

ESMA CONSULTATION PAPER ON DRAFT GUIDELINES ON DISCLOSURE REQUIREMENTS UNDER THE PROSPECTUS REGULATION

AMAFI's contribution

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants based in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located.

AMAFI has been paying close attention to progress in the Capital Markets Union initiative and, within such initiative, to the proposals which aimed at revising the Prospectus Directive with a view to making it easier and cheaper for companies, and in particular smaller companies, to access capital and improve prospectus accessibility for investors.

Having contributed to the three consultations launched by ESMA on 6 July 2017 (*ESMA31-62-532, ESMA31-62-649, and ESMA1-62-650*), and responded to the EC's feedback request on the draft Commission Delegated Regulation in December 2018, AMAFI is now keen to comment on ESMA's draft Guidelines on disclosure requirements under the Prospectus Regulation (*ESMA31-62-1239*).

The French Banking Federation's (FBF) mission is to promote the banking and financial industry in France, in Europe and around the world. It determines the profession's positions and makes proposals to public authorities and economic/financial authorities. The FBF has 340 member banks including 115 foreign banks.

While the content of the Guidelines is generally satisfactory, AMAFI and FBF have highlighted certain concerns in response to the specific questions asked by ESMA. As a preliminary comment though, the respondents would like to clarify the consequences, from a purely legal point of view, of the integration of a number of ESMA Q&A in the Guidelines. Whilst Q&As are not legally binding (in that they provide examples of good practices without prohibiting other compliant ways of operating), Guidelines may, through compliance by national competent authorities, be so. Our understanding is that the inclusion of Q&As in the Guidelines will not have any effect on the legal standing of those Q&As – however, we respectfully ask that ESMA expressly clarify this point in its Final report.

On the issue of costs, the changes introduced by the Prospectus Regulation will necessarily generate additional legal costs in the first years, particularly in terms of the extra time lawyers will have to spend carrying out their revue. It is also important to note that issuance programmes require annual updates which will give rise to recurring additional costs. As at today, they are difficult to quantify.

A. OPERATING AND FINANCIAL REVIEW

Question 1: Do you agree with the choice to largely carry over the CESR recommendations on OFR? If not, could you please indicate what further guidance should be provided and the legal basis for such?

We generally agree. It should however be pointed out that the proposed guidelines are not necessarily clearer than the CESR recommendations. For instance, the comprehensibility of the concept of qualified investor included under the audience principle has not improved. The definition was indeed clearer as drafted by CESR.

Question 2: Do you agree with the introduction of draft guideline 4 in order to provide further guidance on the use of the management report? Do you believe the inclusion of any separate non-financial report (when applicable) could materially increase the length of equity prospectuses? If so, please provide your reasoning and an alternative proposal.

We agree.

Question 3: Do you believe the application of draft guidelines 1, 2, 3 and 4 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

B. CAPITAL RESOURCES

Question 4: Do you agree with the choice to largely carry over the CESR recommendations on capital resources? If not, could you please indicate what further guidance should be provided and the legal basis for such?

We agree, with the caveat that the introductory paragraph 33 of the CESR recommendations should have been retained given its important illustrative purpose.

Question 5: Do you consider that the clarifications in these draft guidelines on how text provided elsewhere should be cross-referred to are useful?

The possibility to cross-refer to information provided in the financial statements, mentioned in Paragraph 32, is very useful as it will avoid unnecessary duplication. For the avoidance of doubt however, ESMA could further specify that cross-references to the URD, including but not limited to its cash flow section, is acceptable.

Question 6: Do you believe the application of draft guidelines 5, 6, 7 and 8 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

C. PROFIT FORECASTS AND ESTIMATES

Question 7: Do you agree with the choice to largely carry over the CESR recommendation on profit forecasts and estimates? If not, could you please indicate what further guidance should be provided and the legal basis for such?

The concept of profit forecast is subject to major differences of interpretation across the Union, i.e. among national competent authorities. This heterogeneity may lead to legal uncertainty which may in turn negatively impact the proper functioning of capital markets.

Some national regulators have a very clear definition of what a profit forecast looks like and how to differentiate it from other – close but nonetheless different – concepts (for example, some consider that as soon as an analyst is in a position to infer the operational profit from the information provided, then it is a profit forecast). In other jurisdictions however, a simple statement about future performance can be qualified as a profit forecast, even though it was not the issuer's intention.

Up until the Prospectus Regulation, the issue revolved around whether or not the obligation to publish a report by the auditor was triggered. It has become since then a matter of liability for issuers. As a consequence, it is of the utmost importance that ESMA provide additional guidance so as to ensure that the definition is harmonised and used in a consistent manner by national competent authorities.

Question 8: Do you believe the application of draft guidelines 9, 10, 11 and 12 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

D. HISTORICAL FINANCIAL INFORMATION

Question 9: In relation to draft guideline 14, do you consider that it is beneficial to clarify the application of the bridge approach for prospectuses that include less than three years of financial information? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 10: Do you agree with the guidance set out in draft guidelines 13, 14, 15, 16 and 17? If not, please explain your reasons and provide alternative suggestions.

N/A

Question 11: Do you consider that additional guidance is necessary as regards the restatement of historical financial information in the case of prospectuses that include less than three years of financial information? If so, please explain your view.

N/A

Question 12: Do you believe the application of any of the draft guidelines 13, 14, 15, 16 and 17 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

E. PRO FORMA INFORMATION

Question 13: Should draft guideline 18 include any other standard indicators of size? Have you ever used other indicators because the three indicators included in draft guideline 18 would produce anomalous results?

The purpose of the pro forma information disclosures is quite narrow in that it only serves to illustrate the impact of transactions on the issuer's latest financial information. We wish to point out that it would be useful if issuers could be allowed to provide pro forma financial information on a voluntary basis, in relation to events other than a transaction. For example: an important change in taxation, a significant regulatory change, or an internal reorganisation, the consequences of which on the issuer's earlier results would certainly be of interest to investors.

As a matter of fact, allowing the inclusion of pro forma financial information in relation to any significant event (as opposed to "transactions") would adequately complement the historical information provided by the issuer.

Question 14: In draft guideline 18, do you agree that when an issuer is involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, pro forma information should be required unless it is disproportionately burdensome to produce it?

Whilst the inclusion of a principle of proportionality in Guideline 18 is certainly welcome, ESMA should qualify the requirement in line with its pursued objective, which is to highlight significant changes. As a result, an issuer involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, should be required to produce pro forma information only if a significant change is identified and unless it is disproportionately burdensome to do so.

Question 15: In draft guideline 18, do you agree that when an issuer is involved in several transactions of which only one constitutes a 25% variation to the issuer's size, pro forma information should be required for all the transactions unless it is disproportionately burdensome to produce it?

In the same vein as above, whilst the inclusion of a principle of proportionality in Guideline 18 is certainly welcome, ESMA should qualify the requirement in line with its pursued objective which is to highlight significant changes. As a result, an issuer involved in several transactions of which only one constitutes a 25% variation to the issuer's size, should be required to produce pro forma information for all the transactions only if these other transactions constitute individually or together a significant change and unless it is disproportionately burdensome to do so.

Question 16: In draft guideline 25, do you agree that the accountant / auditor report should not be permitted to include an emphasis of matter?

N/A

Question 17: In relation to draft guidelines 19, 20, 21, 22, 23, 24 and 26 which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

N/A

Question 18: Do you believe the application of any of the draft guidelines 18, 19, 20, 21, 22, 23, 24, 25 and 26 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

F. INTERIM FINANCIAL INFORMATION

Question 19: Do you agree with the proposal to carry over only part of the CESR recommendations on interim financial information since some of the contents appear to be obsolete under the current legislative framework? If not, could you please indicate which CESR recommendations should have been retained and the legal basis for including them in these draft guidelines?

N/A

Question 20: Do you believe the application of draft guidelines 27 and 28 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

G. WORKING CAPITAL STATEMENTS

Question 21: Do you agree with the rules for calculation of working capital in draft guideline 31? If you do not agree, please explain why and propose an alternative approach.

As a preliminary comment, it would be useful, for the avoidance of doubt, to specify that “working capital” means “net consolidated working capital”.

Now in relation to Guideline 31 in particular, ESMA proposes that the issuer should only be permitted to include the proceeds of the offer in the working capital statement if the offering is underwritten on a firm commitment basis, or if irrevocable undertakings have been given for placings. In this regard, we recommend that ESMA clarify that the mere presence of a termination clause in the agreement between the financial institution and the issuer should not preclude the latter from using the possibility hereby offered.

Question 22: Do you agree with the rules for calculation of present requirements in draft guideline 32? If you do not agree, please explain why and propose an alternative approach.

N/A

Question 23: Do you agree that it is useful to require credit institutions to take their liquidity risk into account when they determine their working capital? Do you agree with the requirements of draft guideline 34?

N/A

Question 24: Do you agree that it is useful to require (re)insurance undertakings to take their liquidity metrics and their regulatory capital requirements into account when they determine their working capital? Do you agree with the requirements of draft guideline 35?

N/A

Question 25: In relation to draft guidelines 29, 30, 33, 36 and 37, which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

N/A

Question 26: Do you believe the application of any of the draft guidelines 29, 30, 31, 32, 33, 34, 35, 36, and 37 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

H. CAPITALISATION AND INDEBTEDNESS STATEMENTS

Question 27: Would you like more specific guidance on what to disclose concerning the type of guarantee according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

N/A

Question 28: Would you like more specific guidance on how credit institutions and (re)insurance undertakings should adapt the capitalisation statement according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

N/A

Question 29: Do you agree that trade receivables and trade payables should be included in the indebtedness statement, as proposed in draft guideline 39?

We do not agree with the position hereby taken. Trade receivables and trade payables do not fit in the definition of financial indebtedness. They relate to the core business operations of an entity while financial debt refers to money owed to a financial institution. It is important to ensure that the classification of obligations is appropriate, especially under the scrutiny of financial analysts. We therefore suggest to remove trade receivables/payables from the financial indebtedness statement, so that it is in line with the *International Accounting Standards* (IAS 1.54) as adopted by the Commission in its Regulation (EC) No 1126/2008 of 3 November 2008.

Question 30: In the indebtedness statement, do you agree that financial liabilities from leases should be included under financial debt and described further in a paragraph after the statement of indebtedness?

N/A

Question 31: Do you consider that any line items in either the capitalisation or the indebtedness statement are not useful to investors? Please explain your answer.

N/A

Question 32: Do you have any other comments on draft guidelines 38 and 39?

N/A

Question 33: Do you believe the application of draft guidelines 38 and 39 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

I. REMUNERATION

Question 34: Do you agree with the approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

N/A

Question 35: Do you believe the application of draft guideline 40 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

J. RELATED PARTY TRANSACTIONS

Question 36: Do you agree with the content of this draft guideline? Do you think it provides further clarity to the market? If not, please explain.

N/A

Question 37: Do you believe that the application of draft guideline 41 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

K. ACQUISITION RIGHTS AND UNDERTAKINGS TO INCREASE CAPITAL

Question 38: Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

N/A

Question 39: Do you believe the application of draft guideline 42 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

L. OPTIONS AGREEMENTS

Question 40: Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

N/A

Question 41: Do you agree with the introduction of a specific disclosure point on the potential dilution effects connected to the exercise of option agreements?

N/A

Question 42: Do you believe the application of draft guideline 43 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

M. HISTORY OF SHARE CAPITAL

Question 43: Do you agree with the guidance set out in draft guideline 44 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 44: Do you believe the application of draft guideline 44 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

Question 45: Do you agree with the guidance set out in draft guideline 45 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 46: Do you believe the application of draft guideline 45 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

N. STATEMENTS BY EXPERTS

Question 47: Do you agree with the guidance set out in draft guideline 46 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 48: Do you believe the application of draft guideline 46 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

O. INFORMATION SHARING

Question 49: Do you agree with the proposal to carry over only part of the CESR recommendations on information on holdings? If not, please indicate what further CESR recommendations should be retained and the legal basis for their inclusion in these draft guidelines.

N/A

Question 50: Do you consider the clarification on the general principle whereby this draft guideline does not apply when the required information is provided in the issuer's

consolidated / separate financial statements prepared in accordance with IFRS to be useful?

N/A

Question 51: Do you believe the application of draft guideline 47 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

P. INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE / OFFER

Question 52: Do you agree with the guidance set out in draft guideline 48 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 53: Do you believe the application of draft guideline 48 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

Q. COLLECTIVE INVESTMENT UNDERTAKINGS

Question 54: Do you agree with the guidance set out in the draft guidelines which have been subject only to minor revision, i.e. draft guidelines 49, 50, 52, 53, 54, 55 and 57? If not, please elaborate on your reasoning and suggest an alternative approach.

N/A

Question 55: Do you agree with the inclusion of new draft guideline 51? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

N/A

Question 56: Do you agree with the inclusion of new draft guideline 56? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

N/A

Question 57: Do you believe the application of any of the draft guidelines 49, 50, 51, 52, 53, 54, 55, 56 and 57 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

N/A

