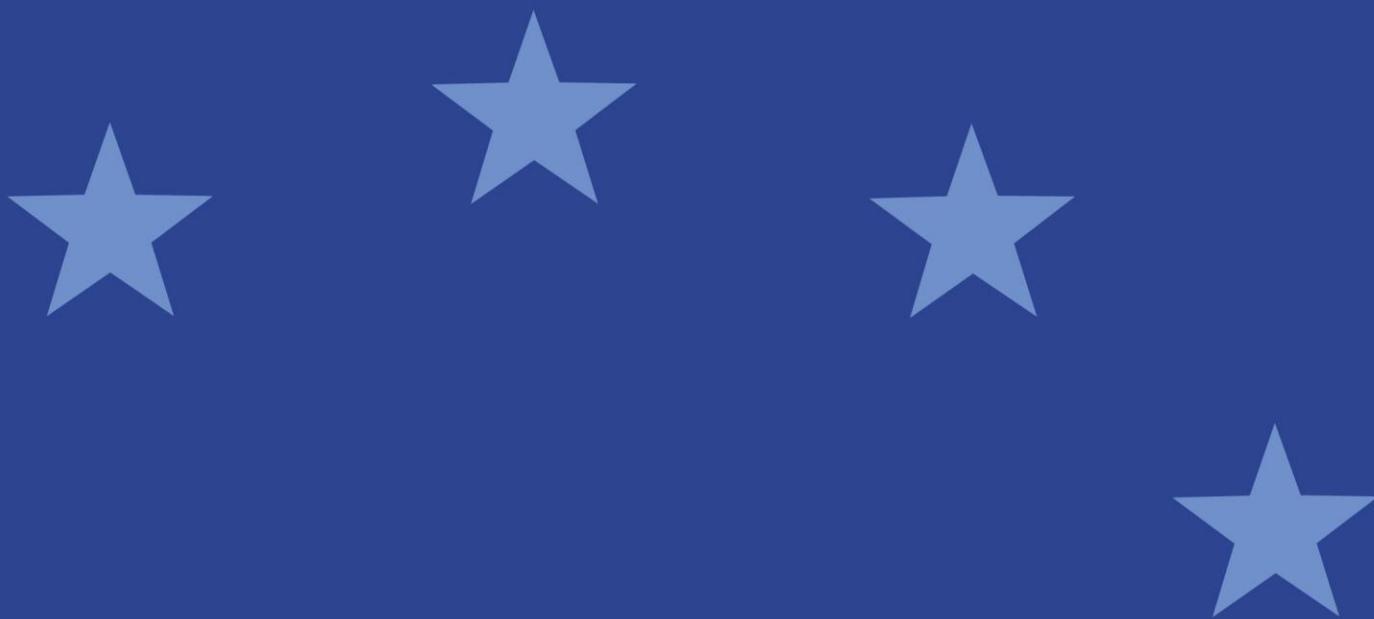




European Securities and  
Markets Authority

# Consultation Paper

Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive



## **Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which they relate;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 19 December 2014.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Legal Notice’.

### **Who should read this paper**

This document will be of interest to all stakeholders. It would primarily be of interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market, as well as to any market participant who is affected by Directive 2003/71/EC of 4 November 2003 (the Prospectus Directive) as amended by Directive 2010/73/EU and Directive 2010/78/EU and its Regulation (Commission Regulation (EC) No 809/2004) and Delegated Regulations (Commission Delegated Regulation (EC) No 486/2012, No 862/2012, No 759/2013 and No 1392/2014).

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## Acronyms used

Amending Directive	Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
CARD	Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities
CESR	Committee of European Securities Regulators
Commission	The European Commission
Directive 97/7/EC	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
ESMA	European Securities and Markets Authority
ESMA Regulation	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
IPO	Initial Public Offer
Market Abuse Directive	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)
NCA	National Competent Authority
Omnibus I Directive	Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)
Omnibus II Directive	Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)

PD/Prospectus Directive	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
PR/Prospectus Regulation	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
RTS	Regulatory Technical Standard
TD/Transparency Directive	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013)
Timmel case	Judgment of the European Court of Justice of 15 May 2014 in case C-359/12 (Michael Timmel v Aviso Zeta AG)

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## **I. Executive Summary**

### **Reasons for publication**

Directive 2014/51/EU (the ‘Omnibus II Directive’) was published in the Official Journal of the European Union on 22 May 2014 and entered into force on 23 May 2014. The Omnibus II Directive requires ESMA to submit draft Regulatory Technical Standards (‘RTS’) on procedures for approval of prospectuses, incorporation by reference of information, publication of prospectuses and dissemination of advertisements relating to offers to the public and admissions to trading to the European Commission by 1 July 2015.

According to Articles 10 and 15 of Regulation (EU) No 1095/2010 (the ‘ESMA Regulation’), ESMA must conduct a public consultation before submitting draft RTS to the European Commission (the ‘Commission’). This Consultation Paper therefore seeks stakeholders’ views on ESMA’s proposals for such RTS. Respondents to this Consultation Paper are encouraged to consider the costs and benefits that the draft RTS would imply and provide the relevant data to support their arguments or proposals. The input from stakeholders will help ESMA finalise the draft RTS before submitting them to the Commission.

### **Contents**

This Consultation Paper addresses the four mandates given to ESMA in the Omnibus II Directive on procedures for approval of prospectuses, incorporation of information by reference, publication of prospectuses and dissemination of advertisements relating to offers to the public and admissions to trading, respectively.

Section II addresses the background to the four mandates.

Sections III-VI set out the scope and content of the four draft RTS referred to above. The wording proposed for the draft RTS is presented along the way in sections III-VI and repeated in its entirety in Annex IV at the end of the Consultation Paper.

### **Next steps**

When finalising the draft RTS, ESMA will consider all feedback received in relation to this consultation by 19 December 2014.

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## **II. Background**

1. The Omnibus II Directive requires ESMA to draft RTS in relation to four topics in Directive 2003/71/EC (the 'Prospectus Directive' or 'PD'); prospectus approval, incorporation by reference, prospectus publication and dissemination of advertisements. The deadline for ESMA to deliver such RTS is 1 July 2015.
2. The background of the four mandates given to ESMA is further detailed below.

### **II.i Approval of the prospectus**

3. Article 13 of the PD sets out provisions regarding the approval of prospectuses drawn up in accordance with that directive. The article has been previously amended by Directive 2010/73/EU (the 'Amending Directive') and Directive 2010/78/EU (the 'Omnibus I Directive').
4. Article 13(7) of the original version of the PD (as enacted in 2003) empowered, but did not oblige, the Commission to adopt implementing measures concerning the conditions in accordance with which the time limits for approval may be adjusted. The empowerment to adopt such implementing measures was however not utilised by the Commission. In 2010, the Amending Directive replaced Article 13(7), obliging the Commission to adopt delegated acts in relation to time limits for the approval of prospectuses. No deadline was set for the Commission to adopt such acts and the Commission has not utilised the mandate.
5. Article 1(3) of the Omnibus II Directive further changed PD Article 13(7) by replacing the obligation for the Commission to adopt delegated acts with an obligation for ESMA to draw up draft RTS for delivery to the Commission:  
*In order to ensure consistent harmonisation in relation to the approval of prospectuses, ESMA shall develop draft regulatory technical standards to specify the procedures for the approval of the prospectus and the conditions in accordance with which time limits may be adjusted.*
6. Power is delegated to the Commission to adopt the draft RTS referred to above in accordance with Articles 10 to 14 of the ESMA Regulation.
7. The mandate provided by the Omnibus II Directive goes beyond the previous mandates addressed to the Commission by not only requiring ESMA to specify the conditions in accordance with which time limits may be adjusted but in addition obliging ESMA to specify the procedures for prospectus approval.

### **II.ii Incorporation by reference**

8. Article 11 of the PD sets out requirements for issuers, offerors and persons asking for admission to trading to comply with when incorporating information into a prospectus by reference. The article was amended by the Amending Directive.

#### *The previous mandates to the Commission*

9. When first adopted, the PD contained a mandate in Article 11(3) for the Commission to adopt implementing measures concerning the information to be incorporated by reference by 1 July 2004. The Commission fulfilled this mandate with Article 28 of Commission Regulation (EC) No 809/2004 (the 'Prospectus Regulation' or 'PR'). To provide the background on which ESMA has to fulfil its current mandate regarding incorporation by reference, ESMA considers it helpful to briefly review the way in which the Commission enacted its mandate in 2004.

10. Article 11(1) of the original PD stated that:
- Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive in particular pursuant to Article 10, or with Title IV or V of Directive 2001/34/EC. This information shall be the most recent available to the issuer. The summary shall not incorporate information by reference.*
11. The original text of Article 11(1) therefore provided the following principles for documents containing information incorporated by reference:
- a) the documents may be more than one;
  - b) the documents must have been previously or simultaneously published;
  - c) the documents must have been approved by the competent authority of the home Member State or filed with it;
  - d) the abovementioned approval or filing must have been in accordance with the PD, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC ('CARD'); and,
  - e) the information shall be the latest available to the issuer.
12. To assist the development of the implementing measures which the Commission was mandated to adopt on incorporation by reference, in 2002 it requested ESMA's predecessor CESR to provide technical advice on possible draft rules concerning the documents that could be incorporated by reference in a prospectus. The request for advice specifically referred to memoranda of association, annual and interim accounts and press releases as examples of the type of documents from which information could be incorporated by reference.
13. In its technical advice<sup>1</sup> from August 2003, CESR, while acknowledging the aim of the PD, noted that *[t]his aim however should not be achieved to the detriment of the other interests the prospectus is meant to protect. In fact according to the Directive (Article 5(1)), the prospectus shall contain all the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor and of the rights attaching to such securities.* To this end, when evaluating whether documents may or may not be incorporated by reference, the obligation to simplify procedures and reduce costs for issuers should be weighed against the fact that the natural location of the information required is the prospectus, and that the information should be presented in an easily analysable and comprehensible form.
14. In the advice – which was ultimately taken on board by the Commission – CESR suggested that, assuming that certain recommendations in its advice were taken on board and the requirements set by the PD were met, information contained in the documents listed below could be incorporated by reference in a prospectus:
- a) annual and interim financial information;
  - b) documents prepared on occasion of a specific transaction such as a merger or de-merger;
  - c) audit report and financial statements;

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<sup>1</sup> CESR's Advice on Level 2 Implementing Measures for the Prospectus Directive (CESR/03-208), <http://www.esma.europa.eu/system/files/83.pdf>

- d) memorandum and articles of association;
  - e) earlier approved and published prospectuses;
  - f) regulated information; and,
  - g) circulars to security holders.
15. The abovementioned non-exhaustive list of documents corresponds to the list now contained in Article 28(1) of the PR which lays down the arrangements for incorporation by reference and establishes the requirement that *[w]hen incorporating information by reference, issuers, offerors or persons asking for admission to trading on a regulated market shall endeavour not to endanger investor protection in terms of comprehensibility and accessibility of the information.*
  16. Following the Commission's fulfilment of the mandate in Article 11(3) of the original PD, the mandate was changed by the Amending Directive which, in addition to deleting Article 10 of the PD (and thereby the opportunity to incorporate by reference information filed in accordance with it), conferred on the Commission the obligation to adopt measures concerning the information to be incorporated by reference by means of delegated acts. The new mandate did not set a deadline for such delegated acts and the Commission did not utilise the mandate.

*ESMA's current mandate*

17. Article 1(2) of the Omnibus II Directive changed the mandate in Article 11(3) of the Prospectus Directive once again by providing the following empowerment to ESMA to deliver draft RTS to the Commission:  
*In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the information to be incorporated by reference.*
18. Power is delegated to the Commission to adopt the draft RTS referred to above in accordance with Articles 10 to 14 of the ESMA Regulation.

### **II.iii Publication of the prospectus**

19. Article 14 of the PD contains provisions on the publication of prospectuses. The article has also previously been amended both by the Amending Directive and by the Omnibus I Directive.
20. The original PD contained a mandate in Article 14(8) for the Commission to adopt implementing measures concerning paragraphs 1 to 4 of Article 14 by 1 July 2004. The Commission fulfilled this mandate by enacting Article 29 to 33 of the PR. The Amending Directive inserted a new mandate in PD Article 14(8) for the Commission to adopt measures concerning paragraphs 1 to 4 of Article 14 by means of delegated acts. No deadline was given for such delegated acts and the Commission has not utilised the mandate.
21. Article 1(4) of the Omnibus II Directive replaced the previous PD Article 14(8) with an empowerment for ESMA to draw up draft RTS for delivery to the Commission:  
*In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions relating to the publication of the prospectus in paragraphs 1 to 4.*
22. Power is delegated to the Commission to adopt the draft RTS referred to above in accordance with Articles 10 to 14 of the ESMA Regulation.

## **II.iv Dissemination of advertisements**

23. Article 15 of the PD sets out provisions regarding advertisements relating to an offer of securities to the public or an admission of securities to trading on a regulated market. The article has been amended both by the Amending Directive and by the Omnibus I Directive.
24. Originally, the PD contained a mandate in Article 15(7) for the Commission to adopt implementing measures concerning the dissemination of advertisements announcing the intention to offer securities to the public or admit securities to trading and concerning PD Article 15(4). The deadline for adopting such measures was 1 July 2004. The Commission fulfilled the mandate with Article 34 of the PR.
25. The Amending Directive changed PD Article 15(7), mandating the Commission to adopt measures concerning the dissemination of advertisements announcing the intention to offer securities to the public or admit such to trading and concerning PD Article 15(4) by means of delegated acts. The mandate did not specify a deadline by which the Commission had to deliver the delegated acts and the Commission has not utilised the mandate.
26. Article 1(5) of the Omnibus II Directive changed PD Article 15(7) once again, this time empowering ESMA to draw up draft RTS for submission to the Commission:  
*In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and specify the provisions laid down in paragraph 4.*
27. Power is delegated to the Commission to adopt the draft RTS referred to above in accordance with Articles 10 to 14 of the ESMA Regulation.

## **III. Draft RTS on approval**

### **III.i Scope of the mandate**

28. The mandate contains two distinct elements for ESMA to cover in its draft RTS:
  - specification of procedures for prospectus approval; and
  - specification of conditions in accordance with which time limits for prospectus approval may be adjusted.

#### *Procedures for approval*

29. “Approval” is defined in Article 2(1)(q) of the PD as [...] *the positive act at the outcome of the scrutiny of the completeness of the prospectus by the home Member State’s competent authority including the consistency of the information given and its comprehensibility.*
30. In addition, Recital 8 of the Amending Directive states that ensuring the correct and full application of Union law is a core prerequisite for the integrity, efficiency and orderly functioning of financial markets and further states that it is expected that ESMA will contribute to that goal by issuing a single rule book and by fostering a more convergent approach regarding the scrutiny and approval of prospectuses.

31. Taking the preceding paragraphs into account, ESMA considers there to be a distinction between the concepts of scrutiny and approval and understands that, for the purposes of the mandate included in the Omnibus II Directive, ESMA is solely empowered to specify the procedures relating to the approval of the prospectus. ESMA's role in terms of scrutiny relates to supervisory convergence and this is more appropriately dealt with by way of either guidelines or other convergence tools available to ESMA. ESMA considers that the approval process begins when a draft prospectus is first submitted to a national competent authority ('NCA') and finishes when the NCA either approves or refuses approval of that prospectus.
32. Furthermore, ESMA is of the view that supplements should be considered out of scope of the mandate. This is based on the fact that the mandate refers to prospectuses and not to supplements and that supplements are covered by PD Article 16 and not by PD Article 13 which is the basis for the current mandate. ESMA notes, however, that according to PD Article 16 supplements shall be approved in the same way as the prospectus.

#### *Adjustment of time limits*

33. ESMA has examined the historical background to the second part of the mandate regarding adjustment of time limits for approval. The initial legislative proposal for the PD contained a mandate for the Commission to adopt technical rules concerning "adaptation of deadlines" in relation to time limits, but the proposal was accompanied by longer time limits for NCAs to approve prospectuses<sup>2</sup>. During the legislative development process, the Commission's mandate changed to adopting implementing measures according to which time limits may be "reduced" and later, in tandem with a reduction in the draft time limits, "reduced" was changed to "adjusted".
34. PD Article 13 only refers to time limits in the context of NCAs. As such, ESMA considers it to be outside the scope of the mandate to specify time limits that would be applicable to market participants seeking approval of a prospectus.
35. Lastly, ESMA considers that a plain reading of the mandate would only permit it to specify the *conditions* in accordance with which the time limits for prospectus approval may be adjusted rather than to specify the *actual new time limits*.

### **III.ii Content of draft RTS**

#### **III.ii.i Procedures for approval**

36. As identified above, ESMA considers that the first part of the approval mandate solely relates to the *procedures* for approval of the prospectus and not *requirements relating to the contents* of the prospectus. On that basis, ESMA is of the view that its focus should be on the method and contents of communications between NCAs and the persons responsible for drawing up a prospectus. ESMA considers that the person responsible for drawing up the prospectus is the issuer, offeror or person asking for admission to trading on a regulated market, cf. PD Article 13(2).
37. While not explicitly set out in the PD, ESMA recognises that the process of prospectus review and approval is an iterative one, beginning with the first submission of a draft prospectus to an NCA, where arriving at a decision regarding approval involves repeating rounds of analysis and development of the prospectus.

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<sup>2</sup> Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, 2001/0117 (COD).

*Procedures for communication regarding the draft prospectus*

38. In the context of submission of prospectuses to NCAs for review, ESMA considers that an issuer, offeror or person asking for admission to trading on a regulated market should prepare any draft prospectus at a minimum in searchable electronic format (e.g. Word or searchable PDF) and submit it via the means acceptable to the NCA.
39. According to PR Article 25(4), NCAs have the option of requiring the issuer, offeror or person asking for admission to trading on a regulated market to provide a cross reference list when the order of the items in the prospectus does not coincide with the order of information in the schedules and building blocks of the PR. ESMA is of the view that adaptations to the minimum information given in prospectuses and base prospectuses according to PR Article 23, such as in the case of hybrid securities, should also be included in the cross reference list.
40. ESMA considers that if a cross reference list is not required, the issuer, offeror or person asking for admission to trading may itself choose to provide a cross reference list. Where the issuer, offeror or person asking for admission to trading does not provide a cross reference list – either on requirement from the NCA or on his own initiative – he should be obliged to annotate the draft prospectus in the margin, identifying which part(s) of the prospectus demonstrate compliance with the relevant disclosure requirements under the PR to facilitate an efficient review of prospectuses submitted for approval and any related dialogue with the NCA. The final version of the prospectus submitted to the NCA should not contain annotation.
41. Initial drafts of the prospectus should be in substantially complete form. As regards subsequent drafts of the prospectus, ESMA considers that the use of tools which show the marking or tracking of changes made compared to the preceding version facilitates an efficient review by the NCA. On that basis, subsequent drafts of the prospectus should be marked or tracked to show changes which have been made against the preceding version of the prospectus reviewed by the NCA. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement to mark or track changes, an identification of each change should be provided to the NCA in writing. In addition to the marked up version, ESMA considers that a clean version of each subsequent draft should also be submitted to the NCA.
42. In order to effectively review and approve prospectuses, NCAs may require supplementary information and confirmations. There is an implicit acknowledgement of this in Article 13(4) of the PD which refers to the "documents" rather than the "prospectus" or "draft prospectus". This indicates that the NCA has the right to require ancillary support documentation in relation to prospectus approval. Furthermore, PD Article 13(4) clarifies that the time limits for approval only apply from the date on which the NCA receives the complete information needed to review the prospectus.
43. ESMA considers that support documentation and confirmations required by NCAs is an area which could benefit from increased harmonisation and clarity. However, ESMA also considers that it is important to maintain a degree of flexibility regarding the point in the prospectus approval process at which this documentation is provided.
44. ESMA is of the view that along with the initial submission of the draft prospectus, or, where appropriate, during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market should submit draft versions of the following supporting information at a minimum in searchable electronic format:
  - a) if requested or on the initiative of the issuer, offeror or person asking for admission to trading, where the order of items in the prospectus does not coincide with the order in the schedules and building blocks in the PR, a cross reference list identifying the pages where each item can be found in the prospectus. This cross reference list should also identify

any items from the relevant schedules and building blocks in the PR that have not been included in the prospectus because they are not applicable;

- b) where the list identified in (a) is not provided, a document identifying any items from the relevant schedules and building blocks in the PR that have not been included in the prospectus because they are not applicable;
  - c) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the NCA to authorise the omission of information from the prospectus, an omission request;
  - d) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the NCA to provide the NCA of a relevant host Member State with a certificate of approval when the prospectus is approved, a request to this effect;
  - e) any information which is incorporated by reference into the prospectus unless such information has already been approved by or filed with the NCA in accordance with the provisions of PD Article 11; and,
  - f) any other information necessary for the NCA's review process and expressly required by the NCA for that purpose.
45. In the case of subsequent submissions of the prospectus, where the amended prospectus has been marked up to show the changes made to the preceding version submitted to the NCA, the prospectus should be accompanied by a statement confirming that all changes to the prospectus are shown.
46. NCAs should acknowledge, in writing via electronic means, the receipt of a prospectus as soon as possible and no later than two working days following receipt. ESMA considers that the electronic acknowledgement should advise of the following:
- any relevant reference number; and,
  - the contact point(s) (e.g. an email address) within the NCA to which queries regarding the submission can be addressed.
47. After reviewing the compliance of the draft prospectus with relevant provisions of the prospectus regime, NCAs should return clear comments in writing by electronic means to an address specified when the initial submission of the draft prospectus was made<sup>3</sup>. ESMA considers that comments in relation to the prospectus may be provided orally where such are of a minor nature or where timing is of the utmost importance, particularly towards the end of the review process.
48. ESMA considers that while NCAs are not prevented from raising additional comments on subsequent drafts of a prospectus under review, they should endeavour to raise any comments on the draft prospectus at the earliest possible opportunity.
49. Where comments have been raised by an NCA on an initial or subsequent draft of the prospectus, each subsequent draft of the prospectus should be accompanied by an explanation, either through a list of changes or otherwise, of the relevant resolutions to each of the comments raised by the NCA in respect of the previous submission. Explanations should be clear and indicate where comments from the NCA have been resolved as opposed to merely stating that they are resolved. Where changes made to a previous draft of a prospectus are self-explanatory or clearly address a

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<sup>3</sup> ESMA acknowledges that communication by electronic means may be temporarily unfeasible due to unforeseen and exceptional circumstances. ESMA would expect such an interruption to be covered by business continuity plans put in place by the individual NCA.

comment raised by the NCA, an indication of where the comments of the NCA have been addressed should suffice.

*Procedures for communication regarding the final prospectus*

50. A prospectus can only be approved once all the relevant provisions of national and EU prospectus law have been fully addressed and all comments which have been raised by the NCAs have been resolved.
51. ESMA is of the view that in advance of or, at the latest, on the approval date, the issuer, offeror or person asking for admission to trading on a regulated market should submit the following information to the NCA, at a minimum in electronic format, if the information has changed since it was submitted in draft form during the review process:
  - a) the prospectus (in searchable electronic format);
  - b) if requested by the NCA or on the initiative of the issuer, offeror or person asking for admission to trading, where the order of items in the prospectus does not coincide with the order in the schedules and building blocks in the PR, a cross reference list identifying the pages where each item can be found in the prospectus. This cross reference list should also identify any items from the relevant schedules and building blocks in the PR that have not been included in the prospectus because they are not applicable;
  - c) where the list identified in (b) is not provided, a document identifying any items from the relevant schedules and building blocks in the PR that have not been included in the prospectus because they are not applicable;
  - d) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the NCA to authorise the omission of information from the prospectus, an omission request in its final version (where not granted at an earlier stage);
  - e) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the NCA to provide the NCA of a relevant host Member State with a certificate of approval when the prospectus is approved, a request to this effect in its final version; and,
  - f) any other information necessary for the NCA's review process and expressly required by the NCA for that purpose.
52. The NCA should provide notification of approval to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, as soon as possible and no later than by close of business on the working day following approval.
53. Considering the fact that approval is defined as being the *positive* outcome of the approval process (cf. PD Article 2(1)(q)), ESMA considers that there must be a corresponding *negative* outcome where approval is not granted by an NCA. ESMA believes that there is a difference between non-approval which forms part of the iterative review process and refusal to approve which signals the termination of the review process by the NCA.
54. When the issuer, offeror or person asking for admission to trading is unable or unwilling to comply with the disclosure requirements of the prospectus regime or the requirements of the NCA, an NCA should be entitled to refuse the approval of the prospectus and to close the review process. Refusal should not be considered as refusal of the offer or request for admission to trading but merely as a refusal to approve the prospectus. Refusal, along with the reasons supporting the decision of the NCA, should be notified to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, in a timely manner and no later than by close of business on the working day following that of the decision.

55. Based on the above considerations, ESMA proposes the following wording for Articles 2 and 3 of the draft RTS:

*Article 2*

**“1. The issuer, offeror or person asking for admission to trading on a regulated market shall submit the prospectus at a minimum in searchable electronic format.**

**2. Along with the initial submission of the prospectus, or where appropriate during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market shall submit the following information at a minimum in searchable electronic format:**

- (1) if required by the competent authority of the home Member State according to Article 25(4) of Commission Regulation (EC) 809/2004 or on their own initiative, a cross reference list which must also identify any items from the relevant schedules and building blocks of Commission Regulation (EC) 809/2004 that have not been included in the prospectus because they are not applicable;**
- (2) where the list mentioned in point (1) is not submitted, a document identifying any items from the relevant schedules and building blocks of Commission Regulation (EC) 809/2004 that have not been included in the prospectus because they are not applicable;**
- (3) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the competent authority of the home Member State to authorise the omission of information from the prospectus according to Article 8(2) of Directive 2003/71/EC, a request to that effect;**
- (4) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the competent authority of the home Member State to notify the competent authority of a host Member State, upon approval of the prospectus, with a certificate of approval according to Article 18(1) of Directive 2003/71/EC, a request to this effect;**
- (5) any information which is incorporated by reference into the prospectus unless such information has already been approved by or filed with the competent authority of the home Member State in accordance with Article 11 of Directive 2003/71/EC; and,**
- (6) any other information necessary for the review by the competent authority of the home Member State and expressly required by the competent authority for that purpose.**

**3. Where the order of the items in the prospectus does not coincide with the order of the information provided for in the schedules and building blocks according to which the prospectus is drawn up, and the issuer, offeror or person asking for admission to trading on a regulated market does not provide a cross reference list, the prospectus shall be annotated in the margin to clarify which sections of the prospectus correspond to the relevant disclosure requirement.**

**4. Following initial submission 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 a subsequent draft of the prospectus, the subsequent draft shall be marked up to show changes made to the preceding unmarked draft of the prospectus as submitted to the competent authority. The subsequent draft of the prospectus shall be accompanied by a written statement confirming that all changes to the preceding draft of the prospectus are identified. An unmarked draft of the prospectus shall always be submitted along with the draft showing the changes made.

5. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement laid down in paragraph (4), an identification of each change made to the preceding draft of the prospectus shall be provided to the competent authority of the home Member State in writing.

6. Each subsequent draft of the prospectus shall be accompanied by an explanation of how comments raised by the competent authority of the home Member State regarding the preceding submission have been addressed. Where changes made to a previous draft of a prospectus are self-explanatory or clearly address a comment raised by the competent authority, an indication of where the comments of the competent authority have been addressed shall suffice.

7. On the approval date, or in advance thereof, the issuer, offeror or person asking for admission to trading on a regulated market shall submit, at a minimum in electronic format, the prospectus and any information mentioned under paragraph (2) which has been changed since the preceding submission. The prospectus shall be in searchable format.

Where information submitted along with the initial draft of the prospectus has not changed and is not resubmitted, the issuer, offeror or person asking for admission to trading on a regulated market shall confirm in writing that the information contained in the prior submission is still correct.”

### ***Article 3***

“1. The competent authority of the home Member State shall acknowledge receipt of the initial application for approval of a prospectus in writing, at a minimum 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 advise 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(s) within the authority to which queries regarding the application may be addressed.

2. Upon review, the competent authority of the home Member State shall provide any comments on the submitted prospectus to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, to a contact point specified when the initial application for approval was made. In exceptional circumstances the competent authority may provide comments orally, particularly where such are of a minor nature or where timing is of utmost importance.

3. 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 approval in writing, at a minimum via electronic means, as soon as possible and no later than by close of business on the working day following the decision.

**4. When the issuer, offeror or person asking for admission to trading on a regulated market is unable or unwilling to comply with the disclosure requirements of Directive 2003/71/EC and Commission Regulation (EC) No 809/2004, the competent authority of the home Member State is entitled to refuse approval of the prospectus and terminate the review process.**

**The competent authority of the home Member State shall notify its decision to refuse approval and terminate the review process to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, as soon as possible and no later than by close of business on the working day following the decision. The competent authority shall provide the reasons for its decision in the notification.”**

**Question 1: Is there any information that should be added or removed from the list in the proposed Article 2(2)?**

**Question 2: Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

**Question 3: Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?**

### **III.ii.ii Adjustment of time limits**

56. Article 13 of the PD contains the following provisions on time limits:

Article 13(2)

*This competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 10 working days of the submission of the draft prospectus [...]*

Article 13(3)

*The time limit referred to in paragraph 2 shall be extended to 20 working days if the public offer involves securities issued by an issuer which does not have any securities admitted to trading on a regulated market and who has not previously offered securities to the public.*

Article 13(4)

*If the competent authority finds, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, the time limits referred to in paragraphs 2 and 3 shall apply only from the date on which such information is provided by the issuer, the offeror or the person asking for admission to trading on a regulated market.*

*In the case referred to in paragraph 2 the competent authority should notify the issuer if the documents are incomplete within 10 working days of the submission of the application.*

57. PD Article 13(3) sets out conditions under which the 10 working day limit shall be extended to 20 working days. This is limited to public offers by issuers which 1) do not have any securities admitted to trading, and 2) have not previously offered securities to the public.

58. The effect of the first paragraph in Article 13(4) is that the period within which an NCA has to approve a prospectus only starts when the draft prospectus submitted to the NCA is complete. If the submitted draft prospectus is incomplete, the NCA must notify that fact to the issuer, offeror or person asking for admission to trading within the 10 or 20 working day period and the 10 or 20 working day period will start *ab initio* again when the issuer, offeror or person asking for admission to trading submits a new draft to the NCA with the deficiency rectified. The second paragraph in Article 13(4) clarifies that NCAs should take no more than 10 or 20 working days to assess draft prospectuses and inform issuers, offerors or persons asking for admission to trading of incompleteness.
59. With the above clarifications in mind, ESMA considers that there are a number of difficulties connected with responding to the mandate regarding time limits for prospectus approval.
60. First of all, the mandate in Article 1(3) of the Omnibus II Directive empowers ESMA to draw up draft RTS specifying the conditions in accordance with which time limits may be adjusted. ESMA considers that “adjusted” implies that it is possible either to reduce or extend the time limits laid down in PD Article 13(2), 13(3) and 13(4). As such, a draft RTS in response to this mandate would lay down conditions for NCAs to apply either a shorter or a longer time limit for prospectus approval than the ones specified in the PD.
61. However, the time limits specified in PD Article 13(2), 13(3) and 13(4) will remain set at Level 1 and therefore in national legislation transposing the PD. Therefore, ESMA considers that any changes proposed by ESMA in the draft RTS could potentially clash with the Level 1 provisions.
62. Secondly, the wording of the mandate is to specify the *conditions* in accordance with which time limits may be adjusted, not to specify the *adjusted time limits themselves*. ESMA considers that this would entail the risk of promoting non-harmonisation of prospectus approval: If conditions for extending/reducing time limits for approval were to be specified without a parallel specification of such extended/reduced time limits, one NCA might extend the time limit for approval from 10 to 18 working days when the conditions for extending are met while another NCA might decide to extend the time limit from 10 to 25 working days in the same situation. This would be compliant with the new regime but clearly runs counter to the harmonisation purpose behind the entire prospectus regime.
63. Thirdly, ESMA is unaware of there being any substantial problems with the operation of the existing time limits and as such adjusting the time limits does not seem fundamentally necessary. The 10 and 20 working day limits laid down in PD Article 13 could generally be considered sufficient for NCAs to meet their obligations of reviewing the compliance of prospectuses with the prospectus regime, and if a draft prospectus does not comply with the prospectus regime because it is incomplete, inconsistent or incomprehensible, the NCA will inform the issuer thereof and the 10 or 20 working day time limit will start anew when the prospectus is resubmitted. On this basis, there seems to be no significant need to *extend* time limits.
64. Additionally, specifying conditions for extending the time limits for prospectus approval seems to run counter to the Amending Directive’s policy objective of *reducing administrative burdens relating to the publication of a prospectus in the case of offers of securities to the public and admission to trading in regulated market within the Union*<sup>4</sup>. It is questionable whether allowing NCAs to apply longer time limits for prospectus approval is reconcilable with this objective.

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<sup>4</sup> Recital 30 of the Amending Directive.

65. At the same time, a *reduction* of time limits does not seem to add value to the existing regime. The time limits set out in PD Article 13 and transposed into national legislation are maximum thresholds for NCAs to comply with to ensure that issuers, offerors or persons asking for admission to trading will not have to wait for an unreasonable amount of time for a prospectus to be approved. However, NCAs are free to approve prospectuses faster than the time limits specify and, on many occasions, do so. NCAs have little interest in, and do not benefit from, evaluating prospectuses for longer than necessary and the general approach is to revert to the persons responsible for drawing up the prospectus in a timely manner once the NCA's review of the prospectus has concluded. It therefore seems that there is no significant need to *reduce* time limits either.
66. Furthermore, specifying conditions for reducing the time limits for prospectus approval could put NCAs under excessive time pressure when scrutinising prospectuses, creating a risk of less comprehensive scrutiny and even lapses in the approval process. This seems directly at odds with the purpose of ensuring investor protection which underlies the prospectus regime<sup>5</sup>.
67. ESMA did consider specifying that time limits should be shorter than the maximum permitted under the PD for securities notes and for subsequent drafts of prospectuses, both in the case of IPOs and otherwise, but, given the limitations of the mandate, was unable to elaborate any substantive provisions that would have contributed to the overall goal of increased harmonisation. Furthermore, by not being in a position to specify new time limits, any provision drafted would have lacked sufficient precision to be effective in practice. However, ESMA is aware that, where possible and dependent on the quality of the submission, in practice NCAs take fewer days on subsequent submissions than on the initial submission.
68. On the basis of the above concerns and after careful consideration, ESMA has made the decision not to draw up draft RTS regarding the conditions in accordance with which time limits may be adjusted.

## **IV. Draft RTS on incorporation by reference**

### **IV.i Scope of the mandate**

69. A number of considerations can help clarify the scope of the mandate in Article 1(2) of the Omnibus II Directive. Firstly, since the wording of the mandate to the Commission in the original Prospectus Directive was similar to the wording of the current mandate to ESMA, it seems reasonable to take the Commission's approach in fulfilling its mandate into account when considering the scope of ESMA's mandate.
70. Based on the reflections set out by CESR in the advice which the Commission took on board, ESMA is of the view that in responding to the mandate in Article 1(2) of the Omnibus II Directive, it is imperative to seek to strike a balance between reducing costs for companies raising capital and ensuring that the goal of providing adequate investor protection is respected.
71. This is further corroborated by Recital 29 of the PD which states that *[t]he opportunity of allowing issuers to incorporate by reference documents containing the information to be disclosed in a prospectus – provided that the documents incorporated by reference have been previously filed with or accepted by the competent authority – should facilitate the procedure of*

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<sup>5</sup> Recital 10 and 16 of the PD.

*drawing up a prospectus and lower the costs for the issuers without endangering investor protection.*

72. Secondly, taking into consideration the wording in Article 1(2) of the Omnibus II Directive, ESMA considers that the draft RTS should be limited to the specification of information which can be incorporated by reference. This means that topics such as comprehensibility and accessibility of documents containing information which may be incorporated by reference are considered outside the scope of this mandate. ESMA is aware that there might be outstanding issues regarding these topics but, given the limited scope of the mandate, ESMA could consider dealing with such issues at a later date. Harmonisation is also central to the mandate; therefore the provision of clarity both to market participants and NCAs is key.
73. Thirdly, ESMA is of the view that the task of specifying the information to be incorporated by reference is best undertaken by compiling an exhaustive list of information which can be incorporated by reference. ESMA considered whether the specification of information should follow a principles-based approach, but taking into account that the principles for incorporation by reference are already laid down in Article 11 of the PD, an exhaustive list would have the benefit of adding legal clarity and promoting harmonisation.
74. While it would be preferable to deal with all aspects of incorporation by reference in one legal instrument, ESMA considers that its mandate only extends to the subject matter of Article 28(1) of the PR. Any revision of the provisions contained in PR Article 28(2)-(5) would exceed the mandate provided to ESMA by the co-legislators. To avoid the duplication of legislative provisions, ESMA's proposal below will necessitate the deletion of PR Article 28(1) whereas Article 28(2)-(5) will remain unchanged in the PR.

#### **IV.ii Content of draft RTS**

75. Based on the text of Article 11(1) of the PD, ESMA considers that there are three conditions for incorporating information into a prospectus by reference:
- i. the document(s) containing the information have been approved or filed with the home competent authority in accordance with the PD; or
  - ii. the document(s) containing the information have been filed with the home competent authority in accordance with Directive 2004/109/EC (the 'Transparency Directive' or 'TD')<sup>6</sup>;
  - iii. in both of the above cases, such documents must be previously or simultaneously published.

##### **IV.ii.i Condition i: "filed or approved in accordance with the Prospectus Directive"**

76. Regarding the condition that information incorporated by reference must be contained in document(s) approved or filed with the competent authority of the home Member State under the PD, it is to be noted that within this directive "approved" and "filed" can be distinguished as two separate stages of the treatment of the same document. In other words, approval and filing is not one step but two, regardless of the fact that some NCAs automatically file a prospectus immediately after approving it. In this regard, while it is very often the case that the home NCA who approved the document to be incorporated by reference or with whom such document was

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<sup>6</sup> No reference is made to the term "approved" in connection with the TD because there are no approval requirements under the TD.

filed and the home NCA for the purpose of approval of the prospectus into which it will be incorporated by reference will be one and the same, this will not necessarily always be the case. In other words, information from documents approved and filed with other NCAs as home Member State may also be incorporated by reference. The draft RTS should therefore take this into account when specifying the information that may be incorporated by reference.

77. The difference between the two processes was acknowledged when transposition of the PD into national legislation was discussed between the Commission and Member States in January 2005. The summary from the transposition meeting thus states that PD Article 14(1) requires that a prospectus must be filed *and published within a reasonable time after approval. If the period of delay between approval and filing / publication is significant, it would fall to the CA's general supervisory powers functions whether to take any regulatory action in respect of the delay*<sup>7</sup>.
78. As such, a document can be:
- a) approved but not yet filed (for example a prospectus);
  - b) filed but not approved (this would be the case for documents not subject to approval); or,
  - c) both approved and filed.
79. As regards a), only certain documents can be approved by an NCA in accordance with the PD: prospectuses/base prospectuses, registration documents, securities notes, summaries and supplements.
80. The meaning of “filed” is less straightforward as there is no definition of this term in either the PD or the PR. However, the word “filed” is used a number of places in the PD. As such, ESMA understands that “documents filed in accordance with the PD” is to be understood as documents in connection with which the word “filed” is used in the PD. This is the case for the prospectus (PD Article 13(1)), the final offer price and amount of securities (PD Article 8(1), second subparagraph) and final terms (PD Article 5(4))<sup>8</sup>. For the sake of clarity, documents made “available” under Article 4 of the PD or documents provided to an NCA, following a request under Article 21, would not be considered “filed”.
81. Furthermore, while registration documents may be filed without approval under PD Article 12(3), these may not be incorporated by reference as they are not published.
82. While the approach outlined above could be viewed as a strict or literal interpretation of the term “filed”, ESMA does not consider that any other interpretation would be in line with the wording of the mandate and ipso facto the intention of the co-legislators. The goal of the RTS in this case is to ensure consistent application and harmonisation when it comes to incorporation by reference, thereby providing a level playing field and mitigating the possibility of regulatory arbitrage.
83. While the proposed RTS seeks to provide clarity on the topic of incorporation by reference, ESMA is aware that some NCAs may be obliged to change existing practices in this area. Although certain NCAs have facilitated “voluntary filing” of documents under the prospectus regime in the past (such as circulars sent to shareholders, financial statements not filed in accordance with the TD, documents prepared in connection with a merger/takeover when such is not required under national provisions under the TD), and this could be seen as reducing the administrative burden

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<sup>7</sup> 3<sup>rd</sup> Informal Meeting on Prospectus Transposition – 26 January 2005 (MARKT/G3/WG D(2005)), page 8, [http://ec.europa.eu/internal\\_market/securities/docs/prospectus/summary-note-050126\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/prospectus/summary-note-050126_en.pdf).

<sup>8</sup> Prior to the date of application of the Amending Directive, this was also the case for documents filed in accordance with PD Article 10.

on issuers, offerors and persons asking for admission to trading, such practice is arguably not in line with the wording of PD Article 11. In many cases, the facilitation of such filings by NCAs, which were possible prior to 2007 (but under CARD rather than PD), has continued despite legislative change and has led to a vastly different application of incorporation by reference across Member States. Such an uneven application of the provision runs counter to the goal of a single rule book and may endanger the objective of ensuring that investors are protected. ESMA considers that had the co-legislators intended to facilitate incorporation of documents submitted on a voluntary basis, they would not have included the explicit requirement that filing be done in accordance with the PD. Furthermore, the deletion of the reference to PD Article 10 in PD Article 11 has further reduced the scope for filing of certain information under the PD.

84. Lastly concerning the condition that information must be contained in documents that have been filed or approved in accordance with the Prospectus Directive, ESMA discussed whether the list of information which may be incorporated by reference should include *all* information contained in documents approved by or filed with the NCA under the PD or if certain information should be excluded from the list due to its seeming lack of relevance. For example, though the PD explicitly allows filing of the pricing notice under Article 8(1), second subparagraph, it is difficult to see under which circumstances such information would be incorporated by reference.
85. On the one hand, it would seem that such a limitation to information which may be incorporated by reference would comply with the condition that RTS may not modify essential elements of Level 1 but only provide technical specifications within the principles laid down in Level 1<sup>9</sup>.
86. However, ESMA is of the view that, seeing as PD Article 11(1) states that *Member States shall allow information to be incorporated by reference [...] (emphasis added)*, it would be contrary to the co-legislators' intention to exclude some information from the list created in the RTS, even if the practical relevance of such seems insignificant.
87. On the basis of the above reflections, ESMA is of the view that NCAs must, subject to the information complying with the requirements mentioned in paragraph 99 below, allow information contained in the following documents to be incorporated by reference as such documents comply with the requirement of being approved or filed in accordance with the PD:
  - prospectuses (including base prospectuses, approved registration documents, and any supplements thereto, securities notes and summaries);
  - final offer price and amount of securities (Article 8(1) notifications); and,
  - final terms.

**Question 4: Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.**

**Question 5: Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

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<sup>9</sup> Article 290(1) of the Treaty on the Functioning of the European Union; Recital 40 of the Prospectus Directive.

#### **IV.ii.ii Condition ii: “filed in accordance with the Transparency Directive”**

88. Regarding the second condition for incorporation by reference – that documents are filed in accordance with the TD – as noted in paragraph 10, the original provisions of Article 11(1) allowed incorporation by reference of information contained in documents filed with the NCA under CARD. The Amending Directive changed Article 11 of the PD by replacing the reference to CARD, the relevant provisions of which were repealed by the TD, with a reference to the TD. Furthermore, the reference to the now repealed PD Article 10 concerning the Annual Information Document was removed. While the reference to CARD in the PD was only formally removed by the Amending Directive in 2010, ESMA considers that it was no longer possible to incorporate by reference documents filed under CARD once the TD had been transposed at national level in 2007.
89. Under the TD, Article 19 expressly requires only regulated information to be filed with the NCA of the home Member State. According to TD Article 2(1)(k), *‘regulated information’ means all information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer’s consent, is required to disclose under this Directive, under Article 6 of Directive 2003/6/EC [...], or under the laws, regulations or administrative provisions of a Member State under Article 3(1) of this Directive.* Lastly, TD Article 3(1) specifies that *[t]he home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive except that it may not require issuers to publish periodic financial information on a more frequent basis than the annual financial reports referred to in Article 4 and the half-yearly financial reports referred to in Article 5.*
90. ESMA understands that the removal of the reference to CARD and its replacement with a reference to the TD indicates that it was the co-legislators’ intention to reduce the type of documents from which incorporation by reference of information is possible. By way of example, it was possible under CARD to file memoranda of association or circulars to securities holders and therefore such documents were permitted to be incorporated by reference. This is reflected in the current Article 28(1) of the PR. The provisions in CARD concerning the filing of these types of documents with the NCA were repealed by the TD but, in contrast to provisions relating to e.g. annual financial statements, were not replaced.
91. Taking the above into account, ESMA considers that, despite some national practices to the contrary (without prejudice to national provisions under Article 3(1) of the TD discussed below), certain annual financial statements and interim management statements can no longer be incorporated by reference as was the case under CARD, given the fact that issuers issuing exclusively debt securities (as defined in the TD) with a denomination of at least €100,000 are exempt from these disclosure obligations under the TD. On that basis, it is evident that the replacement of the reference to CARD by a reference to the TD has reduced the type of information which can be considered “filed” in accordance with the TD and as such incorporated by reference.
92. On that basis, ESMA believes that the following information, once filed in accordance with the TD, must be allowed to be incorporated by reference as it constitutes regulated information:
- Choice of home Member State;
  - Annual financial report (except of debt securities with a denomination of €100,000 or more);
  - Half-yearly financial reports (except of debt securities with a denomination of €100,000 or more);
  - Report on payments to governments;

- Information about major holdings;
  - Information on own shares;
  - Information on total number of voting rights and capital;
  - Information on change in the rights and other additional information;
  - Inside information; and,
  - Directors' dealings.
93. Additionally, regulated information covers information which the issuer, or any other person who has applied for admission to trading of securities without the issuer's consent, is required to disclose under provisions enacted in connection with national transposition of Article 3(1) of the TD. If additional information is required to be filed under national provisions enacted under the TD, such information would fall under the definition of regulated information and be eligible for incorporation by reference.
94. ESMA considers that making an exhaustive list of information disclosed under national requirements in each Member State would be both practically challenging and add very little value. Instead, ESMA suggests adding to the above list of information the provision that information required to be disclosed according to the laws, regulations or administrative provisions of a Member State adopted under TD Article 3(1) may also be incorporated by reference. In addition to being more concise than an exhaustive list of information required according to the national provisions of the 28 Member States, this approach would facilitate any future changes to the information which can be filed in accordance with the TD. While aiming for the consistent harmonisation required by the mandate, ESMA is aware that the existence of a minimum harmonisation provision such as that contained in Article 3(1) TD somewhat impedes this goal.

**Question 6: Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.**

**Question 7: Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

#### **IV.ii.iii Condition iii: “previously or simultaneously published documents”**

95. The third condition expressed in PD Article 11(1) is that documents must be previously or simultaneously published to be eligible for incorporation by reference. Arguably, this must be taken to mean that documents approved or filed in accordance with the PD have to be published in accordance with the PD's publication requirements while documents filed in accordance with the TD have to be published in accordance with the TD's publication requirements.
96. As such publication requirements are clearly defined, in Article 14 for the PD and Article 21 for the TD, respectively, the meaning of the term “previously published” seems quite straightforward: Any information approved or filed in accordance with the PD and published in accordance with Article 14 thereof and any information filed in accordance with the TD and published in accordance with Article 21 thereof may be incorporated into a prospectus by reference.

97. The meaning of the term “simultaneously published” is a bit less clear-cut as it is not patently obvious which information could be published exactly simultaneously to the publication of the prospectus into which the information is being incorporated by reference. However, Article 26(4) of the Prospectus Regulation casts light on the matter with the following wording:

*In case the issuer, the offeror or the person asking for admission to trading on a regulated market has previously filed a registration document for a particular type of security and, at a later stage, chooses to draw up base prospectus in conformity with the conditions provided for in points (a) and (b) of Article 5(4) of Directive 2003/71/EC, the base prospectus shall contain:*

1. *the information contained in the previously or simultaneously filed and approved registration document which shall be incorporated by reference, following the conditions provided for in Article 28 of this Regulation;*
  2. *the information which would otherwise be contained in the relevant securities note less the final terms where the final terms are not included in the base prospectus.*
98. This provision indicates that the concept of “simultaneously published” in PD Article 11(1) is put in place for the purpose of situations where an issuer, offeror or person asking for admission has had a registration document approved by the NCA but has not yet filed or published this document and decides to draw up a base prospectus. As the issuer, offeror or person asking for admission to trading is obliged to incorporate the registration document into the base prospectus by reference, but the registration document has not yet been published, such simultaneous publication has to take place for the incorporation of the registration document to be possible. Where a number of prospectuses are published at the same time they may equally incorporate information from such simultaneously published prospectuses.

**Question 8: Do you consider that there are any other documents that could meet the criteria of being “simultaneously published” from which information could be incorporated by reference?**

99. It is important to note that the establishment of a list does not imply that NCAs are always obliged to accept the incorporation by reference of any information included in the list. NCAs should consider the incorporation by reference of any information in conjunction with the conditions set out by the PD and PR. As such, NCAs would still have the possibility to reject, on a case-by-case basis, the incorporation by reference of any information when such information, in its opinion:
- is not the most recent available to the issuer (PD Article 11(1));
  - is not presented in an easily analysable and comprehensible form (PD Article 5(1));
  - is not easily accessible (PR Article 29(1)(1)); or,
  - is not compliant with the language requirements (PD Article 19).

100. **On the basis of the above considerations, ESMA proposes the following wording for Article 4 of the draft RTS:**

**“The following information may be incorporated by reference in a prospectus:**

- (1) information contained in prospectuses, registration documents, securities notes or summaries approved in accordance with Article 13 of Directive 2003/71/EC;**

- (2) information contained in supplements approved in accordance with Article 16 of Directive 2003/71/EC;**
- (3) final terms filed in accordance with Article 5(4) of Directive 2003/71/EC;**
- (4) final offer price and amount of securities filed in accordance with Article 8(1) of Directive 2003/71/EC;**
- (5) the following disclosures filed in accordance with Article 19(1) of Directive 2004/109/EC:**
- (i) choice of home Member State disclosed in accordance with the second subparagraph of Article 2(1)(i) of Directive 2004/109/EC;**
  - (ii) annual financial reports disclosed in accordance with Article 4(1) of Directive 2004/109/EC;**
  - (iii) half-yearly financial reports disclosed in accordance with Article 5(1) of Directive 2004/109/EC;**
  - (iv) reports on payments to governments disclosed in accordance with Article 6 of Directive 2004/109/EC;**
  - (v) information about major holdings disclosed in accordance with Article 9(1) of Directive 2004/109/EC;**
  - (vi) information about major proportions of voting rights disclosed in accordance with Article 10 of Directive 2004/109/EC;**
  - (vii) information about financial instruments that result in an entitlement to acquire shares to which voting rights are attached disclosed in accordance with Article 13 of Directive 2004/109/EC;**
  - (viii) information about acquisition or disposal of own shares disclosed in accordance with Article 14(1) of Directive 2004/109/EC;**
  - (ix) total number of voting rights and capital shares disclosed in accordance with Article 15 of Directive 2004/109/EC; and,**
  - (x) information on changes in the rights attaching to classes of shares and securities disclosed in accordance with Article 16 of Directive 2004/109/EC;**
- (6) disclosures made in accordance with Article 6 of Directive 2003/6/EC; and,**
- (7) information provided under the laws, regulations and administrative provisions of a Member State adopted in accordance with Article 3(1) of Directive 2004/109/EC.”**

## V. Draft RTS on publication

### V.i Scope of the mandate

101. As PR Articles 29 to 33 concern publication, to fulfil its mandate ESMA must determine to what extent these five articles need to be replaced and, where necessary, provide such draft replacements.
102. As regards PR Articles 30 to 32, although an argument could be made that these are covered by the mandate, ESMA sees little benefit in further specifying these provisions by replacing them with new ones in the draft RTS.
103. Both Article 30 and 31 of the PR are sufficiently precise so as not to give rise to any confusion regarding the issues contained therein. In addition, in light of the obligation introduced by the Amending Directive regarding electronic publication, and the corresponding effective redundancy of publication in accordance with PD Article 14(2)(a), there is now little practical significance to PR Article 30 with the exception of specifying the types of newspapers in which notices for the purposes of PR Article 31 can be placed. However, given the continued existence of the possibility to publish a prospectus in a newspaper, ESMA would not propose to delete this article with the RTS. Regarding PR Article 32, ESMA considers that there would be little to be gained from either deleting or changing the provision as NCAs are aware of their obligations regarding publication and publish accordingly, and given the level of harmonisation that exists.
104. On that basis, and in order to have only one legal instrument address the topic of publication, ESMA proposes deleting Articles 30 to 32 from the PR and inserting corresponding provisions in Articles 7, 8 and 9 of the draft RTS but to largely leave the wording as is. Some minor amendments are proposed in order to take account of the obligation to publish prospectuses electronically. For consistency purposes, reference to “prospectus or base prospectus” has been changed to “prospectus” to better align the provisions with those used in the PR. Regardless of this change, the requirements apply irrespective of whether the issuer, offeror or person asking for admission to trading draws up a single document prospectus, a tripartite prospectus or a base prospectus. The proposed wording of Articles 7-9 of the draft RTS is inserted in paragraph 111 below.
105. On the other hand, ESMA does see value in amending and further specifying the requirements set out in PR Articles 29 and 33. Specifically, ESMA considers that implementing measures could clarify the meaning of certain terms and requirements in Article 14 of the PD, particularly regarding the obligation to publish prospectuses, and any documents incorporated by reference therein, electronically. In order to avoid having two legislative instruments dealing with the same subject matter, ESMA proposes deleting PR Articles 29 and 33.

#### *Publication of final terms*

106. The mandate in PD Article 14(8) refers to paragraphs 1 to 4 of PD Article 14 and none of those four paragraphs explicitly mention final terms. Nevertheless, ESMA is of the view that the publication of final terms is covered by the provisions in PD Article 14, including those in paragraphs 1 to 4. The reason is that throughout the PD, the term “prospectus” should be read as a reference to each of the permitted formats for a prospectus (single document prospectus, tripartite prospectus and prospectus consisting of a base prospectus and a set of final terms). While there is no definition of the term “prospectus” in either the PD or the PR, Chapter II of the PD is titled “Drawing up of the prospectus” and includes provisions on single document prospectuses, tripartite prospectuses and base prospectuses and final terms. All of these formats constitute prospectuses.

107. On this basis, ESMA considers that its empowerment to specify the provisions relating to the publication of the prospectus covers publication of both single document prospectuses, tripartite prospectuses and base prospectuses along with their final terms, if in a separate document.

*Publication of documents incorporated by reference*

108. PD Article 14(5) sets out provisions regarding publication of, amongst other things, information incorporated into a prospectus by reference and stipulates that such information may be published separately provided that it is made available, free of charge, to the public, in accordance with the arrangements established in PD Article 14(2).
109. ESMA considers that given the requirement for information incorporated by reference to be published in accordance with PD Article 14(2), the draft RTS specifying the provisions in Article 14(2) will affect the way in which information incorporated by reference is published. On that basis, ESMA considers it within the mandate set out in PD Article 14(8) to include certain provisions on the publication of information incorporated by reference in the draft RTS.

## **V.ii Content of draft RTS**

*Publication in newspapers, publication of the notice and list of approved prospectuses*

110. As explained in paragraphs 102-104, ESMA will delete Articles 30, 31 and 32 of the Prospectus Regulation and reiterate these in the draft RTS with slight adjustments.
111. **The three articles will become Articles 6, 7 and 8 of the draft RTS with the following wording:**

***Article 6***

**“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 7***

**“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 6 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:**

- (1) the identification of the issuer;**
- (2) 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;**
- (3) the intended time schedule of the offer/admission to trading;**
- (4) a statement that a prospectus has been published and where it can be obtained;**
- (5) the addresses where and the period of time during which a paper copy is available to the public; and,**
- (6) the date of the notice.”**

**Article 8**

**“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.”**

*Responsibility for electronic publication when such is delegated under PD Article 14(2)(c)*

112. According to PD Article 14(2)(c), the issuer, offeror or person asking for admission to trading may meet its obligation to publish the prospectus by having the financial intermediaries placing or selling the securities, including paying agents, publish the prospectus on their websites.
113. ESMA understands this provision to mean that the practical task of publication can be delegated to the financial intermediaries but that the responsibility for publication remains with the issuer, offeror or person asking for admission to trading. This is based on the fact that PD Article 14(1) states that the prospectus *shall be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market [...]* (emphasis added). As level 1 seems sufficiently clear on this issue, ESMA considers that it is not necessary to address the issue in the draft RTS.

**Question 9: Do you agree that it is sufficiently clear from PD Article 14 that the issuer, offeror or person asking for admission to trading can delegate the task of publication but not the responsibility? If not, please state your reasoning.**

*Publication of final terms*

114. According to Article 5(4) of the PD, the prospectus can consist of a base prospectus and a set of final terms for non-equity securities issued under an offering programme or in a continuous or repeated manner by credit institutions. Where the final terms are neither included in the base prospectus nor in a supplement, they shall be published separately.

115. The Amending Directive introduced an obligation for the issuer or the person responsible for drawing up the prospectus to always publish the prospectus electronically<sup>10</sup>. However, it was not clarified whether this obligation to publish the prospectus electronically covers the publication of final terms. ESMA is of the view that the obligation to publish a prospectus electronically extends to the publication of final terms because the final terms, if published separately from the base prospectus, constitute part of the prospectus. This view can be supported by the following observations.
116. Firstly, according to the definition of “base prospectus” in PD Article 2(1)(r), a base prospectus is a prospectus containing all relevant information as specified in Articles 5, 7 and 16 of that directive and, at the choice of the issuer, the final terms of the offering. This last element of the definition entitles the issuer to decide whether to include the final terms directly in the base prospectus or to publish them separately; either way, a set of final terms must be published. In this context, the final terms constitute part of the prospectus.
117. Secondly, PR Article 26(5)(a) and (c) require that final terms contain a clarification that the final terms must be read in conjunction with the base prospectus and its supplements for the reader to obtain full information. This indicates that neither the base prospectus nor the final terms can stand alone but should be read together.
118. Thirdly, PR Recital 21 explicitly states that *[a] base prospectus and its final terms should contain the same information as a prospectus* which removes any doubt on the matter. This is confirmed by Advocate General Sharpston of the European Court of Justice according to whom *[t]he base prospectus together with the final terms is considered to be equivalent to a prospectus*<sup>11</sup>.
119. On the basis of the above considerations, the obligation of electronic publication should be extended to final terms. This view is further substantiated by PR Recital 21, according to which *[a]ll the general principles applicable to a prospectus are applicable also to the final terms*. Because the summary is also part of the prospectus, the obligation of electronic publication will also apply to issue-specific summaries where such are required to be annexed to the final terms.
120. According to PR Article 33, 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 publication methods indicated in PD Article 14. ESMA is of the opinion that it would improve investor protection to change this provision.
121. Allowing final terms to be published by a different method than the base prospectus to which they relate does not seem to promote the easy access of investors to the base prospectus and its final terms as a whole. As such, it would appear that requiring the issuer, offeror or person asking for admission to trading to use the same publication method for the base prospectus and its final terms would improve investor access to the information needed for making an informed investment decision, thus enhancing investor protection. ESMA considers that, where the base prospectus is published by more than one of the methods specified in PD Article 14(2), it should suffice to publish the final terms by one of those methods.

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<sup>10</sup> Amending Directive Recital 22; PD Article 14 (2), second subparagraph.

<sup>11</sup> Case C359/12, Michael Timmel v Aviso Zeta AG, paragraph 46.

122. On the basis of the above, ESMA suggests the following wording for Article 10 of the draft RTS:

**“1. Final terms and, where applicable, the summary of the individual issue, shall be published at a minimum electronically and in compliance with the publication methods indicated in Article 14(2) of Directive 2003/71/EC. The publication method for final terms and, where applicable, the summary of the individual issue, shall be the same as at least one of the methods used for publication of the related base prospectus.**

**2. When published in electronic form, final terms shall comply with the requirements set out in Article 5 of this Regulation.”**

**Question 10: Do you agree that the obligation to publish the prospectus electronically should also apply to the publication of final terms? If not, please provide your reasoning.**

**Question 11: Do you agree that the method for publishing final terms should be the same as the method used for publication of the base prospectus? If not, please state your reasoning.**

**Question 12: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

*Clarification of the term “available to the public” in PD Article 14(2)*

123. Article 14(2) of the PD sets out methods for making the prospectus “available to the public”, and Article 29 of the PR specifies the requirements which must be complied with when making the prospectus available in an electronic form. According to PR Article 29(1)(1), the prospectus shall be easily accessible when entering the website.
124. On 15 May 2014, the European Court of Justice provided a ruling in case C-359/12<sup>12</sup> (the ‘Timmel case’) which specifically addresses the issue of easy accessibility. According to this ruling Article 29(1)(1) of PR is to be interpreted as meaning that the requirement that a prospectus must be easily accessible on the website on which it is made available to the public is not fulfilled where there is an obligation to register on that website, entailing acceptance of a disclaimer and the obligation to provide an email address, where a charge is made for that electronic access or where consultation of parts of the prospectus free of charge is restricted to two documents per month.
125. ESMA is of the view that requiring investors to go through a registration process which contains conditions that restrict access to the prospectus in electronic form in order to gain access to the prospectus is not compliant with the intention behind introducing the obligation to publish electronically, namely to enhance investors’ access to information<sup>13</sup>. It furthermore conflicts with the co-legislators’ intention to guarantee investors easy access to the prospectus as expressed in PR Article 29(1)(1). While going through a mandatory registration process may be a manageable burden for at least some investors, where such contains conditions that restrict access to the

<sup>12</sup>

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5c1399f539cf740228164f71db9f098da.e34KaxiLc3qMb40RchoSaxuNbh90?text=&docid=152345&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=237631>

<sup>13</sup> Recital 22 of the Amending Directive.

prospectus in electronic form it cannot be regarded as facilitating easy access to the prospectus. Additionally, tying access to the prospectus to the provision of an email address limits prospectus accessibility based on an arbitrary distinction and excludes investors without an email address from the information which Article 5(1) of the PD entitles them to.

126. Disclaimers may be used, but investors should not be required to accept – i.e., actively indicate their agreement to – such disclaimers to access the prospectus. Furthermore, disclaimers should not limit the rights of any prospective investor or limit the remedies available to him should the publication not comply with the requirements of the PD or be deficient in any way. While the acceptability of a disclaimer will depend on its context, the persons responsible for the prospectus cannot exclude or restrict their liability in any way through the use of disclaimers. The legality of any disclaimer is a matter for determination by the courts.

**Question 13: Do you consider there are any other impediments to a prospectus being considered available to the public?**

*“Free of charge”*

127. PD Article 14(2)(b) states that a prospectus published in printed form shall be made available free of charge. When the Amending Directive introduced the obligation for the issuer or the person responsible for drawing up the prospectus to always publish the prospectus electronically, it was not clarified whether an electronically published prospectus should be made available free of charge in the same way as is required for a prospectus made available in printed form.
128. After having also considered the Timmel case ESMA considers that there is no valid reason for treating prospectuses published electronically differently from prospectuses made available in a printed form. Firstly, charging investors for obtaining electronically published prospectuses clearly constitutes an impediment to their access to such prospectus and would thus be inconsistent with the requirement that electronically published prospectuses be easily accessible (PR Article 29(1)(1)).
129. Secondly, PD Article 14(5) requires all documents in prospectuses comprised of several documents and prospectuses incorporating information by reference to be made available to the public free of charge in accordance with PD Article 14(2). There is no reference to this requirement of providing documents free of charge being limited to prospectuses in printed form. This could be taken to indicate that no intentional distinction is made between physically and electronically published prospectuses and that the obligation in PD Article 14(2)(b) to make printed prospectuses available free of charge also extends to electronically published prospectuses.
130. Thirdly, as the Amending Directive introduced electronic publication as the main method for making prospectuses available to the public, it seems reasonable to ensure that investors are not disadvantaged when issuers, offerors or persons asking for admission to trading use this form of publication.
131. Based on these reflections, ESMA considers that the obligation for a printed prospectus to be made available free of charge should also apply to electronically published prospectuses. ESMA’s view in this regard is in line with the ruling of the European Court of Justice in the Timmel case.

**Question 14: Do you agree that the obligation to make the prospectus available to the public free of charge also applies to prospectuses that are published electronically? If not, please provide your reasoning.**

**Question 15: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

*Provisions regarding websites used for the purpose of electronic publication*

132. According to Recital 22 of the Amending Directive, *[i]nternet ensures easy access to information*. In order to ensure better accessibility for investors, the prospectus should always be published in an electronic form on the relevant website. The purpose of electronic publication is to enhance investor access to prospectuses, ultimately facilitating issuer access to investors at the same time as enhancing investor protection. This objective is also reflected in the requirement to make the prospectus easily accessible on the website on which it is published in Article 29(1)(1) of the PR.
133. Establishing standards for how electronic publication takes place would contribute to ensuring that electronic publication actually facilitates investor access to prospectuses. Such standards are of particular importance in terms of the websites used for publication.
134. As regards the question of websites, PD Article 14(2) allows for electronic publication on the websites of the following entities:
- a) the issuer (Article 14(2)(c));
  - b) the financial intermediaries placing or selling the securities, including paying agents (Article 14(2)(c));
  - c) the regulated market where admission to trading is sought (Article 14(2)(d)); and,
  - d) the NCA of the home Member State (Article 14(2)(e)).
135. Where the abovementioned entities already have a website, this website may be used for such publication. For issuers, offerors or persons seeking admission to trading with a pre-existing website, ESMA considers that a general requirement to establish a designated website for prospectus publication would be contrary to the objective of the Amending Directive to reduce administrative burdens related to the publication of a prospectus<sup>14</sup>. Similarly, where an issuer publishes a prospectus according to PD Article 14(2)(c), and the issuer is part of a group, the issuer should be permitted to use the website of the group for the purpose of publishing the prospectus, provided that the use of the group's website does not impede investors' access to the prospectus. If using the website of the group to publish the prospectus, the issuer, offeror or person asking for admission to trading should be required to inform investors of this.
136. If electronic publication on the website of the financial intermediaries placing or selling the securities, the regulated market (in case of admission to trading) or the NCA is not available, and the issuer, offeror or person asking for admission to trading does not have a website at its disposal, and, in the case of an issuer, does not belong to a group the website of which can be used, the entity in question would be obliged to establish a website for the purpose of complying with the prospectus regime.
137. For consistency purposes, as noted in paragraph 104, reference to "prospectus or base prospectus" in provisions of PR Article 29 – which will be deleted and reintroduced in the RTS – have been changed to "prospectus". Regardless of this change, requirements apply irrespective of whether

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<sup>14</sup> Recital 30 of the Amending Directive.

the issuer, offeror or person asking for admission to trading draws up a single document prospectus, a tripartite prospectus or a base prospectus.

**Question 16: Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.**

**Question 17: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

**138. Based on the considerations in this and the two preceding sections, ESMA suggests the following wording for Article 5 of the draft RTS:**

**“1. When published in electronic form either pursuant to points (c), (d) and (e) of Article 14(2) of Directive 2003/71/EC or as an additional means of availability, the prospectus shall:**

- (1) be easily accessible when entering the website;**
- (2) be in a file format that cannot be modified;**
- (3) not contain hyperlinks with the exception of links to the electronic addresses where information incorporated by reference is available; and,**
- (4) be capable of being downloaded and printed.**

**2. 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.**

**3. Access to a prospectus published in electronic form shall not be contingent on:**

- (1) completion of a registration process;**
- (2) acceptance of a disclaimer; or,**
- (3) payment of a fee.**

**4. Access to a prospectus published in electronic form shall be provided to all documents comprising the prospectus at the same time.**

**5. The issuer, financial intermediary or regulated market shall be entitled to use an existing website for the purpose of publication in electronic form and shall not be obliged to establish a designated website specifically for prospectus publication. In the case of an issuer that is part of a group, the issuer shall be entitled to use the website of the group for the purpose of electronic publication of the prospectus provided such does not hinder access to the prospectus by investors. Where publication is on the website of the group, the issuer shall inform investors of using the website of the group for the purpose of prospectus publication.”**

*Publication of a list of approved prospectuses by the home NCA under PD Article 14(4)*

139. According to Article 14(4) of the PD, *[t]he competent authority of the home Member State shall publish on its website over a period of 12 months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved in accordance with Article 13, including, if applicable, a hyperlink to the prospectus [...].* As the obligation is to include either the prospectuses, or hyperlinks thereto, for a period of at least 12 months, ESMA is of the view that there is a corresponding obligation that prospectuses must be electronically available for this period. Where publication is not on the website of the NCA or its agent, ESMA considers that it is the responsibility of the relevant NCA to ensure that publication by other parties adheres to this 12 month obligation.
140. As hyperlinks provided to an NCA are put on the website of that NCA for investors to access the prospectus, the objective of providing investors with easy access to the prospectus must again be taken into account. ESMA considers that it should not be permitted to provide the NCA with a hyperlink leading to a home page from which a search must be conducted to find the specific prospectus as this cannot be considered to enhance easy access to the prospectus. Furthermore, the hyperlink should not require the investor to go through a succession of links to reach the prospectus as this also does not enhance the investor's access to prospectus information. On that basis, ESMA is of the view that the hyperlink provided to the home NCA should be a hyperlink directly into the prospectus document.
141. **Based on those considerations, ESMA proposes the following wording for Article 9 of the draft RTS:**

**“1. When the competent authority of the home Member State has made the choice to publish a list of approved prospectuses according to Article 14(4) of Directive 2003/71/EC, the issuer, offeror or person asking for admission to trading on a regulated market shall provide a hyperlink to the prospectus published in electronic form.**

**2. The hyperlink provided in accordance with paragraph (1) shall remain active for a minimum period of 12 months.**

**3. The hyperlink shall link directly into the prospectus document. It shall be possible to download and print the prospectus when following the hyperlink.”**

**Question 18: Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?**

**Question 19: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

*Publication of information incorporated by reference*

142. According to Article 14(5) of the PD, *[i]n the case of a prospectus [...] incorporating information by reference, the documents and information making up the prospectus may be published and circulated separately provided that the said documents are made available, free of charge, to the public, in accordance with the arrangements established in paragraph 2. Each document shall indicate where the other constituent documents of the full prospectus may be obtained.*

143. As mentioned previously, the Amending Directive introduced the requirement that all prospectuses be electronically published with the objective of enhancing investor access to prospectus information. For a number of reasons, ESMA considers that it would be beneficial to require that all information included in a prospectus by reference be electronically published. Firstly, information incorporated by reference is no less part of the prospectus than the information directly included in the prospectus and is reviewed by NCAs in the same manner. As such, information incorporated by reference must be subject to the same requirements that apply to the prospectus. Secondly, PD Article 14(5) requires that information incorporated by reference is published according to PD Article 14(2) which necessitates electronic publication at a minimum. Thirdly, electronic publication of information incorporated by reference would facilitate investors' access to information incorporated by reference to the largest extent possible.
144. Having taken the view that information incorporated by reference should be electronically published, ESMA further considered whether the issuer, offeror or person asking for admission to trading should be obliged to publish all information incorporated by reference on the same website as the prospectus is published. However, introducing such a requirement would seem to entail some problems.
145. Requiring all information to be published on the same website as the prospectus is published would indirectly limit the websites on which the prospectus could be published; specifically the options to publish electronically on the website of the regulated market (PD Article 14(2)(d)) and on the website of the home NCA (PD Article 14(2)(e)). A regulated market may agree to publish the prospectuses approved for admission of securities to trading, however, not all regulated markets offer the facility to publish documents incorporated by reference. If the information incorporated into the prospectus by reference was required to be published on the same website as the prospectus, this would thus render the option of publication on the website of the regulated market unavailable. The same logic applies to publication on the website of a home NCA.
146. On that basis, ESMA considers that it would be in contradiction with the intention of the co-legislators to offer different methods for electronic publication of the prospectus to require that information incorporated by reference be published on the same website as the prospectus.
147. Having drawn this conclusion, ESMA then considered whether the issuer, offeror or person asking for admission to trading should be required to publish all information incorporated by reference on one website, possibly different from the one where the prospectus is published. The advantage of requiring all information incorporated by reference into a prospectus to be published in one website would be that this would make it considerably easier for investors to collect the elements which together constitute the full prospectus. Of course, the added benefit of publishing all such information in one place depends on the number of different documents or pieces of information incorporated into a prospectus by reference which will vary from one prospectus to the next.
148. However, requiring all information incorporated by reference to be published on the same website would entail the same problem as described in paragraph 145: If the issuer, offeror or person asking for admission to trading wishes to incorporate by reference elements of e.g. a previously approved prospectus which is published on the website of the NCA, the abovementioned requirement would necessitate that all other information incorporated by reference was published on the website of that same NCA. Alternatively, the issuer, offeror or person asking for admission to trading would be obliged to publish the information incorporated by reference again on e.g. its own website. This would, however, entail a dual publication which would appear overly burdensome.
149. On the basis of the above reflections, it seems that it would not be prudent to require that information incorporated by reference be published on the same website as the prospectus or that

all information incorporated by reference be published on the same website, though different from the website publishing the prospectus. However, to facilitate investor access to all parts of the prospectus, including the ones incorporated by reference, ESMA is of the opinion that the prospectus should include a hyperlink either to each document containing information incorporated by reference or to each webpage on which documents containing information incorporated by reference are published. This will make finding the information as easy as possible for investors without entailing any of the unfortunate side effects of the requirements considered above.

**150. Accordingly, ESMA proposes the following wording for Article 11 of the draft RTS:**

**“1. Documents containing information incorporated by reference in a prospectus shall be published electronically.**

**2. A prospectus containing information incorporated by reference shall include hyperlinks to each document containing information incorporated by reference or to the webpage on which each document containing information incorporated by reference is published.”**

**Question 20: Do you agree that all information incorporated by reference in a prospectus should be published electronically? If not, please state your reasoning.**

**Question 21: Would issuers, offerors or persons asking for admission to trading incur costs if required to publish all information incorporated by reference electronically? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

## **VI. Draft RTS on advertisements**

### **VI.i Scope of the mandate**

151. The mandate contains two distinct elements for ESMA to address:

- i. specification of the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public/admit securities to trading, in particular before the prospectus has been made available to the public; and,
- ii. specification of the provisions laid down in Article 15(4).

#### *Provisions concerning the dissemination of advertisements*

152. ESMA considers that the first part of the mandate concerns setting out rules for the format and distribution of advertisements. This is based on the fact that the wording explicitly refers to “dissemination” of advertisements and not to, for example, their content. As such, the intention of the mandate is to create rules on the practical arrangements relating to advertisements.

153. ESMA is of the opinion that it is necessary to provide a clear delineation of the advertisements which will be covered by the draft RTS drawn up according to the first part of the mandate.

154. Firstly, according to PD Article 15(1), the PD’s rules on advertisements apply to *[a]ny type of advertisement relating either to an offer to the public of securities or to an admission to trading on a regulated market*. Furthermore, the PR defines “advertisement” as *announcements a) relating to a specific offer to the public of securities or to an admission to trading on a regulated market; and b) aiming to specifically promote the potential subscription or acquisition of*

*securities* (PD Article 2(9)). On this basis, ESMA is of the view that the first part of the mandate covers advertisements relating to *specific* offers/admission of *specific* securities to trading whereas it does not cover advertisements relating to the general activity of issuers etc.

155. Secondly, as the mandate refers to advertisements announcing the *intention* to offer securities to the public or admit such to trading, ESMA believes that this limits the scope to advertisements for offers which have not closed or where the securities to which the advertisement pertains have not yet been admitted to trading. This is because advertisements regarding offers that have already closed, or where admission to trading has already taken place, cannot be seen to announce an intention to offer/admit securities.
156. Thirdly, and related to the above point, advertisements announcing the intention to offer securities to the public or admit securities to trading may be disseminated prior to the prospectus being approved and published. Accordingly, ESMA is of the view that both advertisements regarding offers/admission to trading for which a prospectus has already been approved and for which a prospectus has yet to be approved are within the scope of the first part of the mandate.
157. Fourthly, to take into account the variety of means employed to advertise offers to the public and admissions to trading, ESMA considers that it is necessary to consider both written and oral communication.
158. Lastly, Article 34 of the PR concerns dissemination of advertisements. To fulfil its mandate, ESMA must therefore consider whether this article needs to be deleted and possibly replaced and, where necessary, draw up relevant replacing provisions.
159. Taking the above reflections into account, ESMA's interpretation of the current mandate is that it does not extend to notices published in accordance with PR Article 31. Furthermore, while acknowledging the power of NCAs to exercise control over advertising activity as set out in PD Article 15(6), ESMA considers that the current mandate does not permit ESMA to require vetting of advertisements (either ex-ante or ex-post) or, with the exception of the second part of the mandate discussed below, the procedures which NCAs should adopt in their supervision of the content of advertisements. As noted in Article 15(6) PD, exercising control over the compliance of advertising activity, and compliance with the provisions set out in Article 15 generally, is a matter for the home NCA of each Member State.

*Provisions laid down in Article 15(4)*

160. While the first part of the mandate concerns the practical arrangements relating to advertisements, ESMA considers that the second part of the mandate covers the actual consistency of advertisements or other information disclosed with that contained in the prospectus. This view is based on the fact that the second part of the mandate refers to the provisions laid down in PD Article 15(4) which contains the following wording:

*In any case, 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.*
161. In addition, ESMA notes that PD Article 15(4) is not limited to advertisements but covers all circulated information regarding a given offer or admission to trading. This suggests that the specification of the provisions in PD Article 15(4) must cover two areas, namely 1) advertisements and 2) other information distributed regarding a specific offer or admission to trading.
162. As the provisions in PD Article 15(4) concern the requirement that all information regarding an offer or admission to trading be consistent with the information in the prospectus, this would seem to indicate that to specify these provisions, ESMA has to draw up specific rules.

## VI.ii Content of draft RTS

### VI.ii.i Provisions concerning dissemination of advertisements

#### *Categories for dissemination of advertisements*

163. As explained above, under this part of the mandate ESMA must address whether to delete and possibly replace Article 34 of the PR. The present Article 34 contains a list of the means of communication by which advertisements may be disseminated and this list was largely inspired by the list of dissemination methods provided for in Annex 1 of Directive 97/7/EC. In addition, the ways of dissemination already included in Article 101 of CARD (which has been repealed) and in Article 14 of the PD were included in the list. Further dissemination methods were also included to take technical progress and recent emerging advertisement practices into consideration.
164. ESMA considers that a list of permitted media for disseminating advertisements, be it exhaustive or otherwise, adds little value to the prospectus regime. The main concern with advertisements is not so much by which means of communication they are disseminated but rather the circumstances surrounding such dissemination and the formatting techniques applied to the advertisements.
165. Rather than drawing up an updated list of means of communication and replacing the current PR Article 34 with this, ESMA considers that a more effective approach to revising Article 34 is to split means of disseminating advertisements into high level categories and to specify requirements relating to those means. An additional benefit of such an approach compared to a list of communication means is that it will be better able to absorb new means of dissemination of advertisements brought about by technological developments.
166. On this basis, ESMA has identified the following categories for dissemination of advertisements:
- Print advertising (including, but not limited to, addressed or unaddressed printed matter, newspapers, magazines, newsletters, booklets, flyers, posters and other outdoor advertising, direct mail, pathfinder/red herring documents or anything else that could be considered a portable printed medium).
  - Broadcast advertising (television and radio).
  - Digital advertising (whether through visual or audio representation or a combination of both, including, but not limited to, streaming, webcast, webinar, podcast, website advertisements, social media and email communications).
  - Oral advertising (including, but not limited to, telephone, with or without human intervention, seminars, public appearances, presentations and roadshows).
167. ESMA considers that in situations where it is unclear which category the means of dissemination of a given advertisement falls in, the issuer, offeror or person asking for admission to trading may, taking into consideration the specific characteristics of the media being used, select the most appropriate category and adhere to its requirements. Such a situation may for example arise in case new means of dissemination appear as a result of technological advances.

**Question 22: Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.**

*Dissemination of advertisements*

168. While acknowledging the different characteristics of the means of dissemination mentioned in the above categories, ESMA considers that, with some limited exceptions due to the practicalities involved, the rules drawn up should apply to dissemination of advertisements regardless of the means used for such dissemination. On that basis, ESMA considers that the following requirements should apply to the dissemination of all advertisements.
169. In cases where an advertisement contains inaccurate or misleading information, the issuer, offeror or person asking for admission to trading should amend the advertisement in order to comply with the requirement in PD Article 15(3) that *[t]he information contained in an advertisement shall not be inaccurate, or misleading*. The amended advertisement should make reference to the previous advertisement and specify the reason for amending it as well as the differences between the two versions.
170. ESMA acknowledges that where advertisements disseminated orally, e.g. at roadshows/public appearances, turn out to contain inaccurate or misleading information, it will not be practical to “amend” the original advertisement as this would effectively entail organising a new roadshow/event at which the corrected information could be delivered. Where inaccurate or misleading information was included in an oral advertisement, it may therefore be more practical for the issuer, offeror or person asking for admission to trading to communicate such amendment for example by way of a press release, public statement or by direct correspondence with those individuals targeted by the original advertisement.

**Question 23: Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.**

**Question 24: Will the suggested rule impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

171. **On the basis of the considerations presented above, ESMA suggests the following wording for Article 12 of the draft RTS:**

**“1. The means with which advertisements announcing the intention to offer securities to the public or admit securities to trading on a regulated market can be disseminated fall in one of the following four categories:**

- (1) print;**
- (2) broadcast;**
- (3) digital; or,**
- (4) oral.**

**When it is unclear which category the means of dissemination of a given advertisement falls in, the issuer, offeror or person asking for admission to trading on a regulated market shall have the right to select a category for the purpose of this Regulation.**

**2. Regardless of the means with which they are disseminated, advertisements which contain inaccurate or misleading information shall be amended. The amended advertisement shall make reference to the previous advertisement, specify that the previous advertisement has been amended due to it containing inaccurate or misleading information and specify the differences between the two versions of the advertisement.**

**With the exception of orally disseminated advertisements referred to in paragraph 1(4), amended advertisements shall be disseminated, at a minimum, through the same means as the original advertisement.**

**3. 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 and Commission Regulation (EC) No 809/2004.”**

#### **VI.ii.ii Provisions laid down in Article 15(4)**

172. ESMA understands that Article 15 of the PD regulates the content of *advertisements* and not the content of *prospectuses*.
173. The second part of ESMA’s mandate in PD Article 15(7) concerns PD Article 15(4). Article 15(4) goes beyond advertisements and extends to all information concerning the offer or the admission to trading on a regulated market disclosed in an oral or written form, even if not for advertising purposes.
174. ESMA is of the view that specifying the provisions laid down in PD Article 15(4) only extends to drawing up rules ensuring the consistency between information disclosed about an offer to the public/admission to trading and the information contained in the prospectus. By contrast, specifying the provisions in PD Article 15(4) does not encompass specifying the contents of advertisements or other information that may be disclosed about an offer to the public/admission to trading.
175. The requirement for consistency between information contained in the prospectus and information disclosed outside of the prospectus does not mean that the contents of both have to be identical. Given the channels through which information or advertisements can be communicated, ESMA is of the view that a requirement for information to be identical would be overly burdensome and counterproductive. This would furthermore seem to turn such information into a substitute for the prospectus which was arguably not the intention of the co-legislators with PD Article 15(4).
176. With the above reflections in mind, ESMA suggests the following requirements to ensure the consistency between the prospectus and information disclosed about the offer to the public/admission to trading.
177. Firstly, ESMA considers that information circulated about an offer to the public or an admission to trading outside the prospectus should not contradict the information contained in the prospectus. Each of the annexes to the PR require that the prospectus contain a declaration of those responsible for the prospectus that the information contained therein is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import. In other words, the persons responsible for the prospectus have attested that the information contained in it is correct. On that basis, it seems reasonable to require that information circulated

outside the prospectus does not contradict the information included in the prospectus as any such contradiction would ipso facto imply that the information circulated outside the prospectus is factually incorrect.

178. Secondly, ESMA considers that information about an offer to the public or an admission to trading circulated outside the prospectus should not refer to information which contradicts information in the prospectus. Since information disclosed about an offer to the public/admission to trading outside the prospectus cannot contradict the prospectus, it would seem logical to extend the same requirement to documents referred to in such information.
179. Thirdly, it should in ESMA's view be prohibited to omit information contained in the prospectus from the information circulated outside the prospectus if omitting such information could create a distorted or biased image of the risks of the investment. Depending on the content of the information disclosed, where the positive attributes of a potential investment are included, the issuer, offeror or person asking for admission to trading should consider whether the related downside potential should also be included to ensure balance.
180. Fourthly, where information disclosed about the offer or admission to trading, including advertisements, contains statements on the negative aspects of that offer or admission to trading, e.g. regarding risks ("the investor may lose some or all of the amount invested") and forward-looking statements ("forward-looking statements may and often do differ from actual results"), the presentation of such statements should be given at least the same prominence as the presentation of other information disclosed, whether in written form (size and formatting of the statement) or in oral form (speed with which the statement is communicated).
181. The four rules suggested above would constitute the general framework for ensuring consistency between information disclosed outside the prospectus and information contained in the prospectus. In addition to these general rules, it is necessary to consider the acceptability of a specific type of information – numerical performance measures – being circulated due to its disproportionate potential to influence the investment decision.
182. Numerical performance measures consist of any numerical measures of past, present or future performance relating to the financial position, comprehensive income or cash flows of an issuer. Issuers, offerors or persons asking for admission to trading may include such measures in the prospectus if they so wish and where that is the case, ESMA is of the view that the numerical performance measures may also be included in information circulated outside the prospectus.
183. However, ESMA is of the opinion that numerical performance measures should not be permitted in information circulated outside the prospectus if they are not included in the prospectus. The reason is that numerical performance measures constitute a powerful means of creating a given impression of an investment, and if information circulated outside the prospectus was to contain numerical performance measures other than those included in the prospectus (if any), this could lead to an inconsistency between the information in and outside the prospectus.

**Question 25: Do you agree with the requirements suggested for Article 13(1) of the draft RTS? If not, please provide your reasoning.**

**Question 26: Do you believe that the inclusion of numerical performance measures in information disclosed about the offer or admission to trading, which are not contained in the prospectus, should be prohibited?**

*Investor access to information disclosed outside of the prospectus*

184. In addition to the abovementioned requirements, ESMA suggests that a further condition should apply to all information disclosed about an offer to the public or admission to trading, whether in oral or written form, in order to ensure the consistency of such with the contents of the prospectus.
185. As all information required for investors to make an informed investment decision must be included in the prospectus, information disclosed outside of the prospectus, including advertisements, cannot be relied upon by investors as complete information about an offer or admission. However, it may still be the case that investors wish to thoroughly examine and compare the consistency of such information with the more complete information contained in the prospectus. ESMA is of the opinion that issuers, offerors or persons asking for admission to trading should facilitate this.
186. ESMA acknowledges that not all information disclosed concerning an offer or admission to trading, including advertisements, is necessarily publicly disseminated (e.g. roadshows, pathfinder documents). On this basis, ESMA is of the view that the right to receive a copy of such information, to verify consistency with the contents of the prospectus, shall be predicated on the fact that the investor was the intended addressee of the information disclosed. By way of further example, where a potential investor has been made an “insider” in the context of Directive 2003/6/EC (the ‘Market Abuse Directive’), and the information communicated to that investor has been made on a confidential basis, but may fall within the strict definition of advertisement contained in the PR, only that investor should be able to request a copy of the information.
187. As the abovementioned provision will be a new requirement imposed on the issuer, offeror or person asking for admission to trading, care must be taken so that this new requirement does not inflict excessive burdens on such persons. This can be achieved by ensuring that the period of time in which investors have the right to request a copy of the information – and in which the person responsible for the information consequently has to keep a copy of such – is sufficiently long to safeguard investor protection without being so long as to impose unnecessary obligations on the person responsible for the information.
188. Without prejudice to other legislation and the powers of NCAs which may govern the retention of advertisements, ESMA considers that requiring the issuer, offeror or person asking for admission to trading to maintain a copy of the information from the date on which it is first disclosed until the date when the related prospectus is no longer valid achieves this balance. Seeing as the issuer, offeror or person asking for admission to trading will necessarily maintain a copy of the information for the duration of the period in which it is circulated, this requirement would only impose a minimal burden. At the same time, this time period would allow investors to verify the consistency of the information both during and for a reasonable time after its dissemination.
189. Furthermore, ESMA considers that the issuer, offeror or person asking for admission to trading may designate an entity or agent for the purpose of retention and delivery of such information to investors who may request it. Outsourcing of the retention to another entity should also be possible. This should, however, be without prejudice to the responsibility of the issuer, offeror or person asking for admission to trading under the RTS.
190. Given that information may be disclosed in either oral or written form, ESMA acknowledges that the methods for maintaining a copy of such information will also vary. For information disclosed in written form, the issuer, offeror or person asking for admission to trading can reasonably be required to maintain a copy in durable format. Copies of such information should always be identical to the information which was originally disclosed as the purpose of providing investors

with the possibility to further scrutinise the consistency of the information with the prospectus is otherwise compromised.

191. For information disclosed in oral form, it is not possible to put in place the same requirements. This is because no immediate copy of oral disclosure will necessarily exist as such will consist of seminars, presentations, roadshows etc. To overcome the more fleeting nature of oral disclosures, ESMA suggests that the person responsible for such disclosure should be obliged to keep a copy of any material on which the seminar, presentation, roadshow etc. was based whether this be in the form of a script, slides, hand-outs or other. Obtaining such material may not allow investors to go through the information as it was originally presented word for word, but it does afford them the opportunity to compare the main contents of the information disclosed with that disclosed in the prospectus.
192. ESMA clarifies that Article 13 of the draft RTS, as presented below, obliges those responsible for disclosure of information concerning an offer or admission to trading outside of the prospectus to maintain a copy of such for the period outlined above, it does not oblige NCAs to scrutinise such information.

**Question 27: Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.**

**Question 28: Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

193. **On the basis of this and the previous section, ESMA proposes the following wording for Article 13 of the draft RTS:**

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

- (1) contradict the information contained in the prospectus;**
- (2) refer to information which contradicts that contained in the prospectus;**
- (3) omit information contained in the prospectus, if such omission could cause the information disclosed about the offer to the public or admission to trading to be misleading; or,**
- (4) contain numerical performance measures concerning the issuer, unless such are contained in the prospectus.**

**2. If the information disclosed about an offer to the public or admission to trading on a regulated market includes statements on the negative aspects of that offer or admission to trading, such statements shall be presented with at least the same prominence as other parts of the information.**

**3. The issuer, offeror or person asking for admission to trading shall maintain a copy of any information disclosed in oral or written form about an offer to the public**

**or admission to trading on a regulated market from the date of its first disclosure and until the related prospectus is no longer valid. Persons to whom the information was addressed shall have the right to request a copy of the information free of charge.**

**4. Information disclosed shall be maintained in durable format. The text and format of the information maintained must at all times be identical to the original version disclosed.**

**5. By way of derogation from paragraph (4), for information disclosed in oral form, any script and/or presentation materials used shall be maintained in durable format.**

**6. For the purpose of this Article, information contained in the prospectus shall mean information included in the prospectus, if already published, or information to be included in the prospectus, if the prospectus is published afterwards.”**

## **Annex I: List of questions**

- Question 1: Is there any information that should be added or removed from the list in the proposed Article 2(2)?
- Question 2: Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 3: Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?
- Question 4: Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.
- Question 5: Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 6: Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.
- Question 7: Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 8: Do you consider that there are any other documents that could meet the criteria of being “simultaneously published” from which information could be incorporated by reference?
- Question 9: Do you agree that it is sufficiently clear from PD Article 14 that the issuer, offeror or person asking for admission to trading can delegate the task of publication but not the responsibility? If not, please state your reasoning.
- Question 10: Do you agree that the obligation to publish the prospectus electronically should also apply to the publication of final terms? If not, please provide your reasoning.
- Question 11: Do you agree that the method for publishing final terms should be the same as the method used for publication of the base prospectus? If not, please state your reasoning.
- Question 12: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 13: Do you consider there are any other impediments to a prospectus being considered available to the public?
- Question 14: Do you agree that the obligation to make the prospectus available to the public free of charge also applies to prospectuses that are published electronically? If not, please provide your reasoning.

- Question 15: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 16: Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.
- Question 17: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 18: Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?
- Question 19: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 20: Do you agree that all information incorporated by reference in a prospectus should be electronically published? If not, please state your reasoning.
- Question 21: Would issuers, offerors or persons asking for admission to trading incur costs if required to publish all information incorporated by reference electronically? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 22: Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.
- Question 23: Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.
- Question 24: Will the suggested rule impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 25: Do you agree with the requirements suggested for Article 13(1) of the RTS? If not, please provide your reasoning.
- Question 26: Do you believe that the inclusion of numerical performance measures in information disclosed about the offer or admission to trading, which are not contained in the prospectus, should be prohibited?
- Question 27: Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.
- Question 28: Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

## **Annex II: Legislative mandate to develop draft RTS**

### *Mandate for ESMA to develop draft RTS in general*

Article 10(1) of 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:

“Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards.”

### *Mandate for ESMA to develop draft RTS on approval*

Article 1(3) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to the approval of prospectuses, ESMA shall develop draft regulatory technical standards to specify the procedures for the approval of the prospectus and the conditions in accordance with which time limits may be adjusted.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

### *Mandate for ESMA to develop draft RTS on incorporation by reference*

Article 1(2) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the information to be incorporated by reference.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

### *Mandate for ESMA to develop draft RTS on publication*

Article 1(4) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions relating to the publication of the prospectus in paragraphs 1 to 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

### *Mandate for ESMA to develop draft RTS on advertisements*

Article 1(5) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and specify the provisions laid down in paragraph 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

## **Annex III: Cost-benefit analysis**

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### **1. Executive Summary**

#### **Reasons for publication**

The Omnibus II Directive was published on 22 May 2014 and requires ESMA to draft RTS in relation to four topics in the Prospectus Directive; prospectus approval, incorporation by reference, prospectus publication and dissemination of advertisements. The deadline for ESMA to deliver such RTS to the Commission is 1 July 2015.

According to Article 10(1), third subparagraph of the ESMA Regulation, ESMA shall analyse the potential related costs and benefits of the RTS, unless such analyses are disproportionate in relation to the scope and impact of the draft RTS concerned or in relation to the particular urgency of the matter.

The Cost-Benefit Analysis ('CBA') aims to provide the reader with an overview of findings with regard to the potential impacts of the proposed draft RTS.

#### **Contents**

Section 2 introduces the CBA by describing ESMA's four mandates and explaining the nature of the CBA along with its structure. Sections 3-6 analyse the costs and benefits connected with the proposed draft RTS on approval, incorporation by reference, publication and advertisements, respectively.

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## 2. Introduction

1. This CBA has been developed in order to assist in the drafting of the RTS which the Omnibus II Directive mandates ESMA to submit to the Commission. The Omnibus II Directive empowers ESMA to draw up draft RTS specifying:
  - i. the procedures for the approval of the prospectus and the conditions in accordance with which time limits may be adjusted;
  - ii. the information to be incorporated by reference;
  - iii. the provisions relating to the publication of the prospectus in PD Article 14, paragraphs 1 to 4; and,
  - iv. the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and the provisions laid down in PD Article 15, paragraph 4.

2. The objective of the mandates given to ESMA is to ensure harmonisation in relation to the four abovementioned topics. This fits into the larger purpose of the PD to harmonise requirements for the drawing up, approval and distribution of prospectuses (PD Article 1(1)). Harmonisation of such requirements ensures investor protection by guaranteeing that all prospectuses, wherever in the EU they are issued, provide information that allows investors to make an informed assessment of the investment they are contemplating, thereby making it easier for companies to raise capital throughout the EU. Additionally, harmonised requirements relieve companies from having to know and comply with different rules in the different EU Member States they operate in.

### *Nature of the CBA*

3. ESMA has drawn up the CBA internally with contributions from NCAs in order to benefit from their experience in the four areas covered by the draft RTS.
4. As with the Consultation Paper, the CBA can include different options which could be taken in responding to each mandate, which is the case for approval. As regards the other mandates, only one proposal has been identified. The reason for this is two-fold. Firstly, the mandates given to ESMA by the Omnibus II Directive are very specific which limits the flexibility ESMA has in fulfilling them. Secondly, the four subject matters covered by the mandates are quite narrow which again limits the range of approaches which can be taken.
5. At this stage, the CBA is qualitative in nature. This is primarily due to the fact that ESMA is of the belief that the suggested draft RTS will not impose substantial costs on either NCAs, issuers, offerors or persons asking for admission to trading or other stakeholders (mainly investors). The reasons are explained in the sections below.
6. However, ESMA would welcome any quantitative input from respondents to the consultation which may be used to supplement the CBA as it currently stands.
7. The provisions which are directly transferred from the Prospectus Regulation – Article 5(1) and (2), Articles 6, 7 and 8 and Article 12(3) of the draft RTS – are not addressed in the CBA. As equivalent provisions are already in force, these draft RTS will not lead to incremental costs or benefits.

*Structure of the CBA*

8. The CBA analyses the four areas of the draft RTS in the same order as they are presented in the Consultation Paper. As such, section 3 deals with the proposed measures regarding approval, section 4 addresses the proposed measures concerning incorporation by reference, section 5 analyses the proposed measures in the area of publication and section 6 assesses the proposed measures regarding advertisements. Within each section, the different provisions of the draft RTS have been grouped in a way that is meaningful for the assessment of costs and benefits.

### **3. Analysis of proposed measures regarding approval**

#### **3.1 Article 2 and 3 on specification of the iterative review process**

These two articles of the draft RTS have been drawn up in response to the first part of the mandate on approval which empowers ESMA to specify procedures for prospectus approval. According to the mandate, the goal of the draft RTS is to ensure consistent harmonisation in relation to the approval of prospectuses. With this in mind, ESMA has laid down the requirements which, in the different stages of the iterative review process, should apply to issuers, offerors and persons asking for admission to trading on a regulated market, on the one hand, and to NCAs on the other.

<b>Article 2 and 3 on specification of the iterative review process</b>	
	Qualitative description
<i>Benefits</i>	<p>A harmonisation of supporting documents required by NCAs ensures not only clarity for market participants but also minimises unnecessary delays in the prospectus approval process.</p> <p>Requiring NCAs to acknowledge receipt of the initial application for prospectus approval and to provide a reference number and the relevant contact points assures the issuer, offeror or person asking for admission to trading that their application is being processed and eases their further contact with the NCA.</p> <p>The possibility for the NCA to provide comments on the prospectus orally in exceptional circumstances facilitates a rapid turn-around of the prospectus when timing is crucial.</p> <p>Submission of draft prospectuses in searchable electronic format which show changes made since the previous submission and which provide explanations to comments raised by NCAs can ensure a smoother and faster approval process and can reduce the need for subsequent submissions of prospectuses due to unclear or inadequate resolution of comments.</p> <p>Allowing NCAs to terminate the review process in cases where drafting of the prospectus is clearly not progressing enables NCAs to put their resources to efficient use. Requiring NCAs to provide reasoning for any such decision ensures protection of the interests of the issuer, offeror or person asking for admission to trading.</p>
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>NCAs may experience very small on-going costs from the obligation to acknowledge receipt of the application for approval.</p>

<i>Compliance costs</i>	<p><i>One-off</i></p> <p>Issuers, offerors and persons asking for admission to trading may incur very small one-off costs if they are unfamiliar with the procedure of marking changes made to documents.</p> <p><i>On-going</i></p> <p>They may also suffer small on-going costs from the requirement that they provide explanations of how comments from the NCA have been addressed where changes are not self-explanatory.</p> <p>Furthermore, the right of NCAs to terminate the review process in certain situations may impose costs on issuers, offerors and persons asking for admission to trading should they decide to resubmit their application for approval as they may have to pay associated fees.</p>
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### 3.2 Specification of conditions in accordance with which time limits may be adjusted

The second part of the mandate on approval empowers ESMA to specify the conditions in accordance with which time limits may be adjusted. “Time limits” is a reference to the deadlines within which an NCA must notify the issuer, offeror or person asking for admission to trading of its decision regarding approval; these deadlines are set out in PD Article 13(2), (3) and (4).

The general purpose of the mandate on approval is to ensure harmonisation in relation to prospectus approval. The specific objective of specifying conditions for adjusting time limits would seem to be 1) to clarify that in certain situations, NCAs are entitled to extend/obliged to reduce time limits, and 2) to make sure that such extensions/reductions are carried out in a uniform way across Member States.

ESMA has considered how to fulfil this objective and has come to the conclusion that it is preferable to refrain from responding to this part of the approval mandate. The reasoning for this decision is set out in the sections below where two options (Option 1: responding to the mandate, Option 2: refraining from responding to the mandate) are described and the costs and benefits of each analysed.

<b>Policy objective</b>	1) Clarifying that NCAs are entitled to extend/obliged to reduce time limits for approval in certain situations, and 2) ensuring that such extensions/reductions are harmonised across the EU.
<b>Option 1</b>	Specifying conditions in accordance with which time limits may be extended/reduced.
<b>Option 2</b>	Refraining from responding to the mandate.
<b>Preferred option</b>	<p>Option 2</p> <p>Refraining from responding to the mandate is the preferred way forward due to substantial difficulties connected with specifying the conditions under which time limits may be adjusted. First of all, the time limits would remain set at Level 1 while at the same time being specified in Level 2 which would create a situation of legal uncertainty as regards which time limits were authoritative. Secondly, and even more importantly, ESMA is only empowered to specify the conditions under which time limits may be adjusted but not the actually adjusted time limits. Drawing up draft RTS on this basis would thus not enhance harmonisation because each NCA would be able to define the time limit to be applied in the situations specified by ESMA. The provisions would therefore be more or less empty as they would not enhance harmonisation and furthermore provide nothing by way of clarification to market participants regarding the time frame within which they could expect prospectuses to be approved.</p> <p>As such, the main reason for selecting Option 2 is not the benefits connected</p>

	with this option but rather the practical/legal difficulties connected with Option 1. The below analysis of each of the two options therefore cannot in itself explain ESMA's choice as this is primarily related to the practical/legal shortcomings of Option 1 and not simply based on the costs and benefits connected with it.
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<b>Option 1: Specifying conditions in accordance with which time limits shall be extended/reduced</b>	
	Qualitative description
<i>Benefits</i>	<p>An extension of time limits in certain situations could be useful to NCAs, allowing them more time to sufficiently review prospectuses of a particularly complex nature.</p> <p>A reduction of time limits in certain situations could benefit issuers, offerors and persons asking for admission to trading as prospectuses would be approved faster, thereby easing access to capital markets.</p>
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>If conditions for reducing time limits were to be specified, this could put NCAs under excessive time pressure and necessitate them to assign additional resources to prospectus review. The assignment of additional resources to the prospectus review function may entail additional costs to regulators.</p>
<i>Compliance costs</i>	<p><i>On-going</i></p> <p>If conditions for extending time limits were to be specified, this could impose costs on issuers, offerors and persons asking for admission to trading on a regulated market, given that they would have to wait longer for prospectuses to be approved in some situations.</p>
<i>Costs to other stakeholders</i>	<p>If conditions for reducing time limits were to be specified, this could put NCAs under excessive time pressure which could result in less comprehensive scrutiny and lapses in the approval process, thereby endangering investor protection.</p> <p>Should NCAs have to increase resources to facilitate shorter time limits, this may impact on any prospectus approval fees that are levied on market participants.</p>
<i>Indirect costs</i>	<p>Possible legal uncertainty because of a contradiction between time limits set in Level 1 (PD Article 13) and in the RTS.</p> <p>Promotion of non-harmonised application of time limits because it is not possible within the mandate to specify the actual new time limits, only the conditions under which time limits may be extended/reduced; it would therefore be up to the individual NCA to decide on the 'size' of the extension/reduction.</p>

<b>Option 2: Refraining from responding to the mandate</b>	
	Qualitative description
<i>Benefits</i>	By refraining from responding to the mandate, ESMA effectively preserves the status quo so this option would not provide any new benefits compared to the current situation. As clarified above, ESMA has chosen this option because it avoids the problems connected with Option 1 rather than because it provides distinct benefits.
<i>Costs to regulator</i>	<i>One-off</i>

	No change from current situation. <i>On-going</i> No change from current situation.
<i>Compliance costs</i>	<i>One-off</i> No change from current situation. <i>On-going</i> No change from current situation.

#### 4. Analysis of proposed measures regarding incorporation by reference

Article 4 of the draft RTS is proposed as a response to ESMA’s mandate to specify the information to be incorporated by reference in order to ensure consistent harmonisation in relation to Article 11 of the PD. Currently, different practices exist among NCAs regarding the information which issuers, offerors and persons asking for admission to trading are allowed to incorporate into the prospectus by reference. The objective of the proposed Article 4 is to ensure consistent application of rules regarding incorporation by reference, thereby providing a level playing field for issuers, offerors and persons asking for admission to trading and mitigating the risk of regulatory arbitrage.

<b>Article 4 on information which may be incorporated by reference</b>	
	Qualitative description
<i>Benefits</i>	Specifying an exhaustive list of information which may be incorporated by reference creates clarity for market participants and mitigates the possibility of regulatory arbitrage.
<i>Costs to regulator</i>	<i>One-off</i> As some NCAs currently have practices that facilitate incorporation by reference of a wider collection of information, these may incur small one-off costs when aligning their practices with the new Article 4 (training staff in applying new rules, informing market participants etc.).
<i>Compliance costs</i>	<i>On-going</i> Issuers, offerors and persons asking for admission to trading applying for approval of a prospectus in a Member State which previously permitted wider incorporation by reference may experience on-going costs stemming from the reduced access to incorporation by reference according to the new rules. However, ESMA estimates that those costs will be minor as such market participants will simply have to include the information directly in the prospectus instead of inserting a link to it. As electronic publication of prospectuses is the norm, the fact that the number of pages in the prospectus will increase should not be connected with significant costs.

## 5. Analysis of proposed measures regarding publication

### 5.1 Article 5(3), 5(4) and 5(5) on access to the published prospectus, Article 10 on publication of final terms and Article 11 on publication of information incorporated by reference

These provisions are drawn up in response to the mandate for ESMA to specify the provisions relating to the publication of the prospectus set out in Article 14(1), (2), (3) and (4) of the PD. As with the other mandates, the objective is harmonisation and ESMA has pursued this goal by detailing which measures issuers, offerors and persons asking for admission to trading may use when publishing the prospectus and specifying that all constituent parts of the prospectus must be published electronically.

<b>Article 5(3), 5(4) and 5(5) on access to the published prospectus, Article 10 on publication of final terms and Article 11 on publication of information incorporated by reference</b>	
	Qualitative description
<i>Benefits</i>	<p>A prohibition from requiring investors to go through a registration process, accepting a disclaimer or paying a fee to gain access to the prospectus ensures that prospectuses are easily available. The prohibition from requiring investors to accept a disclaimer furthermore ensures investor protection as investors should not be obliged to waive legal rights to gain access to the prospectus.</p> <p>Allowing the issuer, financial intermediary or regulated market to use an existing website, including the website of the group, to publish the prospectus minimises the administrative burden on such entities.</p> <p>Electronic publication provides investors with fast and easy access to the information contained in a prospectus. Therefore, all constituent parts of the prospectus, including final terms and information incorporated by reference, should be available electronically. It is important to clarify that access to a prospectus published in electronic form shall be provided to all documents comprising the prospectus at the same time.</p> <p>Requiring that final terms be published in the same manner as the base prospectus to which they relate facilitates investor access to the different parts of the prospectus.</p> <p>The obligation to include hyperlinks in the prospectus to information incorporated by reference ensures that investors are able to find such information as easily as possible.</p>
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>Possible enforcement costs from prohibition of registration processes which restrict access to the prospectus published in electronic form.</p>
<i>Compliance costs</i>	<p><i>On-going</i></p> <p>Compliance costs may vary depending on the medium of publication used by the issuer, offeror or person asking for admission to trading.</p>

### 5.2 Article 9 on the provision of a hyperlink to the published prospectus

ESMA has drawn up Article 9 specifically to elaborate on PD Article 14(4) which obliges NCAs to publish either all prospectuses approved or a list of such along with hyperlinks to the actually published prospectus. Currently, it is unclear how NCAs are to comply with the obligation to publish hyperlinks to approved prospectuses when they decide to publish a list of prospectuses. To address this lack of clarity, ESMA proposes that, when the NCA selects to publish a list of approved prospectuses, the issuer, offeror

or person asking for admission to trading should be obliged to provide the NCA with a hyperlink to the published prospectus. The general practice is already for issuers, offerors or persons asking for admission to trading to provide such hyperlinks, but ESMA considers it useful to establish this as an explicit obligation. This also permits a specification of the time period in which the hyperlink must be functional.

<b>Article 9 on the provision of a hyperlink to the published prospectus</b>	
	Qualitative description
<i>Benefits</i>	As prospectuses are generally valid for a period of 12 months, it is important to clarify that electronic access via the website of the NCA should be provided for the same period of time.
<i>Costs to regulator</i>	<i>On-going</i> NCAs may experience on-going costs arising from their obligation to ensure that the issuer or the regulated market adheres to their obligation of keeping the hyperlink functional for at least 12 months. However, the requirement for NCAs to publish a hyperlink to the published prospectus when a list of prospectuses is published under PD Article 14(4) is already in force, so in principle such costs should not be new to NCAs.
<i>Compliance costs</i>	<i>On-going</i> Given that all prospectuses must be published electronically, it should not imply additional costs for the issuer or the regulated market to provide the NCA with a hyperlink to the published prospectus. On the other hand, it may not be customary to publish the prospectus for at least 12 months and, as such, this requirement may impose on-going costs on issuers and regulated markets. However, such costs should be negligible as the resources required to extend the publication period for a document which has already been drawn up and published are likely to be minimal.

## **6. Analysis of proposed measures regarding advertisements**

### **6.1 Article 12(1) and 12(2) on dissemination of advertisements**

These provisions have been proposed in response to the first part of the mandate on advertisements which empowers ESMA to specify the provisions concerning dissemination of advertisements. ESMA has responded to this part of the mandate by drawing up provisions preventing the circulation of inaccurate or misleading information.

<b>Article 12(1) and 12(2) on dissemination of advertisements</b>	
	Qualitative description
<i>Benefits</i>	The requirement that advertisements, regardless of the way they are disseminated, be amended if they contain inaccurate or misleading information ensures that investors are not presented with a wrongful picture of a given investment through an advertisement.
<i>Costs to regulator</i>	<i>On-going</i> Likely to be of minimal significance.
<i>Compliance costs</i>	<i>On-going</i> It is possible that costs will be connected with amending advertisements

	containing inaccurate or misleading information. Such costs would however indicate that persons responsible for advertisements at the moment do not amend advertisements when discovering inaccurate or misleading information which would be a direct breach of PD Article 15(3). Therefore, the incremental cost arising from this RTS is negligible.
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## 6.2 Article 13 on consistency between the prospectus and information disclosed about the offer to the public or admission to trading on a regulated market

Article 13 is drafted to fulfil the second part of the mandate on advertisements which requires ESMA to specify the provisions laid down in PD Article 15(4). PD Article 15(4) requires that all information concerning an offer to the public or admission to trading on a regulated market disclosed outside of the prospectus, whether in oral or written form, shall be consistent with the information in the prospectus. ESMA has pursued this objective by drawing up provisions which clarify how the consistency between information in the prospectus and information circulated outside the prospectus can be ensured. The article also ensures that investors have access to information addressed to them for a reasonable amount of time after its distribution so as to allow them to compare the consistency of such information with the more complete information contained in the prospectus.

<b>Article 13 on consistency between the prospectus and information disclosed about the offer to the public or admission to trading on a regulated market</b>	
	Qualitative description
<i>Benefits</i>	<p>It is important to specify that information circulated about an offer to the public or an admission to trading outside of the prospectus should not contradict information in the prospectus, refer to information which contradicts information in the prospectus or omit information contained in the prospectus if such an omission causes a misleading picture of the offer/admission to trading at hand because the prospectus is the authoritative source of information concerning such offer or admission to trading.</p> <p>Dissemination of numerical performance measures which are not contained in the prospectus should be avoided because such measures are a powerful means to create a certain impression of an offer/admission to trading, and therefore only measures reviewed and approved by the NCA should be allowed.</p> <p>When information disclosed about an offer to the public or admission to trading contains statements regarding the negative aspects of that offer or admission to trading, such statements should be presented with the same prominence as other parts of the information. This prevents the person responsible for the information from concealing statements on the negative aspects of the offer/admission to trading from the attention of investors.</p> <p>The requirement that information disclosed be retained and a copy provided on request to investors addressed by the information in question facilitates a thorough examination of the consistency of the information with the content of the prospectus by investors.</p>
<i>Compliance costs</i>	<p><i>One-off</i></p> <p>Persons responsible for the disclosure of information may incur a cost from establishing a system for retaining such information if such a system is not already in place. However, these costs are likely to be small.</p> <p><i>On-going</i></p> <p>Such persons may additionally sustain costs from the operation of such a retention system. Again, these costs are likely to be very small.</p> <p>Minor costs may also be incurred in responding to requests for copies of the</p>

	information retained.
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## **Annex IV: Draft Regulatory Technical Standards**

**Draft**

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

**of [...]**

**supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for incorporation by reference, approval and publication of the prospectus and dissemination of advertisements**

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/EC<sup>15</sup>, and in particular Articles 11, 13, 14 and 15 thereof,

Whereas:

- (1) Directive 2003/71/EC harmonises requirements for the drawing up, approval and distribution of prospectuses. These requirements need to be specified, in particular as regards the approval process, the information to be incorporated by reference, the act of publication and the information disseminated about the offer or admission to trading outside of the prospectus, including advertisements.
- (2) At present, Commission Regulation (EC) No 809/2004 contains provisions regarding information to be incorporated by reference, publication of the prospectus and dissemination of advertisements. To avoid duplication of requirements, certain provisions of Commission Regulation (EC) No 809/2004 should be deleted.
- (3) 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 prospectus on the part of the issuer, offeror or person asking for admission to trading on a regulated market. In order to provide greater certainty about the approval process to issuers, offerors or persons asking for admission to trading, it is necessary to specify which documents should be provided to national competent authorities at different points in the prospectus approval cycle.
- (4) To facilitate an efficient and timely review process, the prospectus should always be submitted to the national competent authority at least in searchable electronic format. It is imperative that each draft of the prospectus submitted to the national competent authority clearly shows changes made since the previous submission and explains how such changes address the comments raised by the national competent authority.
- (5) Where it becomes evident to the national competent authority that the issuer, offeror or person asking for admission to trading is unable or unwilling to comply with the requirements of the prospectus regime, the national competent authority should have the right to terminate the review

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<sup>15</sup> OJ L 345, 31.12.2003, p. 64.

process without approving the prospectus, provided that it explains this decision to the issuer, offeror or person asking for admission to trading.

- (6) The possibility for issuers, offerors or persons asking for admission to trading to incorporate by reference certain information to be disclosed in a prospectus was created to simplify the drafting of the prospectus and lower the costs associated with such drafting. However, the information that can be incorporated by reference should be specified to prevent investor protection from being compromised.
- (7) Electronic publication provides investors with fast and easy access to the information contained in a prospectus and should therefore be required for all constituent parts of the prospectus, including final terms and information incorporated by reference. Requiring investors to agree to a disclaimer, pay a fee or go through a registration process to gain access to the prospectus impedes easy accessibility and should not be permitted.
- (8) The duration of time for which prospectuses are required to be published relates to their period of validity rather than the closing of the offer or the admission of securities to trading on a regulated market. Electronic access should be provided at least for the period of time for which a prospectus is valid.
- (9) Advertisements relating to an offer to the public or an admission to trading can be disseminated in a number of ways. Requirements should be established to ensure that advertisements, regardless of the way they are disseminated, do not present a misleading or inaccurate picture of the investment in question.
- (10) 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 can be ensured by requiring that any information circulated does not contradict, or refer to information which contradicts, the contents of the prospectus. Moreover, any omission from the information circulated which could create a misleading impression of the offer or admission to trading should be prohibited. Furthermore, information circulated outside the prospectus should not be permitted to contain numerical performance measures if such are not contained in the prospectus.
- (11) Information disclosed outside of a prospectus should not be perceived as a means of circulating complete information about an offer to the public or an admission to trading as all information required for investors to make an informed investment decision is required to be included in the prospectus. Nevertheless, investors addressed by such information may wish to thoroughly examine the content of the information to ensure consistency with the contents of the prospectus and retention requirements should be established to ensure this is possible.
- (12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (13) In accordance with Article 15 of 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), 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

*Article 1*  
*Subject matter*

This Regulation establishes regulatory technical standards specifying:

- (1) the procedures for the approval of the prospectus as referred to in Article 13 of Directive 2003/71/EC;
- (2) the information that may be incorporated by reference in the prospectus as provided for in Article 11 of Directive 2003/71/EC;
- (3) the provisions regarding publication of the prospectus laid down in paragraph (1) to (4) of Article 14 of Directive 2003/71/EC;
- (4) the provisions for dissemination of advertisements referred to in Article 15 of Directive 2003/71/EC;
- (5) the provisions regarding consistency between information disclosed about an offer to the public or admission to trading on a regulated market and the information contained in the prospectus laid down in Article 15(4) of Directive 2003/71/EC.

CHAPTER II  
APPROVAL OF THE PROSPECTUS

*Article 2*  
*Application for approval of a prospectus by the issuer, offeror or person asking for admission to trading on a regulated market*

1. The issuer, offeror or person asking for admission to trading on a regulated market shall submit the prospectus at a minimum in searchable electronic format.
2. Along with the initial submission of the prospectus, or where appropriate during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market shall submit the following information at a minimum in searchable electronic format:
  - (1) if required by the competent authority of the home Member State according to Article 25(4) of Commission Regulation (EC) 809/2004 or on their own initiative, a cross reference list which must also identify any items from the relevant schedules and building blocks of Commission Regulation (EC) 809/2004 that have not been included in the prospectus because they are not applicable;
  - (2) where the list mentioned in point (1) is not submitted, a document identifying any items from the relevant schedules and building blocks of Commission Regulation (EC) 809/2004 that have not been included in the prospectus because they are not applicable;
  - (3) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the competent authority of the home Member State to authorise the omission of information from the prospectus according to Article 8(2) of Directive 2003/71/EC, a request to that effect;

- (4) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the competent authority of the home Member State to notify the competent authority of a host Member State, upon approval of the prospectus, with a certificate of approval according to Article 18(1) of Directive 2003/71/EC, a request to this effect;
- (5) any information which is incorporated by reference into the prospectus unless such information has already been approved by or filed with the competent authority of the home Member State in accordance with Article 11 of Directive 2003/71/EC; and,
- (6) any other information necessary for the review by the competent authority of the home Member State and expressly required by the competent authority for that purpose.

3. Where the order of the items in the prospectus does not coincide with the order of the information provided for in the schedules and building blocks according to which the prospectus is drawn up, and the issuer, offeror or person asking for admission to trading on a regulated market does not provide a cross reference list, the prospectus shall be annotated in the margin to clarify which sections of the prospectus correspond to the relevant disclosure requirement.

4. Following initial submission 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 a subsequent draft of the prospectus, the subsequent draft shall be marked up to show changes made to the preceding unmarked draft of the prospectus as submitted to the competent authority. The subsequent draft of the prospectus shall be accompanied by a written statement confirming that all changes to the preceding draft of the prospectus are identified. An unmarked draft of the prospectus shall always be submitted along with the draft showing the changes made.

5. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement laid down in paragraph (4), an identification of each change made to the preceding draft of the prospectus shall be provided to the competent authority of the home Member State in writing.

6. Each subsequent draft of the prospectus shall be accompanied by an explanation of how comments raised by the competent authority of the home Member State regarding the preceding submission have been addressed. Where changes made to a previous draft of a prospectus are self-explanatory or clearly address a comment raised by the competent authority, an indication of where the comments of the competent authority have been addressed shall suffice.

7. On the approval date, or in advance thereof, the issuer, offeror or person asking for admission to trading on a regulated market shall submit, at a minimum in electronic format, the prospectus and any information mentioned under paragraph (2) which has been changed since the preceding submission. The prospectus shall be in searchable format.

Where information submitted along with the initial draft of the prospectus has not changed and is not resubmitted, the issuer, offeror or person asking for admission to trading on a regulated market shall confirm in writing that the information contained in the prior submission is still correct.

### *Article 3*

#### *Procedures to be followed by the competent authority of the home Member State*

1. The competent authority of the home Member State shall acknowledge receipt of the initial application for approval of a prospectus in writing, at a minimum 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 advise 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(s) within the authority to which queries regarding the application may be addressed.

2. Upon review, the competent authority of the home Member State shall provide any comments on the submitted prospectus to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, to a contact point specified when the initial application for approval was made. In exceptional circumstances the competent authority may provide comments orally, particularly where such are of a minor nature or where timing is of utmost importance.

3. 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 approval in writing, at a minimum via electronic means, as soon as possible and no later than by close of business on the working day following the decision.

4. When the issuer, offeror or person asking for admission to trading on a regulated market is unable or unwilling to comply with the disclosure requirements of Directive 2003/71/EC and Commission Regulation (EC) No 809/2004, the competent authority of the home Member State is entitled to refuse approval of the prospectus and terminate the review process.

The competent authority of the home Member State shall notify its decision to refuse approval and terminate the review process to the issuer, offeror or person asking for admission to trading on a regulated market in writing, at a minimum via electronic means, as soon as possible and no later than by close of business on the working day following the decision. The competent authority shall provide the reasons for its decision in the notification.

### CHAPTER III INCORPORATION BY REFERENCE

#### *Article 4*

#### *Information which may be incorporated by reference*

The following information may be incorporated by reference in a prospectus:

- (1) information contained in prospectuses, registration documents, securities notes or summaries approved in accordance with Article 13 of Directive 2003/71/EC;
- (2) information contained in supplements approved in accordance with Article 16 of Directive 2003/71/EC;
- (3) final terms filed in accordance with Article 5(4) of Directive 2003/71/EC;
- (4) final offer price and amount of securities filed in accordance with Article 8(1) of Directive 2003/71/EC;
- (5) the following disclosures filed in accordance with Article 19(1) of Directive 2004/109/EC:
  - (i) choice of home Member State disclosed in accordance with the second subparagraph of Article 2(1)(i) of Directive 2004/109/EC;
  - (ii) annual financial reports disclosed in accordance with Article 4(1) of Directive 2004/109/EC;
  - (iii) half-yearly financial reports disclosed in accordance with Article 5(1) of Directive 2004/109/EC;
  - (iv) reports on payments to governments disclosed in accordance with Article 6 of Directive 2004/109/EC;
  - (v) information about major holdings disclosed in accordance with Article 9(1) of Directive 2004/109/EC;

- (vi) information about major proportions of voting rights disclosed in accordance with Article 10 of Directive 2004/109/EC;
  - (vii) information about financial instruments that result in an entitlement to acquire shares to which voting rights are attached disclosed in accordance with Article 13 of Directive 2004/109/EC;
  - (viii) information about acquisition or disposal of own shares disclosed in accordance with Article 14(1) of Directive 2004/109/EC;
  - (ix) total number of voting rights and capital shares disclosed in accordance with Article 15 of Directive 2004/109/EC; and,
  - (x) information on changes in the rights attaching to classes of shares and securities disclosed in accordance with Article 16 of Directive 2004/109/EC;
- (6) disclosures made in accordance with Article 6 of Directive 2003/6/EC; and,
- (7) information provided under the laws, regulations and administrative provisions of a Member State adopted in accordance with Article 3(1) of Directive 2004/109/EC.

#### CHAPTER IV PUBLICATION OF THE PROSPECTUS

##### *Article 5 Publication of the prospectus in electronic form*

1. When published in electronic form either pursuant to points (c), (d) and (e) of Article 14(2) of Directive 2003/71/EC or as an additional means of availability, the prospectus shall:

- (1) be easily accessible when entering the website;
- (2) be in a file format that cannot be modified;
- (3) not contain hyperlinks with the exception of links to the electronic addresses where information incorporated by reference is available; and,
- (4) be capable of being downloaded and printed.

2. 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.

3. Access to a prospectus published in electronic form shall not be contingent on:

- (1) completion of a registration process;
- (2) acceptance of a disclaimer; or,
- (3) payment of a fee.

4. Access to a prospectus published in electronic form shall be provided to all documents comprising the prospectus at the same time.

5. The issuer, financial intermediary or regulated market shall be entitled to use an existing website for the purpose of publication in electronic form and shall not be obliged to establish a designated website specifically for prospectus publication. In the case of an issuer that is part of a group, the issuer shall be entitled to use the website of the group for the purpose of electronic publication of the prospectus provided such does not hinder access to the prospectus by investors. Where publication is on the website of the group, the issuer shall inform investors of using the website of the group for the purpose of prospectus publication.

#### *Article 6*

##### *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 7*

##### *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 6 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:

- (1) the identification of the issuer;
- (2) 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;
- (3) the intended time schedule of the offer/admission to trading;
- (4) a statement that a prospectus has been published and where it can be obtained;
- (5) the addresses where and the period of time during which a paper copy is available to the public; and,
- (6) the date of the notice.

*Article 8*  
*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.

*Article 9*  
*Provision of a hyperlink to the published prospectus*

1. When the competent authority of the home Member State has made the choice to publish a list of approved prospectuses according to Article 14(4) of Directive 2003/71/EC, the issuer, offeror or person asking for admission to trading on a regulated market shall provide a hyperlink to the prospectus published in electronic form.
2. The hyperlink provided in accordance with paragraph (1) shall remain active for a minimum period of 12 months.
3. The hyperlink shall link directly into the prospectus document. It shall be possible to download and print the prospectus when following the hyperlink.

*Article 10*  
*Publication of the final terms of base prospectuses*

1. Final terms and, where applicable, the summary of the individual issue, shall be published at a minimum electronically and in compliance with the publication methods indicated in Article 14(2) of Directive 2003/71/EC. The publication method for final terms and, where applicable, the summary of the individual issue, shall be the same as at least one of the methods used for publication of the related base prospectus.
2. When published in electronic form, final terms shall comply with the requirements set out in Article 5 of this Regulation.

*Article 11*  
*Publication of information incorporated by reference*

1. Documents containing information incorporated by reference in a prospectus shall be published electronically.
2. A prospectus containing information incorporated by reference shall include hyperlinks to each document containing information incorporated by reference or to the webpage on which each document containing information incorporated by reference is published.

CHAPTER V  
ADVERTISEMENTS

*Article 12*  
*Dissemination of advertisements*

1. The means with which advertisements announcing the intention to offer securities to the public or admit securities to trading on a regulated market can be disseminated fall in one of the following four categories:

- (1) print;
- (2) broadcast;
- (3) digital; or,
- (4) oral.

When it is unclear which category the means of dissemination of a given advertisement falls in, the issuer, offeror or person asking for admission to trading on a regulated market shall have the right to select a category for the purpose of this Regulation.

2. Regardless of the means with which they are disseminated, advertisements which contain inaccurate or misleading information shall be amended. The amended advertisement shall make reference to the previous advertisement, specify that the previous advertisement has been amended due to it containing inaccurate or misleading information and specify the differences between the two versions of the advertisement.

With the exception of orally disseminated advertisements referred to in paragraph 1(4), amended advertisements shall be disseminated, at a minimum, through the same means as the original advertisement.

3. 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 and Commission Regulation (EC) No 809/2004.

#### *Article 13*

##### *Consistency between the prospectus and information disclosed about the offer to the public or admission to trading on a regulated market for the purposes of Article 15(4) of Directive 2003/71/EC*

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

- (1) contradict the information contained in the prospectus;
- (2) refer to information which contradicts that contained in the prospectus;
- (3) omit information contained in the prospectus, if such omission could cause the information disclosed about the offer to the public or admission to trading to be misleading; or,
- (4) contain numerical performance measures concerning the issuer, unless such are contained in the prospectus.

2. If the information disclosed about an offer to the public or admission to trading on a regulated market includes statements on the negative aspects of that offer or admission to trading, such statements shall be presented with at least the same prominence as other parts of the information.

3. The issuer, offeror or person asking for admission to trading shall maintain a copy of any information disclosed in oral or written form about an offer to the public or admission to trading on a regulated market from the date of its first disclosure and until the related prospectus is no longer valid. Persons to whom the information was addressed shall have the right to request a copy of the information free of charge.

4. Information disclosed shall be maintained in durable format. The text and format of the information maintained must at all times be identical to the original version disclosed.

5. By way of derogation from paragraph (4), for information disclosed in oral form, any script and/or presentation materials used shall be maintained in durable format.

6. For the purpose of this Article, information contained in the prospectus shall mean information included in the prospectus, if already published, or information to be included in the prospectus, if the prospectus is published afterwards.

CHAPTER VI  
TRANSITIONAL AND FINAL PROVISIONS

*Article 14*

*Deletion of provisions of Commission Regulation (EC) No 809/2004*

With effect from the date specified in Article 15, the following provisions of Commission Regulation (EC) No 809/2004 shall be deleted:

- (1) Article 1(4), (5) and (6);
- (2) Article 28(1); and
- (3) Articles 29 to 34.

*Article 15*

*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, [date]

*For the Commission*  
*The President*  
[name]