

**ESMA's
CONSULTATION PAPER
ON DRAFT REGULATORY
TECHNICAL STANDARDS
UNDER THE NEW
PROSPECTUS REGULATION**

AMAFI's contribution

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

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

Having contributed to the two EC Consultations of May 2015 on its Green Paper on Capital Market Union ([AMAFI / 15-28](#)) and on the review of the Prospectus Directive ([AMAFI / 15-27](#)) and having then contributed to the three ESMA consultations on draft technical advice relating to the Prospectus Regulation of September 2017 ([AMAFI / 17-61](#)), AMAFI is now keen to contribute to the consultation launched by ESMA - on 15 December 2017 until 9 March 2018 – on draft regulatory technical standards (RTS) on the five topics mentioned hereafter, it being specified that the responses below reflect the views of its members acting in an advisory capacity, for the benefit of issuers, in relation essentially to ECM transactions:

- Key financial information for the summary
- Data and machine readability
- Advertisements
- Supplements
- Publication

You will find below AMAFI's responses to those questions raised by ESMA to which it considers that a response may be given.

A. Key financial information for the summary

Question 1: Do you agree that the KFI extracted from the issuer's historical financial information should be sign-posted?

Yes, AMAFI agrees that the KFI extracted from the issuer's historical financial information should be sign-posted.

Question 2: Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.

No, AMAFI believes that adding specific templates for other types of issuer would be counterproductive. For some issuers, because of the specific nature of their activity, there may be a discussion as to the category/ template in which they fall. Rather than creating additional templates with the hope of covering all existing activities, it seems much preferable to allow more flexibility in the use of the proposed templates.

Regarding those templates, it would be useful to have a definition of what is to be considered as "non financial entities" (which, unlike the notion of "credit institution", is not defined in the Prospectus Regulation). Please note also that the title of Annex II to the RTS should be modified to reflect the fact that it concerns "*Non-financial entities (non-equity securities)*".

Question 3: Do you agree that cash flow from operations is the most useful measure of cash flow for non-financial entities issuing equity and that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities?

No, AMAFI does not agree with the statements contained in this question as they cannot be applied to all situations. In order to cover all situations adequately, it is essential to allow flexibility in the use of the proposed templates.

Question 4: Given the page limit for the summary, please provide your views on which items of historical financial information should be most useful of retail investors?

AMAFI would like to stress again the need for flexibility as what is most useful to investors (all of them - why would retail investors only be concerned by this question?) depends greatly on the activity of the entity concerned, its organization, its business model, the way in which it operates.

Question 5: Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?

AMAFI agrees with the proposal to allow the use of footnotes to describe APMs. This however should be a possibility – not an obligation – for issuers.

Question 6: Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

Yes, AMAFI agrees that issuers should be given flexibility in their presentation of pro forma financial information which is the most valuable information to be given to investors in relation to a proposed transaction. Therefore the presentation in a separate table appears more appropriate and comprehensible than adding another column to the relevant table.

Question 7: Do you agree that complex financial information in the summary should be presented according to its presentation in the prospectus? If not, please specify and provide alternative ways of presentation.

Yes, complex financial information in the summary should be presented according to its presentation in the prospectus. Of course it will be summarized in the summary.

Question 8: Which financial measures are most useful for retail investors to determine the health of a credit institution? Do you consider that the CET 1 is comprehensible for retail investors? Please specify.

As mentioned already in relation to question 4 above, AMAFI would like to stress once more the need for flexibility as what is most useful to investors (all of them – there is no reason to limit the question – and the answer – to retail investors) depends greatly on the specific activity of the entity concerned, its organization, its business model, the way in which it operates, which may be different, even between different credit institutions. Therefore, the issuer (credit institution) should be given the flexibility to decide what is more relevant to its particular activity, bearing in mind that as it is in its interest to show the health of its institution, it should be able to put forward the most relevant financial measures establishing such health.

Question 9: Do you agree that it should be mandatory for credit institutions to disclose SREP information in relation to Common Tier One Equity, the minimum prudential capital requirements, the Total Capital Ratio and the Leverage Ratio in the summary?

No response.

Question 10: Do you agree with the choice of measures for insurance companies?

No response.

Question 11: Do you think it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary?

No response.

Question 12: Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?

Until now, no such requirement has been imposed and there is no evidence that this has created a difficulty of any sort. So AMAFI would recommend that the issuers concerned be given the flexibility to include, or not, such regulated ratios in their summary, as they deem fit.

Question 13: Would the issuer, offeror or person asking for admission to trading incur costs if the proposed provisions are adopted? If so, please specify the nature of such costs, including quantifying term.

As a professional organization, AMAFI is unable to respond to this question.

B. Data and machine readability

Question 14: Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.

Of course, the data relating to the amount raised is important. But depending on the nature of the transaction, the issuer may be unable to provide this information upfront. For instance, most of the time, the price offered is not a determined figure but rather a price range, with only the maximum known until the close of the transaction. So, with respect to items 25, 26 and 27 of Annex VII, it is important not to impose an obligation that, given the nature of the transaction, and the way in which it develops, could not be possibly fulfilled. The only principle that could be set is that information regarding these items should be provided as and when they become known.

Question 15: Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.

Yes, AMAFI agrees with the proposal (to the extent it relates to ECM transactions).

Question 16: Do you agree with ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?

No response.

Question 17: Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?

No response.

Question 18: Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?

No response.

C. Advertisements

Question 19: Do you consider that an advertisement should contain at least a hyperlink to the website where it is published and where available and technically feasible additional information that would facilitate tracing the prospectus? Please provide examples of the additional information that you think would be helpful to include in the advertisement.

AMAFI agrees that an advertisement should contain a hyperlink to the website where the prospectus and possibly other information are published – as this is a simple and easy to provide this information.

Question 20: Do you consider that the definition for complex securities set out in para 140 provides clarity to issuers and would be helpful in deciding when the comprehension alert referred to in Article 8(3)(b) of the PRIIPs Regulation should be included in an advertisement?

No, it is fact rather confusing.

It should be recalled that “complex securities” are not defined as such in MiFID 2. They are “defined” “negatively” as the financial instruments which may not be exempted from the obligation imposed on the ISPs to assess the suitability or appropriateness of the financial instruments when providing investment services to their clients.

The instruments that may be exempted are those which are considered as “simple”. The others are considered as “complex”. The instruments covered by the exemption appear indeed in article 25(4)(a) of MiFID 2. But referring simply to the subparagraphs of this article may be confusing as each of these subparagraphs mentions both a category of “simple” instrument and in relation to such category, the instruments which cannot be considered as “simple” and therefore must be considered as “complex”.

For instance, article 25(4)(a)(ii) refers to “*bonds or other forms of securitized debt admitted to trading on a regulated market or an equivalent third country market or on an MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult of the client to understand the risk involved”.* While the first part of this sentence (“*bonds or other forms of securitized debt admitted to trading on a regulated market or an equivalent third country market or on an MTF*”) refers to some instruments which are considered to be “simple”, the second part (“*excluding those that embed a derivative or incorporate a*

structure which makes it difficult of the client to understand the risk involved") on the contrary refers to some instruments which should be considered as "complex".

Therefore, the proposed drafting of article 12(2)(c) of the RTS which refers simply to "*where the security does not fulfil the requirements laid down in points (i), (ii) and (v) of article 25(4)(a) of Directive 2014/65/EU*" is likely to be confusing and misleading.

Regarding the reference to "complex securities", AMAFI would suggest the following drafting which seems more accurate from a legal standpoint:

"... and where the security does not fall within the scope of the exemption provided in article 25(4)(a), points (i), (ii) and (v)".

Question 21: Do you agree with the requirement suggested for Article 12 of the RTS? If not, please provide your reasoning.

Please refer to AMAFI's comment in Question 20 above relating to the reference to "complex securities". No other comment with respect to Article 12 of the RTS.

Question 22: In particular, do you agree with the requirement to include warnings in advertisements? Do you consider that the suggested warnings are fit for purpose in terms of investor protection?

The proposed warnings may be justified for retail investors even though the reference to the prospectus could be sufficient in terms of investor protection. In any case and as proposed by ESMA, such warnings should be strictly limited to advertisements disseminated to retail investors.

Question 23: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including whether they are one-off or ongoing and, quantify them.

As a professional organization, AMAFI is not in a position to respond to this question.

D. Supplements

Question 24: Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?

AMAFI agrees with that proposal.

Question 25: Do you agree that the additional requirements identified from ESMA's draft technical advice should also be included.

In its response to ESMA's consultation on its draft technical advice to the EC on the format and content of the prospectus in September 2017, AMAFI, with respect to equity issuances only, supported the position

that when a profit forecast is established, it should be included in the prospectus with the auditor's report relating to such forecast (save in the context of a EU Growth Prospectus). Therefore, logically, if a profit forecast or profit estimate is published after the approval of the prospectus but before the close of the offer or the date of admission of the securities to trading, it should trigger the publication of a supplement.

But AMAFI considers that it should be made clear that the publication of forecasts or estimates should not be mandatory.

Question 26: Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?

In principle, AMAFI agrees with that proposal but wonders why it is limited to the issuer of retail debt or retail derivative securities. If this obligation is not imposed in the case of retail issuance, it should not be imposed either in the case of issuance to non retail investors (in the cases where a prospectus is nevertheless required).

Question 27: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

As a professional organization, AMAFI is unable to respond to that question.

D. Publication

Question 28: Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?

AMAFI agrees with the proposed wording of Article 17 of the draft RTS.

Question 29: Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.

Yes, AMAFI agrees that the proposed Article 17 (1) and (2) is sufficient.

Question 30: Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.

As a professional organization, AMAFI is unable to respond to this question.