

Feedback to EC Commission Delegated Regulation supplementing Regulation (EU) 2017/1129 and repealing Commission Regulation 809/2004

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 members are subsidiaries or branches of non-French institutions

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

Having contributed in the three consultations launched by ESMA on 6 July 2017 on the draft technical advice that it proposed to give to the EC on format and content of the Prospectus (*ESMA31-62-532*), and the EU Growth Prospectus (*ESMA31-62-649*), and scrutiny and approval of the Prospectus (*ESMA1-62-650*), AMAFI is now keen to give feedback to the EC following the publication of a draft Commission Delegated Regulation supplementing Regulation (EU) 2017/1129 on 28 November 2018.

While the content of the draft Delegated Regulation is generally satisfactory, AMAFI would like to comment on the unfortunate deletion of the requirement to include an accountant's or auditor's report on profit forecast for equity prospectuses.

In its Technical Advice under the Prospectus Regulation dated 28 March 2018 (*ESMA31-62-800*), despite a majority of respondents being against (including the Securities and Markets Stakeholders Group), ESMA advised in favour of the deletion for two reasons, namely costs and limited value, which AMAFI strongly disagree with as far as equity prospectuses are concerned.

Whilst it is accepted that the obligation to include an auditor report on profit forecast can be burdensome in relation to debt securities issuance, which must progress quickly in order to fulfil the issuer's financing need and where, in any event, investors/analysts do not expect to see such a report, the situation is entirely different for equity.

I – On the issue of costs

AMAFI is of the view that removing the requirement for an auditor's report on profit forecasts will not have any material impact on the costs associated with the involvement of the issuer's auditor in the offering.

In practice, the company's auditor, in its capacity as trusted, independent and objective partner and due to its detailed knowledge of the company, is involved at the outset, as soon as an equity offering is considered.

The auditor will indeed be required to review and comment on the prospectus generally. As a consequence, producing a report on profit forecasts constitutes a marginal cost only which is certainly insufficient to override its benefits.

II – On the issue of value

In its Consultation Paper dated 13 December 2011 on the technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU (ESMA/2011/444), ESMA's position was as follows, the exact opposite to its current one:

“ESMA believes that reports prepared by independent accountants or auditors provide investors with confidence that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. Accordingly, investors should be able to compare the profit forecast or estimate to historical financial information of the issuer. In addition, the reports provide investors with assurance that the profit forecast or estimate has been properly prepared on the basis of the underlying assumptions. In practice, independent accountants and auditors tend to play an active role by advising the issuer on what assumptions should be provided in the prospectus and how they should be worded. They might also ensure that all material assumptions have been disclosed and that no assumption has been included that appears to be unrealistic”.

On that basis, ESMA proposed to keep the requirement of an auditor's report on profit forecasts.

It is extremely difficult to understand why ESMA has now taken a completely different view especially given that the arguments expressed at the time are still very relevant and that nothing has changed since then.

To ESMA's point above, it is worth noting that auditors are subject to overriding principles as set out in their Code of Ethics: integrity, impartiality, independence & prevention of conflicts of interest and constructive challenge.

More often than not, the issuer will review its assumptions following questions and challenges by the auditor. As a consequence, the profit forecasts are more accurate and more reliable and the risk of a profit warning following the offering is reduced accordingly, which is beneficial not only for investors, whose confidence is increased, but also for the market as a whole.

For the reasons set out above, AMAFI respectfully asks that the EC consider re-introducing the requirement of an auditor's report on profit forecasts in its Delegated Regulation.

