in that registration document is updated in accordance with Article 10(1) of the Prospectus Regulation:*

- *if a universal registration document is no longer a constituent part of a prospectus, then the information in that universal registration document should be updated via*

an amendment in accordance with Articles 9(7) and 9(9) of the Prospectus Regulation. See further the Q&A relating to updating the information in a universal registration document before it is a constituent part of a prospectus.

Figure 1: Updating the information in registration documents (RDs) and universal registration documents (URDs) after they are a constituent part of a prospectus



Public offer

4.1 Share option schemes

Updated: 12/07/2019

Q4.1 Are non-transferable options covered by the Prospectus Regulation? Even if they are not, would the exercise of those options constitute an offer of the underlying shares?

A4.1 *ESMA believes that non-transferable options do not fall under the Prospectus Regulation, as the Prospectus Regulation only applies to transferable securities (Article 2(a)).*

As for the exercise of non-transferable options, at the time of the conversion or exercise there is no public offer within the meaning of Article 2(d) of the Prospectus Regulation since it is just the execution of a previous offer.

Where in the view of national Competent Authorities transactions are structured as options, but are in reality an offer of shares, such authorities reserve the right to re-qualify the options as an offer of shares in order to overcome any circumvention of the Prospectus Regulation

4.2 Free offers

Updated: 12/07/2019

Q4.2 Can 'free offers' be considered outside the definition of public offer (for example options granted to employees for no consideration)?

If they do fall under the definition of public offer, could it be considered that they have a total consideration of zero and therefore fall outside the scope of the Prospectus Regulation (EU) 2017/1129, e.g. where the total consideration is less than EUR 1,000,000?

A4.2 ESMA considers that where securities are generally allotted free of charge no prospectus should be required. In the case of allocations of securities (which are almost invariably free of charge) where there is no element of choice on the part of the recipient, including no right to repudiate the allocation, there is no "offer of securities to the public" within the meaning of Article 2(d) of the Prospectus Regulation. This is because the definition refers to a communication containing "sufficient information to enable an investor to decide to purchase or subscribe for the securities". Where no decision is made by the recipient of the securities, there is no offer for the purposes of the Prospectus Regulation. Such allocations will therefore fall outside the scope of Prospectus Regulation.

Offers of free shares, where the recipient decides whether to accept the offer, are properly regarded as an offer for zero consideration. As such, they would fall within the excluded offers under Article 1.3 of the Prospectus Regulation, and accordingly no prospectus can be required

This analysis does not prevent Competent Authorities from assessing whether an offer, presented as an offer of free shares, in fact disguises a 'hidden' consideration. However, if the shares are expressly offered in the place of quantifiable financial benefits in another form, then it might be appropriate to identify consideration to the value of the benefits that the employee would otherwise have been entitled to receive.

4.3 Rights issue: communication by a custodian to its clients in a member state about pre-emption rights in relation to a public offer of new shares taking place in another EEA member state

Updated: 12/07/2019

Q4.3 Is the communication from a custodian to its clients (normally under its contractual duty to inform them) in respect of a rights issue in another EEA Member State (where a prospectus has been approved) in itself an "offer of securities to the public" and therefore would not be permitted unless a passport had been obtained in order to make public offers into the EEA Member State of the clients of the custodian?

A4.3 ESMA considers that a communication of a custodian bank informing its clients in one Member State about their pre-emption rights in relation to a public offer of new shares taking place in another Member State or in a third country does not mean that the custodian is making a public offer in the former Member State. The PR should not be interpreted in a way that limits cross border share ownership, restricts the ability of custodians to comply with their contractual obligations or restricts shareholders' ability to exercise their pre-emption rights.

Such a communication would constitute a public offer by the custodian only if it meets the following two conditions:

- It provides to the shareholders the terms of the offer and of the shares that would enable them to decide to subscribe the share and
- The custodian acts on behalf of the offeror or issuer when making such a communication.

4.4 Subscription of securities by residents of a country where the public offer is not taking place

Updated: 12/07/2019

Q4.4 Is it possible for residents in Member State 'A' (where a public offer does not take place) to subscribe for securities in Member State 'B' (where the public offer takes place directly or through their financial intermediaries acting on behalf of these investors¹³)?

¹³ There are different situations where investors in Member State 'A' might find out that a public offer is taking place in Member State 'B' even when there is no public offer in the former. For example, investors in Member State 'A' find out about the offer in Member State 'B' by their own means, without a communication to them in the sense of Article 2 (d) of the Prospectus Regulation; the offer in Member State 'A' is exempt from the prospectus obligation because it falls under one of the cases set out in Article 1(4) or 3(2) of the Regulation; investors are informed of the public offer in Member State 'B' by their financial intermediaries acting under their contractual duty as custodians to inform their clients.

A4.4 *Yes. There is no need for the offeror to publish a prospectus in Member State A, as no public offer is made in such a country. But this does not prevent investors in that country to subscribe or buy the securities which are subject to a public offer in another Member State. What is relevant in this case is that a prospectus is published in Member State B where the public offer takes place.*

Incorporation by reference

5.1 Incorporation by reference: language requirements

Updated: 12/07/2019

Q5.1a **Is it possible to incorporate by reference information in a language different than the language in which the prospectus is drafted?**

A5.1a *Yes, the issuer can incorporate a document drawn up in a different language than that of the prospectus provided that the language of the incorporated document complies with the language rules of the Prospectus Regulation. For example: the competent authority of Poland approves a prospectus drawn up in English that incorporates by reference the annual financial statements drawn up in Polish. However, if the issuer wishes to passport this prospectus it could do so only to countries where Polish is accepted by the host competent authorities.*

Q5.1b **Is it possible to incorporate by reference the translation of a document that has been approved or filed with the competent authority in a different language? For instance, a Spanish issuer has drawn up its prospectus in English, can it have its annual report translated into English and incorporate it by reference into the prospectus?**

A5.1b *The translation of a document may be incorporated by reference as long as it complies with Article 19 of the Prospectus Regulation.*

Q5.1c **Is it possible to include or incorporate by reference only the translation of the audited financial statements and the audit report without a letter/statement of consent of the auditor to fulfil the requirement of Annex 1, item 18.1. Commission Delegated Regulation 2019/980 (“audited historical financial information”)? If yes, is it necessary to request a written confirmation for the accuracy of the translation and, if so, who has to issue this written confirmation?**

A5.1c *Yes, it is possible to include or incorporate by reference the translation of the audited financial statements and the audit report without a letter/statement of consent of the auditor. No written confirmation for the accuracy of the translation is needed.*

ESMA draws attention to the fact, that according to national legislation it might be necessary to ask for the auditor's consent to include or incorporate by reference the audit report in the prospectus.

Home Member State

6.1 Nearly equivalence of Euro 1,000 (Article 2(m)(ii) of the Prospectus Regulation)

Updated: 12/07/2019

Q6.1 When determining the home Competent Authority, the figure of EUR 1,000 is a key element. ESMA discussed how the second sentence of Article 2(m)(ii) of the Prospectus Regulation, in particular the part which states "nearly equivalent to EUR 1,000", is applied in practice to cases where the securities are denominated in a currency other than euro?

A6.1 *The decision regarding which Competent Authority should approve the prospectus on the basis of the denomination of the non-equity securities according to Article 2(m)(ii) of the Prospectus Regulation should be made at the time of the submission of the draft prospectus. At that time, "nearly equivalent" doesn't mean exactly EUR 1,000.*

Financial information

7.1 Item 18.1.1 of Annex I of the Commission Delegated Regulation (EU) 2019/980

Updated: 12/07/2019

Q7.1 Item 18.1.1 requires issuers to disclose audited historical financial information covering the latest three financial years and the audit report in respect of each year. If historical information has not been restated and the issuer decides to present the historical financial information for the last three years in a columnar format, and an accountant's report is provided for the purposes of the prospectus, would this meet the requirements of the Prospectus Regulation?

A7.1 *The issuer has the right to choose the format of the historical financial information as far as the minimum information required by item 18.1.1 is included.*

7.2 Inclusion of Alternative Performance Measures (APMs) in information disclosed about the offer to the public or the admission to trading on a regulated market

Updated: 12/07/2019

Q7.2 **Given that Article 16(1)(d) of the Commission Delegated Regulation (EU) 2019/979 sets out that only APMs included in the prospectus can be included in the information disclosed about the offer to the public or the admission to trading on a regulated market, how should the issuer, offeror or person asking for admission to trading proceed in case a participant at a live presentation (e.g. a roadshow/interview) requests information about an APM which is not included in the prospectus?**

A7.2

Before the prospectus is approved and published

If a participant at a live presentation requests information about an APM that is not included in the draft prospectus which has been submitted to the relevant national competent authority (NCA) but which has not yet been approved and published, the issuer, offeror or person asking for admission to trading is free to provide information on the APM in question. However, in order to ensure that no APM is included in the information disclosed about the offer/admission to trading without being included in the prospectus, the issuer, offeror or person asking for admission to trading should afterwards include the APM in the draft prospectus before this is approved and published, it being understood that the ESMA Guidelines on Alternative Performance Measures should be taken into account.

After the prospectus is approved and published

If a participant at a live presentation requests information about an APM that is not included in the approved and published prospectus, the issuer, offeror or person asking for admission to trading can proceed in two ways. It can decide to provide information on the APM and afterwards publish a supplement containing this APM, thereby ensuring consistency between the prospectus and the information disclosed about the offer/admission to trading. In such case, the ESMA Guidelines on Alternative Performance Measures should be taken into account. Alternatively, if the issuer, offeror or person asking for admission to trading does not wish to publish a supplement, it should decline to provide information on the APM as there will otherwise be a breach of the requirement set out in Article 16(1)(d) of the Commission Delegated Regulation (EU) 2019/979.

7.3 Identification of profit forecasts in prospectuses

Updated: 09/11/2020

Q7.3 Issuers sometimes make statements that can be considered profit forecasts. How can it be determined whether a profit forecast has been made?

A7.3 Article 1(d) of Delegated Regulation 2019/980 states that a profit forecast means:

“a statement that expressly or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for current or future financial periods, or contains data from which a calculation of such a figure for future profits or losses can be made, even if no particular figure is mentioned and the word “profit” is not used.”

ESMA has analysed terms used in the Article to determine what can be considered a profit forecast. In this respect, where applicable, ESMA notes that this Q&A should be read in conjunction with Guidelines 10 to 13 of the Guidelines on disclosure requirements under the Prospectus Regulation (ESMA31-62-1426) which deal with the same topic.

Wording that qualifies as a ‘profit forecast’

An important part of the definition of ‘profit forecast’ are the terms, ‘minimum or maximum figure’. Profit forecasts refer to the issuer’s projections for future periods, where the wording, ‘either directly or indirectly’, indicates the likely minimum or maximum level of the issuer’s future profit or loss. Instead of a precise figure, a profit forecast can also refer to a range of figures particularly when a minimum or maximum figure is mentioned or implied.

Examples of profit forecasts include:

- “We expect this year’s profits before taxes to be between €30 million and €50 million.”
 - “The profit / loss is expected to be in line with the previous year.”
- “The profit / loss is expected to be higher / lower than the previous year.”
- “This year’s annual results will be positive / negative.”

The phrase **‘the likely level of profits or losses’** does not only refer to the profit or loss for the year (bottom line of the profit and loss account) / (bottom line of statement of profit or loss and other comprehensive income) / net profit or loss, but also to other measures of profitability when these measures convey an expectation of a future performance. For example:

Profit forecast derived from profit and loss accounts:

- *EBITDA = Earnings before Interest, Taxes, Depreciation and Amortization.*
- *EBIT = Earnings before Interest and Taxes (and similar measures such as Operating Profit/Earnings/Income).*
- *EBT = Earnings before Taxes.*
- *Similar and adjusted versions of the examples above (such as “Adjusted EBIT” or “Recurring net income”).*

Example of a profit forecast:

- *“Before the estimated impact of disposals, [...] current expectations for the 20XX Financial Year are Adjusted Operating Profit of around €100 million and EBITDA [...] of around €160 million.”*

Accounting data or financial indicators that may, on certain conditions, be considered as constituting a profit forecast

ESMA adopts a ‘substance over form’ approach concerning what financial measures may be viewed as profit forecasts for the purpose of the Prospectus Regulation. This approach is consistent with the definition of ‘profit forecast’, which includes statements that by implication indicate a minimum or maximum figure or a likely level of profits or losses, even if no particular figure is mentioned.

Examples of measures that may, on certain conditions, be considered as a profit forecast:

1. *If an issuer normally communicates financial performance on Gross Profit level, or if the issuer has rigid cost structures ESMA may deem forecasted Gross Profit to be a profit forecast.*
2. *Projections of cash flow metrics could be deemed profit forecasts in specific instances if indications making it possible to deduce the likely profit level from it are given in the prospectus.*
3. *Alternative Performance Measures or Key Performance Indicators pointing into the future that are calculated (in full or in part) based on profit/loss measures.*

*The statement ‘**contains data from which a calculation of such a figure for future profits and losses can be made**’ clarifies that the scope of the profit forecast definition encompasses forms of words from which profits or losses can be derived, even if no particular figure is mentioned and the word ‘profit’ is not used. With this in mind, it follows that information may be considered a profit forecast if it is possible to calculate a figure or a minimum or a maximum for the likely levels of future profit or loss in combination with other information in the prospectus.*

Examples of profit forecasts:

- *“Turnover for Q4 as well as costs are expected to remain the same as last year.”*
- *“We are expecting this year’s turnover to remain the same and this year’s EBITDA margin to rise by 5%.”*

Information does not need to relate to the entirety of the issuer’s results to be a profit forecast. Where one or more segments of the issuer’s business generates the majority of the issuer’s profit / loss, and predictions are made about the level of the segment’s profit / loss, this can also constitute a profit forecast for the issuer as a whole. Likewise, where a proposed acquisition is expected to generate the vast majority of the issuer’s profit / loss, and predictions are made about the level of the target’s profit / loss, that can also constitute a profit forecast for the issuer if this information is included in a prospectus

‘...expressly or by implication indicates’- if the purpose of the wording is to provide information about expected future profit / loss for a specific financial period, it is considered a profit forecast, regardless of the verb used. Particularly if a specific figure is stated.

Examples of profit forecasts:

- *“We hope to reach a profit of €10 million this year.”*
- *“We aim to reach a profit of €10-12 million earnings before taxes next year.”*
- *“Our target is to become profitable by the end of Q3 this year.”*

Long term financial objectives or forecasts

Long term financial objectives, for several future periods (aggregated or not) or for a distant future period may be considered profit forecasts depending on facts and circumstances, such as the context and the way they are presented.

Wording that is not considered to be a profit forecast

To constitute a profit forecast, a statement must be specific with respect to (i) level of profit / loss or other measure of profitability (a number / range / floor / ceiling) and (ii) a specific financial period. Profit forecasts differ from trend information required by item 10 of Annex 1 to Commission Delegated Regulation 2019/980. In practice, there is often a fine line between what constitutes a profit forecast and what constitutes trend information. A general discussion about future prospects of the issuer under trend information will not normally constitute a profit forecast.

Depending on the context and whether a profit forecast can be derived when combined with other information in the prospectus, the following are examples of disclosures that are not, by themselves, profit forecasts:

- *“We expect our sales/revenue to decline to €560 million.”*
- *“Turnover is expected to rise by 5 % compared to last year.”*
- *“Our target is to maintain an operating margin of 7% in the medium to long term.”*
- *“Announcement of an amount of dividend per share.”*
- *“Description of the issuer’s dividend policy.”*

Disclaimers

It is not possible to remove information from the scope of the definition of profit forecast by merely stating that it is not a profit forecast.

Examples:

- *“No profit forecast or estimate is included in this prospectus.”*
- *“Nothing in this document is intended to be, nor should be construed as a profit forecast.”*
- *“The foregoing statement should not be interpreted to mean X’s future earnings per share will necessarily be the same or greater than its historic earnings per share.”*

Identification of profit/loss forecasts in the prospectus

Profit forecasts and related assumptions should be clearly identified in the prospectus as such. It is important for the investor to be able to easily differentiate between a “profit/loss forecast” and other information, such as “objectives” or “trend information”.

7.4 Item 18.1.1 of Annex 1¹⁴ Commission Delegated Regulation 2019/980: clarifying the meaning of “or such shorter period as the issuer has been in operation”

Updated: 28/01/2021

Q7.4a What is meant by “or such shorter period as the issuer has been in operation” in item 18.1.1 of Annex 1?

A7.4a *The following example provides an illustration of what is meant by “such shorter period as the issuer has been in operation”:*

A company was incorporated in February 2019 and has been in operation since June 2019. The company submits a prospectus for approval at the end of January 2021.

Due to the timing of events, the company won’t have audited historical financial information for a whole financial year and will therefore need to cover the “shorter period as the issuer has been in operation”.

In this example, the company should present audited financial information for the short period covering February-December 2019 or June-December 2019 and unaudited interim financial information for the first half-year of 2020^{15, 16}.

The audited historical financial information prepared by the issuer for the period covering February-December 2019 or June-December 2019 would be considered as covering the “shorter period as the issuer has been in operation”.

Q7.4b What financial information is required where the shorter period is less than one year?

A7.4b *The following example should provide some insight into what financial information is required from an issuer that has been operating for less than a year:*

An issuer commenced operations on 1 November 2019 and is due to prepare audited historical financial information for the year ended 31 December 2019¹⁷. The issuer produces a prospectus in June 2020.

Two situations can be envisaged in terms of the financial information to be provided:

¹⁴ Please note that this clarification provided in relation to item 18.1.1 of Annex 1 is also relevant to other annexes containing a similar requirement.

¹⁵ Interim financial information would be provided in accordance with item 18.2.1 of Annex I.

¹⁶ The assumption in this example is that the company’s full year financial period is from 1 January to 31 December.

¹⁷ As required by national accounting legislation.

1. Audited historical financial information could be included from the date of incorporation of the issuer (or the date when the issuer started its operations in its current sphere of economic activity, if different from the date of incorporation) until the end of the financial year chosen by the issuer¹⁸. In the example above, the financial year of the issuer is from January to December 2019, so the period covered would be two months audited historical financial information, i.e. 1 November 2019 to 31 December 2019.

Or

2. Audited historical financial information could be included from the date of incorporation of the issuer (or the date when the issuer started its operations in its current sphere of economic activity, if different from the date of incorporation) until the most practicable date before the publication of the prospectus. This means that the audited historical financial information should be prepared by the issuer just for the purposes of the prospectus and the period this information would cover would not be consistent with the future financial information produced according to accounting legislation applicable to the issuer. For example, in the case above, the period covered by audited historical financial information could be from 1 November 2019 until 31 March 2020.

In the example described above, the issuer would not be obliged by the Commission Delegated Regulation 2019/980 to include interim financial information, because:

i) more than 9 months would not have elapsed since the end of the last audited financial year until the date of the prospectus or the registration document (item 18.2.1 of Annex I Commission Delegated Regulation 2019/980); and

ii) the issuer would not have published its half-yearly financial report since the draft prospectus was submitted for approval in June (item 18.2.1 of Annex I Commission Delegated Regulation 2019/980).

Situation (1) has the advantage of ensuring timing consistency between the audited historical financial information required by both accounting and prospectus rules. Whereas situation (2) would oblige the issuer to produce audited historical financial statements just for the purposes of the prospectus, with a closing date that would not be consistent with future audited historical financial statements or with those of other issuers.

When the issuer has already published audited historical financial information required by national legislation, this should normally be the only information required to comply with item 18.1.1 in situation (1) referred to above. Additionally, ESMA considers that inclusion of the audited historical financial information required by national legislation together with requirements under item 18.7.1 of Annex 1¹⁹ and the Recommendations published for start-up companies by ESMA (see paragraphs 135 to 139 of ESMA/2013/319) will normally

¹⁸ According to its national accounting legislation.

¹⁹ *Significant change in the issuer's financial or trading position*: A description of any significant change in the financial position of the group which has occurred since the end of the last financial period for which either audited financial statements or interim financial information have been published, or provide an appropriate negative statement.

provide investors with relevant information in the prospectus and should enable issuers to comply with Article 6.1 of the Prospectus Regulation.

However, in exceptional circumstances (such as the absence of interim financial information in the prospectus combined with the passing of a significant amount of months since the end of the last audited financial statements) situation (2) would be more appropriate to satisfy Article 6.1 of the Prospectus Regulation.

Q7.4c If an issuer which is incorporated in January 2019 produces a prospectus in June 2019 (No 1) and a new prospectus in November 2019 (No 2), should audited historical financial information be prepared both for the period from January to the most recent practicable date before publication of prospectus (No 1) and for an additional period in connection with prospectus (No 2)?

A7.4c *In this example, the issuer has not yet produced financial statements according to its national accounting legislation. Therefore, prospectus (no 1) should include audited historical financial statements for the period covering the date of incorporation to the most recent practicable date before publication of the prospectus. This is a similar situation to situation (2) in the previous question.*

Regarding prospectus (no 2), ESMA considers that the audited historical financial information produced for the first prospectus (together with the half yearly report that the issuer will have published by the end of September 2019) would be sufficient under normal circumstances.

Q7.4d Do these requirements²⁰ only apply when the issuing entity has been operating for less than one year (e.g. when the issuer is a newly incorporated holding company of an established business) or is it if the business as a whole has less than one year of history?

A7.4d *The requirements only apply if the business as a whole has less than one year financial information.*

If in addition the entire business undertaking at the time of the prospectus is not accurately represented in the audited historical financial information required under item 18.1.1, the issuer will have to assess whether pro-forma information or complex financial history information is needed, e.g. where there is a merger.

Supplements

²⁰ The requirements in 7.4b and 7.4c.

8.1 Supplement to prospectuses: interim financial information

Updated: 12/07/2019

Q8.1 Is the publication of interim financial statements considered as a significant new factor that requires the publication of a supplement in accordance with Article 23 of the Prospectus Regulation?

A8.1 There is no systematic requirement to supplement the prospectus when interim financial statements are produced. This will depend on the circumstances of the case, in particular the relevance of the information included in the interim financial statements (such as any significant deviation in relation to previous financial information) or the type of securities to which the prospectus refers. In case of doubt ESMA recommends issuers to produce the supplement.

8.2 Non-relevant information in relation to a published prospectus that does not trigger the obligation to publish a supplement

Updated: 12/07/2019

Q8.2 ESMA considered how to deal with information that arises after the publication of the prospectus which is not significant within the meaning of the Prospectus Regulation but could be useful for investors (i.e. information that is not capable of significantly affecting the assessment of the securities and therefore does not trigger the obligation to publish a supplement but is of interest to investors)?

A8.2 The Prospectus Regulation states that the text and the format of the prospectus, and any supplement thereto, which is made available to the public, shall at all times be identical to the original version approved by the home Competent Authority according to Article 21(10). Moreover, according to Article 23(1), every significant new factor, material mistake or material inaccuracy relating to the information included in the prospectus which may affect the assessment of the securities shall be published through a supplement to the prospectus. There are cases where the information is not significant within the meaning of the Prospectus Regulation that could, however, be useful for investors. For example, where the prospectus contains mistakes or inaccuracies which are not material.

As prescribed by Article 21(10), the prospectus approved by the Competent Authority cannot be subsequently modified (apart from via supplement). However, in case the prospectus contains a mistake or inaccuracy that is not material or significant pursuant to Article 23(1) of the Prospectus Regulation, the issuer should be entitled to make an announcement to the market explaining the mistake or inaccuracy.

The above comments are without prejudice to the obligations imposed by other legislation on issuers who have their securities admitted to trading on a regulated market or a multilateral trading facility, in particular the Market Abuse Regulation 596/2014.

8.3 Application of Article 23(3) where an entity distributes its own securities

Updated: 12/07/2019

Q8.3 Article 23(3) of the Prospectus Regulation sets out different obligations for issuers and financial intermediaries. Where a financial intermediary distributes its own securities should it be treated as an issuer or a financial intermediary?

A8.3 *Although the concept of a financial intermediary is not defined in the Prospectus Regulation, ESMA generally understands financial intermediaries to be those persons who are allowed, by EU or national legislation, to distribute securities issued by other entities. Consequently, ESMA believes that the obligations of Article 23(3) of the Prospectus Regulation addressed to financial intermediaries clearly apply to those persons when they distribute securities issued by other entities.*

However, the situation is slightly more equivocal where the financial intermediary distributing the securities is also the issuer, e.g. credit institutions, investment firms or management companies distributing securities they have issued themselves.

To provide clarity in respect of the latter situation, above, ESMA believes that financial intermediaries should also comply with the obligations addressed to financial intermediaries in Article 23(3) of the Prospectus Regulation, when distributing securities that they issue themselves. This understanding appears to be in line with both Recital 45 and Article 4(1) point 5 of MiFID II (Directive 2014/65/EU) and is consistent with the principle of investor protection.

8.4 Application of Article 23(3) subparagraphs 1 and 2

Updated: 12/07/2019

Q8.4 When must a financial intermediary comply with the obligations set out in the subparagraphs 1 and 2?

A8.4 For the avoidance of doubt, ESMA would like to clarify that the obligations addressed to financial intermediaries in Article 23(3), subparagraphs 1 and 2, of the Prospectus Regulation, should be construed as follows: the obligation laid down in subparagraph 1 should be fulfilled only at the time when investors accept through a financial intermediary to purchase or subscribe the security. While the obligation laid down in subparagraph 2 should be fulfilled on the day when the supplement is published.

Passporting

9.1 Quality of translations of passported prospectuses

Updated: 12/07/2019

There is no provision in the Prospectus Regulation dealing with the quality of the translation of a prospectus. Therefore, the following practical aspects have to be tackled:

Q9.1a Should the quality of the translations be left entirely to the responsibility of the issuer?

A9.1a Yes. ESMA considers that the persons responsible for the prospectus is also responsible for any translation of the approved prospectus.

Q9.1b Notwithstanding last sentence of Article 24.1 of the Prospectus Regulation, would it be possible or desirable that the host Competent Authority scrutinises the quality of the translation of a prospectus to its own language?

A9.1b No.

Q9.1c If the host competent authority decided to undertake that task voluntarily, would it mean that the offer cannot proceed until the translation has been accepted or checked by the host Competent Authority?

A9.1c No, the passport process may not be stopped. However, if the host competent authority finds that a translation is not accurate, it could refer its findings to the Competent

Authority of the home Member State as envisaged in Article 37 of the Prospectus Regulation (precautionary measures).

ESMA recommends issuers to insert, in any translation of a prospectus, a statement that clarifies that the document is a translation of the approved prospectus made under the sole responsibility of the person responsible for the approved prospectus.

Q9.1d The translated version of the prospectus referred to in Article 27.3 of the Prospectus Regulation should contain the same information as the original version published in the home Member State. How should the issuer and the home Competent Authority react in case of significant mistakes or omissions of information contained in the translated version concerning the information contained in the approved prospectus?

A9.1d *Without prejudice to the fact that the person responsible for the prospectus is also responsible for any translation of the approved prospectus, if a translated version of a prospectus contains material mistakes or omissions of information which might cause investors to make a misleading assessment of the issuer and/or the securities, both the home Competent Authority and the issuer should cooperate with the host competent authority in finding the solution which better fits the specific case.*

Responsibility for a prospectus

10.1 Responsibility Statements

Updated: 12/07/2019

Q10.1a If a transaction combines a sale from a shareholder and an issue of new shares can the selling shareholder be required to make a responsibility statement in the prospectus, in addition to the responsibility statement already included in the prospectus?

A10.1a *The Prospectus Regulation only requires that at least one of the persons mentioned in Article 11(1) (the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be) is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person) should also be responsible for the whole or part of the prospectus.*

Q10.1b Where an offer of securities involves a guarantee, can the guarantor be required to make a responsibility statement in the prospectus, in addition to the issuer's responsibility statement?

A10.1b *At least one of the persons mentioned in Article 11(1) of the Prospectus Regulation must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus. The Prospectus Regulation only requires that at least one of these persons mentioned in Article 11(1) is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person) should also be responsible for the whole or part of the prospectus*

Final terms/Base prospectus

11.1 More than one final terms for a specific issue of bonds

Updated: 12/07/2019

Q11.1 Can an issuer provide investors and file with the Competent Authority more than one document with final terms for a specific issue of bonds?

A11.1 *ESMA has analysed two cases where more than one document with final terms for a specific issue of bonds could be filed:*

1. *Amendment of information included in final terms that is not a significant new factor, material mistake or material inaccuracy: in this case, ESMA considers that issuers should publish a notice of the change to amend final terms, if they have reserved the right to do so in the applicable terms and conditions. It is the issuer's responsibility to ensure compliance with the applicable terms and conditions and any national laws, in order to prevent an infringement of the existing securities holders' rights.*

2. *A significant new factor, material mistake or material inaccuracy relating to the information included in the final terms which is capable of affecting the assessment of the securities: in this case, it is ESMA's view that a supplement to the related base prospectus with reference to the amended final terms in accordance with Article 23 of the Prospectus Regulation would be required. In addition to the required supplement, ESMA recommends to file and publish a second set of final terms replacing the first set of final terms to give a clear picture for investors. This allows the investors to easily have a full and clear view of the relevant issue.*

Without prejudice to Article 18 of Commission Delegated Regulation 2019/979, Publication of a supplement to the prospectus, ESMA considers that it is up to the issuer to assess the significance or materiality of a new factor, mistake or inaccuracy, without prejudice to the powers of the home Competent Authority.

11.2 Issue specific details in case of Category B items

Updated: 12/07/2019

Q11.2 What relevant details not known at the time of the approval of the base prospectus may be included in final terms in case of Cat.B items?

A11.2 *ESMA considers that Article 26(2) of the Commission Delegated Regulation (EU) 2019/980 implies that for an item categorized as “**CAT. B**”, the base prospectus should contain all the general principles of such item and only placeholders for the relevant details not known at the time of the approval of the base prospectus. ESMA also believes that requiring a defined and limited list of issue specific details ensures legal certainty and harmonization of the final terms.*

ESMA therefore believes that such details can only refer to amounts, currencies, dates, time periods, percentages, reference rates, screen pages, names and places.

The final terms may replicate or refer to such principles and fill out the relevant placeholders.

Examples of CAT. B Items:

a) Example of final terms replicating the principle:

THE BASE PROSPECTUS:

“Redemption Amount payable in respect of each certificate as determined by the Calculation Agent shall be:

(i) if the Final Reference Price is equal to or greater than [O] of the Initial Reference Level, then the settlement Amount shall be [O]

(ii) if the Final Reference Price is less than [O] of the Initial Reference Level, then the Settlement Amount shall be [O]”

THE FINAL TERMS:

“Redemption Amount payable in respect of each certificate as determined by the Calculation Agent shall be:

(i) if the Final Reference Price is equal to or greater than 80 per cent of the Initial Reference Level, then the Settlement Amount shall be 200 EUR

(ii) if the Final Reference Price is less than 80 per cent of the Initial Reference Level, then the Settlement Amount shall be 0 EUR”

b) Example of final terms referring to the principle:

THE BASE PROSPECTUS:

“XY. Redemption at the option of the Issuer (Issuer Call)

If Issuer Call is applicable, the Issuer may:

(a) in not less than 15 nor more than 30 days’ notice to the Noteholders; and

(b) in not less than 4 days before the giving of the notice referred to in a notice to the Trustee redeem all or some only of the Notes then outstanding on any Optional Redemption Date and at the Optional Redemption Amount specified in, or determined in the manner specified in, the applicable Final Terms.”

THE FINAL TERMS:

“Redemption at the option of the Issuer (as referred to under condition XY)

Optional Redemption Date: [xx-2019]

Optional Redemption Amount: 1000 EUR”

Derivatives, indices, underlyings and related disclosure

12.1 Interpretation of the text "description of the index" included in item 2.2.2 of Annex 17 of the Commission Delegated Regulation (EU) 2019/980

Updated: 12/07/2019

Q12.1 ESMA has discussed how the text “description of the index” included in item 2.2.2 (“Where the underlying is an index”) of Annex 17 of the Commission Delegated Regulation (EU) 2019/980 should be interpreted?

A12.1 *To allow an investor to make an informed assessment, ESMA believes that the description of the index should contain the essential characteristics which will enable full comprehension of the index and its dynamics.*

Accordingly, ESMA considers that at least a description of the following essential characteristics should be included:

- strategy of the index/investment policy;*
- description of the individual selection process of the components weighting factors;*
- method and formulas of calculation;*
- name of the calculation agent;*
- adjustment rules;*
- review frequency;*
- type of index (price return, excess return, etc.); and*
- currency*

The description of the composition of the index should be provided as of the date of the prospectus.

12.2 Type of underlying

Updated: 12/07/2019

Q12.2 In Commission Delegated Regulation 2019/980 Annex 14 item 4.8, Annex 15 item 4.8, Annex 16 item 4.9, Annex 17 item 2.2.2 and Annex 27 item 3.1.7 a statement setting out the type of underlying is required. According to the respective annexes, a statement setting out the type of the underlying is labelled as Category A information and must, therefore, be included in the base prospectus. When making the Category A statement setting out the type of the underlying in the base prospectus, how precise should the information be?

A12.2 *All information known at the time of drawing up the base prospectus must be disclosed in the base prospectus itself. Therefore, if the precise underlying is known by the issuer, then full and complete information must be included in the base prospectus.*

If the issuer has not decided on the details of the underlying at the time of the approval of the base prospectus, then a more general statement setting out the type of the underlying should be included. The minimum disclosure in the base prospectus would be whether the underlying is:

- an equity security;*
- a non-equity security;*
- an interest rate;*
- an index;*
- a commodity; or*
- a reference entity or reference obligation.*

If the type of underlying does not fall within the categories listed above, the type of underlying should be defined.

If the underlying is a basket of underlyings, the type(s) of underlying(s) should be defined in the same manner as described above.

The final terms then have to state the details of the underlying(s) pursuant to Category C information requirements and may provide information in accordance to Annex 28. In case of proprietary indices and credit-linked securities further disclosure requirements must be complied with in accordance with the Commission Delegated Regulation 2019/980.

Summaries

13.1 Inclusion of “extra” information in individual summaries

Updated: 12/07/2019

Q13.1 Can a summary related to an individual issue contain information that is not included in the base prospectus, final terms or supplement?

A13.1 *No. The summary of the individual issue shall not include information which was not included in the base prospectus, final terms or supplement. However, the issuer, offeror or person asking for the admission to trading on a regulated may add sub-headings, where deemed necessary, under each section of the summary according to Article 7(9) of the Prospectus Regulation.*

13.2 Pro-forma summaries in base prospectuses

Updated: 04/12/2019

Q13.2 Is it possible to include a pro-forma summary in a base prospectus?

A13.2 *No. It is not possible to include a pro-forma summary in a base prospectus.*

Article 8(8) of the Prospectus Regulation states that ‘a summary shall only be drawn up once the final terms are included in the base prospectus, or in a supplement, or are filed, and that summary shall be specific to the individual issue’. ESMA understands that the intention of this article is to clarify that it is not possible to include a summary in a base prospectus, unless the final terms are included in the base prospectus or supplement and the issue specific summary is annexed thereto.

While the Prospectus Directive required the inclusion of such a pro-forma summary in base prospectuses, Recital 37 of the Prospectus Regulation clarifies that the Prospectus Regulation no longer allows such summaries in order to reduce the administrative burden on the parties responsible for the prospectus and to improve the readability of base prospectuses. In that regard, ESMA notes that including pro-forma summaries in base prospectuses does not present the investors with a comprehensible document, since significant parts of the pro-forma summary are incomplete or have not been determined at the time of the approval of the base prospectus.

13.3 The length of summaries (multiple securities)

Updated: 18/02/2020

Q13.3 How many additional pages can be included in a summary relating to several securities, as per Article 7(7) of the PR?

A13.3 *ESMA understands that the fourth subparagraph of Article 7(7) of the PR stipulates that the maximum length of the summary should only be increased by ‘[...] two additional sides of A4-sized paper’, our understanding is that the page limit may only extend to a maximum of nine sides of A4-sized paper.*

In addition, ESMA notes that Article 7(7) also refers to a situation involving the use of a key information document (KID). In such case, the length of the summary can be extended by three pages for each additional security.

13.4 The length of summaries (multiple guarantors)

Updated: 18/02/2020

Q13.4 How many additional pages can be included in a summary where there is more than one guarantor?

A13.4 *As Article 7(7)(c) of the PR refers to ‘a guarantee’ in the singular form, the text in the final subparagraph of Article 7(7) means the summary may be extended by only one additional side of A4-sized paper per guarantor. Accordingly, if there are multiple guarantors, one additional page could be added per guarantor.*

However, acknowledging the size limitations envisaged for summaries in Article 7(3) of the PR and the restriction of one page envisaged per guarantor, ESMA expects that summaries with more than one guarantor be kept as short as possible and that these additional pages only be used to include information relating to the guarantors. Such an approach would be in line with the restrictions envisaged in Article 7 and the general principle in Article 6(2) of the PR which emphasises presentation in an easily analysable, concise and comprehensible form.

Other

14.1 Offering programmes

Updated: 12/07/2019

Q14.1 Is it mandatory for issuers to set in a base prospectus a fixed amount for the programme?

A14.1 *ESMA considers that it is not mandatory to include the amount of the programme in the base prospectus.*

14.2 Use of the term “prospectus”

Updated: 12/07/2019

Q14.2 May an issuer call a document a “Prospectus” when the document does not fulfill the requirements set out in the Prospectus Regulation? For example, if an issuer is exempt from having to produce a prospectus, but decides to prepare a document with an explanation of the securities to be offered may this document be called a prospectus?

A14.2 *ESMA recommends issuers not to use the term “prospectus” for documents that have not been approved according to: the Prospectus Regulation; other EU legislation where the term “prospectus” is used; or any national legislation within a Member State. If issuers use this term, they are encouraged to provide a clear statement in the document indicating that it has not been approved in accordance with Prospectus Regulation (EU) 2017/1129. Otherwise the use of the term “prospectus” could be misleading.*

14.3 Item 4.6 of Annex 11 of Commission Delegated Regulation (EU) 2019/980

Updated: 12/07/2019

Q14.3 How should the requirement in item 4.6 of Annex 11 of Commission Delegated Regulation (EU) 2019/980 on the disclosure of resolutions, authorisations and approvals be interpreted?

A14.3 *It is understood that the wording 'by virtue of which the securities have been or will be created and/or issued' in item 4.6. of Annex 11 of Commission Delegated Regulation (EU) 2019/980 concerns only legal acts on the part of the issuer, i.e. general meeting resolutions and board of directors' decisions.*

However, disclosure on any legal acts on the part of third parties, e. g. approvals by the central bank or competition authorities, or the fulfillment of any other external preconditions to the creation or the issuance of the securities might also be appropriate according to item 5.1 of Annex 11 Prospectus Regulation and Article 6(1) Prospectus Regulation.

If any internal resolutions, authorisations or decisions on the part of the issuer or any external preconditions on the part of third parties are pending or can be revoked, the issuer is expected to include a clear statement to that effect and an explanation of the consequences in case the required resolution, authorization, approval is not given or a precondition is not fulfilled. This information might also be required according to item 5.1.4. of Annex 11 Commission Delegated Regulation (EU) 2019/980. Certain of the abovementioned elements might also be considered as risk factors.

14.4 Scope of the wording 'any bankruptcies, receiverships or liquidations' used in Annex 1, item 12.1 and Annex 3, item 8.1

Updated: 12/07/2019

Q14.4 Third paragraph under (c) of item 12.1 (and item 8.1) requires that the prospectus includes:

“details of any bankruptcies, receiverships, liquidations or companies put into administration in respect of those persons described in points (a) and (d) of the first subparagraph who acted in one or more of those capacities for at least the previous five years;”

Is the required disclosure limited to declared bankruptcies, receiverships or liquidations?

A14.4 *ESMA considers that the scope of the required disclosure is not restricted to declared bankruptcies, receiverships or liquidations but that also information on bankruptcies, receiverships, liquidations or administration that are pending, or are in progress, should be provided.*

14.5 Estimate expenses charged by a financial intermediary in a retail cascade

Updated: 12/07/2019

Q14.5 **Does the prospectus summary have to contain information about estimated expenses charged by intermediaries offering securities in the retail cascade?**

A14.5 *Financial intermediaries in a retail cascade are offerors, but their offer is not the current offer which is the subject matter of the prospectus, and Commission Delegated Regulation (EU) 2019/980 expressly requires a notice specifying that the financial intermediaries acting in a retail cascade shall make available the information on the subsequent retail cascade offer when it will occur.*

The issuer, offeror or person seeking admission to trading on a regulated market is not required to disclose expenses charged to the investor by financial intermediaries offering securities in a retail cascade in the section titled 'key information on the securities' in the summary. Expenses charged to investors by the financial intermediaries will be disclosed in the financial intermediaries' terms and conditions.

14.6 Application of the various annexes of Commission Delegated Regulation 2019/980

Updated: 04/12/2019

Q14.6 Which annex(es) should be applied where the securities are not the same but comparable to existing types of securities?

A14.6 Generally, the annexes which apply to those existing securities should be applied to the prospectus for comparable securities. However, issuers and competent authorities should consider whether it is necessary to include additional information in the prospectus in order to satisfy the 'necessary information test' in Article 6(1) and Article 14(2) of the Prospectus Regulation. For example, this information could be derived from items from another securities note or additional information annex, taking into account the relevant characteristics of the securities being offered or admitted to trading on a regulated market.

Recital 24 of Commission Delegated Regulation 2019/980 states that, 'there is the possibility that certain types of securities that are not covered by the Annexes to this Regulation will be offered to the public or admitted to trading. In such a case, to enable investors to make an informed investment decision, competent authorities should decide in consultation with the issuer, offeror or person asking for admission to trading on a regulated market which information should be included in the prospectus.'. Therefore, issuers should contact the competent authority in their home Member State when they are uncertain which annexes should be applied to a prospectus.

14.7 Updating of the prospectus

Updated: 28/01/2021

Q14.7 Is the issuer entitled to use its prospectus to make several offers?

A14.7 The following example should provide guidance for this particular situation:

In October 2019, the issuer has an approved prospectus to make a public offer of securities at that time. In June 2020, the issuer decides to make a new offer of securities. As the October prospectus does not contain information concerning the new offer the issuer should produce a new prospectus. This new prospectus could incorporate by reference information from the October prospectus in accordance with Article 19 of the PR.

14.8 Valuations and statements prepared by an expert

Updated: 28/01/2021

Q14.8 The registration document annexes (e.g. in Annex 1, item 21.1 (b)), require a statement outlining that it is possible to inspect "all reports, letters, and other documents, valuations and statements prepared by any expert at the issuer's request any part of which is included or referred to in the registration document". Does this paragraph only require documents prepared by an expert to be displayed? Additionally, does the reference to "prepared by an expert at the issuer's request" refer to the whole sentence from "all reports, letters...", or does it refer only to "valuations and statements"?

A14.8 *The reference to "prepared by an expert" applies to 'valuations and statements' only, rather than to any other report, letter, other document or historical financial information included or referred to in the registration document. All reports, letters and other documents referred to are expected to be put electronically on display whether or not they are prepared by an expert and whether or not they were prepared at the issuer's request, provided they are referred to in the registration document.*

14.9 Order of the information in the prospectus

Updated: 28/01/2021

Q14.9 Articles 24 and 25 of Commission Delegated Regulation 2019/980 specify the elements and order of a prospectus and a base prospectus. Is it possible to deviate from the prescribed order?

A14.9 *The order prescribed by Articles 24 and 25 is mandatory, e.g. this means that the prospectus begins with the table of contents and is followed by the summary, risk factors and the other information referred to in the annexes to Commission Delegated Regulation 2019/980. However, this does not mean that the issuer is prohibited from including an additional brief cover note which contains general information about the issuer and the issue before the items prescribed in Articles 24 and 25 appear in the prospectus. However, such cover note is not a substitute for the summary or the disclosure requirements required by Commission Delegated Regulation 2019/980.*

In the case of wholesale non-equity securities, where an issuer is not under an obligation to include a summary in a prospectus, but wishes to produce an overview section in the prospectus, ESMA considers that issuers may include such an 'overview' section in the place where a summary would usually appear.

14.10 How to determine which annexes of Commission Delegated Regulation 2019/980 apply when drawing up a prospectus

Updated: 28/01/2021

Q14.10 Which annexes of Commission Delegated Regulation 2019/980 should be applied when drawing up a prospectus?

A14.10 *To determine which annexes should apply, ESMA has drawn up a table setting out which combinations of annexes should apply to various types of prospectuses. If market participants still have questions²¹ about which annexes apply, then ESMA recommends that they contact the home Competent Authority that will be responsible for the approval of their prospectus.*

The table is based on Commission Delegated Regulation 2019/980 and is split into four parts. The first part concerns 'standard' and secondary issuance prospectus registration documents, the second part concerns 'standard' and secondary issuance prospectus securities notes, the third part concerns EU growth prospectus registration documents and the fourth concerns EU growth prospectus securities notes.

While the table sets out the combinations of annexes which should apply, issuers always have the option to include more disclosure than what is specified²². However, for the sake of clarity, the issuer should not include less disclosure.

The table is published separately on ESMA's webpage in an annex to this Q&A. Here is the [link to the annex to A14.10](#).

²¹ For example, it may be necessary to determine whether the securities described in a prospectus qualify as derivative securities or if they should be treated as asset-backed securities under Commission Delegated Regulation 2019/980 before it is possible to determine which annexes apply to a prospectus.

²² The issuer has the option to provide more information in accordance with the provisions of Delegated Regulation 2019/980.

14.11 Global Depositary Receipts (GDRs)

Updated: 31/03/2021

Q14.11 How should the PR be applied in the case of admissions to trading of GDRs where the number of GDRs in issue fluctuates as a result of investors exchanging shares for GDRs (and vice versa) on a continuous basis?

A14.11 ESMA recognises that the operation of a typical GDR facility²³ should be accommodated by a pragmatic approach to the application of the PR. ESMA therefore considers that it is acceptable for a person applying for admission of GDRs to trading to produce a prospectus covering the admission of "up to" a specified number of GDRs. The number of GDRs can be no more than an amount equivalent to 100% of the issued capital of the issuer at the date of the GDR prospectus because the GDRs can only reflect the existing amount of the issuer's shares.

The prospectus can be used for admission(s) as long as the total number of GDRs in issue does not exceed the limit set out in the prospectus. This would also allow new shareholders (individuals that hold newly issued shares that were issued after the date of the establishment of the GDR "up to" facility) to exchange their shares for GDRs, as long as the number of GDRs in issue does not exceed the amount of the "up to" facility throughout the period for which the prospectus is valid.

The use of the "up to" amount is appropriate to facilitate market activity in that it enables shareholders to exchange their shares for GDRs.

14.12 Transferable securities

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

Updated: 31/03/2021

Q14.12 If shares are offered to the public under shareholders' agreement restricting the transferability of the shares, would this have an impact on the status of those shares as 'transferable securities'?

²³ Where the number of GDRs in issue fluctuates as a result of the facility for investors to exchange shares for GDRs (and vice versa) at any time and outside the issuer's control.

A14.12 *The definition of securities²⁴ in the Prospectus Regulation refers to transferable securities as defined in MiFID II²⁵. In turn, the obligation to publish a prospectus pursuant to the Prospectus Regulation only applies to the offer or the admission to trading on a regulated market of securities that are transferable.*

Commission Delegated Regulation 2019/98²⁶ requires information in relation to restrictions on the free transferability of the securities (e.g. Annex 11, item 4.8) and information in relation to lock-up agreements of selling securities holders (e.g. Annex 11, item 7.4). Thus, while the ability to transfer a security may be reduced (e.g. on a contractual basis where there are selling restrictions applicable in a specific country, or in a situation where there is a lock-up agreement between an issuer and existing shareholders), it must be concluded that securities offered with certain restrictions remain "transferable securities" within the definition of securities in Article 2(a) of the Prospectus Regulation and, therefore, subject to the scope of the Prospectus Regulation.

Nevertheless, some other restrictions may be so broad that they result in the impossibility to consider the relevant securities as freely transferable and, therefore, outside the scope of the Prospectus Regulation.

When considering this question, NCAs should analyse on a case-by-case basis whether a class of securities that are subject to a restriction are transferable or not.

“Disclaimer:

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.”

²⁴ Article 2(a) of the Prospectus Regulation.

²⁵ Ibid “[...] transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months”.

²⁶ Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (OJ L 166, 21.6.2019, p. 26).

Thresholds, calculations, exemptions, scope

15.1 Application of Article 1(5)(a) of the Prospectus Regulation

Updated: 09/11/2020

Q15.1 How is the exemption provided for in point (a) of the first subparagraph of Article 1(5) applied in practice?

A15.1 Admissions under this exemption must not equal or exceed 20% of the issuer's securities of the same class already admitted to trading on the same regulated market over a 12-month period.

To calculate whether the issuer is exceeding this percentage, it should include the securities that have benefited from this exemption during the previous 12 months in the numerator. However, it should not include securities admitted without a prospectus due to other types of exemptions.

The issuer should include the number of securities of the same class already admitted to trading on the same regulated market at the time it is applying for the new admission in the denominator. (There is no need to calculate for the 12-month average of the securities admitted to trading for the denominator.)

For example:

August 2019: the total number of shares admitted to trading is 100. The issuer applies for the further admission of 10 shares (10%). No prospectus is required.

October 2019: the total number of shares admitted to trading is 110. The issuer applies for the further admission of 4 shares resulting from an offer addressed to its employees. No prospectus is required because the employees' exemption applies (Article 1(5)(h) PR).

March 2020: the total number of shares admitted to trading is 114. The issuer applies for the further admission of 8 shares. No prospectus is required as it amounts to 16% (18/114).

October 2020: the total number of shares admitted to trading is 122. The issuer applies for the further admission of 24 shares. The August 2019 admission of 10 shares is disregarded because more than 12 months have elapsed. The October 2019 admission is also disregarded because it was subject to another exemption. However, the March 2020 admission does count and, therefore, the issuer should add 8 shares to the new application of 24 shares. Based on this calculation, a prospectus is required as it amounts to 26% (32/122).

Although the example set out above relates to shares, ESMA notes that the application of Article 1(5)(a) is the same for non-equity securities.

15.2 Adjustment of the basis for the 20% calculation in Article 1(5)(a) of the Prospectus Regulation

Updated: 09/11/2020

Q15.2 Should the basis for the 20% calculation be adjusted for legal measures affecting the number of securities admitted to trading, for example a share split 1 to 2 or a similar reversed split?

A15.2 *Yes. For example:*

An issuer has 100 shares admitted to trading in January 2020.

Later in January 2020, the issuer applies for the admission of 18 additional shares to trading on the same regulated market. In this case, the exemption applies as the new admission only represents 18% of the issuer's securities of the same class already admitted to trading on the same regulated market over a 12-month period.

In June 2020, the company splits its capital exchanging the existing 118 shares for 236 new shares (1 x 2).

In December 2020, the issuer applies for the admission of 12 new shares. These new shares plus the previous exempted 18 shares (=30) represent only 13% of the total number of shares (30/236). However, taking into consideration the split that took place in June, the previous 18 shares should be adjusted to 36 (18x2). Consequently, 48 (36 + 12) shares divided by the number of shares already admitted (236) amounts to 20% and therefore the issuer should produce a prospectus in December for the admission of the 12 new shares to trading on a regulated market.

Although the example set out above relates to shares, ESMA notes that the application of Article 1(5)(a) is the same for non-equity securities.

15.3 The exemptions from the obligation to publish a prospectus in Article 1(5) Prospectus Regulation (EU) 2017/1129 as stand-alone exemptions

Updated: 28/01/2021

Q15.3 An issuer issues new shares as a result of a merger. The new shares that the issuer wishes to admit to trading in a regulated market represent less than 20% of its total number of shares of the same class already admitted to trading on the same regulated market over a period of 12 months. Does the issuer need to make available the document referred to in Article 1(5)(f) in order to avoid the obligation to publish a prospectus?

A15.3 No. The exemption in point (a) of the first subparagraph of Article 1(5) of the Prospectus Regulation (EU) 2017/1129 applies. All the exemptions in Article 1(5) Prospectus Regulation (EU) 2017/1129 are stand-alone and therefore if one of them applies there is no requirement to publish a prospectus.

15.4 Conversion or exchange of non-transferable securities and exemption from publishing a prospectus

Updated: 31/03/2021

Q15.4 Does the exemption provided for in Article 1(5)(b) of the Prospectus Regulation²⁷ include cases where non-transferable securities are converted into shares?

A15.4 No. The exemption in Article 1(5)(b) of the Prospectus Regulation does not apply to cases of non-transferable securities converted into shares. The Prospectus Regulation only concerns “transferable securities” as defined in Article 2(a).

²⁷ According to Article 1(5)(b) of the Prospectus Regulation (EU) 2017/1129 “the obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of “shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20 % of the number of shares of the same class already admitted to trading on the same regulated market, subject to the second subparagraph of this paragraph.”

Brexit

16.1 Choice of PR home Member State²⁸ at the end of the UK's transition period for leaving the EU

Updated: 09/11/2020

Q16.1 At the end of the UK's transition period for leaving the EU (31 December 2020), current third country issuers who have chosen the UK as their home Member State for prospectus approval, and issuers who currently have the UK as their home Member State for prospectus approval due to their registered office being in the UK, will have to choose a new home Member State when they wish to offer securities to the public or be admitted to trading in the EU27 / EEA EFTA.

According to the Prospectus Regulation (PR) Article 2(m)(iii), third country issuers not mentioned in PR Article 2(m)(ii) may choose as their home Member State the Member State where the securities are intended to be offered to the public for the first time or the Member State where the first application for admission to trading on a regulated market is made.

How should issuers who had the UK as their PR home Member State at the end of the UK's transition period for leaving the EU apply PR Article 2(m)(iii) after the end of the transition period?

A16.1 *The PR provisions regarding the choice of the home Member State do not directly take into account a situation in which a Member State withdraws from the Union. However, PR Article 2(m)(iii) lays down the principle that third country issuers should be afforded a choice when determining their home Member State and that this choice should be limited to Member States in which the issuer first undertakes an offer or an admission to trading.*

ESMA is of the view that applying these principles to issuers having to choose a new home Member State due to the UK withdrawing from the EU would entail allowing such issuers to choose as if for the first time, i.e. resetting their choice at the end of the UK's transition period.

As such, for the purpose of applying PR Article 2(m)(iii), these issuers should choose between the EU27 Member States / EEA EFTA States in which they have activities after the end of the UK's transition period, either offers/admissions made after the end of the transition period or admissions made while the UK was a Member State or during the transition period which continue after the end of the transition period. Offers which opened and closed before the end of the transition period should be disregarded, meaning that

²⁸ At the end of the UK's transition period for leaving the EU, the choice of a home Member State under the Prospectus Regulation will consist of the EU27 Member States and the three EEA EFTA States Iceland, Liechtenstein and Norway.

issuers would not be able to choose the Member State(s) in which such offers took place as their new home.

ESMA describes two scenarios below to illustrate this approach to applying PR Article 2(m)(iii):

- Scenario A:

An issuer has the UK as its home Member State before the end of the transition period and has previously offered securities to the public in Austria, an offer which is now closed. After the end of the transition period, the issuer wishes to offer securities to the public in Germany and to apply for admission to trading in Netherlands.

As the issuer's choice of home Member State was reset at the end of the transition period, it can choose between Germany (since it will make an offer there after the end of the transition period) and Netherlands (since it will be admitted to trading there after the end of the transition period). The issuer cannot choose Austria as its new home Member State since its offer there closed before the end of the transition period.

- Scenario B

An issuer has the UK as its home Member State before the end of the transition period and is admitted to trading in the UK, France and Belgium. After the end of the transition period, it wishes to offer securities to the public in Germany.

As the issuer's choice of home Member State was reset at the end of the transition period, it can choose between France and Belgium (since it has an ongoing admission to trading there after the end of the transition period) and Germany (since it will make an offer there after the end of the transition period).

In ESMA's view, the choice of home Member State under PR Article 2(m)(iii) should be made only once. As such, except where either of the specific circumstances described in that provision arises, a third country issuer's choice of home Member State under that provision is definitive.

16.2 Use of prospectuses, approved by the UK, after the end of the UK's transition period for leaving the EU

Updated: 09/11/2020

Q16.2a After the end of the UK's transition period for leaving the EU (1 January 2021), what is the status within EU27 / EEA EFTA²⁹ of prospectuses approved by the UK FCA while the UK was a Member State or during the transition period?

A16.2a After the end of the UK's transition period for leaving the EU, ESMA considers that the following approach should apply to prospectuses which were approved by the UK FCA while the UK was an EU Member State or during the transition period:

- (i) *These prospectuses can no longer be passported to EU27 Member States / EEA EFTA States.*

Since the Prospectus Regulation will no longer apply to or in the UK, the UK will no longer be covered by the passporting mechanism set out in Article 25 of the Prospectus Regulation (PR). For the same reason, supplements approved in the UK while the UK was a Member State or during the transition period can no longer be passported to EU27 Member States / EEA EFTA States after the end of the transition period.

- (ii) *These prospectuses, if passported to one or several EU27 Member States / EEA EFTA States while the UK was a Member State or during the transition period, can no longer be supplemented.*

Since the PR will no longer apply to or in the UK, the UK is no longer able to approve documents under the PR and cannot in any case passport documents into EU27 / EEA EFTA, cf. item (i). For these reasons, it will not be possible to complete an already passported prospectus by supplement, as required by PR Articles 12 and 23.

- (iii) *Because of item (ii), these prospectuses, if passported to one or several EU27 Member States / EEA EFTA States while the UK was a Member State or during the transition period, can no longer be used to offer securities to the public or admit securities to trading on a regulated market within EU27 / EEA EFTA.*

As it will not be possible to supplement these prospectuses, they cannot be used since this would entail a risk of a significant new factor, material mistake or material inaccuracy arising without the issuer being able to inform investors as required by PR Article 23. The absence of a supplement would in turn deprive investors of their withdrawal rights. As such, UK approved prospectuses passported into EU27 / EEA EFTA while the UK was a Member State or during the transition period cannot be used after the end of the transition period, whether for new offers and admissions to

²⁹ The EEA EFTA States comprise Iceland, Liechtenstein and Norway.

trading or for offers which were commenced while the UK was a Member State / during the transition period and which the issuer wishes to continue after the end of the transition period.

Q16.2b How should issuers with prospectuses approved by the UK FCA while the UK was a Member State or during the transition period proceed after the end of the transition period?

A16.2b

How to continue an offer to the public in EU27 / EEA EFTA

Scenario: At the end of the transition period, an issuer has an open offer to the public in Spain which is based on a prospectus approved by the UK FCA and passported to Spain. The issuer wishes to continue this offer after the end of the transition period.

Approach: ESMA is of the view that the issuer would need to have a prospectus approved in its new EU27 / EEA EFTA home Member State for the part of the offer which will take place after the end of the transition period. However, as

- *the issuer can only choose a new home Member State after the end of the transition period, it cannot formally seek approval of a prospectus by its new home Member State until after the end of the transition period, and*
- *according to PR Article 3(1), an offer of securities may not be made without prior publication of a prospectus,*

it is unlikely that the offer will be able to continue after the end of the transition period as there will likely be time constraints connected with the approval by the new home Member State. Instead, it is likely that the issuer will have to start a new offer once a prospectus is approved within EU27 / EEA EFTA.

How to maintain an admission to trading on a regulated market in EU27 / EEA EFTA

Scenario: At the end of the transition period, an issuer is admitted to trading on a regulated market in Slovakia based on a prospectus approved by the UK FCA and passported to Slovakia. The issuer wishes to continue to be admitted to this market after the end of the transition period.

Approach: ESMA considers that the admission to trading on a regulated market in Slovakia remains valid. The issuer does not need to apply for approval of a new prospectus within EU27 / EEA EFTA in order to maintain the admission to trading.

How to make a new offer to the public in EU27 / EEA EFTA

Scenario: An issuer wishes to make an offer of non-equity securities to the public in Sweden. It has a base prospectus, approved by the UK FCA and passported to Sweden while the UK was a Member State or during the transition period, which still has a number of months left of its validity under PR Article 12.

Approach: ESMA is of the view that the issuer would need to have a prospectus approved in its new EU27 / EEA EFTA home Member State in order to make an offer to the public in Sweden.

How to seek a new admission to trading on a regulated market in EU27 / EEA EFTA

Scenario: An issuer wishes to seek admission to trading on a regulated market in Poland. It has a prospectus, approved by the UK FCA and passported to Poland while the UK was a Member State or during the transition period, which still has a number of months left of its validity under PR Article 12.

Approach: ESMA considers that the issuer would need to have a prospectus approved in its new EU27 / EEA EFTA home Member State in order to seek admission to trading on a regulated market in Poland.

In relation to the scenarios described above, ESMA considers that the issuer would be able to submit the prospectus already approved by the UK FCA to the competent authority of its new home Member State (after making sure the prospectus contains the information required according to PR Article 6(1)). In other words, the issuer is not obliged to draw up an entirely new prospectus for the new approval within EU27 / EEA EFTA.

Advertisements

17.1 Dissemination of amended advertisements

Updated: 31/03/2021

Q17.1 How should the requirement to disseminate an amended advertisement through at least the same means as the previous advertisement (cf. Article 15(3) of Commission Delegated Regulation 2019/979) be applied when the advertisement in question is a roadshow?

A17.1 *If the advertisement was orally delivered as part of a roadshow there is no obligation to hold a new roadshow to disseminate an amended advertisement. The exemption for orally disseminated advertisements should also apply to roadshows in which visual or printed elements (e.g. slides, handouts) are used, as the overall nature of the advertisement is that it is delivered in an oral context.*

However, ESMA emphasises that the general requirement to amend the roadshow advertisement still applies. Therefore, the issuer, offeror or person asking for admission to trading on a regulated market should disseminate an amended version of the information provided in the roadshow through the means which it considers most suitable to reach the participants of the roadshow. Depending on the type of roadshow conducted



and the nature of the participants, this might for example be by way of a press release, publication on the website of the issuer, offeror or person asking for admission to trading or by direct correspondence with the roadshow participants.