



Brussels, 30.11.2015
C(2015) 8379 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 30.11.2015

**supplementing Directive 2003/71/EC of the European Parliament and of the Council
with regard to regulatory technical standards for approval and publication of the
prospectus and dissemination of advertisements and amending Commission Regulation
(EC) No 809/2004**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 1(2) to (5) of Directive 2014/51/EU (the ‘Omnibus II Directive’) requires ESMA to draw up draft regulatory technical standards (‘RTS’) in relation to four topics in Directive 2003/71/EC (the ‘Prospectus Directive’ or ‘PD’): prospectus approval, incorporation of information by reference, prospectus publication and dissemination of advertisements. ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015. Those draft regulatory technical standards had been submitted to the European Commission on 26 June 2015.

Within the framework of the Capital Markets Union (CMU), the Commission will propose an overall review of the Prospectus Directive in 2015 with the objective to reduce administrative burden whilst safeguarding investor protection. The draft RTS on approval and publication of the prospectus and dissemination of advertisements are consistent with this review and have the potential to bring tangible results by clarifying current administrative practices and harmonising procedures between Member States. The RTS will simplify access to capital markets and apply until the revised legislation including its implementing framework is applicable. Based on the responses to ESMA's public consultation, ESMA came to the conclusion that in light of the Commission's plans for the CMU and the facilitation of access to capital, the consulted draft provisions on incorporation by reference would not be in line with the intention of the co-legislators to reduce administrative burden as the proposal would be a departure from current market practice that would not have any significant benefits in terms of investor protection. Thus, the draft RTS do not contain provisions on incorporation by reference.

In accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 (the ‘ESMA Regulation’), the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

The draft technical standards are applicable for the purposes of PD without the need for further amendments.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

As required by Article 10 of the ESMA Regulation, during the phase of developing the draft RTS ESMA consulted stakeholders by way of a consultation paper on the draft RTS on prospectus related issues under the Omnibus II Directive (reference: ESMA/2014/1186; http://www.esma.europa.eu/system/files/2014-1186_consultation_paper_on_omnibus_ii_rts.pdf). The consultation began on 25 September 2014 and closed on 19 December 2014. ESMA received 25 responses, including one from the Securities and Markets Stakeholder Group (‘SMSG’). 22 of the responses are public and can be found on ESMA's website.

The ESMA final report of 25 June 2015 (reference: ESMA/2015/1014; http://www.esma.europa.eu/system/files/esma-2015-1014_-_final_report_-_draft_rts_on_prospectus_related_issues_under_the_omnibus_ii_directive.pdf) provided an analysis of the responses to the consultation, described any material changes to the technical proposals set out in consultation paper (or confirmed that there have been no material changes), and explained the reasons for this in the light of feedback received.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The draft RTS specify requirements regarding the approval process, the publication and the information disseminated about the offer or admission to trading besides the prospectus, including advertisements, which shall be applied consistently across Member States. This not only benefits market participants who wish to sell or buy securities covered by the PD, but also competent authorities in facilitating guidance in the supervisory process.

Article 1 defines the subject matter of the delegated act.

Articles 2 to 5 detail the requirements regarding the approval process. Until now, different administrative practices and in some instances a lack of publicly available guidance through the approval process could be observed among national competent authorities. The draft RTS not only provide for more convergence amongst Member States, but also give persons seeking approval some clear guidance as to which documents need to be submitted when requesting approval, how changes to the draft prospectus can be made in an efficient and timesaving way and how the final submission is to be carried out. The draft RTS considerably alleviate the administrative burden not only by providing more legal clarity, but also by introducing electronic communication instead of paper correspondence wherever possible. As prospectuses can easily contain hundreds of pages, electronic forms of communication are faster, more efficient and better for the environment.

Articles 6 to 10 detail the requirements regarding the publication process. The draft RTS foster the use of prospectuses in electronic form, thus ensuring easy access for end-users. When a prospectus is published in electronic form, the draft RTS mandate that the interested public can easily find, access, download and print the prospectus and information incorporated by reference. Furthermore, access to the prospectus published in electronic form shall not be subject to completion of a registration process or acceptance of a disclaimer limiting legal liability or payment of a fee. If a Member State makes use of the option, referred to in Article 14(3) PD to require the publication of a notice stating how the prospectus has been made available and where it can be obtained by the public, the draft RTS harmonise the content of such notice and where to publish it.

Articles 11 and 12 detail the requirements regarding advertisement. The draft RTS aim at aligning the advertisement regime with the obligation to publish a supplement according to Article 16 PD: an amended advertisement needs to be disseminated without undue delay if a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus renders the contents of the previously disseminated advertisement inaccurate or misleading. Thus, more legal clarity and convergence amongst Member States is introduced as to how and under which circumstances advertisements need to be amended and then disseminated. Furthermore, the draft RTS specify the requirement that all information concerning the offer to the public or the admission to trading on a regulated market disclosed in an oral or written form, even if not for advertising purposes, shall be consistent with that contained in the prospectus as laid down in Article 15(4) PD.

Article 13 provides for the necessary amendments of Regulation (EC) No 809/2004 in order to delete the provisions concerning publication and dissemination of advertisements which would otherwise be duplicated by the RTS.

Article 14 provides that the Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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/EC¹, and in particular the third subparagraph of Article 13(7), the third subparagraph of Article 14(8) and the third subparagraph of Article 15(7) thereof,

Whereas:

- (1) Directive 2003/71/EC harmonised requirements for the drawing up, approval and distribution of prospectuses. In order to ensure consistent harmonisation and to take account of technical developments on financial markets, it is necessary to specify those requirements, in particular those regarding the approval process, the publication and the information disseminated about the offer or admission to trading besides the prospectus, including advertisements.
- (2) The process of prospectus review and approval is an iterative one, where the decision of the national competent authority to approve the prospectus involves repeated rounds of analysis and development of the draft prospectus on the part of the issuer, offerer or person asking for admission to trading on a regulated market to ensure that the prospectus meets the requirement of completeness, including the consistency of the information given and its comprehensibility. In order to provide greater certainty about the approval process to issuers, offerers or persons asking for admission to trading, it is necessary to specify which documents should be provided to national competent authorities at different moments in the prospectus approval cycle.
- (3) A draft prospectus should always be submitted to the national competent authority in searchable electronic format and through electronic means acceptable to that authority. As a searchable electronic format allows national competent authorities to search for specific terms or words in the prospectus, it facilitates faster scrutiny and contributes to an efficient and timely review process.
- (4) With the exception of the first draft prospectus, it is imperative that each draft of the prospectus submitted to the national competent authority clearly show changes made

¹ 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 (OJ L 345, 31.12.2003, p. 64).

to the previously submitted draft and explain how such changes address any incompleteness notified by the national competent authority. Each submission of a draft prospectus to the national competent authority should include both a marked version, highlighting all changes to the previously submitted draft, and an unmarked version, where such changes are not highlighted.

- (5) Where disclosure items contained in the relevant annexes to Commission Regulation (EC) No 809/2004² are not applicable or, given the nature of the issue or issuer, are not relevant in the case of a specific prospectus, those disclosure items should be identified to the national competent authority in order to minimise any delays in the review process.
- (6) To ensure an efficient use of resources, where it becomes evident to the national competent authority that the issuer, offerer or person asking for admission to trading is not in a position to comply with the requirements of the prospectus regime, the national competent authority should have the right to terminate the review process without approving the prospectus.
- (7) Electronic publication of prospectuses, including final terms, ensures that investors are provided with fast and easy access to the information contained therein. Requiring investors to agree to a disclaimer limiting legal liability, pay a fee or go through a registration process to gain access to the prospectus impedes easy accessibility and should not be permitted. Filters warning in which jurisdictions an offer is being made and requiring investors to disclose their country of residence or indicate that they are not resident in a particular country or jurisdiction should not be considered as disclaimers limiting legal liability.
- (8) Advertisements relating to an offer to the public or an admission to trading can become inaccurate or misleading where a significant new factor, material mistake or inaccuracy relating to the information in the corresponding prospectus arises or is noted. Requirements should be established to ensure that when advertisements become inaccurate or misleading due to such a new factor, material mistake or inaccuracy, such advertisements are amended.
- (9) As the prospectus is the authoritative source of information about an offer to the public or an admission to trading, all information circulated about such offers and admissions to trading, whether for advertising or other purposes and whether in oral or written form, should be consistent with the information contained in the prospectus. This should be ensured by requiring that any information circulated does not contradict, or refer to information which contradicts, the contents of the prospectus. Moreover, the information circulated should be prohibited from presenting a materially unbalanced view of the information contained in the prospectus. Furthermore, as alternative performance measures can disproportionately influence the investment decision, information about an offer to the public or an admission to trading circulated outside the prospectus should not be permitted to contain such measures, if they are not contained in the prospectus.
- (10) Regulation (EC) No 809/2004 contains provisions regarding publication of the prospectus and dissemination of advertisements. To avoid duplication of requirements, certain provisions of Regulation (EC) No 809/2004 should be deleted.

² Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p. 1).

- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) In accordance with Article 10 of Regulation (EU) No 1095/2010³ of the European Parliament and of the Council, ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation.

HAS ADOPTED THIS REGULATION:

Chapter I

General Provisions and approval of the prospectus

Article 1 *Subject matter*

This Regulation establishes regulatory technical standards that further specify:

1. the arrangements for approval of the prospectus as referred to in Article 13 of Directive 2003/71/EC;
2. the arrangements for publication of the prospectus laid down in Article 14(1) to (4) of Directive 2003/71/EC;
3. the dissemination of advertisements referred to in Article 15 of Directive 2003/71/EC;
4. the consistency between information disclosed about an offer to the public or admission to trading on a regulated market, on the one hand, and the information contained in the prospectus, on the other, as laid down in Article 15(4) of Directive 2003/71/EC.

Article 2 *Submission of an application for approval*

1. The issuer, offeror or person asking for admission to trading on a regulated market shall submit all drafts of the prospectus in searchable electronic format via electronic means to the competent authority. A contact point to which the competent authority can submit all notifications in writing, via electronic means, shall be specified at the time the first draft of the prospectus is submitted.
2. Along with the first draft of the prospectus submitted to the competent authority, or during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market shall also submit in searchable electronic format:
 - (a) where required by the competent authority of the home Member State in accordance with Article 25(4) of Regulation (EC) No 809/2004 or on their own initiative, a cross reference list which shall also identify any items from Annexes I to XXX to Regulation (EC) No 809/2004 that have not been included in the prospectus because,

³ 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 (OJ L 331, 15.12.2010, p. 84).

due to the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading, they were not applicable.

Where the cross reference list is not submitted, and where the order of the items in the draft prospectus does not coincide with the order of the information provided for in the annexes to Regulation (EC) No 809/2004, the draft prospectus shall be annotated in the margin to identify which sections of the prospectus correspond to the relevant disclosure requirements. A prospectus which is annotated in the margin shall be accompanied by a document identifying any items contained in the relevant annexes to Regulation (EC) No 809/2004 that have not been included in the prospectus because they were not applicable, due to the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading;

- (b) where the issuer, offeror or person asking for admission to trading on a regulated market is requesting that the competent authority of the home Member State authorise the omission of information from the prospectus pursuant to Article 8(2) of Directive 2003/71/EC, a reasoned request to that effect;
- (c) where the issuer, offeror or person asking for admission to trading on a regulated market requests that the competent authority of the home Member State notify the competent authority of a host Member State, upon approval of the prospectus, with a certificate of approval pursuant to Article 18(1) of Directive 2003/71/EC, a request to this effect;
- (d) any information which is incorporated by reference into the prospectus, unless such information has already been approved by or filed with the same competent authority in accordance with Article 11 of Directive 2003/71/EC;
- (e) any other information considered necessary, on reasonable grounds, for the review by the competent authority of the home Member State and expressly required by the competent authority for that purpose.

Article 3

Changes to the draft prospectus

1. Following submission of the first draft of the prospectus to the competent authority of the home Member State, where the issuer, offeror or person asking for admission to trading on a regulated market submits subsequent drafts of the prospectus, the subsequent drafts shall be marked to highlight all changes made to the preceding unmarked draft of the prospectus as submitted to the competent authority. Where only limited changes are made, marked extracts of the draft prospectus, showing all changes from the preceding draft, shall be considered acceptable. An unmarked draft of the prospectus shall always be submitted along with the draft highlighting all changes

Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement set out in the first subparagraph due to technical difficulties related to the marking of the prospectus, each change made to the preceding draft of the prospectus shall be identified to the competent authority of the home Member State in writing.

2. Where the competent authority of the home Member State has, in accordance with Article 5(2) of this Regulation, notified the issuer, offeror or person asking for admission to trading on a regulated market that it considers that the draft prospectus does not meet the requirement of completeness, including consistency of the information given and its comprehensibility, the subsequently submitted draft of the prospectus shall be accompanied by an explanation as to how the incompleteness notified by the competent authority has been addressed.

Where changes made to a previously submitted draft prospectus are self-explanatory or clearly address the incompleteness notified by the competent authority, an indication of where the changes have been made to address the incompleteness shall be considered sufficient.

Article 4 *Final submission*

1. With the exception of the cross reference list mentioned in Article 2(2)(a), submission for approval of the final draft of the prospectus shall be accompanied by any information mentioned in Article 2(2) which has changed since a previous submission. The final draft of the prospectus shall not be annotated in the margin.
2. Where no changes have been made to the previously submitted information mentioned in Article 2(2), the issuer, offeror or person asking for admission to trading on a regulated market shall confirm in writing that no changes have been made to the previously submitted information.

Article 5 *Receipt and processing of the application*

1. The competent authority of the home Member State shall acknowledge receipt of the initial application for approval of a prospectus in writing via electronic means as soon as possible and no later than by close of business on the second working day following the receipt. The acknowledgement shall inform the issuer, offeror or person asking for admission to trading on a regulated market of any reference number of the application for approval and of the contact point within the competent authority to which queries regarding the application may be addressed. The date of acknowledgement shall not affect the date of submission of the draft prospectus, within the meaning of Article 13(2) of Directive 2003/71/EC, from which the time limits for notifications commence.
2. Where the competent authority of the home Member State considers, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, for instance due to inconsistencies or incomprehensibility of certain information provided, it shall notify the issuer, offeror or person asking for admission to trading of the need for supplementary information and the reasons therefor, in writing, via electronic means.
3. Where the competent authority of the home Member State considers the incompleteness to be of a minor nature or timing to be of utmost importance, the competent authority may notify the issuer, offeror or person asking for admission to

trading orally, in which case there shall be no interruption of the time limits for approval of the prospectus as referred to in Article 13(4) of Directive 2003/71/EC..

4. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable or unwilling to provide the supplementary information requested in accordance with paragraph 2, the competent authority of the home Member State shall be entitled to refuse the approval of the prospectus and terminate the review process.
5. The competent authority of the home Member State shall notify the issuer, offeror or person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus in writing, via electronic means, on the day of the decision. In the case of a refusal to approve the prospectus, the decision of the competent authority shall contain the reasons for such refusal.

Chapter II

Publication of the Prospectus

Article 6

Publication of the prospectus in electronic form

1. When published in electronic form pursuant to points (c), (d) or (e) of Article 14(2) of Directive 2003/71/EC, the prospectus, whether a single document or comprising several documents, shall:
 - (a) be easily accessible when entering the website;
 - (b) be in searchable electronic format that cannot be modified;
 - (c) not contain hyperlinks with the exception of links to the electronic addresses where information incorporated by reference is available;
 - (d) be downloadable and printable.
2. Where a prospectus containing information incorporated by reference is published in electronic form, it shall include hyperlinks to each document containing information incorporated by reference or to each webpage on which that document is published.
3. If a prospectus for offer of securities to the public is made available on the websites of issuers or financial intermediaries or of regulated markets, these shall take measures to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, such as the insertion of a disclaimer as to who are the addressees of the offer.
4. Access to the prospectus published in electronic form shall not be subject to:
 - (a) completion of a registration process;
 - (b) acceptance of a disclaimer limiting legal liability;
 - (c) payment of a fee.

Article 7

Publication of final terms

The publication method for final terms related to a base prospectus does not have to be the same as the one used for the base prospectus as long as the publication method used is one of the methods indicated in Article 14 of Directive 2003/71/EC.

Article 8
Publication in newspapers

1. In order to comply with point (a) of Article 14(2) of Directive 2003/71/EC the publication of a prospectus shall be made in a general or financial information newspaper having national or supra-regional scope.
2. If the competent authority is of the opinion that the newspaper chosen for publication does not comply with the requirements set out in paragraph 1, it shall determine a newspaper whose circulation is deemed appropriate for this purpose taking into account, in particular, the geographic area, number of inhabitants and reading habits in each Member State.

Article 9
Publication of the notice

1. If a Member State makes use of the option, referred to in Article 14(3) of Directive 2003/71/EC, to require the publication of a notice stating how the prospectus has been made available and where it can be obtained by the public, that notice shall be published in a newspaper that fulfils the requirements for publication of prospectuses according to Article 8 of this Regulation.

If the notice relates to a prospectus published only for the purpose of admission of securities to trading on a regulated market where securities of the same class are already admitted, it may alternatively be inserted in the gazette of that regulated market, irrespective of whether that gazette is in paper copy or electronic form.

2. The notice shall be published no later than the next working day following the date of publication of the prospectus pursuant to Article 14(1) of Directive 2003/71/EC.
3. The notice shall contain the following information:
 - (a) the identification of the issuer;
 - (b) the type, class and amount of the securities to be offered and/or in respect of which admission to trading is sought, provided that these elements are known at the time of the publication of the notice;
 - (c) the intended time schedule of the offer/admission to trading;
 - (d) a statement that a prospectus has been published and where it can be obtained;
 - (e) the addresses where and the period of time during which a paper copy is available to the public;
 - (f) its date.

Article 10
List of approved prospectuses

The list of the approved prospectuses published on the website of the competent authority, in accordance with Article 14(4) of Directive 2003/71/EC, shall mention how such prospectuses have been made available and where they can be obtained.

Chapter III

Advertisements

Article 11

Dissemination of advertisements

1. Where an advertisement relating to an offer to the public or an admission to trading on a regulated market has been disseminated, and a supplement to the prospectus is subsequently published, due to the arising or noting of a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus, an amended advertisement shall be disseminated if the significant new factor, material mistake or inaccuracy relating to the information included in the prospectus renders the contents of the previously disseminated advertisement inaccurate or misleading.
2. An amended advertisement shall make reference to the previous advertisement, specifying that the previous advertisement has been amended due to it containing inaccurate or misleading information and specifying the differences between the two versions of the advertisement.
3. An amended advertisement shall be disseminated without undue delay following the publication of the supplement. With the exception of orally disseminated advertisements, an amended advertisement shall be disseminated, at a minimum, through the same means as the original advertisement.

The obligation to amend an advertisement shall not apply after the final closing of the offer to the public or after the time when trading on a regulated market begins, whichever occurs later.

4. Where no prospectus is required in accordance with Directive 2003/71/EC, any advertisement shall include a warning to that effect unless the issuer, offeror or person asking for admission to trading on a regulated market chooses to publish a prospectus which complies with Directive 2003/71/EC, Regulation (EC) No 809/2004 and this Regulation.

Article 12

Consistency for the purposes of Article 15(4) of Directive 2003/71/EC

Information disclosed in an oral or written form about the offer to the public or admission to trading on a regulated market, whether for advertisement or other purposes, shall not:

- (a) contradict the information contained in the prospectus;
- (b) refer to information which contradicts that contained in the prospectus;
- (c) present a materially unbalanced view of the information contained in the prospectus, including by way of omission or presentation of negative aspects of such information with less prominence than the positive aspects;
- (d) contain alternative performance measures concerning the issuer, unless they are contained in the prospectus.

For the purposes of points (a) to (d), information contained in the prospectus shall consist of information included in the prospectus, where already published, or information to be included in the prospectus, where the prospectus is published at a later date.

For the purposes of point (d), alternative performance measures shall consist of performance measures which are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined in the applicable financial reporting framework.

Chapter IV

Final Provisions

Articles 13 *Amendments to Regulation (EC) No 809/2004*

Regulation (EC) No 809/2004 is amended as follows:

1. in Article 1, paragraphs 5 and 6 are deleted;
2. Articles 29 to 34 are deleted.

Article 14 *Entry into force*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30.11.2015

For the Commission
The President
Jean-Claude JUNCKER