



Brussels, 16.12.2020  
C(2020) 8822 final

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

**of 16.12.2020**

**supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

#### 1.1. General background

The Prospectus Regulation<sup>1</sup> creates a new and harmonised set of rules that (i) helps companies raising money on capital markets to invest and grow; (ii) helps investors to make better and more informed decisions; and (iii) fosters supervisory convergence throughout the Union. The Prospectus Regulation also delegates the power to the Commission to lay down some details of the new rules.

In this context, Article 1(7) of the Prospectus Regulation empowers the Commission to adopt delegated acts to set out the minimum information content of the document to be published to benefit from the exemption to publish a prospectus in connection with a takeover by means of an exchange offer, a merger or a division. To that effect, the Commission sent a mandate to ESMA on 27 February 2017 to request technical advice on the minimum information content of the above-mentioned document.

In May 2018, the European Commission launched an initiative aiming to adopt proportionate rules to support the promotion of SME Growth markets while safeguarding investor protection and market integrity. The initiative included a proposal for a regulation amending MiFID II<sup>2</sup>, the Market Abuse Regulation<sup>3</sup> and the Prospectus Regulation.

ESMA's technical advice for the delegated act under Article 1(7) was delivered to the Commission on 26 March 2019. Being aware that the co-legislators had reached a political agreement on the SME Growth markets legislative initiative amending the Prospectus Regulation, ESMA highlighted that some parts of the technical advice would require adaptation to take into account those amendments.

Regulation (EU) 2019/2115 of the European Parliament and of the Council<sup>4</sup> was published in the Official Journal of the European Union on 11 December 2019. Article 2 of that Regulation, which entered into application on 31 December 2019, amended Article 1 of the Prospectus Regulation, restricting the scope of the exemption in connection with a takeover by means of an exchange offer, a merger or a division.

Therefore the Delegated Regulation reflects both the main elements from ESMA's technical advice as well as further adjustments meant to reflect the changes introduced by Regulation (EU) 2019/2115. The following are the main changes compared to ESMA's technical advice:

- the definitions set out in Article A of the technical advice were revised in accordance with the feedback received under the Commission's consultation of internal services;

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<sup>1</sup> 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 (OJ L 168, 30.6.2017, p. 12).

<sup>2</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

<sup>3</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse 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 (OJ L 173, 12.6.2014, p. 1).

<sup>4</sup> Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets (OJ L 320, 11.12.2019, p. 1).

- Article B of the technical advice was completely revised and added to Article 2(1) of this Regulation as a fourth subparagraph. In particular, the scope of this provision was amended and its application was circumscribed to the case of a takeover by means of an exchange offer where the equity securities offered are not fungible with existing equity securities already admitted to trading on a regulated market prior to the takeover and its related transaction or where the takeover is considered to be a reverse acquisition transaction;
- Article C of the technical advice was amended due to the change in scope for the exemptions in connection with a takeover by means of an exchange offer, a merger or a division introduced by Regulation (EU) 2019/2115;
- in Article D of the technical advice, points (a) and (c) to (k) were replaced by a dynamic reference to the list of the information that can be incorporated by reference set out in Article 19(1) of the Prospectus Regulation;
- the language regime set out in Article E of the technical advice, which is mirroring Article 27 of the Prospectus Regulation, was revised as the exemption document is not subject to the approval of a competent authority as referred to in Article 20 of the Prospectus Regulation;
- Article F of the technical advice was simplified by inserting references to Articles 18(3) and 18(4) of Commission Delegated Regulation (EU) 2019/980<sup>5</sup> where the meaning of complex financial history and significant financial commitment is explained;
- the disclosure requirements set out in appendix II to the technical advice were incorporated in Annex II to this Regulation in a more efficient way, by making cross references to the relevant sections and items of Annex I to this Regulation and to the relevant sections and items of Annexes 1 and 11 to Delegated Regulation (EU) 2019/980;
- the disclosure requirements set out in appendices I, III and IV to the technical advice were further streamlined, calibrated to the size of the transaction, and combined in Annex I to this Regulation, to make the exemption document user friendly and in line with the objectives of the Prospectus Regulation that no longer requires a document ‘equivalent to a prospectus’ as under the previous regime.

## 1.2. Objective of the Delegated Regulation

The objective of this Delegated Regulation is to lay down the minimum information content of the document to be published to benefit from an exemption to publish a prospectus in connection with a takeover by means of an exchange offer, a merger or a division.

## 1.3. Legal Background

This Delegated Regulation is based on the empowerment set out in Article 1(7) of the Prospectus Regulation.

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<sup>5</sup> 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).

## **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

On 13 July 2018 ESMA published a consultation paper in order to seek the views of stakeholders on the proposed technical advice. The consultation closed on 6 October 2018. ESMA remarked that only five entities responded to the consultation and that none of those entities represented the interests and views of investors. ESMA also sought the advice of the Securities and Markets Stakeholder Group, which, however, did not send a formal response on the consultation.

The draft Delegated Regulation was published on the Better Regulation portal for a 4-week feedback period from 16 June to 14 July 2020. Overall 5 stakeholders officially responded to the consultation, moreover ESMA and some national competent authorities also provided their feedback via the ESMA Prospectus Operational Working Group (OWG). On 24 September 2020, the draft Delegated Regulation was presented to the Expert Group of the European Securities Committee (EGESC) for consultation, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. The feedback received from the feedback portal and the meeting of the EGESC was duly taken into account in the final version of the Delegated Regulation.

## **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

The right to adopt delegated acts is provided for under Article 44 of the Prospectus Regulation.

- Article 1 lays down the definitions applicable in this Delegated Regulation.
- Article 2 lays down the minimum information content for the exemption document.
- Article 3 lays down the rules for the incorporation by reference.
- Article 4 lays down the rules applicable where the issuer of the equity securities has a complex financial history or has undertaken a significant financial commitment.
- Article 5 lays down out the language regime applicable.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to 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<sup>6</sup>, and in particular Article 1(7) thereof,

Whereas:

- (1) In order to provide the highest standards of investor protection across the Union and to enable investors to make an informed investment decision, the document referred to in Article 1(4), points (f) and (g), and Article 1(5), first subparagraph, points (e) and (f), of Regulation (EU) 2017/1129 ('exemption document') should contain sufficient, objective and comprehensible information on the companies involved in the transaction, the rights attaching to the equity securities, the prospects of the issuer of those equity securities and, depending on the type of transaction, of the offeree company, of the company being acquired or of the company being divided.
- (2) To ensure that investors are provided with the necessary information to take an informed investment decision, a more comprehensive exemption document should be required in case of a takeover by means of an exchange offer that meets the condition of Article 1(6a), point (b), of Regulation (EU) 2017/1129 when, in that case, the equity securities offered are not fungible with existing securities already admitted to trading on a regulated market prior to the takeover and its related transaction, or the takeover is considered to be a reverse acquisition transaction. The expanded content of the exemption document in such situations should be specified.
- (3) To limit unnecessary costs for issuers, an exemption document should be lighter where, in connection with a transaction, the equity securities offered to the public or to be admitted to trading on a regulated market are fungible with equity securities already admitted to trading on a regulated market, and represent a small percentage of those equity securities. The reduced content of the exemption document in such a situation should be specified. However, in such a situation an issuer should not be prevented from benefiting from the exemptions laid down in Article 1(5), first subparagraph, points (a) or (b), of Regulation (EU) 2017/1129.

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<sup>6</sup> OJ L 168, 30.6.2017, p. 12.

- (4) To simplify drafting and to reduce costs of producing an exemption document, issuers should be allowed to incorporate by reference into that document certain information that already has been published in electronic form, provided such information is easily accessible and is written in the same language as the exemption document.
- (5) Investors should be able to understand the situation of an issuer with a complex financial history or that has made a significant financial commitment, in which case the disclosure of information about an entity other than the issuer may be necessary. Issuers should therefore be obliged to describe in the exemption document their complex financial history or the effects on the issuer or on the issuer's business of the significant financial commitment undertaken.
- (6) In order to ensure that an exemption document is a workable document for investors, it is necessary to specify that it is for the national competent authority to determine in what language that document will be drafted,

HAS ADOPTED THIS REGULATION:

### *Article 1* **Definitions**

For the purposes of this Regulation, the following definitions shall apply:

- (a) 'transaction' means a takeover by means of an exchange offer, a merger or a division as referred to in Article 1(4), points (f) or (g), or Article 1(5), first subparagraph, points (e) or (f), of Regulation (EU) 2017/1129, in respect of which the conditions laid down in Article 1(6a) or Article 1(6b) of that Regulation have been fulfilled;
- (b) 'exemption document' means a document to be made available to the public in accordance with Article 21(2) of Regulation (EU) 2017/1129 to be entitled to an exemption from the obligation to publish a prospectus in case of a transaction;
- (c) 'offeree company' means an offeree company as defined in Article 2(1), point (b), of Directive 2004/25/EC of the European Parliament and of the Council<sup>7</sup>;
- (d) 'company being acquired' means a company transferring assets and liabilities to an acquiring company as a result of any merger in respect of which the conditions laid down in Article 1(6b) of Regulation (EU) 2017/1129 have been fulfilled;
- (e) 'company being divided' means a company transferring assets and liabilities to a company receiving contributions as a result of any division in respect of which the conditions laid down in Article 1(6b) of Regulation (EU) 2017/1129 have been fulfilled;
- (f) 'offeror' means an offeror as defined in Article 2(i) of Regulation (EU) 2017/1129.

### *Article 2* **Minimum information content of the exemption document**

1. An exemption document shall contain the relevant information which is necessary to enable investors to understand:
  - (a) the prospects of the issuer, and, depending on the type of transaction, of the offeree company, of the company being acquired or of the company being

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<sup>7</sup> 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).

divided, and any significant changes in the business and financial position of each of those companies that have occurred since the end of the previous financial year;

- (b) the rights attaching to the equity securities;
- (c) a description of the transaction and its impact on the issuer.

The information contained in an exemption document shall be written and presented in an easily analysable, concise and comprehensible form and shall enable investors to make an informed investment decision.

An exemption document shall include the minimum information referred to in Annex I to this Regulation.

An exemption document shall, however, include the minimum information referred to in Annex II to this Regulation where all of the following conditions are met:

- (a) the exemption document relates to a takeover by means of an exchange offer in respect of which the conditions laid down in Article 1(6a), point (b), of Regulation (EU) 2017/1129 have been fulfilled;
- (b) the equity securities offered are not fungible with existing securities already admitted to trading on a regulated market prior to the takeover and its related transaction, or the takeover is considered to be a reverse acquisition transaction within the meaning of paragraph B19 of international financial reporting standard (IFRS) 3, Business Combinations, adopted by Commission Regulation (EC) No 1126/2008<sup>8</sup>.

2. By way of derogation from paragraph 1 and without prejudice to Article 1(5), first subparagraph, points (a) or (b), of Regulation (EU) 2017/1129, where, in connection with a transaction, the equity securities are offered to the public or are to be admitted to trading on a regulated market and are fungible with and represent no more than 10% of equity securities already admitted to trading on a regulated market, the exemption document shall only contain the minimum information referred to in sections 1, 3 and 5 and in items 2.2 and 4.2 of Annex I to this Regulation.

### *Article 3*

#### **Incorporation by reference**

1. Information may be incorporated by reference in an exemption document where that information has been previously or simultaneously published electronically, drawn up in a language fulfilling the requirements of Article 5 of this Regulation and where that information is contained in one of the following documents:
  - (a) documents as referred to in Article 19(1) of Regulation (EU) 2017/1129;
  - (b) documents required by national law transposing Directive 2004/25/EC;
  - (c) documents required by national law transposing Directive (EU) 2017/1132 of the European Parliament and of the Council<sup>9</sup>;

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<sup>8</sup> Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ L 320, 29.11.2008, p. 1).

<sup>9</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169 30.6.2017, p. 46).

- (d) other documents that are published in accordance with national law where those documents are relevant to the transaction.

The information referred to in the first subparagraph shall be the most recent that is available to the issuer, the offeree company, the company being acquired or the company being divided.

2. Where only certain items of information are incorporated by reference, the exemption document shall contain a statement that the non-incorporated parts are either not relevant for the investor or are included elsewhere in the exemption document.
3. Persons responsible for the exemption document shall ensure that information incorporated by reference in that exemption document is easily accessible.
4. An exemption document that contains information incorporated by reference shall contain a cross-reference list that enables investors to easily identify specific items of information and shall contain hyperlinks to all documents containing information that is incorporated by reference.

#### *Article 4*

##### **Complex financial history and significant financial commitment**

1. Where the issuer of equity securities has a complex financial history as referred to in Article 18(3) of Commission Delegated Regulation (EU) 2019/980<sup>10</sup>, or has made a significant financial commitment as referred to in Article 18(4) of that Regulation, the exemption document shall contain all information referred to in Annex I or, where applicable, Annex II to this Regulation about the entity other than the issuer as if that entity were the issuer of the equity securities, to the extent that investors need that information to make an informed investment decision as referred to in Article 2(1) of this Regulation.

Such additional information shall specify the anticipated effects of the transaction, as defined in Article 1(a) of this Regulation, on the issuer or on the issuer's business, and the effects of the complex financial history or of the significant financial commitment on the issuer or on the issuer's business.

2. The additional information referred to in paragraph 1 shall be accompanied by a clear explanation why investors need that information to make an informed investment decision.
3. An issuer that is unable to provide the additional information referred to in paragraph 1 shall explain in the exemption document why that is the case.

#### *Article 5*

##### **Use of languages**

An exemption document shall be drawn up in a language accepted by the competent authority as defined in Article 2, point (o), of Regulation (EU) 2017/1129.

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<sup>10</sup> 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).

*Article 6*  
**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, 16.12.2020

*For the Commission*  
*The President*  
*Ursula von der Leyen*