



Brussels, 7.3.2014
C(2014) 1392 final

COMMISSION DELEGATED REGULATION (EU) No .../..

of 7.3.2014

**supplementing Directive 2003/71/EC of the European Parliament and of the Council
with regard to regulatory technical standards for publication of supplements to the
prospectus**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 16(3) of 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 as amended by the Directive 2010/78/EU and the Directive 2010/73/EU (Directive 2003/71/EC) empowers the Commission to adopt, following submission of draft standards by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 of Regulation (EU) No 1095/2010, delegated acts on regulatory technical standards specifying situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published.

Article 16(3) of Directive 2003/71/EC provides that ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014. Those draft regulatory technical standards were approved by the ESMA's Board of Supervisors on 17 December 2013 and has been submitted to the European Commission on 20 December 2013.

In accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 establishing ESMA, 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.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 16(3) of Directive 2003/71/EC.

ESMA published on the ESMA internet site on 15 March 2013 a consultation paper on draft regulatory technical standards on specific situations that require the publication of a supplement to the prospectus (ESMA/2013/316). The consultation paper included a draft RTS as well as an initial cost-benefit analysis. The consultation period was open until 28 June 2013. ESMA received responses from 16 market participants mainly representing issuers.

In addition to this on 3 April 2013 ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) set up in accordance with Article 37 of Regulation (EU) No 1095/2010. The SMSG chose not to provide advice on this issue due to the technical nature of the request.

Moreover, ESMA also consulted the Corporate Finance Standing Committee Consultative Working Group as well as the competent authorities of Member States to draw on their experiences in this field. The Corporate Finance Standing Committee Consultative Working Group provided oral feedback at a meeting on 30 November 2012. The feedback was of a qualitative nature, some relating to the scope of the mandate in the Omnibus Directive and whether a list of situations was recommendable at all. The national competent authorities provided quantitative data relating to costs of submitting a supplement for approval by a national competent authority.

3. ANALYSIS OF COSTS AND BENEFITS

Together with the draft technical standards, ESMA has submitted an explanation of how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission. This analysis is available at: http://www.esma.europa.eu/system/files/2013-1970_report_on_draft_rts_for_supplements_to_prospectuses.pdf

The analysis examines the main benefits and costs that have been identified by ESMA in relation to the draft technical standards.

In order to support ESMA's policy choices with precise cost assessments it was essential to receive such information from the market participants responding to the public consultation as this information is not readily available through the national competent authorities. The information received was of a generic nature setting out either a high maximum cost or a wide cost range without further clarification as to the reasons why costs could/would vary to such a large degree, e.g. due to the specific nature of the situations or high administrative and/or legal costs connected to a particular situation. As such, this information has been taken on board as a more high level consideration.

The limited amount of information available and collected on the basis of the responses to the consultation paper did not allow ESMA to perform an in-depth quantitative cost-benefit analysis. Notwithstanding this, the cost-benefit analysis included contains some quantitative elements where possible and otherwise focuses on qualitative descriptions.

4. LEGAL ELEMENTS OF THE DELEGATED ACTS

Article 1 defines the subject matter of the delegated act.

Article 2 defines the situations for which supplement to the prospectus shall be published.

Article 3 provides that the Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal.

5. BUDGETARY IMPLICATION

There are no budgetary implications for the EU budget.

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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 Article 16(3) thereof,

Whereas:

- (1) Directive 2003/71/EC harmonises requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.
- (2) Directive 2003/71/EC also requires publication of supplements to the prospectus mentioning every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later.
- (3) The provision of full information concerning the securities and the issuers of securities promotes the protection of investors. A supplement should therefore include all material information relating to the specific situations that triggered the supplement and that must be included in the prospectus in accordance with Directive 2003/71/EC and Commission Regulation (EC) No 809/2004².
- (4) In order to ensure consistent harmonisation, to specify the requirements laid down in Directive 2003/71/EC and to take account of technical developments on financial markets, it is necessary to specify situations where publication of supplements to the prospectus is required.

¹ OJ L 345, 31.12.2003, p. 64.

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).

- (5) It is not possible to identify all the situations in which a supplement to the prospectus is required as this may depend on the issuer and securities involved. Therefore, it is appropriate to specify the minimum situations where a supplement is required.
- (6) Annual audited financial statements play a crucial role for investors when making investment decisions. In order to ensure that investors base their investment decisions on the most recent financial information, it is necessary to publish a supplement incorporating new annual audited financial statements of issuers of equity securities and issuers of underlying shares in the case of depository receipts published after the approval of the prospectus.
- (7) In order to take account of the ability of profit forecasts and profit estimates to influence an investment decision, issuers of equity securities and issuers of underlying shares in the case of depository receipts should publish a supplement containing any amendments to implicit or explicit figures constituting profit forecasts or profit estimates already included in the prospectus.
- (8) Information concerning the identity of the main shareholders or any controlling entity of the issuer is vital for an informed assessment of the issuer, in case of any type of security. However, a situation of a change of control of the issuer is particularly significant where the offer refers to equity securities and depository receipts as these types of securities are, in general, more price sensitive to this situation. Therefore, a supplement should be published where there is a change of control of an issuer of equity securities or an issuer of underlying shares in the case of depository receipts.
- (9) It is essential that potential investors assessing an outstanding offer of equity securities or depository receipts are in a position to compare the terms and conditions of such an offer with the price or exchange terms attached to any public takeover bid announced during the offer period. Moreover, the result of a public takeover bid is also significant for the investment decision as investors need to know whether it implies or not a change in control of the issuer. In those cases, therefore, a supplement is necessary.
- (10) Where the working capital statement is not valid anymore investors are unable to make a fully informed investment decision about the issuer's financial situation in the immediate future. Investors should be in a position to reassess their investment decisions in light of the new information on the issuer's ability to access cash and other available liquid resources to meet its liabilities. In those cases, therefore, a supplement is necessary.
- (11) There are situations where, after the approval of a prospectus, an issuer or offeror decides to offer the securities in Member States other than those referred to in the prospectus, or to apply for admission to trading of the securities on regulated markets in additional Member States other than those provided for in the prospectus. Information about those offers in other Member States or admission to trading on regulated markets therein is important for the investor's assessment of certain aspects of the issuer's securities and therefore would necessitate a supplement.
- (12) The financial position or the business of the entity is likely to be affected by a significant financial commitment. Therefore, investors should be entitled to receive additional information on the consequences of that commitment in a supplement to the prospectus.
- (13) An increase of the aggregate nominal amount of an offering programme provides information on issuers' necessity for financing or an increase in demands for the issuers' securities. Therefore, where there is an increase in the aggregate nominal

amount of an offering programme included in the prospectus, a supplement to the prospectus should be published.

- (14) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (15) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, 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 Regulation (EU) No 1095/2010 of the European Parliament and of the Council³,

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation establishes regulatory technical standards specifying situations in which the publication of a supplement to the prospectus is mandatory.

Article 2
Obligation to publish a supplement

A supplement to the prospectus shall be published in the following situations:

- (a) where new annual audited financial statements are published by any of the following:
 - (1) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of Regulation (EC) No 809/2004;
 - (2) an issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities complying with the conditions set out in Article 17(2) of Regulation (EC) No 809/2004;
 - (3) an issuer of the underlying shares where the prospectus is drawn up in accordance with the depository receipt schedule, set out in Annex X or XXVIII to Regulation (EC) No 809/2004;
- (b) where an amendment to a profit forecast or a profit estimate already included in the prospectus is published by any of the following:
 - (1) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of Regulation (EC) No 809/2004;
 - (2) an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to equity securities complying with the conditions set out in Article 17(2) of Regulation (EC) No 809/2004;

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).

- (3) an issuer of the underlying shares where the prospectus is drawn up in accordance with the depository receipt schedule, set out in Annex X or XXVIII to Regulation (EC) No 809/2004;
- (c) where there is a change in control in respect of any of the following:
 - (1) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of Regulation (EC) No 809/2004;
 - (2) an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to equity securities complying with the conditions set out in Article 17(2) of Regulation (EC) No 809/2004;
 - (3) an issuer of the underlying shares where a prospectus is drawn up in accordance with a depository receipt schedule, set out in Annex X or XXVIII to Regulation (EC) No 809/2004;
 - (d) where there is any new public takeover bid by third parties, as defined in Article 2(1)(a) of Directive 2004/25/EC of the European Parliament and of the Council⁴ and the outcome of any public takeover bid in respect of any of the following:
 - (1) the equity of the issuer where a prospectus relates to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of Regulation (EC) No 809/2004;
 - (2) the equity of the issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to equity securities complying with the conditions set out in Article 17(2) of Regulation (EC) No 809/2004;
 - (3) the equity of the issuer of the underlying shares where a prospectus is drawn up in accordance with the depository receipt schedule, set out in Annex X or XXVIII to Regulation (EC) No 809/2004;
 - (e) where in relation to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of Regulation (EC) No 809/2004 and convertible or exchangeable debt securities which are equity securities complying with the conditions set out in Article 17(2) of that Regulation there is a change in the working capital statement included in a prospectus when the working capital becomes sufficient or insufficient for the issuer's present requirements;
 - (f) where an issuer is seeking admission to trading on (an) additional regulated market(s) in (an) additional Member State(s) or is intending to make an offer to the public in (an) additional Member State(s) other than the one(s) provided for in the prospectus;
 - (g) where a new significant financial commitment is undertaken which is likely to give rise to a significant gross change within the meaning of Article 4a(6) of Regulation (EC) No 809/2004 and the prospectus relates to shares and other transferable securities equivalent to shares referred to in Article 4(2)(1) of that Regulation and other equity securities complying with the conditions set out in Article 17(2) of that Regulation;

⁴ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142 30.4.2004 p. 12).

(h) where the aggregate nominal amount of the offering programme is increased.

Article 3
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, 7.3.2014

For the Commission
The President
José Manuel BARROSO